



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

Law Library
Univ. of Calif.
Berkeley

ALL MATERIAL NONCIRCULATING

CALL NUMBER

VOLUME

COPY

13

COPY

3
2

AUTHOR

TITLE

SOUTHWESTERN REPORTER

NAME AND ADDRESS

COPY 3

READING
ROOM

THE
SOUTHWESTERN REPORTER,
VOLUME 13.

CONTAINING ALL THE CURRENT DECISIONS OF THE

SUPREME COURTS OF MISSOURI, ARKANSAS, AND TEN-
NESSEE, COURT OF APPEALS OF KENTUCKY, AND
SUPREME COURT AND COURT OF APPEALS
(CRIMINAL CASES) OF TEXAS.

PERMANENT EDITION.

MARCH 17—JULY 28, 1890.

WITH TABLES OF SOUTHWESTERN CASES PUBLISHED IN VOLS. 99, MISSOURI REPORTS;
75, TEXAS (SUPREME COURT) REPORTS.

ST. PAUL:
WEST PUBLISHING CO.
1890.

Law Library

**COPYRIGHT, 1890,
BY
WEST PUBLISHING COMPANY.**

JUDGES

OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME

KENTUCKY—Court of Appeals.

JOSEPH H. LEWIS, CHIEF JUSTICE.

JUDGES.

WILLIAM H. HOLT. WILLIAM S. PRYOR.
CASWELL BENNETT.

TENNESSEE—Supreme Court.

PETER TURNEY, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

H. H. LURTON. W. C. CALDWELL.
D. L. SNODGRASS. W. C. FOLKES.¹

MISSOURI—Supreme Court.

ROBERT D. RAY, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

THOMAS A. SHERWOOD. THEODORE BRACE.
FRANCIS M. BLACK. SHEPARD BARCLAY.

ARKANSAS—Supreme Court.

STERLING R. COCKRILL, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

BURRILL B. BATTLE. MONTI H. SANDELS.
SIMON P. HUGHES. WILSON E. HEMINGWAY.

TEXAS—Supreme Court.

JOHN W. STAYTON, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

REUBEN R. GAINES. JOHN L. HENRY.

Court of Appeals.

JOHN P. WHITE, PRESIDING JUDGE.

JUDGES.

JAMES M. HURT. SAMUEL A. WILLSON.

Commission of Appeals.

WALTER ACKER, PRESIDING JUDGE.

ASSOCIATE JUDGES.

W. E. COLLARD. EDWIN HOBBY.

¹ Died May 17, 1890.

CASES REPORTED.

	Page		Page
Abble, Shiner v. (Tex.)	618	Bardstown & G. R. Turnpike Co. v. Rod-	917
Abell's Adm'r v. Phillips (Ky.)	109	man (Ky.)	845
Adams v. Missouri Pac. Ry. Co. (Mo.)	509	Barnes v. Williams (Ark.)	845
Adams v. State (Tex.)	1009	Barrett, Deposit Bank of Owensborough v.	887
Adams v. Urquart (Ark.)	78	(Ky.)	77
Adams, Mugge v. (Tex.)	380	Barrett, Reeves v. (Ark.)	783
Adam's Adm'r, Cincinnati, N. O. & T. P.	428	Barton v. State (Tex.)	809
Ry. Co. v. (Ky.)	702	Bates, Wills Point Bank v. (Tex.)	738
Adamson, Locke v. (Ark.)	166	Beasley v. State (Ark.)	1014
Adoue, Morrison v. (Tex.)	68	Beatty v. Masterson (Tex.)	134
Adoue, Wallis v. (Tex.)	867	Beaver v. Frick Co. (Ark.)	1058
Ætna Life Ins. Co., Hite v. (Ky.)	1025	Becke v. Missouri Pac. Ry. Co. (Mo.)	1027
Alexander v. San Antonio Lumber Co.	991	Becker v. Shayne (Tex.)	79
(Tex.)	767	Becker, Nunnally v. (Ark.)	734
Allee v. State (Tex.)	998	Bedding v. Smith (Ark.)	1082
Allen v. Peters (Tex.)	73	Bedford v. Megibben (Ky.)	439
Allen v. State (Tex.)	501	Behan v. Warfield (Ky.)	1048
Allen v. Wortham (Ky.)	989	Behrens, Shropshire v. (Tex.)	822
Allen, Gaven v. (Mo.)	296	Belcher's Sugar Refining Co. v. St. Louis	213
Allen, Manney v. (Tex.)	350	Grain Elevator Co. (Mo.)	232
Allen, Simon v. (Tex.)	128	Belknap, Clark v. (Ky.)	838
Allenberg, Macklin v. (Mo.)	926	Bell v. Boyd (Tex.)	83
Alloway v. City of Nashville (Tenn.)	127	Bell v. Mansfield's Assignee (Ky.)	742
Ambleton v. Dyer (Ark.)	1087	Benne v. Schnecko (Mo.)	220
American Nat. Bank, Snoddy v. (Tenn.)	81	Bennet, St. Louis, I. M. & S. Ry. Co. v.	143
Amyx, Durst v. (Ky.)	30	(Ark.)	1005
Anderson v. Goodwin (Tex.)	196	Bennett v. Kiber (Tex.)	319
Anderson v. Horn (Tex.)	858	Bennett v. State (Tex.)	132
Anderson v. Jackson (Tex.)	640	Bennett v. State (Tex.)	982
Anderson, Gulf, C. & S. F. Ry. Co. v. (Tex.)	1102	Bennett v. State (Tex.)	379
Anderson, McCullough's Adm'r v. (Ky.)	1099	Berry v. Davis (Tex.)	978
Andrews v. Key (Tex.)	422	Best's Ex'r v. Vanhook's Adm'r (Ky.)	119
Andrews, Hanks v. (Ark.)	707	Best's Ex'r, Vaughan v. (Ky.)	537
Andrews, McWhorter v. (Ark.)	436	Biering v. Wegner (Tex.)	808
Andrews, Rhodes v. (Ark.)	441	Billups, Ward v. (Tex.)	208
Anheuser-Busch Brewing Ass'n, Glaessner	791	Bingham v. Delougherty (Mo.)	688
v. (Mo.)	963	Bingham, Keith v. (Mo.)	952
Antle, Prince v. (Ky.)	280	Bingham, Tyree v. (Mo.)	655
Apperson, Morris v. (Ky.)	929	Binz, McIlhenny v. (Tex.)	430
Apperson's Adm'r v. Triplett (Ky.)	864	Bird v. Bank of Williamstown (Ky.)	12
Arbuckle Bros. Coffee Co. v. Wenar (Tex.)	984	Blalock, Texas Land & Loan Co. v. (Tex.)	420
Arkansas M. R. Co. v. Canman (Ark.)	774	Bland, Bowden v. (Ark.)	719
Arkansas & L. Ry. Co. v. Smith (Ark.)	509	Blick & Philips Coal Co., Reinder's Adm'r	961
Armstrong v. State (Tex.)	1097	v. (Ky.)	572
Armstrong v. Truitt, two cases, (Ark.)	415	Blocker, San Antonio Nat. Bank v. (Tex.)	181
Arnold v. State (Tex.)	768	Blum, East Texas Fire Ins. Co. v. (Tex.)	187
Arnold, Winter v. (Ark.)	1090	Blum, Hart v. (Tex.)	276
Atkins, Luck v. (Ark.)	484	Blythe v. Jett (Ark.)	474
Atkinson, State v. (Ark.)	617	Board of Education of the Kentucky An-	85
Avery v. Zander (Tex.)	1042	nual Conference of the M. E. Church	244
Ayers v. Harris (Tex.)	618	South, Bryan v. (Ky.)	920
Ayers, Citizens' Ins. Co. v. (Tenn.)	8	Bodman's Heirs, Utzfeld v. (Tex.)	877
Baird, Carlin v. (Ky.)	1019	Bohart v. Chamberlain (Mo.)	420
Baker v. Dunning (Tex.)	674	Bosquett v. Hall (Ky.)	787
Baker v. McFarland (Tex.)	429	Bosworth v. City of Mt. Sterling (Ky.)	361
Baker v. Millman (Tex.)	958	Boughton, Chouteau v. (Mo.)	99
Baldridge & Courtney Bridge Co. v. Cart-	444	Bowden v. Bland (Ark.)	1009
rett (Tex.)	98	Bowen v. State (Tex.)	864
Baldus, Leroux v. (Tex.)	444	Bowen v. Stone (Ky.)	(v)
Ballard v. State (Tex.)	98	Bowles, Burgess v. (Mo.)	
Ballinger, Chamberlain v. (Ky.)	98	Bowman v. State (Tex.)	
Bamberger, Gainesville Nat. Bank v. (Tex.)	98	Boyd v. State (Tex.)	
Bank of Williamstown, Bird v. (Ky.)	98		
Bannon v. Rohmelsner (Ky.)	98		
Barber Asphalt Paving Co. v. Hunt (Mo.)	98		

	Page		Page
Boyd, Bell v. (Tex.).....	232	Carter v. Commonwealth (Ky.).....	921
Bradbury, Crabtree v. (Ark.).....	985	Carter v. State (Tex.).....	147
Brakefield v. Halpern (Ark.).....	1102	Carter, Jennings v. (Ark.).....	800
Brasher, Stevenson v. (Ky.).....	242	Cartrett, Baldridge & Courtney Bridge Co. v. (Tex.).....	8
Brau v. Von Rosenberg (Tex.).....	485	Caruth-Byrnes Hardware Co. v. Deere (Ark.)	517
Bray v. Conrad (Mo.).....	957	Casey v. Casey's Ex'rs (Ky.).....	718
Brazill v. State (Tex.).....	1006	Cassidy, Rogge v. (Ky.).....	716
Breedlove, Love v. (Tex.).....	222	Cassilly v. Cochran's Guardian (Ky.).....	844
Breed's Ex'x, Jones v. (Ky.).....	366	Cassilly v. Walker (Ky.).....	844
Brent, State v. (Mo.).....	874	Catlett, Van Sickle v. (Tex.).....	31
Bresnen v. State (Mo.).....	761	Cavanaugh v. Britt (Ky.).....	441
Brewer v. State (Tex.).....	1004	Cavanaugh v. Britt (Ky.).....	922
Briant v. Jackson (Mo.).....	91	Cawthorn v. Perry (Tex.).....	268
Brin, Houston & T. C. Ry. Co. v. (Tex.)...	886	Chadwick, Nass v. (Tex.).....	383
Brlson, West v. (Mo.).....	95	Chamberlain v. Ballinger (Ky.).....	429
Britt, Cavanaugh v. (Ky.).....	441	Chamberlain, Bohart v. (Mo.).....	85
Britt, Cavanaugh v. (Ky.).....	922	Chamberlain, Jose San Roman Sobrinos v. (Tex.).....	694
Brooks, Whitaker v. (Ky.).....	855	Chaney v. Coleman (Tex.).....	850
Broussard v. Sabine & E. T. Ry. Co. (Tex.)	68	Chapman v. Western Union Tel. Co. (Ky.)	880
Brown v. Gay (Tex.).....	472	Chavez v. Chavez (Tex.).....	1018
Brown v. Melton (Tex.).....	478	Chenault v. Commonwealth (Ky.).....	442
Brown v. Peters (Ark.).....	729	Chesapeake, O. & S. W. R. Co. v. Foster (Tenn.).....	694
Brown v. State (Tenn.).....	236	Chesapeake, O. & S. W. R. Co. v. Hendricks (Tenn.).....	696
Brown v. State (Tex.).....	150	Chesnut v. Gann (Tex.).....	274
Brown v. United States Home & Dower Ass'n, two cases, (Ky.).....	1085	Chestnut v. Pollard (Tex.).....	852
Brown v. Weldon (Mo.).....	342	Chew v. Keller (Mo.).....	395
Brown, Hughes v. (Tenn.).....	286	Chicago, B. & K. C. Ry. Co., Corey v. (Mo.)	846
Brown, Noyes v. (Tex.).....	86	Childers v. Henderson (Tex.).....	431
Brown, St. Louis, I. M. & S. Ry. Co. v. (Ark.).....	338	Childers v. State (Tex.).....	650
Brown Co. v. Perrill (Tex.).....	975	C. H. Mallory & Co. v. Smith (Tex.).....	199
Browning v. Mullins, two cases, (Ky.).....	427	Chouteau v. Boughton (Mo.).....	877
Brownlee v. State (Tex.).....	866	Christian County Court v. Smith (Ky.).....	276
Brownlee, Williams v. (Mo.).....	1049	Cincinnati, N. O. & T. P. Ry. Co. v. Adam's Adm'r (Ky.).....	428
Brown's Adm'r v. Brown's Ex'rs (Ky.)...	105	Citizens' Ins. Co. v. Ayers (Tenn.).....	1090
Brown's Ex'rs, Brown's Adm'r v. (Ky.)...	105	City of Galveston, Newson v. (Tex.).....	868
Brownson v. Reynolds (Tex.).....	986	City of Galveston, Wood v. (Tex.).....	227
Bryan v. Board of Education of the Ken- tucky Annual Conference of the M. E. Church South (Ky.).....	276	City of Houston v. Emery (Tex.).....	264
Bryson v. Johnson County (Mo.).....	239	City of Houston v. Emery (Tex.).....	266
Buchanan v. State (Tex.).....	1000	City of Houston v. Feizer (Tex.).....	266
Buckner v. Pacific & G. E. Ry. Co. (Ark.)	332	City of Houston v. Jankowskie (Tex.)...	269
Buckner, Gill v. (Ky.).....	908	City of Kansas, Campbell v. (Mo.).....	397
Buffington v. Sipe (Ark.).....	763	City of Kansas, Roe v. (Mo.).....	404
Buller v. Linzee (Mo.).....	344	City of Louisville v. Henderson's Trustee (Ky.).....	111
Burgess v. Bowles (Mo.).....	99	City of Mt. Sterling, Bosworth v. (Ky.)...	920
Burgess, Halpern v. (Ark.).....	763	City of Nashville, Alloway v. (Tenn.)...	123
Burk v. Galveston County (Tex.).....	455	City of Newport v. Newport & C. Bridge Co. (Ky.).....	720
Burke v. Hance (Tex.).....	163	City of St. Louis v. Thierry (Mo.).....	844
Burnett, Davis v. (Tex.).....	613	City of St. Louis v. Thomas (Mo.).....	685
Burns, State v. (Mo.).....	686	City of St. Louis v. Wetzel (Mo.).....	685
Butin, In re (Tex.).....	10	City of Sherman v. Langham (Tex.).....	1042
Byrne v. Henderson, two cases, (Ky.).....	909	City of Sherman v. Nairey (Tex.).....	1028
Caffee v. Smith (Mo.).....	1050	City of Siloam Springs v. McPhitridge (Ark.).....	137
Cain v. State (Mo.).....	761	City of Waxahachie, Connor v. (Tex.)....	30
Cain, Dailey v. (Ky.).....	424	Clafin v. Pfeifer (Tex.).....	483
Calcasieu Lumber Co. v. Harris (Tex.).....	453	Clare, Traders' Nat. Bank v. (Tex.).....	183
Caldwell v. Meshew (Ark.).....	761	Clark v. Belknap (Ky.).....	212
Caldwell v. Truesdell (Ky.).....	101	Clark v. Collins (Tex.).....	44
Caldwell, McCutchen v. (Ky.).....	1072	Clark v. Fairley (Mo.).....	686
Caldwell, Slocum v. (Ky.).....	1069	Clark, Kendall v. (Ky.).....	583
Cameron v. Vandegriff (Ark.).....	1092	Clay, State v. (Mo.).....	827
Campbell v. Carnahan (Ark.).....	1098	Clayton, State v. (Mo.).....	819
Campbell v. City of Kansas (Mo.).....	897	Clem v. Commonwealth (Ky.).....	102
Campbell, Gulf, C. & S. F. Ry. Co. v. (Tex.)	19	Clements v. Waters (Ky.).....	431
Campbell, In re (Tex.).....	141	Cleveland v. Simpson (Tex.).....	851
Canman, Arkansas M. R. Co. v. (Ark.).....	230	Cochran v. State (Tex.).....	651
Capps v. Terry (Tex.).....	52	Cochran, Cochran's Guardian v. (Ky.)....	844
Carder v. Culbertson (Mo.).....	88	Cochran, Walker's Guardian v. (Ky.).....	844
Cargill v. Commonwealth (Ky.).....	916	Cochran's Guardian v. Cochran (Ky.)....	844
Carlin v. Baird (Ky.).....	484	Cochran's Guardian, Cassilly v. (Ky.)....	844
Carnahan, Campbell v. (Ark.).....	1098	Cockrum v. Williamson (Ark.).....	592
Carney v. Marsalis (Tex.).....	686	Cohen, Tynberg v. (Tex.).....	815
Carroll, Yellow Pine Lumber Co. v. (Tex.)	261		
Carson v. Memphis & C. R. Co. (Tenn.)...	598		
Carson, Westmoreland v. (Tex.).....	559		

	Page		Page
Cole v. State (Tex.).....	859	Dailey v. Cain (Ky.).....	424
Cole County v. Dallmeyer (Mo.).....	687	Dallmeyer, Cole County v. (Mo.).....	687
Coleman, Chaney v. (Tex.).....	850	Dalton v. Rainey (Tex.).....	84
Coleman, Dignowity v. (Tex.).....	857	Dameron, Sutton v. (Mo.).....	497
Coleman's Adm'r v. Parrott (Ky.).....	525	Danforth v. Moss (Ky.).....	881
Collins, Clark v. (Tex.).....	44	Daniels, Reinstein v. (Tex.).....	21
Colliver v. Commonwealth (Ky.).....	922	Danaby v. Freiberg (Tex.).....	381
Comminge v. Stevenson (Tex.).....	558	Dant v. Head (Ky.).....	1073
Commonwealth v. Cremeans (Ky.).....	884	Daughtry, Kansas City, Ft. S. & M. R. Co. v. (Tenn.).....	698
Commonwealth v. Kammerer (Ky.).....	108	Davies v. Nichols (Ark.).....	129
Commonwealth v. Masonic Temple Co. (Ky.).....	121	Davless County Court v. Worthington's Adm'r (Ky.).....	101
Commonwealth v. Minor (Ky.).....	5	Davless County Court, Deposit Bank of Owensboro v. (Ky.).....	101
Commonwealth v. Tate (Ky.).....	118	Davis v. Burnett (Tex.).....	613
Commonwealth v. Tate (Ky.).....	117	Davis v. St. Louis, I. M. & S. Ry. Co. (Ark.).....	801
Commonwealth, Cargill v. (Ky.).....	916	Davis v. State (Tex.).....	994
Commonwealth, Carter v. (Ky.).....	921	Davis, Berry v. (Tex.).....	978
Commonwealth, Chenault v. (Ky.).....	442	Davis, Howard Oil Co. v. (Tex.).....	665
Commonwealth, Clem v. (Ky.).....	102	Davis, Taylor v. (Tex.).....	642
Commonwealth, Colliver v. (Ky.).....	922	Davis' Estate v. Herrington (Ark.).....	215
Commonwealth, Crane v. (Ky.).....	1079	Dawkins v. Gulf, C. & S. F. Ry. Co. (Tex.).....	984
Commonwealth, Cunningham v. (Ky.).....	104	Dawkins, Gulf, C. & S. F. Ry. Co. v. (Tex.).....	983
Commonwealth, Hall v. (Ky.).....	1082	Deal, Sneed v. (Ark.).....	708
Commonwealth, Hines v. (Ky.).....	445	Dean, Sabine & E. T. Ry. Co. v. (Tex.).....	45
Commonwealth, Holt v. (Ky.).....	71	Deaton v. State (Tex.).....	1009
Commonwealth, Johnson v. (Ky.).....	520	Deere, Caruth-Byrnes Hardware Co. v. (Ark.).....	517
Commonwealth, Lynn v. (Ky.).....	74	De France, Murphy v. (Mo.).....	756
Commonwealth, Mathis v. (Ky.).....	860	Delk, Punchard v. (Tex.).....	615
Commonwealth, Noble v. (Ky.).....	429	Delougherty, Bingham v. (Mo.).....	208
Commonwealth, Powers v. (Ky.).....	450	Denman, Noel v. (Tex.).....	818
Commonwealth, Sims v. (Ky.).....	1079	Deposit Bank of Georgetown v. Fayette Nat. Bank (Ky.).....	399
Commonwealth, Wells v. (Ky.).....	915	Deposit Bank of Georgetown v. Second Nat. Bank of Lexington (Ky.).....	389
Compton, Gulf, C. & S. F. Ry. Co. v. (Tex.).....	687	Deposit Bank of Owensboro v. Barrett (Ky.).....	387
Connor v. City of Waxahachie (Tex.).....	80	Deposit Bank of Owensboro v. Davless County Court (Ky.).....	101
Conrad, Bray v. (Mo.).....	957	Deutsch, Frost v. (Tex.).....	981
Consumers' Gas Co. of Kansas City v. Kansas City Gas-Light & Coke Co. (Mo.).....	874	Devore, Sayer v. (Mo.).....	201
Cook v. Cook (Tex.).....	847	Dickinson, Gray v. (Ky.).....	209
Cook v. Couch (Mo.).....	80	Dignowity v. Coleman (Tex.).....	857
Cook v. Houston Direct Nav. Co. (Tex.).....	475	Dignowity, Ettet v. (Tex.).....	973
Cooper v. Langway (Tex.).....	179	Diviney, Henry v. (Mo.).....	1057
Cooper v. Loughlin (Tex.).....	37	Dodd v. Templeman (Tex.).....	187
Cooper v. Nevin (Ky.).....	841	Doll v. Reed (Ky.).....	1081
Cooper v. State (Tex.).....	1011	Doss v. State (Tex.).....	788
Coppage, Louisville & N. R. Co. v. (Ky.).....	1086	Dowan, Razor v. (Ky.).....	914
Coquard v. Wernse (Mo.).....	841	Downs, Kenton Ins. Co. v. (Ky.).....	882
Corey v. Chicago, B. & K. C. Ry. Co. (Mo.).....	848	Doyle, East End St. Ry. Co. v. (Tenn.).....	986
Corey v. State (Tex.).....	778	Drone, Robertson v. (Mo.).....	405
Corrigan v. Tiernay (Mo.).....	401	Du Bose, Robertson v. (Tex.).....	300
Cottrill v. Crum (Mo.).....	753	Du Bose, State v. (Tenn.).....	1088
Cotulla v. Goggan (Tex.).....	742	Dunavant, Jefferson v. (Ark.).....	701
Couch, Cook v. (Mo.).....	80	Dunning, Baker v. (Tex.).....	617
County of Bollinger v. McDowell (Mo.).....	100	Dunn's Trustee v. McAlpin (Ky.).....	868
Cox v. Cox (Mo.).....	1055	Durst v. Amyx (Ky.).....	1087
Cox, Hubbard v. (Tex.).....	170	Duvall, Wolf v. (Ark.).....	728
Cox, Ex parte (Tex.).....	862	Dyer, Ambleton v. (Ark.).....	928
Coy, Hearn v. (Ark.).....	598	Dyer, International & G. N. R. Co. v. (Tex.).....	377
Crabtree v. Bradbury (Ark.).....	985	Dyer, Weed v. (Ark.).....	592
Crafton, Huntington v. (Tex.).....	542	Eagle Pass Ferry Co., Tugwell v. (Tex.).....	654
Craig v. Van Bebber (Mo.).....	906	Earp v. State (Tex.).....	888
Crane v. Commonwealth (Ky.).....	1079	East End St. Ry. Co. v. Doyle (Tenn.).....	936
Cremeans, Commonwealth v. (Ky.).....	884	East Texas Fire Ins. Co. v. Blum (Tex.).....	572
Cresap v. State (Tex.).....	992	Ebersole v. Rankin (Mo.).....	756
Crescent Manufg Co. v. N. O. Nelson Manufg Co. (Mo.).....	508	Echols v. Tate (Ark.).....	253
Critz, Greer v. (Ark.).....	764	Eggen v. Huston (Ky.).....	919
C. R. Johns & Co., O'Donnell v. (Tex.).....	376	Eidson, State v. (Tex.).....	268
Crossland v. Powers (Ark.).....	723	Eley v. State (Tex.).....	998
Crowder, Texas & N. O. Ry. Co. v. (Tex.).....	881	Elkins, Johnson v. (Ky.).....	448
Crum, Cottrill v. (Mo.).....	753	Ellis v. Garvey (Tex.).....	820
Crumes v. State (Tex.).....	868	Ellis, Irvin v. (Tex.).....	22
Crutcher v. Muir's Ex'r (Ky.).....	435		
Culbertson, Carder v. (Mo.).....	88		
Cunningham v. Commonwealth (Ky.).....	104		
Cunningham, Heffron v. (Tex.).....	259		
Curry v. State (Tex.).....	752		
Curry v. State (Tex.).....	778		
Daggett v. Wallace (Tex.).....	49		

	Page		Page
Elnell v. Universalist General Convention (Tex.).....	553	Galveston, H. & S. A. Ry. Co. v. Smith (Tex.).....	563
Elvins, State v. (Mo.).....	987	Galveston, H. & S. A. Ry. Co. v. State (Tex.).....	619
Emerson Mercantile & Manuf'g Co., Nickle v. (Ark.).....	78	Galveston Oil Co. v. Thompson (Tex.).....	60
Emery, City of Houston v. (Tex.).....	264	Gann, Chesnutt v. (Tex.).....	274
Emery, City of Houston v. (Tex.).....	266	Garcia, International & G. N. R. Co. v. (Tex.).....	228
English v. State (Tex.).....	775	Gardner v. Watson (Tex.).....	39
Estelle, Snowden v. (Tex.).....	970	Garner v. State (Tex.).....	1004
Estes, Lambert v. (Mo.).....	284	Garrett, Galveston, H. & S. A. Ry. Co. v. (Tex.).....	62
Etter v. Dignowity (Tex.).....	973	Garvey, Ellis v. (Tex.).....	320
Eureka Imp. Co., Jones v. (Ark.).....	1094	Garza, In re (Tex.).....	779
Evans v. Opperman (Tex.).....	812	Gatlin v. State (Tex.).....	993
Evans, Feucht v. (Ark.).....	217	Gaven v. Allen (Mo.).....	501
Fairley, Clark v. (Mo.).....	686	Gay, Brown v. (Tex.).....	473
Falls Land & Cattle Co., Templeton v. (Tex.).....	964	Gebhardt, Ruhrwein v. (Ky.).....	447
Faris v. Goins (Ky.).....	2	Gentry v. Schneider (Tex.).....	614
Farris, Hundley v. (Mo.).....	892	Gerke v. Gerke (Mo.).....	400
Fayette Nat. Bank, Deposit Bank of Georgetown v. (Ky.).....	339	German Ins. Co. v. Read's Ex'x (Ky.).....	1080
Fecheimer v. Robertson (Ark.).....	423	German Ins. Co. v. Smead (Ark.).....	332
Feizer, City of Houston v. (Tex.).....	266	German Ins. Co., Richardson's Adm'r v. (Ky.).....	1
Fenn v. Gulf, C. & S. F. Ry. Co. (Tex.).....	273	Gibson, Wrenn v. (Ky.).....	766
Fenner, Maddox v. (Tex.).....	153	Giddings, Kirby v. (Tex.).....	27
Ferguson, Folts v. (Tex.).....	1037	Giesecke, Moore v. (Tex.).....	290
Ferguson, Houston, E. & W. T. Ry. Co. v. (Tex.).....	57	Gilkerson-Sloss Commission Co. v. London (Ark.).....	513
Feucht v. Evans (Ark.).....	217	Gill v. Buckner (Ky.).....	908
Ficklin v. Strickland (Tex.).....	272	Gillard, Lewy v. (Tex.).....	304
Finlan v. State (Tex.).....	866	Gilmore v. State (Tex.).....	646
Finley v. St. Louis Refrigerator Co. (Mo.).....	87	Glaessner v. Anheuser-Busch Brewing Ass'n (Mo.).....	707
Finn, State v. (Mo.).....	712	Glessner, Hall v. (Mo.).....	349
Fisher v. State (Tex.).....	773	Glidewell, Jones v. (Ark.).....	723
Fitch v. Poplar Flat, I. R. & S. L. Turnpike Co. (Ky.).....	791	Goggan, Cotulla v. (Tex.).....	742
Fitzenrieter, Hooks v. (Tex.).....	230	Goins, Faris v. (Ky.).....	2
Flemming v. State (Mo.).....	761	Goldsmith, Rosenfeld v. (Ky.).....	3
Flournoy, Stevenson v. (Ky.).....	210	Goodbar v. Mears (Ark.).....	515
Foat v. State (Tex.).....	867	Goodbar, Worthley v. (Ark.).....	216
Fogleman, Waggoner v. (Ark.).....	729	Goodwin, Anderson v. (Tex.).....	31
Folts v. Ferguson (Tex.).....	1037	Goosling v. Smith (Ky.).....	437
Foot v. Silliman (Tex.).....	1032	Graham v. State (Tex.).....	1010
Forehand v. State (Ark.).....	728	Graham v. State (Tex.).....	1013
Fort Worth & D. C. Ry. Co. v. Williams (Tex.).....	637	Graham v. Struwe (Tex.).....	381
Fort Worth & R. G. Ry. Co. v. Jennings (Tex.).....	270	Graves v. State (Tex.).....	149
Foster, Chesapeake, O. & S. W. R. Co. v. (Tenn.).....	694	Gray v. Dickinson (Ky.).....	209
Foster, Miller v. (Tex.).....	529	Gray v. Marshall (Ky.).....	913
Foster & Logan Hardware Co., Hope Lumber Co. v. (Ark.).....	731	Gray, State v. (Mo.).....	806
Foulk, In re (Tex.).....	746	Gray, Wolf v. (Ark.).....	512
Fredericks, Warren v. (Tex.).....	643	Green v. State (Tex.).....	784
Freeman v. Freeman (Ky.).....	246	Greenwood, Steenburgen v. (Ark.).....	702
Freeman v. Watkins (Ark.).....	79	Greer v. Critz (Ark.).....	764
Freiberg, Dansby v. (Tex.).....	331	Grenzenbach, Southwick v. (Ky.).....	918
Freybe v. Tiernan (Tex.).....	370	Griffin, Texas & P. Ry. Co. v. (Tex.).....	471
Frick Co., Beaver v. (Ark.).....	134	Griffin, Ex parte (Tenn.).....	75
Fritsch v. Klausing (Ky.).....	241	Griffith v. Langsdale (Ark.).....	733
Frizzell v. Tiller (Ark.).....	1097	Grimes, State v. (Mo.).....	956
Frost v. Deutsch (Tex.).....	981	Grubbs v. Marshall (Ky.).....	447
Eryer v. Meyers (Tex.).....	1025	Guadalupe & San Antonio Rivers Stock Ass'n v. West (Tex.).....	807
Fulcher v. State (Tex.).....	750	Guest, State v. (Mo.).....	957
Furnish v. Missouri Pac. Ry. Co. (Mo.).....	1044	Gulf, C. & S. F. Ry. Co. v. Anderson (Tex.).....	196
Gaines, St. Louis, I. M. & S. Ry. Co. v. (Ark.).....	740	Gulf, C. & S. F. Ry. Co. v. Campbell (Tex.).....	19
Gainesville Nat. Bank v. Bamberger (Tex.).....	959	Gulf, C. & S. F. Ry. Co. v. Compton (Tex.).....	667
Galbraith v. State (Tex.).....	607	Gulf, C. & S. F. Ry. Co. v. Dawkins (Tex.).....	982
Galveston City R. Co., Rogers v. (Tex.).....	540	Gulf, C. & S. F. Ry. Co. v. Hodges (Tex.).....	64
Galveston County, Burk v. (Tex.).....	455	Gulf, C. & S. F. Ry. Co. v. Jones (Tex.).....	874
Galveston County, Kempner v. (Tex.).....	460	Gulf, C. & S. F. Ry. Co. v. Levi (Tex.).....	191
Galveston, H. & S. A. Ry. Co. v. Garrett (Tex.).....	62	Gulf, C. & S. F. Ry. Co., Dawkins v. (Tex.).....	984
Galveston, H. & S. A. Ry. Co. v. Kutac (Tex.).....	327	Gulf, C. & S. F. Ry. Co., Fenn v. (Tex.).....	273
		Habel v. State (Tex.).....	1001
		Haden, Pegues v. (Tex.).....	171
		Hagerty, Harmon v. (Tenn.).....	690
		Hagerty, Louisville Banking Co. v. (Tenn.).....	690
		Hahlo v. Mayer (Mo.).....	804
		Halcomb v. Stubblefield (Tex.).....	231
		Half, Meusebach v. (Tex.).....	979

	Page		Page
Hall v. Commonwealth (Ky.).....	1082	Holt v. Commonwealth (Ky.).....	71
Hall v. Glessner (Mo.).....	849	Hooks v. Fitzenriether (Tex.).....	280
Hall v. Haywood (Tex.).....	612	Hoover, St. Louis, A. & T. Ry. Co. v. (Ark.).....	1092
Hall v. Scott's Adm'r (Ky.).....	249	Hope, State v. (Mo.).....	490
Hall, Bosquett v. (Ky.).....	244	Hope Lumber Co. v. Foster & Logan Hardware Co. (Ark.).....	781
Hall, St. Louis, I. M. & S. Ry. Co. v. (Ark.)	138	Hopkins, Lucy v. (Ky.).....	518
Halliday, Smith v. (Ark.).....	1098	Horn, Anderson v. (Tex.).....	24
Halpern v. Burgess (Ark.).....	768	Hot Spring Co., Peyton v. (Ark.).....	764
Halpern, Brakefield v. (Ark.).....	1102	Houston v. Killough (Tex.).....	959
Hammond v. State (Tex.).....	605	Houston v. Mayes (Tex.).....	1036
Hance, Burke v. (Tex.).....	163	Houston Direct Nav. Co., Cook v. (Tex.)...	475
Handlan v. McManus (Mo.).....	207	Houston, E. & W. T. Ry. Co. v. Ferguson (Tex.).....	57
Hanks v. Andrews (Ark.).....	1102	Houston & T. C. Ry. Co. v. Brin (Tex.).....	886
Hanley v. State (Tex.).....	142	Houston & T. C. Ry. Co. v. Smith (Tex.)...	972
Hannenkamp, Keating v. (Mo.).....	89	Howard v. Masterson (Tex.).....	635
Hannibal & St. J. R. Co., State v. (Mo.)....	406	Howard, Watts v. (Tex.).....	966
Hannibal & St. J. R. Co., State v. (Mo.)....	505	Howard Oil Co. v. Davis (Tex.).....	665
Hardeman County, Reed v. (Tex.).....	1024	Howe v. Harding (Tex.).....	41
Harding, Howe v. (Tex.).....	41	Howe, Morrison v. (Ky.).....	244
Hardwicke, Strickland v. (Tex.).....	978	Howell, Smith v. (Ark.).....	929
Hardy v. State (Tex.).....	1008	Hubbard v. Cox (Tex.).....	170
Hargis v. Kansas City, C. & S. Ry. Co. (Mo.)	680	Hubbard v. Texas County (Mo.).....	1065
Harkins, State v. (Mo.).....	880	Hudson v. State (Tex.).....	388
Harmon v. Hagerty (Tenn.).....	690	Hudson, Smith v. (Ark.).....	597
Harness v. State (Tex.).....	585	Hughes v. Brown (Tenn.).....	286
Harrington, State v. (Mo.).....	898	Hughes v. State (Tex.).....	777
Harris v. State (Tex.).....	608	Hull, Moton v. (Tex.).....	849
Harris v. Townsend (Ark.).....	283	Humason v. Lobe (Tex.).....	382
Harris, Ayers v. (Tex.).....	768	Hundley v. Farris (Mo.).....	892
Harris, Calcasieu Lumber Co. v. (Tex.)....	453	Hunt v. State (Tex.).....	858
Harris, Sherrer v. (Ark.).....	780	Hunt, Barber Asphalt Paving Co. v. (Mo.)..	98
Hart v. Blum (Tex.).....	181	Hunt, King v. (Ky.).....	214
Hartford Life Ins. Co., Hise v. (Ky.).....	867	Hunt, In re (Tex.).....	145
Hartford Life & Annuity Ins. Co. v. Hayden's Adm'r (Ky.).....	535	Hunter v. Southern Pac. Ry. Co. (Tex.)....	190
Hayden's Adm'r, Hartford Life & Annuity Ins. Co. v. (Ky.).....	585	Huntington v. Crafton (Tex.).....	542
Hayes, Rodriguez v. (Tex.).....	296	Hurt v. Marshall (Tex.).....	38
Hayes, Williams v. (Tex.).....	1029	Hurt, Louisville & N. R. Co. v. (Ky.).....	275
Haywood, Hall v. (Tex.).....	612	Huston, Eggen v. (Ky.).....	919
Head, Dant v. (Ky.).....	1078	Hutton, Smith v. (Tex.).....	18
Hearn v. Coy (Ark.).....	596	Hyatt v. State (Ark.).....	215
Hearn, Western Union Tel. Co. v. (Tex.)...	970	Hyde v. McCabe (Mo.).....	875
Hecht v. Scraggs (Ark.).....	980		
Heck v. Martin (Tex.).....	51	Ilse v. Seinsheimer (Tex.).....	829
Heffron v. Cunningham (Tex.).....	259	International & G. N. R. Co. v. Dyer (Tex.)	877
Heidenheimer v. Johnston (Tex.).....	46	International & G. N. R. Co. v. Garcia (Tex.).....	223
Henderson, Byrne v., two cases, (Ky.)....	909	Irvin v. Ellis (Tex.).....	23
Henderson, Childers v. (Tex.).....	481		
Henderson, In re (Tenn.).....	418	Jackson v. McLean's Ex'rs (Mo.).....	393
Henderson's Trustee, City of Louisville v. (Ky.).....	111	Jackson v. State (Tex.).....	451
Hendrick, Olden v. (Mo.).....	821	Jackson, Anderson v. (Tex.).....	30
Hendricks v. State (Tex.).....	672	Jackson, Briant v. (Mo.).....	91
Hendricks, Chesapeake, O. & S. W. R. Co. v. (Tenn.).....	696	Jacobs v. Totty (Tex.).....	372
Hendricks, St. Louis, I. M. & S. Ry. Co. v. (Ark.).....	699	James, Smith v. (Ark.).....	701
Henry v. Diviney (Mo.).....	1057	Jankowskie, City of Houston v. (Tex.)....	269
Herman v. Whitescover's Adm'r (Ky.).....	108	Jasper, Wilson v. (Ky.).....	885
Herndon, Mills v. (Tex.).....	854	Jefferson v. Dunavant (Ark.).....	701
Herringer, Holmes v. (Ky.).....	859	Jennings v. Carter (Ark.).....	800
Herringer, Holmes v. (Ky.).....	918	Jennings, Fort Worth & R. G. Ry. Co. v. (Tex.).....	270
Herrington, Davis' Estate v. (Ark.).....	215	Jett, Blythe v. (Ark.).....	137
Hibernia Ins. Co. v. Starr (Tex.).....	1017	Johnson v. Commonwealth (Ky.).....	520
Hicks, State v. (Ark.).....	704	Johnson v. Elkins (Ky.).....	448
Hill v. Kimball (Tex.).....	59	Johnson v. Miller (Ky.).....	879
Hilliard v. Wilson (Tex.).....	25	Johnson v. State (Tex.).....	651
Hilz v. Missouri Pac. Ry. Co. (Mo.).....	946	Johnson v. State (Tex.).....	1005
Hines v. Commonwealth (Ky.).....	445	Johnson v. Supreme Lodge of Knights of Honor (Ark.).....	794
Hise v. Hartford Life Ins. Co. (Ky.).....	367	Johnson, Jump v. (Ky.).....	843
Hite v. Aetna Life Ins. Co. (Ky.).....	367	Johnson, St. Louis, A. & T. Ry. Co. v. (Ark.)	1096
Hochstadter, Sam v. (Tex.).....	585	Johnson, Texas & P. Ry. Co. v. (Tex.)....	463
Hodgen, Lyons v. (Ky.).....	1076	Johnson County, Bryson v. (Mo.).....	239
Hodges v. Taylor (Ark.).....	129	Johnston, Heidenheimer v. (Tex.).....	46
Hodges, Gulf, C. & S. F. Ry. Co. v. (Tex.)..	64	Johns & Co., O'Donnell v. (Tex.).....	376
Holland, Wood v. (Ark.).....	739	Jones v. Breed's Ex'x (Ky.).....	366
Holmes v. Herringer (Ky.).....	859	Jones v. Eureka Imp. Co. (Ark.).....	1094
Holmes v. Herringer (Ky.).....	918		

	Page		Page
Jones v. Glidewell (Ark.).....	728	Levi, Gulf, C. & S. F. Ry. Co. v. (Tex.)....	191
Jones v. Motley (Ky.).....	482	Lewis, State v. (Ark.).....	925
Jones v. Pratt (Tex.).....	887	Lewy v. Gillard (Tex.).....	804
Jones v. St. Louis, I. M. & S. Ry. Co. (Ark.)	416	Lilly v. Tobbein (Mo.).....	1060
Jones v. State (Tex.).....	990	Lind, Ruff v. (Tex.).....	68
Jones v. Worcher (Ky.).....	911	Linzee, Buller v. (Mo.).....	844
Jones, Gulf, C. & S. F. Ry. Co. v. (Tex.)...	874	Little, Masterson v. (Tex.).....	154
Jones, Shannon v. (Tex.).....	477	Littlejohn v. State (Tex.).....	889
Jose San Roman Sobrinos v. Chamberlain		Little Rock St. Ry. Co., Metcalf v. (Ark.)..	729
(Tex.).....	634	Livingston v. Williams (Tex.).....	173
Joyes v. Shadburn (Ky.).....	861	Lloyd, Matthews v. (Ky.).....	106
Joyner, Thomas v. (Ark.).....	891	Lobe, Humason v. (Tex.).....	382
Jump v. Johnson (Ky.).....	848	Locke v. Adamson (Ark.).....	702
Juneman, In re (Tex.).....	788	Lockhart v. State (Ark.).....	993
		Lockhart v. State (Tex.).....	1012
Kammerer, Commonwealth v. (Ky.).....	108	Logan v. Lee (Ark.).....	422
Kansas City Cable Ry. Co., Ridenhour v.		London, Gilkerson-Sloss Commission Co.	
(Mo.).....	889	v. (Ark.).....	518
Kansas City Cable Ry. Co., Weber v. (Mo.)	587	Long v. Louisville & N. R. Co. (Ky.).....	8
Kansas City, C. & S. Ry. Co., Hargis v.		Lopez v. State (Tex.).....	219
(Mo.).....	680	Loth v. Mothner (Ark.).....	594
Kansas City, Ft. S. & M. R. Co. v. Daugh-		Loughlin, Cooper v. (Tex.).....	87
try (Tenn.).....	698	Louisville Banking Co. v. Hagerty (Tenn.)	690
Kansas City Gas-Light & Coke Co., Con-		Louisville Banking Co. v. Leonard (Ky.)..	521
sumers' Gas Co. of Kansas City v. (Mo.)	874	Louisville & N. R. Co. v. Coppage (Ky.)...	1086
Kauffman v. Wolf (Tex.).....	987	Louisville & N. R. Co. v. Hurt (Ky.).....	275
Kauffman v. Wooters (Tex.).....	549	Louisville & N. R. Co. v. Sheets (Ky.).....	248
Kearnes v. State (Mo.).....	761	Louisville & N. R. Co., Long v. (Ky.).....	8
Keating v. Hannenkamp (Mo.).....	89	Love v. Breedlove (Tex.).....	222
Keith v. Bingham (Mo.).....	683	Luck v. Atkins (Ark.).....	1097
Keller, Chew v. (Mo.).....	595	Luckie v. Watt (Tex.).....	1035
Kellay v. Missouri Pac. Ry. Co. (Mo.).....	806	Lucy v. Hopkins (Ky.).....	318
Kelly v. Salinger (Ark.).....	596	Luker, McIntyre v. (Tex.).....	1027
Kelton, Woolum v. (Ark.).....	78	Lynn v. Commonwealth (Ky.).....	74
Kemp v. State (Tex.).....	869	Lynn v. State (Tex.).....	867
Kempner v. Galveston County (Tex.).....	460	Lyons v. Hodgen (Ky.).....	1076
Kendall v. Clark (Ky.).....	588		
Kendzora, Western Union Tel. Co. v. (Tex.)	986	McAlpin, Dunn's Trustee v. (Ky.).....	363
Kennedy, Milburn Wagon Co. v. (Tex.)...	28	McCabe, Hyde v. (Mo.).....	875
Kenton Ins. Co. v. Downs (Ky.).....	882	McC Campbell, Wright v. (Tex.).....	293
Kentucky Cent. R. Co. v. Walnwright's		McCarthy's Adm'r v. Wood (Ky.).....	792
Adm'r (Ky.).....	438	McClanahan v. West (Mo.).....	674
Kentucky Flour Co.'s Assignee v. Mer-		McClelland, Prather v. (Tex.).....	548
chants' Nat. Bank (Ky.).....	910	McCleskey v. State (Tex.).....	997
Kentucky Mutual Security Fund Co. v.		McCorkle, Ex parte (Tex.).....	991
Turner (Ky.).....	104	McCullough's Adm'r v. Anderson (Ky.)...	353
Kerr, Texas Homestead Building & Loan		McCutchen v. Caldwell (Ky.).....	1072
Ass'n v. (Tex.).....	1020	McDaniel v. Nashville, C. & St. L. R. Co.	
Key, Andrews v. (Tex.).....	640	(Tenn.).....	76
Keyser v. Meusebach (Tex.).....	967	McDermott, Rector v. (Ark.).....	834
Kiber, Bennett v. (Tex.).....	220	McDowell, County of Bollinger v. (Mo.)...	100
Killough, Houston v. (Tex.).....	959	McFarland, Baker v. (Tex.).....	1042
Kimball, Hill v. (Tex.).....	59	McGonigle v. State (Mo.).....	761
Kimbrough v. State (Tex.).....	218	McGonigle, State v. (Mo.).....	758
King v. Hunt (Ky.).....	214	McIlhenny v. Binz (Tex.).....	655
Kinyon, Quinn v. (Mo.).....	873	McIntyre v. Luker (Tex.).....	1027
Kirby v. Giddings (Tex.).....	27	McKee, Washington County Court v. (Ky.)	909
Kirk, State v. (Ark.).....	925	McKiernan, O'Riley v. (Ky.).....	360
Kirkpatrick, Western Union Tel. Co. v.		Macklin v. Allenberg (Mo.).....	350
(Tex.).....	70	Macklin, State v. (Mo.).....	680
Klausing, Fritsch v. (Ky.).....	241	McLaurine v. State (Tex.).....	992
Klotz v. Perteet (Mo.).....	955	McLean's Ex'rs, Jackson v. (Mo.).....	893
Knight v. State (Tex.).....	598	McMahon v. McMahon (Mo.).....	208
Kutac, Galveston, H. & S. A. Ry. Co. v.		McManus, Handlan v. (Mo.).....	207
(Tex.).....	827	McNamara, State v. (Mo.).....	938
		McNeill, Woodward v. (Tex.).....	222
Lambert v. Estes (Mo.).....	284	McPhitridge, City of Siloam Springs v.	
Lamothe, Missouri Pac. Ry. Co. v. (Tex.)...	194	(Ark.).....	137
Langham, City of Sherman v. (Tex.).....	1042	McPike, Wernse v. (Mo.).....	809
Langdale, Griffith v. (Ark.).....	738	McWhorter v. Andrews (Ark.).....	1099
Langway, Cooper v. (Tex.).....	179	Maddox v. Fenner (Tex.).....	153
Lanigan v. Sweany (Ark.).....	740	Maddox v. State (Tex.).....	861
Lanius v. Shuler (Tex.).....	614	Magruder, Wickliffe v. (Ky.).....	523
Largen v. State (Tex.).....	161	Mahle v. State (Tex.).....	999
Leach v. Wilson County (Tex.).....	618	Malin v. Ralfe (Ark.).....	595
Lee, Logan v. (Ark.).....	422	Mallory & Co. v. Smith (Tex.).....	198
Leonard, Louisville Banking Co. v. (Ky.)...	521	Manney v. Allen (Tex.).....	989
Leroux v. Baldus (Tex.).....	1019	Mansfield v. Wilson (Ark.).....	596
Lesueur, State v. (Mo.).....	287	Mansfield's Assignee, Bell v. (Ky.).....	838

	Page		Page
Marsalis, Carney v. (Tex.).....	686	Morris, Western Union Tel. Co. v. (Tex.)..	888
Marshall, Gray v. (Ky.).....	918	Morrison v. Adoue (Tex.).....	166
Marshall, Grubbs v. (Ky.).....	447	Morrison v. Howe (Ky.).....	244
Marshall, Hurt v. (Tex.).....	88	Moss, Danforth v. (Ky.).....	881
Martin v. Ratcliff (Mo.).....	1051	Mothner, Loth v. (Ark.).....	594
Martin v. St. Louis, I. M. & S. Ry. Co. (Ark.)	765	Motley, Jones v. (Ky.).....	432
Martin v. State (Tex.).....	151	Moton v. Hull (Tex.).....	849
Martin, Heck v. (Tex.).....	51	Mugge v. Adams (Tex.).....	830
Martin, Measels v. (Ky.).....	859	Muir's Ex'r, Crutcher v. (Ky.).....	435
Martin Brown Co. v. Perrill (Tex.).....	975	Mullins, Browning v., two cases, (Ky.)...	427
Masonic Temple Co., Commonwealth v. (Ky.)	121	Murphy v. De France (Mo.).....	756
Masters v. State (Tex.).....	999	Murphy v. State (Tex.).....	141
Masteron v. Little (Tex.).....	154	Murray v. Missouri Pac. Ry. Co. (Mo.)....	817
Masteron, Beatty v. (Tex.).....	1014	Murray v. Murray (Ky.).....	244
Masteron, Howard v. (Tex.).....	685	Murrell's Adm'r, Williams v. (Ky.).....	1075
Mathis v. Commonwealth (Ky.).....	860	Myers, Wygal v. (Tex.).....	567
Matthews v. Lloyd (Ky.).....	106	Nairey, City of Sherman v. (Tex.).....	1028
Mattingly, Smith v. (Ky.).....	719	Nalley v. State (Tex.).....	670
Mattingly, Sun Mut. Ins. Co. v. (Tex.)....	1016	Nance v. State (Tex.).....	790
May, Pouncey v. (Tex.).....	888	Nashville, C. & St. L. R. Co., McDaniel v. (Tenn.)	76
Mayer, Hahlo v. (Mo.).....	804	Nashville & K. R. Co., Smith v. (Tenn.)...	128
Mayes, Houston v. (Tex.).....	1036	Nass v. Chadwick (Tex.).....	888
Mayors, State v. (Mo.).....	88	Neel, State Nat. Bank v. (Ark.).....	700
Mays v. State (Tex.).....	787	Neimeyer, Schmidt v. (Mo.).....	405
Mears, Goodbar v. (Ark.).....	515	Nelson Manuf'g Co., Crescent Manuf'g Co. v. (Mo.)	508
Measels v. Martin (Ky.).....	859	Nevin, Cooper v. (Ky.).....	841
Megibben, Bedford v. (Ky.).....	1082	Newcomer v. State (Tex.).....	1040
Melton, Brown v. (Tex.).....	478	New Orleans Ins. Ass'n, Spratt v. (Ark.)...	799
Memphis & C. R. Co., Carson v. (Tenn.)...	588	Newport & C. Bridge Co., City of Newport v. (Ky.)	720
Memphis & L. R. Ry. Co. v. Shoecraft (Ark.)	422	Newson v. City of Galveston (Tex.).....	868
Merchants' Nat. Bank, Kentucky Flour Co.'s Assignee v. (Ky.).....	910	Nichols v. Tribble (Ark.).....	796
Meredith, Randall v. (Tex.).....	576	Nichols, Davies v. (Ark.).....	129
Mesbaw, Caldwell v. (Ark.).....	761	Nickerson, Meyer v. (Mo.).....	904
Metcalf v. Little Rock St. Ry. Co. (Ark.)..	729	Nickle v. Emerson Mercantile & Manuf'g Co. (Ark.)	78
Meusebach v. Half (Tex.).....	979	Noble v. Commonwealth (Ky.).....	429
Meusebach, Keyser v. (Tex.).....	967	Noble v. Meyers (Tex.).....	229
Mexican Nat. Construction Co. v. Middlegge (Tex.).....	257	Noel v. Denman (Tex.).....	818
Meyer v. Nickerson (Mo.).....	904	Noell, Walker v. (Tex.).....	281
Meyer v. Opperman (Tex.).....	174	N. O. Nelson Manuf'g Co., Crescent Manuf'g Co. v. (Mo.)	508
Meyers, Fryer v. (Tex.).....	1025	Noyes v. Brown (Tex.).....	86
Meyers, Noble v. (Tex.).....	229	Nunnally v. Becker (Ark.).....	79
Middlegge, Mexican Nat. Construction Co. v. (Tex.)	257	O'Brien v. Western Steel Co. (Mo.).....	402
Mike, Willis v. (Tex.).....	58	O'Connor v. State (Tex.).....	14
Milburn Wagon Co. v. Kennedy (Tex.).....	28	O'Connor, Withers v. (Tex.).....	743
Miller v. Foster (Tex.).....	529	O'Donnell v. C. R. Johns & Co. (Tex.)....	376
Miller v. Reynolds (Ark.).....	597	O'Farrell, Rollins v. (Tex.).....	1021
Miller v. State (Tex.).....	646	Olden v. Hendrick (Mo.).....	821
Miller, Johnson v. (Ky.).....	879	Opperman, Evans v. (Tex.).....	812
Miller, Porter v. (Tex.).....	555	Opperman, Meyer v. (Tex.).....	174
Miller, State v. (Mo.).....	677	O'Riley v. McKiernan (Ky.).....	360
Miller, State v. (Mo.).....	882	Orr v. Rode (Mo.).....	1066
Miller, State v. (Mo.).....	1051	Osborn v. Osborn (Tex.).....	598
Miller, Watts v. (Tex.).....	16	O'Shaughnessy v. Moore (Tex.).....	570
Millman, Baker v. (Tex.).....	618	Oury v. Saunders (Tex.).....	1030
Mill v. Herndon (Tex.).....	854	Overaker, Waples v. (Tex.).....	527
Minor, Commonwealth v. (Ky.).....	5	Overfield, Phillips v. (Mo.).....	705
Missouri Pac. Ry. Co. v. Lamothe (Tex.)...	194	Overheiser, Texas & P. Ry. Co. v. (Tex.)..	468
Missouri Pac. Ry. Co. v. Whipker (Tex.)....	639	Owensborough & N. R. Co. v. Sutton (Ky.)..	1086
Missouri Pac. Ry. Co. v. White (Tex.).....	65	Owenton, S. & B. L. Turnpike Road Co. v. Smith (Ky.)	426
Missouri Pac. Ry. Co., Adams v. (Mo.).....	509	Owings v. Tucker (Ky.).....	1078
Missouri Pac. Ry. Co., Becke v. (Mo.).....	1053	Pacific & G. E. Ry. Co., Buckner v. (Ark.)	832
Missouri Pac. Ry. Co., Furnish v. (Mo.)....	1044	Paducah Lumber Co. v. Paducah Water Supply Co. (Ky.)	249
Missouri Pac. Ry. Co., Hilz v. (Mo.).....	946	Paducah Water Supply Co., Paducah Lumber Co. v. (Ky.)	249
Missouri Pac. Ry. Co., Kelny v. (Mo.).....	806	Palmer v. State (Tenn.).....	233
Missouri Pac. Ry. Co., Murray v. (Mo.)....	817	Parrott, Coleman's Adm'r v. (Ky.).....	525
Missouri Pac. Ry. Co., Silver v. (Mo.).....	410	Parsons, Spencer v. (Ky.).....	72
Mixon v. State (Tex.).....	143	Patterson, Scott v. (Ark.).....	419
Montgomery v. State (Tex.).....	1000	Pegues v. Haden (Tex.).....	171
Moore v. Giesecke (Tex.).....	290		
Moore v. State (Tex.).....	152		
Moore, O'Shaughnessy v. (Tex.).....	570		
Moore, San Antonio & A. P. Ry. Co. v. (Tex.)	295		
Morris v. Apperson (Ky.).....	441		

	Page		Page
Pelican Fire Ins. Co. v. Troy Co-op. Ass'n (Tex.).....	980	Robertson v. Du Bose (Tex.).....	800
Pelican Ins. Co. v. Wilkerson (Ark.).....	1108	Robertson, Fecheimer v. (Ark.).....	423
Penzel Grocer Co. v. Williams (Ark.).....	736	Robinson, In re (Tex.).....	786
Perego v. White (Tex.).....	974	Rode, Orr v. (Mo.).....	1066
Perez v. Raybaud (Tex.).....	177	Rodman, Bardstown & G. R. Turnpike Co. v. (Ky.).....	917
Perkins v. State (Tex.).....	790	Rodriguez v. Hayes (Tex.).....	296
Perrill, Martin Brown Co. v. (Tex.).....	975	Roe v. City of Kansas (Mo.).....	404
Perry v. Stephens (Tex.).....	984	Rogers v. Galveston City R. Co. (Tex.).....	540
Perry, Cawthorn v. (Tex.).....	268	Rogers v. Trustees Graded School (Ky.).....	587
Perteet, Klotz v. (Mo.).....	955	Rogers v. Wheaton (Tenn.).....	689
Peters, Allen v. (Tex.).....	767	Rogge v. Cassidy (Ky.).....	716
Peters, Brown v. (Ark.).....	729	Rohmeiser, Bannon v. (Ky.).....	444
Petrucio v. Seardon (Tex.).....	560	Rollins v. O'Farrell (Tex.).....	1021
Peyton v. Hot Spring Co. (Ark.).....	764	Rosenfeld v. Goldsmith (Ky.).....	3
Pfeifer, Cladin v. (Tex.).....	483	Rowland v. Phillips (Ark.).....	1101
Phillips, Shumard v. (Ark.).....	510	Ruddell, St. Louis, I. M. & S. Ry. Co. v. (Ark.).....	418
Phillips v. Overfield (Mo.).....	705	Ruff v. Lind (Tex.).....	68
Phillips, Abell's Adm'r v. (Ky.).....	109	Ruhrwein v. Gebhardt (Ky.).....	447
Phillips, Rowland v. (Ark.).....	1101	Rush, Snowden v. (Tex.).....	189
Pittman v. Wakefield (Ky.).....	525	Russell v. Tate (Ark.).....	180
Polk v. State (Tex.).....	1041		
Pollard, Chestnutt v. (Tex.).....	852	Sabine & E. T. Ry. Co. v. Dean (Tex.)....	45
Poplar Flat, I. R. & S. L. Turnpike Co., Fitch v. (Ky.).....	791	Sabine & E. T. Ry. Co., Broussard v. (Tex.)	68
Porter v. Miller (Tex.).....	555	Sabine & E. T. Ry. Co., Smith v. (Tex.)...	165
Pouncey v. May (Tex.).....	383	St. Louis, A. & T. Ry. Co. v. Hoover (Ark.).....	1092
Powell v. State (Tex.).....	599	St. Louis, A. & T. Ry. Co. v. Johnson (Ark.).....	1096
Powell v. Virginia Const. Co. (Tenn.)	691	St. Louis, A. & T. Ry. Co. v. Whitley (Tex.).....	858
Powers v. Commonwealth (Ky.).....	450	St. Louis Grain Elevator Co., Belcher's Sugar Refining Co. v. (Mo.).....	822
Powers, Crossland v. (Ark.).....	722	St. Louis, I. M. & S. Ry. Co. v. Bennet (Ark.).....	742
Prater v. Strother (Ky.).....	252	St. Louis, I. M. & S. Ry. Co. v. Brown (Ark.).....	338
Prather v. McClelland (Tex.).....	543	St. Louis, I. M. & S. Ry. Co. v. Gaines (Ark.).....	740
Pratt, Jones v. (Tex.).....	887	St. Louis, I. M. & S. Ry. Co. v. Hall (Ark.)	138
Preston, Stengel v. (Ky.).....	839	St. Louis, I. M. & S. Ry. Co. v. Hendricks (Ark.).....	699
Price, Smith v. (Ky.).....	428	St. Louis, I. M. & S. Ry. Co. v. Ramsey (Ark.).....	931
Pride v. State (Ark.).....	135	St. Louis, I. M. & S. Ry. Co. v. Ruddell (Ark.).....	418
Prince v. Antle (Ky.).....	436	St. Louis, I. M. & S. Ry. Co. v. Worthen (Ark.).....	354
Proctor, Scott v. (Ky.).....	790	St. Louis, I. M. & S. Ry. Co. v. Yonley (Ark.).....	338
Punchard v. Delk (Tex.).....	615	St. Louis, I. M. & S. Ry. Co., Davis v. (Ark.).....	801
Purcelley v. State (Tex.).....	998	St. Louis, I. M. & S. Ry. Co., Jones v. (Ark.).....	416
		St. Louis, I. M. & S. Ry. Co., Martin v. (Ark.).....	765
Quinn v. Kinyon (Mo.).....	873	St. Louis, I. M. & S. Ry. Co., St. Louis T. Ry. Co. v. (Mo.).....	710
		St. Louis, I. M. & S. Ry. Co., Soeder v. (Mo.).....	714
Rabb v. State (Tex.).....	1000	St. Louis, I. M. & S. Ry. Co., Wilkins v. (Mo.).....	898
Rachford v. Rachford (Ky.).....	1075	St. Louis Refrigerator Co., Finley v. (Mo.)	87
Radcliff, State v. (Mo.).....	285	St. Louis T. Ry. Co. v. St. Louis, I. M. & S. Ry. Co. (Mo.).....	710
Rainey, Dalton v. (Tex.).....	84	St. Louis & S. F. Ry. Co. v. Williams (Ark.).....	796
Rains v. Wheeler (Tex.).....	324	Salinger, Kelly v. (Ark.).....	596
Ralfe, Malin v. (Ark.).....	595	Sam v. Hochstadter (Tex.).....	535
Ramsey, St. Louis, I. M. & S. Ry. Co. v. (Ark.).....	981	Sampson v. Solinsky (Tex.).....	67
Randall v. Meredith (Tex.).....	576	Samuels, Williams v. (Ky.).....	438
Rankin, Ebersole v. (Mo.).....	756	San Antonio Lumber Co., Alexander v. (Tex.).....	1025
Ratcliff, Martin v. (Mo.).....	1011	San Antonio Nat. Bank v. Blocker (Tex.)	961
Raybaud, Perez v. (Tex.).....	177	San Antonio & A. P. Ry. Co. v. Bennett (Tex.).....	319
Razor v. Dowan (Ky.).....	914	San Antonio & A. P. Ry. Co. v. Moore (Tex.).....	295
Read's Ex'x, German Ins. Co. v. (Ky.)....	1080		
Reagan v. State (Tex.).....	1009		
Rector v. McDermott (Ark.).....	334		
Reed v. Hardeman County (Tex.).....	1024		
Reed v. State (Tex.).....	865		
Reed, Doll v. (Ky.).....	1081		
Reeves v. Barrett (Ark.).....	77		
Reinder's Adm'r v. Blick & Phillips Coal Co. (Ky.).....	719		
Reinstein v. Daniels (Tex.).....	21		
Reynolds, Brownson v. (Tex.).....	986		
Reynolds, Miller v. (Ark.).....	597		
Rhodes v. Andrews (Ark.).....	422		
Rhodes v. Rhodes (Tenn.).....	590		
Richardson's Adm'r v. German Ins. Co. (Ky.).....	1		
Ridenhour v. Kansas City Cable Ry. Co. (Mo.).....	889		
Riley, State v. (Mo.).....	1063		
Roberson v. Tonn (Tex.).....	885		
Roberts' Adm'r, Willis' Adm'r v. (Ky.)....	358		
Robertson v. Drone (Mo.).....	405		

	Page		Page
San Antonio & A. P. Ry. Co. v. Wallace (Tex.).....	565	Southern Pac. Ry. Co., Hunter v. (Tex.)...	190
Saunders, Oury v. (Tex.).....	1080	Southwick v. Grenzenbach (Ky.).....	918
Sayer v. Devore (Mo.).....	201	Spencer v. Parsons (Ky.).....	72
Schmidt v. Neimeyer (Mo.).....	405	Spratt v. New Orleans Ins. Ass'n (Ark.)...	799
Schnecko, Benne v. (Mo.).....	82	Springfield v. State, two cases, (Tex.).....	752
Schneider, Gentry v. (Tex.).....	614	Stafford v. Williams (Tenn.).....	793
School-Dist. No. 42 v. Bennett (Ark.).....	183	Staley, Southern Pac. Co. v. (Tex.).....	480
Scott v. Patterson (Ark.).....	419	Stanley v. Wabash, St. L. & P. Ry. Co. (Mo.).....	709
Scott v. Proctor (Ky.).....	790	Starr, Hibernia Ins. Co. v. (Tex.).....	1017
Scott's Adm'r. Hall v. (Ky.).....	249	State v. Atkinson (Ark.).....	415
Scraggs, Hecht v. (Ark.).....	990	State v. Brent (Mo.).....	874
Screwmen's Ben. Ass'n v. Benson (Tex.)..	379	State v. Burns (Mo.).....	688
Searcy v. State (Tex.).....	782	State v. Clay (Mo.).....	827
Seardon, Petrucio v. (Tex.).....	590	State v. Clayton (Mo.).....	819
Secker v. State (Tex.).....	774	State v. Du Bose (Tenn.).....	1088
Second Nat. Bank of Lexington, Deposit Bank of Georgetown v. (Ky.).....	889	State v. Eidson (Tex.).....	263
Seemuller v. Thornton (Tex.).....	846	State v. Elvins (Mo.).....	937
Seinsheimer, Iise v. (Tex.).....	829	State v. Finn (Mo.).....	712
Self v. State (Tex.).....	602	State v. Gray (Mo.).....	808
Shadburn, Joyes v. (Ky.).....	361	State v. Grimes (Mo.).....	956
Shannon v. Jones (Tex.).....	477	State v. Guest (Mo.).....	957
Shannon v. State (Tex.).....	599	State v. Hannibal & St. J. R. Co. (Mo.)...	406
Shattuck v. Watson (Ark.).....	516	State v. Hannibal & St. J. R. Co. (Mo.)...	505
Shayne, Becker v. (Tex.).....	1027	State v. Harkins (Mo.).....	880
Sheets, Louisville & N. R. Co. v. (Ky.)...	248	State v. Harrington (Mo.).....	898
Sherrer v. Harris (Ark.).....	780	State v. Hicks (Ark.).....	704
Shiner v. Abbie (Tex.).....	618	State v. Hope (Mo.).....	490
Shoecraft, Memphis & L. R. Ry. Co. v. (Ark.).....	423	State v. Kirk (Ark.).....	923
Shornick v. Bennett (Tex.).....	982	State v. Lesueur (Mo.).....	287
Shropshire v. Behrens (Tex.).....	1043	State v. Lewis (Ark.).....	925
Shuler, Lanins v. (Tex.).....	614	State v. McGonigle (Mo.).....	758
Shumard v. Phillips (Ark.).....	510	State v. Macklin (Mo.).....	680
Silliman, Foot v. (Tex.).....	1082	State v. McNamara (Mo.).....	988
Silver v. Missouri Pac. Ry. Co. (Mo.).....	410	State v. Mayors (Mo.).....	88
Simon v. Allen (Tex.).....	296	State v. Miller (Mo.).....	677
Simon, Thornton v. (Ark.).....	789	State v. Miller (Mo.).....	882
Simpson, Cleveland v. (Tex.).....	851	State v. Miller (Mo.).....	1051
Sims v. Commonwealth (Ky.).....	1079	State v. Radcliff (Mo.).....	285
Sims v. State (Tex.).....	653	State v. Riley (Mo.).....	1068
Sipe, Buffington v. (Ark.).....	763	State v. Smith (Ark.).....	891
Sisk v. State (Tex.).....	647	State v. Stratman (Mo.).....	814
Slaughter, Wilson v. (Ark.).....	515	State v. Sumpter (Ark.).....	988
Nocum v. Caldwell (Ky.).....	1069	State v. Valliant (Mo.).....	898
Small's Adm'r. Ward v. (Ky.).....	1070	State v. Witten (Mo.).....	871
Smead, German Ins. Co. v. (Ark.).....	832	State, Adams v. (Tex.).....	1009
Smith v. Halliday (Ark.).....	1098	State, Allee v. (Tex.).....	991
Smith v. Howell (Ark.).....	929	State, Allen v. (Tex.).....	998
Smith v. Hudson (Ark.).....	597	State, Armstrong v. (Tex.).....	864
Smith v. Hutton (Tex.).....	18	State, Arnold v. (Tex.).....	774
Smith v. James (Ark.).....	701	State, Ballard v. (Tex.).....	674
Smith v. Mattingly (Ky.).....	719	State, Barton v. (Tex.).....	783
Smith v. Nashville & K. R. Co. (Tenn.)...	128	State, Beasley v. (Ark.).....	783
Smith v. Price (Ky.).....	428	State, Bennett v. (Tenn.).....	142
Smith v. Sabine & E. T. Ry. Co. (Tex.)...	165	State, Bennett v. (Tex.).....	1005
Smith v. Upton (Ky.).....	721	State, Bowen v. (Tex.).....	787
Smith v. Westall (Tex.).....	540	State, Bowman v. (Tex.).....	1009
Smith, Arkansas & L. Ry. Co. v. (Ark.)...	929	State, Boyd v. (Tex.).....	864
Smith, Bedding v. (Ark.).....	784	State, Brazzil v. (Tex.).....	1006
Smith, Caffee v. (Mo.).....	1050	State, Bresnen v. (Mo.).....	761
Smith, C. H. Mallory & Co. v. (Tex.).....	199	State, Brewer v. (Tex.).....	1004
Smith, Christian County Court v. (Ky.)...	276	State, Brown v. (Tenn.).....	286
Smith, Galveston, H. & S. A. Ry. Co. v. (Tex.).....	562	State, Brown v. (Tex.).....	150
Smith, Goosling v. (Ky.).....	487	State, Brownlee v. (Tex.).....	866
Smith, Houston & T. C. Ry. Co. v. (Tex.)..	973	State, Buchanan v. (Tex.).....	1000
Smith, Owenton S. & B. L. Turnpike Road Co. v. (Ky.).....	426	State, Cain v. (Mo.).....	761
Smith, State v. (Ark.).....	891	State, Carter v. (Tex.).....	147
Smith, Western Union Tel. Co. v. (Tex.)...	169	State, Childers v. (Tex.).....	650
Sneed v. Deal (Ark.).....	703	State, Cochran v. (Tex.).....	651
Snoddy v. American Nat. Bank (Tenn.)...	127	State, Cole v. (Tex.).....	859
Snowden v. Estelle (Tex.).....	970	State, Cooper v. (Tex.).....	1011
Snowden v. Rush (Tex.).....	189	State, Corey v. (Tex.).....	778
Soeder v. St. Louis, I. M. & S. Ry. Co. (Mo.)	714	State, Cresap v. (Tex.).....	992
Solinsky, Sampson v. (Tex.).....	67	State, Crumes v. (Tex.).....	868
Southern Pac. Co. v. Staley (Tex.).....	480	State, Curry v. (Tex.).....	752
		State, Curry v. (Tex.).....	773
		State, Davis v. (Tex.).....	994
		State, Deaton v. (Tex.).....	1009
		State, Doss v. (Tex.).....	785

	Page		Page
State, Earp v. (Tex.)	888	State, Tucker v. (Tex.)	1004
State, Eley v. (Tex.)	998	State, Walker v. (Tex.)	860
State, English v. (Tex.)	775	State, Wampler v. (Tex.)	144
State, Finlan v. (Tex.)	866	State, Washington v. (Tex.)	606
State, Fisher v. (Tex.)	773	State, Wegner v., two cases, (Tex.)	608
State, Flemming v. (Mo.)	761	State, Weitzel v. (Tex.)	864
State, Foat v. (Tex.)	867	State, Wellington v. (Ark.)	134
State, Forehand v. (Ark.)	728	State, Wells v. (Ark.)	737
State, Fulcher v. (Tex.)	750	State, Wells v., two cases, (Tex.)	889
State, Galbraith v. (Tex.)	607	State, Wicks v. (Tex.)	748
State, Galveston, H. & S. A. Ry. Co. v. (Tex.)	619	State, Williams v. (Tex.)	609
State, Garner v. (Tex.)	1004	State, Wren v. (Tex.)	885
State, Gatlin v. (Tex.)	993	State, Yarbrough v. (Tex.)	775
State, Gilmore v. (Tex.)	646	State Nat. Bank v. Neel (Ark.)	700
State, Graham v. (Tex.)	1010	Steenburgen v. Greenwood (Ark.)	702
State, Graham v. (Tex.)	1013	Stengel v. Preston (Ky.)	839
State, Graves v. (Tex.)	149	Stephens, Perry v. (Tex.)	984
State, Green v. (Tex.)	784	Stevenson v. Brasher (Ky.)	242
State, Habel v. (Tex.)	1001	Stevenson v. Flournoy (Ky.)	210
State, Hammond v. (Tex.)	605	Stevenson, Commings v. (Tex.)	556
State, Hanley v. (Tex.)	142	Stone, Bowen v. (Ky.)	861
State, Hardy v. (Tex.)	1008	Strattman, State v. (Mo.)	814
State, Harness v. (Tex.)	535	Strickland v. Hardwicke (Tex.)	973
State, Harris v. (Tex.)	606	Strickland v. State (Tex.)	865
State, Hendricks v. (Tex.)	672	Strickland, Ficklin v. (Tex.)	272
State, Hudson v. (Tex.)	388	Strohmeier, Zapp v. (Tex.)	9
State, Hughes v. (Tex.)	777	Strother, Prater v. (Ky.)	252
State, Hunt v. (Tex.)	858	Struwe, Graham v. (Tex.)	381
State, Hyatt v. (Ark.)	215	Stubblefield, Halcomb v. (Tex.)	231
State, Jackson v. (Tex.)	451	Sumpter, State v. (Ark.)	983
State, Johnson v. (Tex.)	651	Sun Mut. Ins. Co. v. Mattingly (Tex.)	1016
State, Johnson v. (Tex.)	1005	Supreme Lodge Knights & Ladies of Honor, Whitmore v. (Mo.)	495
State, Jones v. (Tex.)	990	Supreme Lodge of Knights of Honor, Johnson v. (Ark.)	794
State, Kearnes v. (Mo.)	761	Sutor v. Wood (Tex.)	821
State, Kemp v. (Tex.)	869	Sutton v. Dameron (Mo.)	497
State, Kimbrough v. (Tex.)	218	Sutton, Owensborough & N. R. Co. v. (Ky.)	1086
State, Knight v. (Tex.)	598	Sweany, Lanigan v. (Ark.)	740
State, Largent v. (Tex.)	161		
State, Littlejohn v. (Tex.)	889	Tate v. Town of Parkland (Ky.)	443
State, Lockhart v. (Tex.)	993	Tate, Commonwealth v. (Ky.)	113
State, Lockhart v. (Tex.)	1012	Tate, Commonwealth v. (Ky.)	117
State, Lopez v. (Tex.)	219	Tate, Echols v. (Ark.)	253
State, Lynn v. (Tex.)	867	Tate, Russell v. (Ark.)	130
State, McCleskey v. (Tex.)	997	Taylor v. Davis (Tex.)	642
State, McGonigle v. (Mo.)	761	Taylor v. Van Meter (Ark.)	699
State, McLaurine v. (Tex.)	992	Taylor, Hodges v. (Ark.)	129
State, Maddox v. (Tex.)	861	Templeman, Dodd v. (Tex.)	187
State, Mahle v. (Tex.)	999	Templeton v. Falls Land & Cattle Co. (Tex.)	964
State, Martin v. (Tex.)	151	Terry, Capps v. (Tex.)	52
State, Masters v. (Tex.)	999	Texas County, Hubbard v. (Mo.)	1065
State, Mays v. (Tex.)	787	Texas Homestead Building & Loan Ass'n v. Kerr (Tex.)	1020
State, Miller v. (Tex.)	646	Texas Land & Loan Co. v. Blalock (Tex.)	12
State, Mixon v. (Tex.)	143	Texas Land & Mortgage Co. v. Worsham (Tex.)	884
State, Montgomery v. (Tex.)	1000	Texas & N. O. Ry. Co. v. Crowder (Tex.)	381
State, Moore v. (Tex.)	152	Texas & P. Ry. Co. v. Griffin (Tex.)	471
State, Murphy v. (Tex.)	141	Texas & P. Ry. Co. v. Johnson (Tex.)	463
State, Nalley v. (Tex.)	670	Texas & P. Ry. Co. v. Overheiser (Tex.)	468
State, Nance v. (Tex.)	790	Thierry, City of St. Louis v. (Mo.)	844
State, Newcomer v. (Tex.)	1040	Thomas v. Joyner (Ark.)	891
State, O'Connor v. (Tex.)	14	Thomas, City of St. Louis v. (Mo.)	685
State, Palmer v. (Tenn.)	233	Thompson, Galveston Oil Co. v. (Tex.)	60
State, Perkins v. (Tex.)	790	Thorn, Wilson v. (Ky.)	365
State, Polk v. (Tex.)	1041	Thornton v. Simon (Ark.)	789
State, Powell v. (Tex.)	599	Thornton, Seemuller v. (Tex.)	846
State, Pride v. (Ark.)	135	Tiernan, Freybe v. (Tex.)	870
State, Purcelley v. (Tex.)	998	Tiernay, Corrigan v. (Mo.)	401
State, Rabb v. (Tex.)	1000	Tiller, Frizzell v. (Ark.)	1097
State, Reagan v. (Tex.)	1009	Tippie v. State (Tex.)	777
State, Reed v. (Tex.)	865	Tipton, In re (Tex.)	610
State, Searcy v. (Tex.)	782	Tobbein, Lilly v. (Mo.)	1060
State, Secker v. (Tex.)	774	Tonn, Roberson v. (Tex.)	385
State, Self v. (Tex.)	602	Totty, Jacobs v. (Tex.)	372
State, Shannon v. (Tex.)	599	Town of Parkland, Tate v. (Ky.)	443
State, Sims v. (Tex.)	653	Townsend, Harris v. (Ark.)	283
State, Sisk v. (Tex.)	647	Traders' Nat. Bank v. Clare (Tex.)	183
State, Springfield v., two cases, (Tex.)	752		
State, Strickland v. (Tex.)	865		
State, Tipple v. (Tex.)	777		

	Page		Page
Tribble, Nichols v. (Ark.).....	796	Wegner, Biering v. (Tex.).....	587
Triplett, Apperson's Adm'r v. (Ky.).....	791	Weitzel v. State (Tex.).....	864
Troy Co-op. Ass'n, Pelican Fire Ins. Co. v. (Tex.).....	980	Weldon, Brown v. (Mo.).....	842
Truesdell, Caldwell v. (Ky.).....	101	Wellington v. State (Ark.).....	184
Truitt, Armstrong v., two cases, (Ark.).....	984	Wells v. Commonwealth (Ky.).....	915
Trustees Graded School, Rogers v. (Ky.).....	587	Wells v. State (Ark.).....	787
Trustees of First Colored Baptist Church of Lexington, Webb v. (Ky.).....	862	Wells v. State, two cases, (Tex.).....	889
Tucker v. State (Tex.).....	1004	Wenar, Arbuckle Bros. Coffee Co. v. (Tex.).....	963
Tucker, Owings v. (Ky.).....	1078	Wernse v. McPike (Mo.).....	809
Tugwell v. Eagle Pass Ferry Co. (Tex.).....	654	Wernse, Coquard v. (Mo.).....	841
Turner, Kentucky Mutual Security Fund Co. v. (Ky.).....	104	West v. Brison (Mo.).....	95
Turner's Guardian v. Turner's Heirs and Creditors (Ky.).....	6	West, Guadalupe & San Antonio Rivers Stock Ass'n v. (Tex.).....	807
Turner's Heirs and Creditors, Turner's Guardian v. (Ky.).....	6	West, McClanahan v. (Mo.).....	674
Tutt, Williams v. (Mo.).....	674	Westall, Smith v. (Tex.).....	540
Tynberg v. Cohen (Tex.).....	815	Western Steel Co., O'Brien v. (Mo.).....	402
Tyree v. Bingham (Mo.).....	952	Western Union Tel. Co. v. Hearn (Tex.).....	970
United States Home & Dower Ass'n, Brown v., two cases, (Ky.).....	1085	Western Union Tel. Co. v. Kendzora (Tex.).....	986
Universalist General Convention, Elnell v. (Tex.).....	552	Western Union Tel. Co. v. Kirkpatrick (Tex.).....	70
Upton, Smith v. (Ky.).....	721	Western Union Tel. Co. v. Morris (Tex.).....	888
Urquart, Adams v. (Ark.).....	78	Western Union Tel. Co. v. Smith (Tex.).....	169
Utziefield v. Bodman's Heirs (Tex.).....	474	Western Union Tel. Co. v. Young (Tex.).....	985
Valliant, State v. (Mo.).....	398	Western Union Tel. Co., Chapman v. (Ky.).....	880
Van Bebber, Craig v. (Mo.).....	906	Westmoreland v. Carson (Tex.).....	559
Vandegriff, Cameron v. (Ark.).....	1092	Wetzel, City of St. Louis v. (Mo.).....	685
Vanhook's Adm'r, Best's Ex'r v. (Ky.).....	119	Wheaton, Rogers v. (Tenn.).....	689
Vanmeter v. Vanmeter's Assignee (Ky.).....	924	Wheeler v. Wheeler (Tex.).....	805
Van Meter, Taylor v. (Ark.).....	699	Wheeler, Rains v. (Tex.).....	824
Vanmeter's Assignee, Vanmeter v. (Ky.).....	924	Whipker, Missouri Pac. Ry. Co. v. (Tex.).....	639
Van Sickle v. Catlett (Tex.).....	81	Whitaker v. Brooks (Ky.).....	855
Vaughan v. Best's Ex'r (Ky.).....	119	White, Missouri Pac. Ry. Co. v. (Tex.).....	65
Vaughn v. Vaughn (Tenn.).....	1089	White, Perego v. (Tex.).....	974
Virginia Const. Co., Powell v. (Tenn.).....	691	Whitescover's Adm'r, Herman v. (Ky.).....	103
Von Rosenberg, Brau v. (Tex.).....	485	Whitley, St. Louis, A. & T. Ry. Co. v. (Tex.).....	853
Von Rosenberg, Zwernemann v. (Tex.).....	485	Whitmore v. Supreme Lodge Knights & Ladies of Honor (Mo.).....	495
Wabash, St. L. & P. Ry. Co., Stanley v. (Mo.).....	709	Wickliffe v. Magruder (Ky.).....	523
Waggoner v. Fogleman (Ark.).....	729	Wicks v. State (Tex.).....	748
Wainwright's Adm'r, Kentucky Cent. R. Co. v. (Ky.).....	483	Wilkerson, Pelican Ins. Co. v. (Ark.).....	1103
Wakefield, Pittman v. (Ky.).....	525	Wilkins v. St. Louis, I. M. & S. Ry. Co. (Mo.).....	893
Walker v. Noell (Tex.).....	231	Williams v. Brownlee (Mo.).....	1049
Walker v. State (Tex.).....	860	Williams v. Hays (Tex.).....	1029
Walker, Cassilly v. (Ky.).....	844	Williams v. Murrell's Adm'r (Ky.).....	1075
Walker, Ex parte (Tex.).....	861	Williams v. Samuels (Ky.).....	438
Walker's Guardian v. Cochran (Ky.).....	844	Williams v. State (Tex.).....	609
Wallace, Daggett v. (Tex.).....	49	Williams v. Tutt (Mo.).....	674
Wallace, San Antonio & A. P. Ry. Co. v. (Tex.).....	565	Williams v. Wilson (Tex.).....	69
Wallis v. Adoue (Tex.).....	68	Williams, Barnes v. (Ark.).....	845
Wampler v. State (Tex.).....	144	Williams, Fort Worth & D. C. Ry. Co. v. (Tex.).....	687
Waples v. Overaker (Tex.).....	527	Williams, Livingston v. (Tex.).....	173
Ward v. Billups (Tex.).....	808	Williams, Penzel Grocer Co. v. (Ark.).....	736
Ward v. Small's Adm'r (Ky.).....	1070	Williams, St. Louis & S. F. Ry. Co. v. (Ark.).....	796
Warfield, Behan v. (Ky.).....	439	Williams, Stafford v. (Tenn.).....	793
Warren v. Fredericks (Tex.).....	643	Williams' Ex'r v. Williams (Ky.).....	250
Washington v. State (Tex.).....	606	Williamson, Cockrum v. (Ark.).....	592
Washington County Court v. McKee (Ky.).....	909	Willis v. Mike (Tex.).....	58
Waters, Clements v. (Ky.).....	431	Willis, Wynne v. (Tex.).....	548
Watkins, Freeman v. (Ark.).....	79	Willis' Adm'r v. Roberts' Adm'r (Ky.).....	853
Watson, Gardner v. (Tex.).....	89	Willis Point Bank v. Bates (Tex.).....	309
Watson, Shattuck v. (Ark.).....	516	Wilson v. Jasper (Ky.).....	885
Watt, Luckie v. (Tex.).....	1035	Wilson v. Slaughter (Ark.).....	515
Watts v. Howard (Tex.).....	966	Wilson v. Thorn (Ky.).....	865
Watts v. Miller (Tex.).....	16	Wilson, Hilliard v. (Tex.).....	25
Webb v. Trustees of First Colored Baptist Church of Lexington (Ky.).....	862	Wilson, Mansfield v. (Ark.).....	598
Weber v. Kansas City Cable Ry. Co. (Mo.).....	587	Wilson, Williams v. (Tex.).....	69
Weed v. Dyer (Ark.).....	592	Wilson, In re (Tex.).....	609
Wegner v. State, two cases, (Tex.).....	608	Wilson County, Leach v. (Tex.).....	613
		Winter v. Arnold (Ark.).....	509
		Withers v. O'Connor (Tex.).....	743
		Witten, State v. (Mo.).....	871
		Wolf v. Duvall (Ark.).....	728
		Wolf v. Gray (Ark.).....	512
		Wolf, Kauffman v. (Tex.).....	987
		Wood v. City of Galveston (Tex.).....	227
		Wood v. Holland (Ark.).....	739
		Wood, McCarthy's Adm'r v. (Ky.).....	792

	Page		Page
Wood, Sutor v. (Tex.).....	321	Wrenn v. Gibson (Ky.).....	766
Woodlief's Heirs, Wygal v. (Tex.).....	569	Wright v. McCampbell (Tex.).....	293
Woodward v. McNeill (Tex.).....	222	Wygal v. Myers (Tex.).....	567
Woolum v. Kelton (Ark.).....	78	Wygal v. Woodlief's Heirs (Tex.).....	569
Wooters, Kauffman v. (Tex.).....	549	Wynne v. Willis (Tex.).....	548
Worcher, Jones v. (Ky.).....	911		
Worsham, Texas Land & Mortgage Co. v. (Tex.).....	884	Yarbrough v. State (Tex.).....	775
Wortham, Allen v. (Ky.).....	73	Yellow Pine Lumber Co. v. Carroll (Tex.)..	261
Worthen, St. Louis, I. M. & S. Ry. Co. v. (Ark.).....	254	Yonley, St. Louis, I. M. & S. Ry. Co. v. (Ark.).....	333
Worthington's Adm'r, Daviess County Court v. (Ky.).....	101	Young, Western Union Tel. Co. v. (Tex.)..	935
Worthley v. Goodbar (Ark.).....	218	Zander, Avery v. (Tex.).....	971
Wren v. State (Tex.).....	865	Zapp v. Strohmeyer (Tex.).....	9
		Zwer nemann v. Von Rosenberg (Tex.)....	48

See End of Index for Tables of Southwestern Cases in State Reports.

†

THE
Southwestern Reporter.
VOLUME XIII.

RICHARDSON'S ADM'R v. GERMAN INSURANCE CO.

(Court of Appeals of Kentucky. Feb. 20, 1890.)

FIRE INSURANCE—CONDITIONS OF POLICY.

1. Where a policy of insurance provides that the company will make good to the assured, his executors, administrators, and assigns, all loss or damage to his dwelling-house, not exceeding the interest of the assured in the property, caused by fire or lightning between certain dates, the company cannot avoid payment of a loss under the policy on the ground that the assured died before the loss occurred, in the absence of a provision for forfeiture for such cause.

2. The clause in the policy providing for forfeiture in case of any change in the title, use, occupancy, or possession of the property cannot be construed to include a change resulting unavoidably from the death of the assured, but only such change as might be caused by act of the assured while living.

Appeal from circuit court, Garrard county.
"To be officially reported."

Action by the administrator of the estate of Joseph Richardson, deceased, against the German Insurance Company of Freeport, Ill., upon a policy of insurance. There was judgment for defendant, and plaintiff appealed.

P. B. Thompson, Sr., and H. C. Kauffman, for appellant. *D. S. Clay*, for appellee.

LEWIS, C. J. This is an appeal from a judgment dismissing an action instituted by appellant, administrator of the estate of Joseph Richardson, to recover of appellee value of a dwelling-house and furniture destroyed by fire, which was insured by a policy issued to decedent.

As all other conditions necessary to recover appear, from allegations of the petition, to exist, the single question presented is whether the policy became void, and of no effect, upon death of the assured, which occurred before destruction of the property. The policy, dated March 17, 1883, contains the following: "The German Insurance Company, by this policy of insurance, in consideration of two notes for \$26.50, do insure Joseph Richardson against loss or damage by fire and lightning, to the amount of \$——, on * * * dwelling-house and furniture.

* * * And the said company hereby agree to make good unto the said assured, his executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum insured, nor the interest of the assured in the property, nor the cash value of any building or other property at the time of loss, as shall happen by fire or lightning to the property above specified, from the 10th day of March, 1883, at 12 o'clock, noon, to the 10th day of March, 1888, at 12 o'clock noon, except such portion of the above-mentioned period of time as this company shall hold against the insured any promissory note past due and unpaid in whole or part; and during such portion of time the policy shall be null and void, and so continue till such promissory note is fully paid." Following provisions in regard to amount of loss and damage to be estimated, and right of the company to repair or rebuild the property destroyed, and others having no application to this case, is this clause in the policy: "If there is, or shall be, other prior, concurrent, or subsequent insurance, whether valid or not, on said property, or on any part thereof, without the company's consent hereon; or if said building * * * now is, or shall become, vacant or unoccupied; or if the hazard shall be increased in any way; or if the property, or any part thereof, shall be sold, conveyed, incumbered by mortgage or otherwise, or any change takes place in the title, use, occupation, or possession thereof, whatever; or if foreclosure proceedings shall be commenced; or if the interest of the insured on said property, or any part thereof, now is, or shall become, any other or less than a perfect legal and equitable title and ownership, free from any lien whatever except as stated in writing hereon; or if the building or buildings stand on leased land, of which the assured has not a perfect title; or if this policy shall be assigned without written consent hereon,—then and in every such case this policy shall be void." The right was in terms given to the insurance company to terminate the policy at any time by giving notice to that effect, and refunding unearned premium, and also to the insured,

to be, however, exercised only after full payment of premium.

According to the only meaning we think the language used fairly capable of, the property was insured for a specified period of time, which could, after the premium had been fully paid, be adjudged by the company only upon notice and refunding the unearned part of the premium; and it agreed to make good unto, not merely the insured himself, but his executors, administrators, and assigns, the immediate loss or damage that might happen by fire or lightning to the property at any time during that period, whether before or after his death. And, therefore, to treat that event as *ipso facto* a termination of the policy, and liability under it, would be contrary to the express terms of it, render the stipulation for payment to the personal representative of the insured superfluous, and allow the company to retain the full consideration paid, while being held to only part performance of its agreement. It is true, as argued, the property might have been destroyed before, though the loss not made good until after, his death; but the stipulation of the company to pay his personal representative was not necessary to meet such contingency, because the amount due could have in that case been collected without. On the other hand, it is both rational and provident for a person obtaining a policy of fire insurance to have provision in it against destruction of the property after his death; and in such case the stipulation mentioned becomes applicable and necessary. It seems to us the force and effect of language so comprehensive and clear should not be neutralized, or to any extent impaired, by a subsequent forfeiting clause of a policy of insurance, unless the words used for that purpose be so definite, explicit, and free from ambiguity as to leave no other reasonable alternative; for, while forfeitures are not favored by the law, and provisions in a contract therefor are always to be strictly construed, the terms of a policy of insurance, as said in *Insurance Co. v. Jackson*, 16 B. Mon. 242, should be liberally construed for the benefit of the insured, and so as to effectuate, as far as may reasonably be done, the indemnity he justly expected. It is evident the clause referred to was prepared with care, and a purpose to guard every supposed right and interest of the company; yet, of the seven distinct causes for forfeiting the policy therein enumerated, not one of them, in express terms or by fair implication, relates to or includes the death of the insured, nor is it anywhere mentioned as a condition or cause for forfeiting or terminating the policy. The only part of the clause which can be construed to have any relation at all is expressed as follows: "Or any change takes place in the title, use, occupation, or possession thereof, whatsoever;" and that, we think, does not necessarily or properly refer to a change unavoidably resulting from his death, but rather to such as might be caused or suffered by act of

the insured while living, which is the case in each one of the other causes or conditions set forth in the forfeit clause, as well those which precede as those following the one quoted. But, be that as it may, each condition of forfeiture mentioned may, without destroying or lessening its proper meaning or effect, be reconciled with a continuation of the policy after such death to the end of the period; and it therefore should be done, rather than defeat what was elsewhere in the policy clearly provided for. We have been referred to the cases of *Sherwood v. Insurance Co.*, 29 Amer. Rep. 180, and *Wyman v. Wyman*, 26 N. Y. 253. The first one has no application to this case, because there a change "by operation of law" was in terms made a cause of forfeiture. The latter involves practically the same question as this case, and the conclusion arrived at is different from what we think is the proper one; for, according to rules of construction frequently approved by this court, a forfeiting clause in a contract should never defeat a right previously agreed upon, and provided for, unless the language used, strictly interpreted, require it. We think a cause of action is stated in the petition; and the judgment must be reversed, and cause remanded, with directions to overrule the general demurrer, and further proceedings consistent with this opinion.

FARIS v. GOINS *et al.*

(Court of Appeals of Kentucky. Feb. 15, 1890.)

DIVORCE—DIVISION OF PROPERTY—RIGHTS OF CREDITORS.

In an action for divorce, where, in view of the separation, the husband and wife had in writing agreed upon the division of the property, judgment was rendered accordingly, investing the wife with the right and title to certain lands. *Held*, that the judgment invested the wife with the fee of the land, and it could not be subjected to the payment of a debt of the husband contracted subsequent to the rendition of the judgment.

Appeal from court of common pleas, Laurel county.

"Not to be officially reported."

Ewell & Smith, for appellant. *W. R. Ramsey*, for appellee.

PRYOR, J. An action was instituted in the Laurel circuit court by R. D. Goins against his wife, Elizabeth Goins, for a divorce, and a judgment rendered sundering the marital relation, and determining the right and title of the property that would thereafter belong to each. The two, in view of the separation, had by a written agreement that was made the basis of the judgment designated the property that was to belong to each. In pursuance of this written agreement the chancellor adjudged that the wife was invested with the right and title to certain land, describing it, and the husband to certain property. After this judgment the husband who had been divorced became indebted to the appellant, and the latter, by proper proceedings, attempted to subject this land that had

been adjudged to the wife to the payment of the debt. The appellee, the wife, ascertaining this fact, attempted, by a proceeding, to have the judgment in the divorce case by which she was given the land perfected by asking that a deed be executed in pursuance of the judgment. This the appellant resisted on the ground that the chancellor, under the statute in regard to divorce, cannot divest either the husband or wife of the title to real estate, but can only apply the use thereof for the wife, etc. It is therefore insisted that this was only alimony, and the chancellor could not divest the husband of title, but only of the use of the land during the life of the wife. This might be true if there had been no written agreement between the husband and wife, on the eve of separation, as to how the property should be held. The written agreement is not before us, but, in pursuance of that agreement, the chancellor by his judgment has invested the wife with the title; and having jurisdiction of the subject-matter, and the parties the right to make such an agreement, it is apparent that the appellee was invested with the fee. The appellant was not then a creditor, and has no cause to complain; and the husband says that such was the agreement, and if he had contended otherwise the result would have been the same, as the judgment fixes the rights of these parties. The wife being entitled to the land, the creditor of the husband cannot subject it. Judgment affirmed.

ROSENFELD v. GOLDSMITH.

(Court of Appeals of Kentucky. Feb. 20, 1890.)

APPEALS FROM INFERIOR COURTS—JUDGMENT.

In an action on a promissory note, defendant pleaded an illegal agreement between the parties to the note, tainting it with fraud. A jury being waived, the court found for defendant, and dismissed the petition. On appeal it appeared that the only witnesses as to the existence of the alleged agreement were the plaintiff and defendant. The testimony of defendant failed to show any such agreement as he had alleged. *Held*, that it was within the province of the court in such case to direct a judgment for the plaintiff, and to refuse to remand the case for a new trial.

Appeal from law and equity court of Louisville.

"Not to be officially reported."

Petition for rehearing. For former opinion, see 12 S. W. Rep. 928.

Willson & Thum and *G. H. Wald*, for appellant. *Brown, Humphrey & Davie*, for appellee.

HOLT, J. This is a common-law action. By consent, a trial by jury was waived, and the law and facts submitted to the court. It found for the defendant, who is the appellee, and dismissed the petition. This appeal was taken after a motion for a new trial had been overruled. This court by its opinion reversed the judgment, and directed the lower court to render one for the appellant for his debt. It is now urged that the province of

the jury has been invaded, and that the case should have been remanded for a new trial. The only witnesses whose testimony relates to the existence or non-existence of any illegal agreement or understanding between the parties to the notes in contest, tainting them, are the parties to the suit. The appellant testifies that there was none. He gives his version of what occurred and was said between them, and it negatives the existence of any such agreement or arrangement. The testimony of the appellee, and which it is to be presumed was as strong as the facts would admit, fails to show any, and does not support the averments of his pleadings. The mere fact that the appellant expected the appellee to pay his entire debt, and that the latter promised to do so, either verbally or in writing, does not, of course, vitiate the notes executed to the appellant. It was entirely proper, and especially so under all the circumstances, that the appellee should do so. Now, the alleged illegal agreement, if made at all, was made by the immediate parties. When the appellee testifies, and tells what did occur, no such agreement is to any degree shown. This being so, why should the case be returned for a new trial? This court's history shows that it has always been mindful of the right of a litigant to a jury in a proper case. It must pass upon the facts in what is properly a jury case, if there be any conflicting testimony whatever, unless the parties waive such a mode of trial. In such a case the court has no power to find the facts. If there be some evidence to sustain the cause of action or the defense, the case must, upon a reversal by this court, be returned for a new trial. In such a case the court must give way to the jury as to finding the facts. But when the party's own evidence shows that there is nothing in his defense, when upon his own statement but one result can follow, why should not this court direct what judgment shall be entered? Why subject the parties to another trial, which must result in the same judgment the court is now ready to order entered? Such a course is unsupported by reason, and the petition for a rehearing or a modification of the opinion is refused.

LONG v. LOUISVILLE & N. R. CO. *et al.*

(Court of Appeals of Kentucky. Feb. 13, 1890.)

DEEDS—CONSTRUCTION—EJECTMENT—PARTIES.

1. The city of Louisville condemned a certain strip of land for railroad and sewer purposes, and, after constructing a road-bed along this, it conveyed to the L. & N. R. Co. "its title to the road-bed, bridges, and right of way" along the entire route, and "all the land belonging to the city," between certain streets, "for depot purposes." The railroad company had formerly occupied a right of way for a double track on other streets, and the city, in consideration of the change of the railway to the street forming the line of the road in the conveyance, agreed to furnish the company a road-bed. *Held*, that outside the part conveyed for depot purposes nothing but the road-bed was conveyed.

2. In an action of ejectment, plaintiff cannot bring in parties who assert no claim against him,

so that they, by filing cross-petitions, may in the same suit recover from defendant land outside of the line claimed by plaintiff.

Appeal from Louisville chancery court.
"To be officially reported."

Ejectment by the Louisville & Nashville Railroad Company against Dennis Long and others. Judgment for plaintiff, and defendant Long appeals.

O'Neal, Jackson & Phelps, for appellant.
Wm. Lindsay, Barnett, Miller & Barnett, and *Thomas & John Speed*, for appellees.

PRYOR, J. The Louisville, Cincinnati & Lexington Railroad Company originally occupied a right of way for a double track road on Jefferson street, in the city of Louisville; and, the city or the railroad company being desirous of changing the location of the railway from Jefferson street to a point north of Main street, an agreement was entered into by which the city was to furnish a road-bed for the company at the place and on the ground north of Main street, where the track of the Louisville & Nashville Railroad Company now runs, it being the successor by purchase of all the rights and franchises of the Louisville, Cincinnati & Lexington Railroad Company. In order to effect the change in the location of the road, it appears that the city of Louisville, by condemnation and purchase, obtained the fee-simple title to 110 feet of ground near the old bed of Bear Grass creek, running to Brook street, and below that street, where the depot switches and turn-outs of the road are located.

One of the principal questions in this case, and upon which the right of recovery by the railroad company depends, is, did the city convey or donate to the company the entire 110 feet of land as a way, or did it give to the railroad company a road-bed of sufficient width on which to construct a double track, that is, a way similar to the one it had given the company on Jefferson street, from which the road-bed had been removed? Its road-bed was constructed, upon which a double track was laid; and the right to the use of this road-bed, 60 feet in width, by the company, is unquestioned. The questions arise between Dennis Long, the appellant, and the railroad company; the latter filing its petition in equity in which it is alleged that the defendant Long was about to erect a fence on the side of, and within, the 110 feet of ground, so as to affect the enjoyment of the easement, and the proper operation of the road, by the company. It appears affirmatively that this assertion of right by the appellant does not affect or interfere with the road-bed in any way, or with the rights of the appellee, unless the company is entitled to the use of the entire ground. In the case of *City of Louisville v. Hall* and others, the object of the condemnation was to obtain this strip of land for railroad and sewer purposes, the record in that case plainly indicating that the appellee was not to occupy over 60 feet of the ground; and, while this cannot affect the rights of the company,

if a conveyance has been made of the entire strip, it is persuasive as to what was contemplated by the parties. When the fence was constructed, and the road-bed completed, the city conveyed to the railway company "its title to the road-bed, bridges, and right of way from near the round-house of the Louisville, Cincinnati & Lexington Railway Company, east of Southall street, along Poca-hontas street and the old bed of Bear Grass creek, to Brook street; also, all the land belonging to the city between Brook street and Second street, and the south line of the wharf, and the north line of Water street, to be used for depot purposes," etc. When the route reaches Brook street, between that and Second all the land of the city is conveyed for depot purposes, but east of that the right of way is given over the 110 feet, so as to operate a double track railroad. The double track is laid,—is now being operated; and from the facts of the record it is manifest that the city intended to part with 60 feet of the strip for railroad purposes until it reached Brook and Second, when all the land was given. There is no reason for this court to imply a purpose on the part of the city to give to the company more of this ground, or to so construe the conveyance, and particularly when the city, in parting with all of its title to the land between Brook and Second streets, has said so in express terms; and, as to this strip of land, the title to the road-bed, with the right of way, is passed, and nothing more. It was condemned for city purposes, and these purposes were to furnish the railway company with its road-bed and sewers for drainage; and there appears no fact upon which to conclude that the intention of the city was to give all of its purchase by condemnation to the railroad company. It occupies, or has been given, more ground than it occupied on Jefferson street, for the reason, as the record shows in the case of *City v. Hall*, that such was the purpose of the city when the condemnation proceedings were had. The city of Louisville is not a party to this proceeding, and, the title to the land upon which appellee runs its road outside of the road-bed (60 feet) being in the city, as between it and the railroad company, the title is in the city, and not in the appellee; and therefore this action cannot be maintained.

During the progress of the trial, the heirs of Hampton were made parties defendant; and by an answer and cross-petition they assert a claim against the appellant Long, and seek to recover land not involved in this controversy. Their right to maintain the cross-action is based on the idea that this litigation involves the settlement of, or location of, the boundary line that, when established, determines the rights of these parties. As to where the thread of Bear Grass creek ran many years anterior to this litigation was an issue presented by the pleadings and the proof, and as to its exact location the witnesses differ widely; and a decision either way, upon the issue of fact, by the court below, would

have to be approved by this court. This action is in fact an equitable ejectment. There was no motion to transfer the case to the common law court; and, with title in the plaintiff, the defendant could not complain that he was deprived of a trial by jury. The record presents this state of case: The plaintiff, the appellee, is claiming in ejectment the land in possession of or a part, at least, of the defendant, appellant. The plaintiff brings other parties as defendants into the case, who file a cross-petition against their co-defendant Long, claiming other land than that involved in the original action. Hampton's heirs concede that the plaintiff owns the land it claims to recover of the defendant, and that its (the railroad's) north line is the center line of Bear Grass; but the cross-plaintiffs say they own a strip of land lying between plaintiff's north line and defendants' south line, and that defendant Long is about to inclose that also. There was an objection to the filing of this cross-petition, and a motion to strike out so much of the pleading as made it a cross-petition; and the objection was overruled, and two recoveries permitted,—one by the original plaintiff, and the other by the cross-plaintiffs. If Hampton's heirs owned no part of the land in dispute between the parties to the original action, they were not necessary parties; and, if owning the land sought to be recovered by the plaintiff, there is still less reason for making them parties, because they could not be used by the plaintiff for the purpose of divesting the defendant of his possession, or asserting their title, in any such manner. The plaintiff must recover on the strength of his own title; and, while an outstanding title might be relied on by the defendant to defeat the plaintiff, the plaintiff cannot bring into his action a party who has a better title than either, or a defendant who has title to some other land, not in controversy in the original action, but in the defendant's possession, so as to permit him by cross-petition to recover this land also of the defendant. Here is a question of doubtful boundary, with conflicting testimony as to the real line. This fact does not give the chancellor jurisdiction to determine the question by bringing all parties before the court who may have an interest in establishing the line. The owners of the land claimed to a different boundary; and, if such a state of facts gives the chancellor jurisdiction to settle the true line, there was never any use for the action of ejectment. A case might arise where a multiplicity of suits would be prevented by the exercise of such a jurisdiction; but where the remedy at law is adequate, as it is in this case, there can be no reason for permitting several recoveries in ejectment by plaintiffs and cross-plaintiffs against a common defendant. The case of *Fraleigh v. Peters*, reported in 12 Bush, 469, relied on by counsel, sustains this view of the question. If the plaintiff could not settle a question of boundary as to one because others were interested, then the chancellor might assume jurisdiction, for the

reason that the right of the plaintiff could not be established in any other way, and thus prevent a multiplicity of suits. The facts here present no such case, and, with the remedy ample and complete at law, the cross-plaintiffs have no right to recover that which was not the subject of the action, although the testimony as to possession, title, and boundary are identical in both the original and cross action. The original and cross actions against Long should be dismissed,—the cross-action without prejudice; and the cause is remanded for that purpose.

COMMONWEALTH v. MINOR *et al.*

(Court of Appeals of Kentucky. Feb. 15, 1890.)

GRAND JURIES—EVIDENCE—REVIEW—WITNESS—PRISONER IN PENITENTIARY.

1. *Crim. Code Ky. tit. 6, c. 1, § 107*, providing that the grand jury can receive none but legal evidence, and are not bound to hear evidence for the defendant, but that it is their duty to weigh all evidence before them, and, if they believe other evidence within their reach will explain away the charge, shall order such evidence produced, is directory merely, and does not confer upon the trial court the power to review the action of the grand jury in respect to the evidence received by them.

2. *Gen. St. Ky. c. 29, art. 8*, relates to the crimes of "Perjury and False Swearing." Sections 3 to 7, inclusive, relate to specific kinds of false swearing. Section 8 provides that "if any person be convicted of either of the offenses described in the five preceding sections" he shall ever afterwards be disqualified from being a witness in any case. No other provisions are contained in the statutes disqualifying witnesses. *Held*, that one convicted of manslaughter is not disqualified.

3. The provisions of *Civil Code Ky. § 606, subd. 8*, that no prisoner in the penitentiary of the state or any other country shall testify, do not apply to the procedure in criminal actions, but are limited to civil causes.

Appeal from circuit court, Owen county.

"To be officially reported."

Indictment against V. H. Minor and others for arson. On motion of defendants, the indictment was set aside, and the commonwealth appealed.

Gen. St. Ky. c. 29, art. 8, relates to the crimes of "Perjury and False Swearing." Sections 3 to 7, inclusive, relate to specific kinds of false swearing. Section 8 provides that "if any person be convicted of either of the offenses described in the five preceding sections" he shall ever afterwards be disqualified from being a witness in any case.

P. W. Hardin, Atty. Gen., and *John S. Gaunt*, for appellant.

LEWIS, C. J. An indictment against appellees for the crime of arson having been found and presented at the May term of the lower court, they moved at the November term to set it aside, and, being done, the commonwealth appeals. The ground upon which the motion was made and sustained is, as stated in the affidavit of appellees and admitted by the commonwealth's attorney to be true, that the testimony, among others, of one Wilson, who was a convict in the penitentiary under conviction and sentence for

manslaughter, was heard by the grand jury in regard to the offense for which appellees were indicted.

The first question naturally arising is whether the lower court had authority to inquire at all about the competency of evidence given before the grand jury, and to set aside the indictment, even if the testimony of Wilson was incompetent. Section 158, Crim. Code, provides that "the motion to set aside the indictment can only be made on the following grounds: (1) A substantial error in the summoning or formation of the grand jury; (2) that some person, other than the grand jurors, was present before the grand jury when they acted upon the indictment; (3) that the indictment was not found and presented as required by this Code." Clearly, neither of the first two causes mentioned has any application, nor do we think the last one relates to evidence heard by the grand jury. What is meant by "the finding of an indictment," which is the title of article 1, c. 2, tit. 6, appears from the four sections of the article, in none of which is any mention made of the character of evidence or manner in which it may be heard by the grand jury. But after defining an indictment to be an accusation in writing, found and presented to the court, charging a person with commission of a public offense, as is done in section 118, the remaining sections of the article provide that the concurrence of 12 jurors is required to find an indictment, and when found that it must be indorsed "A true bill," and the indorsement signed by the foreman; that where an indictment is found the names of all witnesses who were examined must be written on it; and that the indictment must be presented by the foreman, in presence of the grand jury, to the court, and filed with the clerk, and remain in his office as a public record. The only provision of the Criminal Code which can be construed to give to the court any semblance of authority, even by implication, to determine as to the competency of evidence heard by the grand jury, is section 107, c. 1, tit. 6, as follows: "The grand jury can receive none but legal evidence. They are not bound to hear evidence for the defendant; but it is their duty to weigh all the evidence before them, and if they believe that other evidence, within their reach, will explain away the charge, they should order the evidence to be produced." It seems to us the provisions of that section are merely directory, and that it was intended thereby no more to give the court the power to revise the action of the grand jury, in respect to the character of evidence received by them, than to authorize it to require or compel them to hear additional evidence that might, in the opinion of the court, explain away the charge, but, as it is regularly presented, we will pass on the question whether a person convicted and under sentence for a felony is competent to testify as a witness.

In the cases of *Com. v. McGun*, 7 Ky. Law

Rep. 814, and *Patterson v. Com.*, 86 Ky. 313, 5 S. W. Rep. 387, it was decided that the qualifications of persons to give evidence as witnesses are regulated exclusively by the General Statutes, and that all persons may testify except those especially excluded by section 8, art. 8, c. 29. Persons intended by that section to be disqualified are those who have been convicted of any one of the offenses mentioned in the article, the title of which is "Perjury and False-Swearing," though by oversight language was used in section 8 which does not in fact comprehend the two principal offenses of perjury and false swearing denounced by sections 1 and 2, but only those of the same class provided against in the subsequent sections of the same article. The omission, however, does not, as held in the two cases just referred to, result in disqualifying persons as witnesses who have been convicted of manslaughter, nor of any other crime besides those enumerated in article 8. We are not aware of any statute making the evidence of a convict in the penitentiary illegal, unless it be section 606, subd. 8, Civil Code, which is as follows: "No prisoner in the penitentiary of this state, or of any other country, shall testify; nor shall any person testify for himself against such prisoner." It seems to us, as there is no law providing it be done, that section cannot be made applicable to criminal procedure; for the two Codes are wholly and necessarily distinct, and in every instance, where it seems to have been intended a section in one of them shall be treated as part of both, it has been so expressly provided. Moreover, the language of and reason for that section show it was not intended to apply to testimony of nor of others against convicts in criminal cases. Whether after a convict has, under conviction and sentence for felony, been actually placed at hard labor and in solitary confinement in the penitentiary, his attendance as a witness can be coerced by judicial process, is a question not involved in this case, nor necessary to be decided. We think, for the reasons stated, the court erred in setting aside the indictment, and the judgment is reversed, and case remanded, with directions to overrule the motion, and for further proceedings consistent with this opinion.

TURNER'S GUARDIAN v. TURNER'S HEIRS AND CREDITORS.

(Court of Appeals of Kentucky. Feb. 20, 1890.)

HOMESTEAD—SALE UNDER ORDER OF COURT—RIGHTS OF HEIRS.

An insolvent debtor died, leaving a widow and several children. Subsequently the widow died, leaving the children in possession of the homestead, valued at \$1,000, which had been allotted to the debtor in an action against him. The homestead was of little value; and, on petition of the guardian of the infant children, he was authorized to divide the same into town lots, for the purpose of sale. The proceeds of the sale thus made amounted to \$5,400. Held, that the children were entitled to the interest on the whole amount realized from the sale until the youngest became

of age, and were not limited to the interest on the original value of the homestead.

Appeal from circuit court, Harlan county.
"To be officially reported."

J. M. Unthank and J. L. Scott, for appellants.

PRYOR, J. William Turner, Sr., died in the county of Harlan, leaving his widow and several infant children surviving him. His widow died shortly after her husband, leaving the children in possession of the homestead, valued at \$1,000. The homestead was allotted to the father of these children in the suit of *Sewell v. Will Turner*, and from the record before us it is conceded that it was also allotted to the children. There is no doubt as to their right to the homestead, and its occupancy by them or their guardians. Under the statute the unmarried infant children are entitled to the homestead until the youngest unmarried child arrives at age. The homestead, when allotted, was not worth exceeding \$1,000, and the children, through their guardians, were renting it annually for \$40. The land was of but little value for cultivation, and the improvements all going to decay. The guardians of the infants, looking to the interest of the children, and, with a view of making the income to the children greater than the annual rent, filed a petition in equity, in which they sought to have the land divided into town lots, with streets adjacent, and then offered for sale, alleging that such a conversion of the homestead would enable them to sell the land for a large sum, resulting in great benefit to the infants, and all the parties in interest. The homestead was in this manner surrendered by the infants, the land divided into town lots, and sold for \$5,400. The creditors of William Turner, Sr., or some of them, were made defendants to the petition of the statutory guardian of these infants; and the chancellor, in rendering his judgment, set apart to the infants \$1,000 of the purchase money, and the balance he gave to creditors. The infants have appealed.

It is insisted by the counsel for the infant appellants that, but for their conversion of the realty by dividing it into town lots, and then selling them, the property could not have been sold for a sum exceeding \$1,000, and that, as the action of their guardians, approved by the chancellor, gave the increased value to the property, they are entitled to all the purchase money except \$1,000 that should be held by them until the youngest child arrived at age, and then paid to creditors; or, if not so entitled, the chancellor should have so secured the entire proceeds of sale for creditors, giving to the infants the entire interest on \$5,400 until the youngest child arrived at age. On the other hand, the appellees insist that all the appellants were entitled to is \$1,000, or a homestead of that value, and no more, and that the father, if living, could not have sold this land, his homestead, for \$5,000, by subdividing it into town lots,

and have pocketed the entire proceeds, leaving his creditors unpaid.

Waiving the question as to the right of the creditors to subject the increased value of the homestead after the allotment, when they were parties to the action in which the allotment was originally made, we think there is a manifest distinction between the rights of the father, who is the debtor, and the rights of the infant children, who are under no legal obligation to pay his creditors. Here the homestead passed from the father to his children, and was only of the value of \$1,000 when they received it, or when it was allotted. The chancellor had no power to compel a conversion of the realty into money, or deprive them of its use and occupancy, in order that it might be divided into town lots for purposes of speculation. Their rights could not be disturbed for any such cause; and when, by their own act, or that of their guardians, approved by a court of equity, the infants have caused the property to be so changed as to increase its value, there is no reason, it seems to us, for holding that such an act results alone to the benefit of creditors, and the infants are only entitled to the value of the homestead as fixed by law. What motive had the guardians in abandoning the homestead for creditors? In its natural condition, or as left by their father, it was worth only \$1,000. In its improved condition, caused by the act of the infants, aided by the speculative mania for town lots, the land sold for \$5,000. Suppose the creditors had filed a petition alleging that by dividing and subdividing this homestead, that had already been allotted, into lots, streets, and alleys, they could realize as much as \$5,000 for the property. Would it be seriously insisted that the chancellor would have ordered a sale, and divested the infants of the right to the homestead that passed to them by operation of law? We think not. This increased value is to be attributed to the act of the infants, or those representing them, and must inure to their benefit. The creditors have not been injured; but, on the contrary, when the youngest child arrives at age, they are entitled to the principal sum. Being entitled to the land, its proceeds should follow the direction the law has given it, when not converted into money. The equity of this case is to give to the infants the interest on the proceeds of sale until the youngest child arrives at age, and then the entire principal to go to the creditors of the father. The chancellor will see that the principal sum is fully secured for all the parties in interest. There is much of this record that has no connection with the controversy, and other objections raised in such a general manner as not to indicate what errors are complained of. In fact, if these appellants were not infants, the case would not have been considered on the record presented. The judgment, for the reasons indicated, is reversed and remanded for proceedings consistent with this opinion.

**BALDRIDGE & COURTNEY BRIDGE Co. v.
CARTRETT.**

(Supreme Court of Texas. Jan. 21, 1890.)

**DEFECTIVE BRIDGES—DAMAGES—PROXIMATE CAUSE
—EVIDENCE.**

1. A petition showing that plaintiff, in crossing a toll-bridge, stopped to pay toll, when his mules, for some unknown reason, became frightened, and, before he could get control of them, backed the wagon against the railing, which was defective, and gave way, is not demurrable as showing an intervening cause of the injury.

2. A non-expert witness cannot testify that, judging from its appearance and his inspection of the bridge, he should think it needed repairs.

3. Evidence of a witness who testifies: "I don't know anything about a bridge of that kind. It seemed to be good, except the sidings, which were shabby,"—is not admissible.

4. A question to plaintiff, "Are not ordinary animals, such as are ordinarily used on farms, apt to be frightened and nervous and skittish when driven on plank-roads and bridges?" is objectionable, as leading.

5. It being alleged that plaintiff was guilty of contributory negligence in not jumping from his wagon before it fell, he may testify that while his mules were backing he looked around, and saw the railing to the bridge, and thought that would stop them.

6. An instruction that plaintiff cannot recover if he could have got out of the wagon after the mules began to back, and by so doing prevented the injury to himself, was properly refused, as plaintiff is entitled to recover for the injury to his team, if not to his person.

7. An instruction that plaintiff cannot recover if his mules became unmanageable on account of his whipping them, and trying to urge them forward, was properly refused, as it was a question for the jury whether it was prudent to whip the mules.

8. An instruction that plaintiff cannot recover if the mules became frightened, after entering upon the bridge, without fault on the part of defendants, and backed the wagon against a portion of the railing which had been passed, knocking it off, and precipitating the wagon to the ground, was properly refused.

9. An instruction to consider as actual damages the physical pain and suffering experienced by plaintiff is not objectionable as a charge on the evidence, where it is undisputed that plaintiff had three ribs and one leg broken.

Appeal from district court, Washington county; C. C. GARRETT, Judge.

Searcy & Garrett, for appellant. *Bryan & Campbell*, for appellee.

GAINES, J. The appellant is a corporation maintaining a toll-bridge across the Brazos river. The appellee attempted to cross the bridge in a wagon drawn by a pair of mules, which he was driving; but, after he had got upon it, the mules, becoming frightened, backed the wagon against the railing, which gave way, and precipitated wagon, mules, and driver to the ground below. The wagon and mules were damaged, and appellee was injured in his person. He brought this suit to recover damages of the corporation owning the bridge, and obtained a verdict and judgment for \$4,000.

A demurrer was interposed to the petition on the ground that "there was an intervening cause which caused the injury complained of, for which the defendant was not responsible." We understand the proposition to be that the accident was not the proximate re-

sult of the alleged defect in the bridge. The allegation which is pointed out as showing this is as follows: "That he [meaning plaintiff] stopped to pay his toll at the usual place at which defendant is accustomed to receive its tolls from passengers over said bridge, when his mules, for some reason unknown to plaintiff, became frightened, and commenced to push the wagon backward. That plaintiff used every possible exertion and means within his power to urge them forward; but, before he could get control of the animals, the wagon struck against the railing or siding of the bridge, which railing immediately gave way, and plaintiff, together with his wagon and mules, * * * was precipitated to the ground below, a distance of over seventeen feet." It was also alleged that the railing was defective, and that the injuries complained of resulted from the fall. If the facts so alleged be true, the damages were the immediate result of the negligence of the defendant in failing to keep the railing in a safe condition. The petition was sufficient.

Upon the trial the following answer of a witness, not shown to be an expert, was read to the jury, over the objection of defendant: "I do not know how long before said accident since said bridge had been repaired. Judging from its appearance and my inspection of said bridge, I should think it did need repairs. The same sidings and uprights were replaced after the accident; the nails put in the same old holes. Nothing else occurs to me as to the condition of said bridge." The objection was upon the ground that the answer gave the opinion of the witness, and was therefore incompetent; and we think the objection well taken to that part of the answer which reads: "Judging from the appearance and my inspection of said bridge, I should think it did need repairs." This was clearly a matter of opinion. The witness should have stated the facts. The same may be said of so much of the testimony of the witness Sullivan as was objected to by defendant. It is as follows: "I don't know anything about a bridge of that kind. It seemed to be good, except the sidings, which were shabby." To say that the sidings were "shabby" does not state a fact, but merely conveys the witness' opinion of their condition, and that, too, in a very indefinite manner.

The following question to plaintiff himself, while on the stand, was objected to by defendant on the ground that it was leading: "Are not ordinary animals, such as are ordinarily used on farms, apt to be frightened and nervous and skittish when driven on plank-roads and bridges, etc." The question was allowed to be asked; and the witness answered, "Yes." This was error. The question both suggested the desired response and admitted of the answer "Yes" or "No." It was clearly leading. It was not, however, irrelevant. The fact that the horses and mules that ordinarily crossed the bridge, and we presume some of them were farm animals, were liable to become

frightened in crossing it, if it were a fact, tended to show the necessity of having the bridge well protected by railings. For the errors of the court in admitting the testimony hereinbefore considered, the judgment must be reversed.

During the trial the plaintiff was also permitted to testify on his own behalf as follows: "I drove on the bridge and stopped to pay toll. While I was getting money from my pocket, the mules got scared at something, and began to back, and I at once changed the lines from my right to my left hand, and grabbed my whip with my right hand, and commenced whipping the mules to keep them from backing, but they kept backing. While the mules were backing, I looked around, and saw the railings on the bridge, and thought to myself, 'As soon as you strike there, you'll stop,' and made no effort to get out of the wagon, but felt safe, because I thought that it was strong, like other bridges, and would stand." This was objected to on the ground that his thoughts about the safety of the bridge was a mere matter of opinion. The objection was properly overruled. The defense was set up that he was guilty of contributory negligence, and that he might have saved himself from injury by jumping from his wagon before it fell. It was proper for him, in the emergency, to act in accordance with the circumstances, as they appeared to him. If he thought that the siding was sufficiently strong to stop the wagon, he was not negligent in not leaving the wagon.

The court did not err in refusing to give to the jury the charge asked by the defendant to the effect that, if the plaintiff could have gotten out of the wagon after the mules commenced to back, and before the wagon struck the railing, and by so doing could have prevented the injury to himself, and that, under the circumstances, ordinarily prudent men would have gotten out of said wagon, then the plaintiff would not be entitled to recover. The plaintiff may have been entitled to recover for injuries to his wagon and mules, although, by the exercise of ordinary care, he may have escaped injury to his person. If the plaintiff was aware of the danger of the railing giving away, and could, by the use of such means as a prudent man would have ordinarily exercised, have escaped it, he was not entitled to recover for personal injuries. An instruction to that effect would have been proper.

Neither was there error in refusing the following instruction asked by defendant: "If the jury believe from the evidence that at the time of the accident the plaintiff's team was frightened, and that said team became unmanageable on account of plaintiff's whipping them, if he did whip them, and trying to urge them forward while on said bridge, and, but for said conduct towards said team, his said team would not have become unmanageable, and said accident would not have occurred, you will find for the defendant." If it could be assumed that the plaintiff knew

that whipping his mules would cause them to go backwards, and not forwards, the instruction may have been proper. Whether it was ordinarily prudent or not to whip the mules, under the circumstances, was a question for the jury.

The following instruction asked by defendant was also properly refused: "If the jury believe from the evidence that the mules of the plaintiff became frightened after entering upon said bridge, if they did become frightened, without fault on the part of the defendants, and commenced to back the wagon, and ran it against a portion of the railing, which had been passed by the plaintiff before his team became frightened, and knocked the railing off, and precipitated the wagon and occupants to the ground, then you will find for the defendant." It is not to be assumed that it was the duty of the defendant to provide safe railings to its bridge in order to guard against accidents to frightened teams, although the fright was not caused by any act of commission or omission on its part.

The instruction that "the jury will also consider as actual damages the physical pain and suffering experienced by the plaintiff resulting from the alleged injury" was not objectional, as being a charge upon the weight of the evidence. It was an undisputed fact that plaintiff, as a result of the accident, had three of his ribs, and the bones of one of his legs, fractured. He was confined to his bed for some months. Under said circumstance, it was not error to assume that he suffered severe pain as the result of the injury. We understand the rule in civil cases to be that in charging the jury the court may assume the existence of uncontroverted facts of the case.

The language of counsel for plaintiff in his closing argument, to which exception was taken by defendant, was decidedly improper; but, since the judgment will be reversed, and it will not likely be repeated upon another trial, we need not determine whether or not it afforded a sufficient ground for setting aside the verdict.

The other assignments submit that the verdict is contrary to the evidence upon the issue of contributory negligence, and that the damages found by the jury are excessive. In view of a new trial, we do not deem it proper to discuss the evidence bearing upon these questions. The judgment is reversed, and the cause remanded.

ZAPP v. STROHMEYER.

(Supreme Court of Texas. Jan. 21, 1890.)

HOMESTEAD—DIVORCE.

A husband, continuing to live on the homestead after divorce, is the head of a family, though the decree did not give the custody of minor children to either party, and they are now living with their mother; and it is immaterial for whose fault the divorce was granted.

Appeal from district court, Fayette county; H. TEICHMUELLER, Judge.

W. S. Robson and A. J. Rosenthal, for appellant.

HENRY, J. On the 12th day of March, 1884, John Strohmeier, appellee, and his wife, owned and lived upon 189 acres of land in Fayette county, Tex., and same was their homestead. On the 21st day of March, 1884, the wife brought an action for divorce and partition of property. A divorce was granted, and said real estate, together with their personal property, was partitioned, the wife receiving ——— acres of land jointly owned by them, and the appellee received the 62 acres of land in controversy in this suit. On the 27th day of January, 1887, an execution for costs in said suit was sued out under said judgment against appellee, and placed in the hands of the sheriff, and by him levied upon the land in controversy, and same was properly sold. Appellant acquired the title claimed by him under that sale, and brought this suit in the form of an action of trespass to try title to recover the property.

That portion of the land that the family had resided on was allotted to the husband in the partition of the homestead, and he never changed his residence from it. At the time the divorce was decreed the parties had minor children residing at home as members of the family. The decree of the court did not give the custody of the children to either of the spouses. With the exception of one, the children remained with their mother. One son, then about 15 or 16 years of age, works about the neighborhood, and sometimes visits his father, but does not make his house his home. In giving his conclusions of law, the district judge used the following language, which we fully approve: "Whether a divorced husband is the head of a family does not depend on the actual and constant presence of his children at his house. When, as in this case, the children reside temporarily with their mother, the father does not renounce his character as head of the family by an acquiescence in such disposition of its members. The natural and legal tie existing between the father and his children continued unimpaired. Many causes were liable at that time to arise which must have occasioned the restoration of even perfectly normal relations between the father and his children. From their own choice, or at the instance of their father, the children might have resumed their residence at the old home place." In the case of *Taylor v. Boulware*, 17 Tex. 77, the wife died leaving the husband without children. This court said: "If he had been without servants or any one with him after the death of his wife, it would still have been his homestead, so long as it continued to be his residence, and protected from a forced sale." See *Kessler v. Draub*, 52 Tex. 575; *Blum v. Gaines*, 57 Tex. 119. The reasons for protecting the homestead right, where the marriage relation has been terminated by a divorce, are as strong as when it has been dissolved by death. The

question of who was in fault in the matter of the divorce can have no proper influence in determining the question of homestead. The head of the family, or the two heads of families, that there may be after the divorce, are entitled to hold their homesteads against forced sale without regard to the causes of divorce, provided that, as to creditors who were such at the date of the divorce, not more than 200 acres of the existing homestead be included in the exemptions to both.

The judgment is affirmed.

In re BUTIN.

(Court of Appeals of Texas. Dec. 14, 1889.)

OCCUPATION TAX—AGENTS—CONSTITUTIONAL LAW.

1. Gen. Laws Tex. 1889, p. 27, provides for the collection of an occupation tax, from every person or firm who peddles out cooking stoves or ranges over the county, \$250 for the state, and \$100 for each county in which they make a sale. *Held*, that where a range company pays the state tax, and the tax for the county in which it does or proposes to do business, the number of teamsters or wagoners it employs to do the peddling is discretionary with the company, and its teamsters or wagoners are not liable for the tax as individual peddlers, where they are paid wages for their services, and receive no other compensation.

2. The statute does not restrict commerce between the states, within the meaning of Const. U. S. art. 1, § 8.

3. Nor does it conflict with Const. Tex. art. 8, § 1, which exempts persons engaged in agricultural or mechanical pursuits from the payment of occupation taxes.

4. Nor does it violate Const. Tex. art. 8, § 2, which provides that all occupation taxes shall be uniform upon the same class of subjects.

Application for writ of *habeas corpus*.

H. E. Shelly and D. H. Hewlett, for relator. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. This is an original application to this court for the writ of *habeas corpus*. The application was first made to the Honorable J. M. BROCKENRIDGE, county judge of Travis county, who, for the reasons assigned and indorsed by him on the petition, declined to entertain and waived jurisdiction of the matter. Application was then made to this court, which granted the writ. The matters of fact involved are set out in an agreed statement of the facts. The applicant was arrested on an information filed in the county court of Travis county, July 24, 1889, founded upon a complaint of that date, charging that he, on the 23d day of July, 1889, in Travis county and state of Texas, did then and there unlawfully engage in, pursue, and follow the occupation of a peddler of cooking ranges over said county and state, the said occupation being taxed by law, without first obtaining a license therefor; that the taxes then and there due by him to the said state upon said occupation amounted to \$62.52, and the taxes then and there due by him to said county upon said occupation amounted to \$25, etc. The applicant at the time of the filing of the complaint and of the commission of the alleged offense was the agent and serv-

ant of the Wrought-Iron Range Company of St. Louis, Mo., by which company he had been employed to sell its cooking ranges. The company had, prior to the sale made by the applicant, and within the quarter of the year covering that time, paid one quarter of the annual state tax of \$250, and the county tax of \$100, imposed and levied, by act of the twenty-first legislature, (pages 24-29, Sess. Acts.) on peddlers of cooking ranges, to the tax collector of Travis county, on and for two of its wagons used by it in conducting its sales in said county. It was at the direction and order of this company that the applicant, with an additional wagon, was pursuing the alleged occupation at the time of his arrest, without having first paid the further demand for a quarter's tax on the wagon being used by him. The applicant was bailed, but on the _____ day of September his bondsmen surrendered his custody to the sheriff of Travis county, who now holds such custody, as appears from the return on the writ. His presence in court has been waived by himself and his counsel. The Wrought-Iron Range Company, the employer and principal of the applicant, is a manufacturing concern, duly incorporated under the laws of the state of Missouri. It has its domicile and principal place of business at the city of St. Louis, in said state, where, also, is situated its manufactory. The main product of its manufacture is, as its name implies, wrought-iron cooking ranges. This company, at the time of the passage of the act before referred to, and at the time of the arrest of the applicant, was, and for several years past had been, engaged in selling its products of wrought-iron ranges within the limits of this state. Its manner of conducting such business was as follows: The territory of the state designed to be covered by its canvass for and sales of its goods was divided into convenient districts or departments, to each of which was assigned a superintendent or foreman, charged with the proper conduct and discharge of the company's business therein. A given number of wagons and teams, owned by the company, were also assigned to each district or department, together with a driver for each wagon and team, who also acted as and discharged the duty of salesman of the goods intrusted to him; all being under the supervision, management, and control of the respective superintendents. The superintendents and the drivers of the teams were all employed by the company, and were paid current wages for their services, receiving no other or further compensation therefor. All the expense incident to the business was borne and paid by the company. The entire outfit was owned by the company. The goods intended for sale in Texas were shipped from St. Louis, billed to the company, to designated points within the territory then covered by the company's operations, and were received by the superintendents of the respective districts or departments to which the goods were shipped. They were then loaded

into the wagons, placed in charge of their respective drivers, who canvassed different parts of the territory in search of purchasers, made sales and delivery of goods from the wagon to the purchasers. In this manner was the business of the company in Texas being conducted at the time of the arrest of the applicant, he being at the time one of the drivers and salesmen of the company. After the passage of the occupation tax law of the twenty-first legislature, (April 6, 1889,) the comptroller of public accounts of the state of Texas instructed the tax collectors of the various counties of the state where the company was doing business that the company was liable to and to exact of it the payment of an occupation tax of \$250 for the state, and \$100 for the county, for each and every wagon used by it in its business; he holding that to be the proper construction of the law in its application to this company. This case grows out of the exaction of one quarter's tax on the wagon driven by applicant, after the company had paid to the tax collector of Travis county one quarter's tax on two of its wagons then being used in Travis county, the quarter paid for embracing the time in which this applicant pursued the business and made the sale for which he was arrested. In the law passed by the last legislature with regard to levy and collection of occupation taxes it is provided, among other matters, that there shall be levied and collected, as an occupation tax, "from every person or firm who peddles out clocks or cooking stoves or ranges over the county, two hundred and fifty dollars for the state, and one hundred dollars for each county in which they make a sale." Gen. Laws 21st Leg. 27.

It is insisted that this statute, when applied to the facts of this case as above stated, is obnoxious to the interstate commerce provision of the constitution of the United States, (article 1, § 8,) in that it restricts commerce between the states; (2) that it conflicts with and violates section 1, art. 8, of the constitution of Texas, which exempts persons engaged in agricultural or mechanical pursuits from the payment of occupation taxes; and (3) that it conflicts with and violates section 2, art. 8, Id., which provides that all occupation taxes shall be uniform upon the same class of subjects. In our opinion, neither of these positions is maintainable. We have not the time to discuss these propositions, but we have maturely considered them, and deem it only necessary to state our conclusions derived from our investigations of the questions.

The only question in the case is as to the proper construction to be placed upon the language of the statute. It seems that the comptroller holds that the tax mentioned can be assessed against and collected of every teamster or wagoner employed by any person, firm, or corporation who, before employing such teamsters or wagoners, has itself paid said occupation tax. We do not believe that such construction was within the legislative

intent, nor that it is within either the letter or spirit of the law. In construing the law we do not think any advantage should be taken of the technical meaning of the word "firm," as contradistinguished from "company" or "corporation." None has been claimed for it in this case by the assistant attorney general, and, in our opinion, in so far as this case is concerned, the word "firm" can be held to embrace, or, at all events, it is properly construed as interchangeable with, "company" or "corporation." The Wrought-Iron Range Company has paid its state tax and its county tax in Travis county. It is a firm or company, and it has paid said tax in order that it may engage in peddling "wrought-iron ranges over Travis county." The law does not specify or limit the number of agents or wagons it shall employ in doing this. Having paid the tax, the matter of the number of agents, wagoners, or teamsters it shall employ, and the number of wagons it shall use to do the hauling and peddling, is entirely discretionary with said firm or company. Whenever these agents go out peddling the ranges they go as agents and employes of the firm or company, and not as individual peddlers; and, whenever they make a sale, the sale is for the company, and not the individual agent. The maxim, *qui facit per alium, facit per se*, applies. Our conclusion of the matter is that the applicant herein is illegally restrained of his liberty, under the facts submitted to us in the agreed statement embraced in the record. Wherefore the complaint and prosecution under which he was arrested are dismissed, and he is hereby released and discharged from further custody and restraint on account of or by virtue of the same, and restored to his liberty. Ordered accordingly.

WILLSON, J., concurs in the opinion, in so far as it construes, but expresses no opinion as to the constitutionality of, the statute.

TEXAS LAND & LOAN CO. v. BLALOCK
et al.

(Supreme Court of Texas. Feb. 11, 1890.)

HOMESTEAD—SUBROGATION—RIGHTS OF VENDEES—
HARMLESS ERROR.

1. Under Const. Tex. art. 16, § 50, providing that "no mortgage, trust-deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon," a trust-deed for borrowed money given on land actually occupied by the borrower and his family as a homestead is invalid, though the borrower states in his sworn application for the loan that the land was not his homestead, and that he owned another tract therein described, which he and his family occupied as a homestead, and he is not estopped by such statement to deny the validity of the deed.

2. Where the lender, before paying over the money, has part of it applied to discharge a vendor's lien on the land, he is entitled to subrogation to all the rights of the vendor.

3. One who purchases land with a full knowledge of an outstanding vendor's lien cannot complain that the property is subjected in his hands to the payment of the purchase money.

4. The improper admission of evidence, especially in a case tried before the court, is not ground for reversal, where, on the uncontradicted testimony, no other judgment could have been rendered than that entered.

Appeal from district court, Galveston county.

R. Waverly Smith and Davidson & Minor, for appellant. McLemore & Campbell, for appellees.

STAYTON, C. J. On March 1, 1887, and for a long time prior thereto, James A. Blalock was the head of a family, consisting of himself, wife, and children, and had and at that date was with his family residing on a tract of land containing less than 200 acres. On day named, Blalock and wife executed a deed of trust on that land to secure to appellant a loan of \$800, then made. Application for the loan was made by Blalock on February 24, 1887, was sworn to by him, and contained the statement "that no portion of the above-described property is now or can become our homestead, or the homestead of any other person, until after the loan applied for has been paid in full; that I am in actual possession of said lands; * * * that M. J. Blalock is my lawful wife; and that I was married to her on the 18th day of March, 1875. * * *

The above lands do not form any part of my homestead. The following described property is the homestead of myself and family, and we are living on it and using and occupying the same as such, and I will further add that the same has been fully paid for, and is free from every lien, except as follows: Due the state, \$320, two years hence; and our homestead is described as follows: Bastrop section school land No. 14, in Burnett county, Texas." This application was made on a blank form furnished by appellant, and there is conflict in the evidence as to whether the persons who conducted the negotiations were the agents of appellant or appellee. The trust-deed contains the following declaration: "The parties of the first part hereby declare that the property hereinbefore mentioned and conveyed to the party of the second part forms no part of any property by them owned, used, or claimed as exempted from forced sale under the laws of the state of Texas, and disclaim and renounce all and every claim thereto under any such law or laws, and hereby designate the following described property, to-wit: Bastrop section school land No. 14, in Burnett county, Texas, on which in good faith they reside, as their homestead, and as constituting all the property (of nature similar to that herein conveyed) used or claimed by them as exempt under said laws; and we declare that we have never used the property herein conveyed, and are not now so using it; and the aforesaid designation is made for the purpose of securing a loan on the property conveyed, with the occupancy of which the party of the second and third parts are wholly unacquainted." The property above designated as homestead at no time was ever occupied by

Blalock as a home. The borrowed money not having been paid, this suit was brought to enforce its payment through foreclosure of the lien claimed through a trust-deed. Blalock and wife, the trustee, and John Markward, who had bought the property, were made defendants. In defense, Blalock and wife alleged that the land was their homestead before and at the time the trust-deed was executed, and that for this reason the lien claimed was void. Markward adopted their answer, and further alleged that on November 9, 1888, he bought the land in ignorance of any lien or claim set up by appellant.

The cause was tried without a jury, and the court admitted evidence of Mrs. Blalock, and of the officer who took her acknowledgment, tending to show that she may not have known that recitals in reference to homestead, before copied, were contained in trust-deed. If that was true, there is no evidence tending to show that the agents or officers of appellant had any knowledge or reason to believe that she did not know the contents of the paper she executed when they received it and advanced money on it, and, in the absence of some such fact, the evidence of the witness should have been excluded. The uncontroverted fact, however, remains that Blalock and his family were occupying the land as their home, continuously, from a period long before until after all the facts transpired on which the rights of the parties depend. It was the homestead of the family. The constitution declares that "no mortgage, trust-deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage or trust-deed or other lien shall have been created by the husband alone, or together with his wife." Article 16, § 50. There is no doubt that the application for the loan, and the recitals and declarations in the trust-deed, that the property was not homestead, went as far as words could go to assure the lender that it might safely lend its money without fear that lien would be defeated by the existence of homestead rights; and, after the many protestations made, the wonder is that the borrowers were not required to make, and did not make, a further statement that no agent or officer of appellant had capacity to know that land owned and occupied by a husband with his wife and children, as their sole place of residence, was their homestead. Discarding all evidence tending to show that the declarations in the trust-deed that the property was not homestead were placed there without the knowledge or consent of its makers, and after its execution,—which, in view of all the evidence, seems to us incredible,—how does the matter stand? The undeniable facts are that Blalock had such interest in the land as homestead rights would attach to, as against every person other than his vendor, to whom balance of purchase money was due; that,

with his family, he was occupying the land as his sole home when the trust-deed was executed and money loaned, and so had been for a long time prior to that date; and that the land designated as homestead was not, and had not been, so occupied.

The fact of actual possession and use, as the home of the family, was one against which the lender could not shut its eyes; and this fact, coupled with the interest held by the borrower in the land, made the property homestead in fact and in law, on which the constitution declares no lien, such as claimed in this case, can exist. Every person dealing with land must take notice of an actual, open, and exclusive possession; and when this, concurring with interest in the possessor, makes it homestead, the lender stands charged with notice of that fact, it matters not what declarations to the contrary the borrower may make. It has been held that one remaining in possession of land, after having executed and permitted to be placed on record an absolute conveyance, could not rely upon his possession as notice of a secret agreement that the absolute conveyance, as between the parties to it, was only intended as a mortgage, and thus defeat the right of a subsequent innocent purchaser. That, however, is not this case. Here nothing was hidden. Possession was open, certain, and in character in no respect ambiguous. It was such as gave homestead right, and the lender cannot be heard to say that it did not know it. The constitution forbidding the fixing on the homestead of liens other than such as are thereby expressly permitted, no estoppel can arise in favor of a lender, who has attempted to secure a lien on homestead in actual use and possession of the family, based on declarations of the husband and wife, made orally or in writing, contrary to the fact. To hold otherwise would practically abrogate the constitution. If property be homestead in fact and law, lenders must understand that liens cannot be fixed upon it, and that declarations of husband and wife to the contrary, however made, must not be relied upon. They must further understand that no designation of homestead, contrary to the fact, will enable parties to evade the law, and incumber homesteads with liens forbidden by the constitution. *Mortgage Co. v. Norton*, 71 Tex. 683, 10 S. W. Rep. 301; *Pellat v. Decker*, 72 Tex. 581, 10 S. W. Rep. 696; *Kempner v. Comer*, 73 Tex. 203, 11 S. W. Rep. 194.

At the time the deed of trust was executed and the money loaned there was a vendor's lien on the land to secure \$475 and accrued interest, and, although application for loan stated that the land was free from incumbrance, the lender knew better, and before paying the money to Blalock had so much as was necessary applied to discharge the lien. Under this state of facts, the court did not err in subrogating appellant to all the rights held by the holder of the note given for purchase money, and in foreclosing

the lien. *Hicks v. Morris*, 57 Tex. 658. It is insisted, however, as the note sued on provided for the payment of 10 per cent. as attorney's fees in case suit became necessary, that the court ought to have at least allowed 10 per cent. on the principal and interest due on purchase money. The court did not err in refusing this; for all appellant was entitled to recover, through enforcement of lien, was by reason of its right to subrogation, which could not extend to any sum the vendor of the land would not have been entitled to receive had he sued. The note given for purchase money had no provision for payment of attorney's fees.

Defendant Markward bought after the trust-deed was executed, and with knowledge of the facts, and cannot complain that the land was subjected in his hands to the payment of purchase money, or some equivalent thereto. Moreover, it seems that he has in his hands property intended as a part of the purchase price he was to pay to Blacklock, in value more than sufficient to discharge the judgment for which the property in his hands is made liable. If there be any matter of error as to him, he has not presented it.

The improper admission of evidence, especially in a cause tried before the court, is no ground for reversal when, on the uncontroverted and vital facts, no other judgment could have been rendered than that entered. The judgment will be affirmed.

O'CONNOR v. STATE.

(Court of Appeals of Texas. Nov. 30, 1889.)

HOMICIDE — FORMER JEOPARDY — ACCOMPLICES — EVIDENCE — RELEVANCY.

1. Defendant entered a plea of jeopardy to an indictment charging the murder of John Dee, and alleged that on the former trial the jury was discharged by the court without his consent, and over his protest, and without legal cause. It was proved that he was put on trial, but the witnesses testified that it was for the murder of John Dees. There was no proof that he was tried on a valid indictment. The testimony as to the length of time the jury was out varied from two to twenty-four hours. There was no evidence that the jury was discharged over the protest or against the consent of the defendant. *Held*, that jeopardy being a special defense, and the burden of proof being on defendant, the jury were properly instructed to find the plea untrue.

2. On a trial for murder, certain Mexicans were witnesses for the state. At the time of the murder, which they witnessed, they were among strangers, hundreds of miles from their homes. They were hired hands, assisting in driving cattle to a distant market. They did not know the English language, and defendant and deceased were Americans, in whom they had no particular interest. *Held*, that the mere fact of their having remained silent as to the murder did not call for instructions on accomplice testimony.

3. After certain state witnesses had testified, on cross-examination, that they had not been paid by D. to testify in this case, they were asked if at the time of taking their depositions in a civil suit, at which time he told them they would be called as witnesses in this case, he had not paid them money, though he owed them nothing at the time. *Held*, that such evidence was irrelevant, and was properly excluded.

4. Defendant offered in evidence a petition in

a civil suit instituted by him against one D., which was excluded. *Held* that, in the absence of any thing to connect D. with this prosecution, or to show that it had been proved, or would be proved, that he had attempted to influence witnesses to testify falsely in this case, such evidence was irrelevant and incompetent.

Appeal from district court, Bosque county; J. M. HALL, Judge.

Thomas O'Connor was indicted for the murder of John Dee. In May, 1871, Mr. O'Connor, of Refugio county, the uncle of the defendant, started a herd of cattle to Kansas in charge of the deceased. The defendant was one of the party which went with the herd, but whether or not he went in the capacity of a hired hand or employee does not appear. He, however, traveled with the party and herd under the deceased's charge until the scene of the murder, in Bosque county, was reached. The murder was committed about 4 o'clock in the morning, after a stormy and tempestuous night, during which the cattle had given the herdsmen a great deal of trouble. The principal witness for the state, one Corona, testifies that not a great while before the killing he and the deceased left the herd, and returned to camp. They took seats by the fire, and conversed for quite a while, during which time the defendant walked about the camp drinking a cup of coffee. Thirty minutes or more after witness and deceased had stopped talking, the defendant approached the deceased from behind, and struck him on the forehead with an axe. Deceased was in a sitting posture, leaning slightly forward, when struck by the defendant, but the witness could not say whether or not he was asleep. Witness then got his horse to go back to the herd. While he was catching his horse he heard a pistol fired at the camp. On looking back he saw the defendant in the act of putting his pistol into the scabbard. The other witness, who was in the camp at the time of the killing, testified, in substance, that he was asleep when the blow with the axe was inflicted, but waked almost immediately. As he raised up he saw deceased, with his face and forehead beaten in and bloody, lying before the fire. The witness Corona was standing before the fire, and the defendant was walking about the camp. Soon afterwards Corona left to go to the herd. A gurgling noise in the throat of deceased attracted the attention of the defendant, who, remarking, "I don't like for any d—d man to make such a noise as that while I am eating," stooped, placed the muzzle of his pistol to the burr of deceased's ear, and fired.

Defendant complains that the court erred in refusing to permit him to prove by a witness that when Dennis O'Connor informed him, in April, 1889, that he (witness) would be called to testify in this case, he paid the said witness \$25, though said Dennis O'Connor did not then owe the witness any sum; and by another witness that he was in the pay of Dennis O'Connor in April, 1889, though O'Connor owed him nothing. The

judge explained the bill of exception to the effect that he refused to permit the witness to answer questions propounded by the defense touching the payment to them of money by Dennis O'Connor when they testified as witnesses in another case, but that he told defendant's counsel he was at liberty to ask the witness such questions with respect to their testimony in this case, and that to the repeated questions of counsel whether they had been paid to testify in this case the said witnesses answered in the negative. Defendant offered in evidence a certified copy of the petition in a civil suit instituted by defendant in the United States court against Dennis O'Connor, which evidence was excluded. State's witness Corona having testified on cross-examination that he was first told by D. O'Connor of this case, and that he would be called as a witness, but that said D. O'Connor did not then pay him \$25 to testify on this trial, defendant proposed to further ask him if D. O'Connor did not at that time, though he owed him nothing, give him \$25, telling him to use it for his family; the stated purpose of which question was that D. O'Connor, in 1889, when the witness' deposition in another case was being taken, paid the witness \$25, but owed him no sum of money at that time. The answer to this question was excluded.

Lockett, Lockett & Kimball, for appellant.
Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. This conviction is for murder in the first degree, the penalty assessed being confinement for life in the penitentiary. John Dee was the name of the deceased, and he was killed in Bosque county, in May, 1871. A few days after he was killed the defendant was arrested, charged with the murder, and there is some evidence tending to show that the defendant was indicted for said murder, and that in 1872 he was placed upon trial upon said indictment in the district court of Bosque county, said trial resulting in a disagreement and discharge of the jury without a verdict having been rendered. Thereafter the defendant escaped from custody, and remained at large until August, 1889, when he was again indicted for said murder, arrested, and in September, 1889, was tried and convicted, as above stated. In addition to the plea of not guilty, the defendant interposed a special plea of jeopardy in due form, setting up in bar of this prosecution his trial in 1872, and alleging that upon that trial the jury was discharged by the court without his consent, and over his protest, and without legal cause. In support of this special plea the evidence is very meager, indefinite, and unsatisfactory. It seems that all the papers in the case tried in 1872 had been destroyed or lost, as well as the minutes of the court of the term at which said trial occurred. The only record evidence relating to said case which could be produced was an entry upon the judge's docket as follows: "No. 325. The State of

Texas v. Thomas O'Connor. Murder. Filed June 7, 1871. June 16, 1871. Continued by state. Attachments to Victoria county for state's witnesses." It was proved by several witnesses that in 1872 the defendant was put upon his trial in the district court of Bosque county for murder, but the witnesses who testified as to said trial all stated that they understood the name of the alleged murdered man in that case to be John Dees. None of the witnesses remembered to have seen or heard read the indictment. None of them testified to the contents, or even the substance, of the indictment. They differed in their recollection and statements as to the time that the jury deliberated upon the case,—some stating that the jury was out on the case two or three hours only, while others thought the jury was out a longer time; the recollection of one witness being that it was out 24 hours. None of the witnesses testified that the jury was discharged from the case over the protest or against the consent of the defendant. This being, in substance, the evidence upon the special plea, the court instructed the jury that they would find the said plea to be untrue. Defendant requested an instruction submitting said plea to the jury upon the evidence adduced, which the court refused. It is insisted by counsel for defendant that the court erred in instructing the jury to find said plea untrue, and in refusing to permit the jury to determine from the evidence whether it was true or untrue. Jeopardy is a special defense, and the burden of establishing it clearly and satisfactorily rests upon the defendant. In this case it devolved upon the defendant to prove: (1) That he had been formerly put upon trial under a valid indictment charging him with the murder of John Dee; (2) that said trial was in the district court of Bosque county; (3) that without his consent, and without legal cause, the trial court discharged the jury trying him, before said jury had rendered a verdict in said cause. Until these essentials of jeopardy were established affirmatively by the defendant, the presumption would prevail that the trial court in discharging the jury acted upon legal cause, and did not abuse its discretion. *Powell v. State*, 17 Tex. App. 345; *Schindler v. State*, Id. 408; *Brady v. State*, 21 Tex. App. 659, 1 S. W. Rep. 462; *Jones v. State*, 13 Tex. App. 1. In this case it was not proved that defendant had been formerly tried upon a valid indictment charging him with the murder of John Dee. There is no proof whatever as to the validity of the indictment upon which he was tried in 1872. The preponderance of the evidence is that, if tried upon an indictment, it was one which charged him with the murder of John Dees, not John Dee, and not, therefore, the same offense charged in the indictment in this case. It was not proved that the trial court discharged the jury without legal cause, and without the consent of the defendant. In the absence of such proof, it must be presumed that the trial court in discharging the

jury did not abuse the discretion vested in said court by the law. *Branch v. State*, 20 Tex. App. 599. As the defendant wholly failed to establish his special defense of jeopardy by evidence, it was not error for the court to refuse to submit that issue to the jury, and to direct the jury to find the special plea untrue. *Varnes v. State*, Id. 107.

It is claimed by counsel for appellant that the Mexican witnesses, Corona, De la Rosa, and Hernandez, were accomplices to the murder of John Dee, and that the court erred in refusing to instruct the jury in relation to accomplice testimony. After a careful examination of the evidence before us we conclude, with the trial judge, that such an instruction was not required. Circumstances apparently casting some suspicion upon said witnesses are satisfactorily accounted for and explained by the evidence. There is no evidence from which it could be reasonably concluded that either of said witnesses was in any manner *particeps criminis* in the murder, or that they, or either of them, were connected with the crime by unlawful act or omission, transpiring either before, at the time of, or after the commission of said murder. A witness cannot be regarded as an accomplice when there is nothing shown to connect him in any manner with the transaction. *Ham v. State*, 4 Tex. App. 645. Mere presence at the time and place of the commission of a crime does not make a person an accomplice, nor will the mere concealment of knowledge that a crime has been committed make the person having such knowledge an accomplice. These Mexican witnesses, when the murder occurred, were among strangers, 300 miles from their homes. They were hired hands, assisting in driving a large herd of cattle to a distant market. They did not understand or speak the English language. The defendant and the deceased were Americans, in whom said witnesses had no particular interest. Under these circumstances it was but natural that said witnesses would remain silent as to the murder, and take no steps to have the defendant arrested and punished. We do not think that the issue as to whether or not said witnesses were accomplices was presented by the evidence, and hence it was not error for the court to decline to submit that issue to the jury.

Defendant's bill of exception No. 2 fails to state facts which show that error was committed in rejecting the offered evidence. It appears from the judge's explanation appended thereto that defendant was not denied the privilege of proving, if he could, that the Mexican witnesses had been paid to testify in this case. As far as we can determine from the bill of exception, the ruling of the court was not erroneous.

Bill of exception No. 3 does not show error. It does not show the relevancy or materiality of the petition offered in evidence. It does not show that it had been proved, or would be proved, that Dennis O'Connor had bribed, or attempted to bribe, witnesses, or otherwise

influence them, to testify in this case falsely against the defendant. It does not show that defendant proposed and expected to show facts which would in any manner connect Dennis O'Connor with this prosecution. In the absence of such showing, the evidence offered was irrelevant and incompetent.

Bill of exception No. 5 shows no error. It was irrelevant to any issue in the case to prove that Dennis O'Connor had paid to witness Corona \$25 on the occasion of taking said witness' deposition in the civil cause. Such testimony was too remote to even be admissible for the purpose of affecting the credibility of said witness. As shown by the bills of exceptions, and the explanations of the judge thereto appended, the remarks of the counsel for the state in his closing argument to the jury were not materially objectionable; and it does not appear that the defendant was, or might probably have been, injured by said remarks.

There was no error in refusing defendant a new trial because of the overruling of his application for a continuance. It does not appear that the defendant suffered any injury by reason of not having an interpreter of his own choice present at the trial. A interpreter was sworn at the trial, and interpreted the testimony of the Mexican witnesses. It is not shown, or even claimed by the defendant, that said interpreter was incompetent, or that he falsely interpreted. No abuse of the discretion of the court in denying the defendant a continuance to enable him to obtain an interpreter is shown. As to the testimony of the absent witness, Cox, when considered in connection with the testimony adduced on the trial, it was immaterial. Conceding that said witness would have testified as stated in the application, his testimony would not have established the special plea of jeopardy, nor any fact which would likely change the result.

There was no error in refusing a new trial upon any of the other grounds set forth in the motion. The evidence conclusively establishes the guilt of the defendant. It conclusively proves that the homicide was murder in the first degree. There was no evidence raising the issue of murder in the second degree or of self-defense, and the court very properly declined to submit said issues to the jury. We find no error in the charge.

Our conclusion upon the whole case is that the defendant has had a fair and impartial trial, and has been legally and justly convicted, and we affirm the judgment.

WATTS v. MILLER.

(Supreme Court of Texas. Feb. 4, 1890.)

HOMESTEAD—RIGHTS OF SURVIVING HUSBAND.

1. In Texas a surviving husband may give a deed of trust, with power of sale, on the homestead, though it is partly community property, to secure payment of a debt against the community property.

2. The county court has no authority to set apart to a minor child of a deceased wife the home-

stead of the surviving husband, or to order a sale thereof to make up an allowance for the child in lieu of exempt property; and such order may be attacked collaterally.

Appeal from district court, Polk county.

James E. Hill, for appellant. *Crosson & Holshousen*, for appellee.

GAINES, J. This was a suit brought by appellee against appellant as guardian of Dick Watts, a minor, to recover a house and lot in the town of Livingston. A. B. Watts, the father of Dick Watts, is the common source of title. In October, 1881, A. B. Watts purchased the lot in controversy for the sum of \$50. He paid \$25 at the time of the contract, but received no deed. He bought lumber and erected a house; and in December, 1881, he married, and immediately occupied the premises as the homestead of himself and wife. After his marriage the house was finished, and other improvements made. In January, 1882, he paid the balance of the purchase money, and received a deed from his vendor. Whether this last payment was made in money earned before or after the marriage, the evidence does not show. In December, 1882, his wife died, leaving Dick Watts as the sole surviving issue of the marriage. After the death of his wife, A. B. Watts executed a deed of trust, with a power of sale, upon the lot, in order to secure the payment of an indebtedness due to appellee. Appellee testified that \$20 of this indebtedness existed at the date of the death of the wife. This testimony was uncontradicted, although A. B. Watts himself was placed upon the stand by appellant, and examined in his behalf. The property was sold under the power granted in the deed of trust, and the appellee became the purchaser. Subsequently to the execution of the mortgage, Watts left the county; and letters of administration were taken out in the county court upon his wife's estate. In course of the proceedings in that administration, the property in controversy was set apart to Dick Watts as the homestead of his mother. The court also made the minor an allowance in lieu of exempt property, not found on hand, belonging to his mother's estate, and also an allowance in lieu of one year's supply of provisions, and ordered the sale of property to pay the same. The property in controversy was sold under this order, and bought by one J. E. Hill, who conveyed it to the guardian of the minor. The case was submitted to a jury, who rendered a verdict for plaintiff. From the judgment upon that verdict, Albert Watts, as guardian of Dick Watts, appeals. Such being the facts of the case, we deem it unnecessary to consider the assignments of error in detail.

In *Ashe v. Yungst*, 65 Tex. 631, it was held that the surviving husband has the power to sell the homestead of himself and his deceased wife, it being community property, for the purpose of paying debts existing against the community estate, although she

leave minor children surviving, and the estate be insolvent. That case arose under the present constitution and laws. In *Fagan v. McWhirter*, 71 Tex. 567, 9 S. W. Rep. 677, that doctrine was distinctly reaffirmed. The question of the power of the husband in such a case can no longer be considered an open one in this court. In *Lacy v. Rollins*, 12 S. W. Rep. 315, we held that section 50, art. 16, Const. did not prohibit a single man from giving a mortgage upon his homestead; and in *Smith v. Hutton*, post, 18, (decided at the present term,) the doctrine was again asserted that the constitutional prohibition only applied to married men. Since A. B. Watts could have sold the homestead, although it may have been in part community property, to pay so much of Miller's debt as was a charge against the community estate, we are of opinion that he could give a deed of trust upon it for the same purpose, and that a sale by the trustee in accordance with the terms of the instrument passed the title to the property.

It is insisted, however, that the action of the county court in setting apart the property in controversy to the minor, Dick Watts, is conclusive upon the parties to this suit until set aside in a proceeding brought directly for that purpose. The evidence leaves no doubt that at least one-half of this homestead was the separate estate of the husband; and we know of no law which authorizes a county court to set apart to the minor child of a deceased wife the homestead of the surviving husband, or which, in such a case, authorizes a sale of the homestead to make up an allowance given in lieu of exempt property. An order of the county court rendered without authority of law, is a nullity and may be so declared in any proceeding in which it is called in question. Besides, the decree of the county court setting apart this property, and then ordering its sale, etc., were made long after the property was sold under the deed of trust.

We have discussed the case upon the theory that there may have been some community interest belonging jointly to Watts and his wife in the property in controversy. The evidence leaves it doubtful whether such interest existed or not. The court below charged the jury, in effect, that if such interest existed they should find for appellant one-half of such interest, but that if they found that it was wholly the separate property of A. B. Watts they should find for appellee. The verdict was for appellee for the entire interest of Watts and his wife in the property, and, in view of the charge of the court, shows that the jury must have found it to be the separate property of the husband. It is insisted that the verdict is without evidence to support it in this particular. The last \$25 that was paid for the lot was paid four or five weeks after the marriage of Watts. When giving testimony in the case in behalf of defendant, he was unable to say that that money was earned after his mar-

riage. In the case of *Medlenka v. Downing*, 59 Tex. 32, it was held that when land was purchased by the husband, and partly paid for before marriage, and the payment of the remainder of the purchase money was made shortly after marriage, no presumption arose that the money used in making the final payment was community funds. In this view of the law, it would seem that the jury were warranted in finding that the property was of the separate estate of the husband, and that the verdict should be deemed conclusive of that question. But we are of the opinion that, in any aspect of the case, the appellee was entitled to a verdict, and hence should have an affirmance of the judgment. Therefore we need not pass upon that question. We find no error in the judgment, and it is affirmed.

SMITH v. HUTTON et al.

(Supreme Court of Texas. Jan. 21, 1890.)

HOMESTEAD—MORTGAGES—UNMARRIED MEN.

Const. Tex. art. 16, § 50, providing that no mortgage, trust-deed, or other lien on the homestead shall ever be valid, whether created by the husband alone or together with his wife, does not prohibit an unmarried man from mortgaging his homestead, though others are living with him as a family.

Appeal from district court, Washington county; C. C. GARRETT, Judge.

Bassett, Muse & Muse, for appellant. *C. R. Breedlove and W. W. Searcy*, for appellees.

HENRY, J. This is an action of trespass to try title brought by appellant. The defendant recovered judgment for the land. Appellant is an unmarried man. In the year 1873 he bought the land in controversy, a lot in the city of Brenham, and at once began to live on it. He occupied a house situated on the lot as a home; and there lived with him in the house one Kell and his wife, and their children. Kell's wife is appellant's cousin. They all lived together as one family; Kell and Smith both contributing to the support of all, and Mrs. Kell and her daughter doing the household work. In the year 1881, Kell died. There survived him his wife and four daughters, who were minors. After Kell's death, his widow, and her daughters, and appellant continued to live together in the house as they had done before. The appellant furnished supplies, and did that which is ordinarily a man's work on the place, while Mrs. Kell and her daughters have performed the duties usually performed by the female members of a family, such as sewing, cooking, and washing for appellant and themselves. In the year 1887 appellant executed a deed of trust on the premises to secure a debt. The property was sold under the deed of trust, and conveyed by the purchaser to appellees. Appellant's only assignment of errors reads as follows: "Upon the conclusions of fact found by the judge, the plaintiff and other persons composing his

household constituted a family, within the intent and meaning of the provisions of the constitution exempting the homestead of a family from forced sale for the payment of debts, and the premises in controversy were their homestead; and the deed of trust and sale under which the defendants claim were therefore invalid and the court erred in its conclusion of law holding otherwise, and in the judgment based thereon, denying plaintiff a recovery of the premises."

We deem it unnecessary to consider the question whether appellant and the persons living with him constituted a family within the meaning and intent of our homestead laws. In the case of *Lacy v. Rollins*, 12 S. W. Rep., 314-316, (Tyler term, 1889,) we decided that an unmarried man may mortgage his homestead. The counsel of appellant makes an argument against the correctness and policy of applying that decision to the case of an unmarried man who has a family. He insists that the decision ought not to be applied to cases where, though there is no wife, yet there are other constituents of a family entitled to the homestead protection. We recognize both the force of the argument and the importance of the question, and yet we are constrained to believe that the decision referred to embraces the case before us, and should be adhered to. The constitutional restriction upon mortgaging a homestead is in the following language: "No mortgage, trust-deed, or other lien on the homestead shall ever be valid, * * * whether such mortgage or trust-deed or other lien shall have been created by the husband alone, or together with his wife." Art. 16, § 50. It is provided by our laws, and is contemplated by the constitution, that other persons besides married people may own homesteads, all of which are equally protected from forced sale, without regard to the *status* of the owner. The restrictions with regard to the voluntary exercise of dominion over a homestead by its owner, we think, do depend upon his *status* as to family relations. The owner is prohibited from selling it according to his own pleasure only when he is a married man, and a mortgage by him is equally prohibited when he is a married man. If the purpose was to prohibit the mortgaging of a homestead by anybody, or under any circumstances, the language used would have been sufficient to accomplish that purpose if the qualifying words had been omitted. As the language, "the homestead of a family shall be, and is hereby, protected from forced sale for the payment of all debts except * * *," is without difficulty construed to embrace every homestead, so would the language, "no mortgage, trust-deed, or other lien on the homestead shall ever be valid except * * *," have as clearly accomplished the same purpose, if they had not been used in connection with the words, "whether such mortgage or trust-deed or other lien shall have been created by the husband alone, or together with his wife." Without the added words, the prohibition is

complete. They can serve no purpose but to qualify and explain the preceding clause. The fact that the constitution permits the husband and wife, when acting together, to sell the homestead, but at the same time denies to them the power to mortgage it, may to some extent impair the force of the argument with regard to the reason of the provision growing out of the power unquestionably left in the unmarried owner to sell the family homestead at his own pleasure. We think the language of the constitution is plain enough to justify the construction that we give it without its being necessary to show why the power to mortgage should have been granted to an unmarried, and denied to a married, man. Satisfactory reasons for the distinction, no doubt, exist. Even if they do not, there still may have existed so much doubt about the utility or advantage of the rule that gave the power to sell, but denied it to make a mortgage, as to prevent its being made universal. The judgment is affirmed.

GULF, C. & S. F. RY. CO. v. CAMPBELL.

(Supreme Court of Texas. Jan. 21, 1890.)

CARRIERS—INJURY TO PASSENGERS—INSTRUCTION—DAMAGES.

1. In an action against a carrier for personal injuries, where it appears that a freight train was forbidden to carry passengers, and the conductor so informed plaintiff, and told him he could not carry him, but a brakeman afterwards told him to get on, and he was injured while the train was being made up, it is error to refuse to charge that, if such were the facts, he cannot recover, and that if the train was forbidden to carry passengers the conductor could not relax the rule without the consent of the company.

2. An allowance for physician's services, in case of a railroad accident, can only be for their reasonable value, and not for a larger sum, in view of a prospective lawsuit and the necessity of testifying as an expert.

Commissioners' decision. Appeal from district court, Washington county; J. B. McFARLAND, Judge.

J. W. Terry, for appellant.

HOBBY, J. This is a suit by the appellee, Campbell, who was plaintiff below, for damages for personal injuries received in a collision between two portions of a freight train, in the city of Brenham, upon which he alleged he had taken passage for the purpose of going to Kinney. He testified that he was in Brenham on the night of the 30th March, 1887, and expected to return to his home at or near Kinney. He had ridden on freight trains on several occasions to and from Brenham and Kinney. The freight train pulled into the depot at Brenham on the way to Kinney. He asked a man standing on the platform, with a lantern in his hand, if he had charge of the train, who answered affirmatively, and gave him permission to get on. Plaintiff took a seat in the caboose, and expected, and was prepared, to pay his fare. In a few moments the engine began to back the car. Plaintiff rose from his seat, and started to the door of the caboose, to ascertain the cause of

the backing, when the collision occurred, and he was thrown out on the ground, and bruised. He did not recollect exactly how he was hurled out of the car. His coat caught on to the brake at the end of the caboose. There was testimony that some freight trains carried passengers and others did not. Martin, the engineer who was in charge of the train, testified that after the train arrived at Brenham he cut the engine loose from the main train, and attached the caboose to it, and pulled to the tank for water. While there plaintiff insisted on riding to Kinney, and got on the engine. After telling him he could not three times, he got off, and he saw no more of plaintiff until he commenced backing down towards the north end of the switch, when he saw the plaintiff standing on the platform of the caboose nearest the engine. Could see him distinctly, as the head-light shone directly in his face. Witness stopped the engine and caboose, waiting for orders from conductor, and while so waiting a portion of the main train of cars broke loose, and ran down with considerable force; struck the caboose, and drove it up on the pilot of the engine, and threw plaintiff from the platform. When witness saw the situation, he reversed his engine so as to give plaintiff a chance to jump off. The cars would not have broken loose and run back had the brakes been set on them. It was negligence not to have them set. Plaintiff was inside of the caboose. The train was not allowed to carry passengers. There was proof that he had stated to several persons, a few days after the injury, that he "got full while at Brenham. Was left by the passenger train. Tried to come home on a freight. Was put off by the engineer. Then went to the conductor, who refused to let him ride. Afterwards he met a man on the platform with a lantern, who told him to get on the train. He got on the rear end of the caboose, and could have jumped off, but he remained standing, and got hurt." The conductor testified that "plaintiff asked him to let him ride on the train to Kinney. He told him he could not ride on the train, as he had no authority to do so, and would not carry passengers. He gave no one permission to ride on the train. The brakemen had no authority to allow any one to ride. Both doors of the caboose were locked. Two brakemen were inside, both of whom had lanterns. There were 14 cars in the collision. The brakeman on the north end of the cars failed to set the brakes, and this caused the collision." Plaintiff denied telling any one that he was on the platform of the caboose at the time of the accident. It was admitted that the conductor and brakemen were discharged on account of the accident. The jury returned a verdict for \$150 actual and \$350 punitive damages. No exemplary damages were claimed in the petition, and judgment was rendered for the former, the latter having been remitted. The case is before us on appeal, but there is no appearance for appellee.

The refusal of the court below to give the following charges requested, is assigned as error: "(1) If you believe from the evidence that the freight train in question was prohibited from carrying passengers, and that when plaintiff applied to the conductor for passage on said train he was informed by the conductor that he could not ride on that train, then you will find for the defendant, although you may believe that a brakeman or some other person afterwards told the plaintiff to get on the train. (2) If you believe from the evidence that by the rules of the company passengers were forbidden to be carried on the train in question, then the presumption is that the plaintiff was an intruder, and without lawful right to be there. This presumption may be rebutted by the plaintiff, showing that while the rules forbid the transportation of passengers upon such trains, yet with knowledge of the company, and without objection on its part, they are habitually permitted to take passage on such trains. The company, through its proper officers, having the right to make these rules, may, through the same officers, relax or dispense with them, and the public are authorized to consider them dispensed with when not practically enforced. The conductor cannot relax these regulations without the consent of the company, because he is the agent whose special duty it is to see that they are enforced, and any relaxation of the rules on his part would be a disobedience of the orders of his superiors. There is no proof of gross negligence in this case, and hence if you find that, as defined in the charge, the plaintiff was not a lawful passenger on the car, you will find for defendant."

These instructions are in the language of our supreme court in the case of *Prince v. Railway Co.*, 64 Tex. 146. The jury were instructed that, if the plaintiff entered the caboose by the invitation, knowledge, and consent of the conductor, he was a lawful passenger, and was entitled to all the rights, etc., of such passenger on a regular passenger train; and, if he received the injuries through the carelessness and negligence of the defendant, he was entitled to a verdict. But if they believed the caboose was not in the habit of carrying passengers, and plaintiff entered it, without the knowledge and consent of the conductor, he was guilty of contributory negligence, and could not recover unless the company was guilty of gross negligence. We do not understand this to be the law applicable to the facts in this case. If the conductor told the plaintiff that he was not authorized or permitted to carry passengers, and still he entered the car with the knowledge and consent of the conductor, he would not, under the authority of *Railway Co. v. Moore*, 49 Tex. 31, and *Prince v. Railway Co.*, supra, have been a lawful passenger thereon; because, from the evidence in the case, he must have known the fact that the conductor possessed no authority to permit him to ride, and that it was in violation of the rules of the company if he became a passenger on the

train. This is not denied by the plaintiff's evidence. It is quite plain that he knew, or certainly had reason to suppose, that the "man on the platform with a lantern in his hand" was violating the order of the defendant even if he was one of defendant's employes, and gave him permission to ride. It does not appear from the plaintiff's evidence that the person giving him permission to ride in the caboose was authorized so to do; and it does appear from the evidence that the plaintiff was informed by the conductor that he could not carry passengers on that train. A case, then, is presented in which the plaintiff is injured while unlawfully upon defendant's car, and, according to his evidence, the injury would not have occurred but for his own negligence. We think, under the rules laid down in the cases cited, a charge embodying the principles contained in the instructions requested should have been given.

The fifth assignment of error is that the court erred in admitting, over the defendant's objection, the evidence of Dr. McGregor relative to his medical bill of \$100; it appearing from said evidence that his said medical bill was based upon a prospective lawsuit, and not for services actually rendered. Dr. McGregor, on direct examination, testified: "My bill was one hundred dollars, and has not been paid. I believe the bill, under the circumstances, was a reasonable one. I have charged Campbell with it, and expect him to pay me if he can but get anything in this suit." On cross-examination, he testified: "Visited plaintiff four or five times, at a distance of three miles. According to my schedule, the ordinary price for a visit to Mr. Campbell would be \$3, which for five visits would amount to \$15. I prescribed for him five times. Charge, for each prescription, \$1.50, which for five prescriptions would amount to \$7.50, making a total of \$22.50. My charge of one hundred dollars was based on a prospective lawsuit. The reason I charge more in cases of gunshot wounds, cuts, and railroad accidents is that, as attending physician, I always have to testify as an expert as to injuries and their possible consequences. This entails a great deal of work I would not have to do in ordinary cases." Whereupon the defendant objected to the evidence relating to the medical bill of \$100, and asked that it be excluded, on the ground that the same was incompetent and inadmissible,—it appearing from the witness' own testimony that his bill was based upon a prospective lawsuit, and not for services actually rendered to the plaintiff; which request was by the court refused. The court, in its charge, did not exclude from the consideration of the jury so much of the bill as was based on a prospective lawsuit. If the plaintiff was entitled to any damages under the facts of this case,—a question we are not called upon to decide,—he was entitled, as a part thereof, to recover the reasonable value of medical services rendered him in effecting a cure; but he was not entitled to recover the value of his services

as a witness in the case. For the errors mentioned we think the judgment should be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment reversed, and cause remanded.

REINSTEIN v. DANIELS.

(Supreme Court of Texas. Jan. 24, 1890.)

HOMESTEAD.

A farm occupied as a homestead does not lose that character by the purchase of a house and lot in a city, occupied by the wife partly for the purpose of sending her children and grandchildren to school, and partly on account of her health, the husband remaining on the farm, and continuing to cultivate it, neither husband nor wife intending to abandon it as a homestead.

Appeal from district court, Washington county.

Action by W. Reinstein against John Daniels on two promissory notes, and to foreclose a deed of trust given to secure them. Plaintiff appeals from a judgment for the defendant.

Searcy & Garrett, for appellant. *Bassett, Muse & Muse*, for appellee.

HENRY, J. This suit was filed in February, 1889, upon two promissory notes of date February 14, 1887, for the sum of \$281.76 each, due and payable two and three years after the date thereof, and to foreclose a mortgage lien on the land described in plaintiff's petition. The defendant answered by general and special demurrers, general denials, and by special answer set up that the land upon which the mortgage was sought to be foreclosed was his homestead, and prayed for judgment canceling the same, etc. The case was tried before the judge without a jury. He found that the land was the homestead of the defendant, refused to foreclose the mortgage, and dismissed the suit. From this judgment plaintiff prosecutes this appeal, and assigns the following errors:

"(1) The court erred in holding that the land upon which the deed of trust was given, and to foreclose which this suit was brought, was the homestead of John Daniels and his wife, Lucinda Daniels. (2) The court erred in refusing to give the plaintiff judgment for the amount of the notes sued upon, and in refusing to foreclose the lien on the land described in plaintiff's petition, and in dismissing plaintiff's suit."

The following are the conclusions of fact and law as found by the court:

"(1) On February 14, 1887, the defendant, John Daniels, executed a deed of trust to William P. Ewing, as trustee for the plaintiff, W. Reinstein, on the land described in the plaintiff's petition, in order to secure the payment of two promissory notes of said Daniels, executed to the said Reinstein, bearing even date with said deed of trust, for the sum of two hundred and eighty-one 76-100 dollars each, payable two and three years after date,

respectively, with interest from date until paid at the rate of ten per cent. per annum. The deed of trust was signed by John Daniels alone, was duly acknowledged and recorded, and became a valid lien on the land, unless it is the homestead of the defendant and his wife, Lucinda Daniels. (2) The defendant is a married man, and the head of a family. He and his wife, Lucinda, have been married about thirty years, and have two children. The eldest, James Massey, is 24 years of age, and the other, Estella, is the wife of Horace Lindsey, whom she married December 2, 1882, when about 16 years old. Since her marriage Mrs. Lindsey has not been a member of the family. James Massey has been with his mother and father up to the present time. Defendant and his wife have living with them also two children of one Polk Hill, a son of Mrs. Daniels by a former marriage, to-wit, John and George Ellis. The mother of these children is dead, and they are cared for and supported by defendant and his wife. (3) In March, 1881, W. A. Bizzell conveyed 213 acres of land to the defendant, which is the same included in the deed of trust, less sixty acres conveyed by defendant and his wife to one Harriet Ford, leaving 153 acres in the tract. The defendant had contracted for this land from Bizzell about the year 1870, and had resided on it ever since with his family, but only finished paying for it about the time of the execution of Bizzell's deed to him. The 153 acres consisted of sixty-six acres in cultivation, and the balance in the timber. The land in cultivation has three tenant-houses on it, and is under fence. (4) In December, 1881, the defendant bought a house and lot in the city of Brenham, for which he agreed to pay \$400. He paid \$100 in cash, and executed two notes for \$150 each, due January, 1883, and January 1, 1884, respectively, with twelve per cent. interest. A deed was executed to him, reciting the consideration as stated, and reserving a vendor's lien for the purchase money. It was duly acknowledged, and was filed for record December 13, 1881, and afterwards duly recorded. Neither of said notes for the purchase money has been paid, and there is now due on them an amount equal to the original purchase money. They have been renewed since their execution, and are in force. The defendant has rendered for taxation and paid the taxes on the said lot in Brenham. (5) Defendant and his wife both testified that Mrs. Daniels came to Brenham for the purpose of sending their children to school, and that they both intended to return to the farm, and that they did not intend to leave or abandon it as a homestead. The daughter attended school until she was married, the son attended for two years, and the Hills are now in attendance, and have been for some time. The defendant has all the time remained on the farm, cultivating a portion of the same with the labor of himself and his children and hired hands, and renting out a portion of it. He has come in town to visit his family on

an average of once in two weeks. Mrs. Daniels gave it as an additional reason for coming into town that her health was bad at the time; that they had bought the lot in town to keep from paying rent. Two or three neighbors near the farm testified that Daniels and his wife had always said that they intended to return to the farm. The defendant has used and cultivated the farm in support of himself and family all the time except the year 1887, when he rented it to the plaintiff, in order to pay him a portion of the debt which he owed him. He is a farmer, and does nothing else. That year the defendant rented and cultivated land adjoining his said farm. On one occasion, but some time before, and not in connection with the deed of trust, Daniels told Reinstein that he had a good home in Brenham. (6) On the marriage of the daughter to Horace Lindsey the parents told Horace Lindsey that they intended to divide the farm between the two children, and the defendant designated and gave to Lindsey a patch or parcel of ten acres in the field, the balance of his half to be taken from outside, and Lindsey has ever since exercised exclusive ownership over, and received the rents from, that ten acres. The gift was oral. No deed or writing whatever has been executed to carry it into effect. (7) Soon after the defendant had agreed to rent the farm to the plaintiff for the year 1887, the defendant, being pushed for the payment of a judgment that had been recovered against him for about \$280 by one Hoffman, and the sale of his land being threatened, went to the plaintiff, and requested him to take the judgment up and give him time. Plaintiff agreed to do so if defendant would include an indebtedness to him on store account, and give notes secured by a deed of trust on defendant's farm for the entire amount. The negotiation resulted in the notes and deed of trust sued on. In arriving at the amount for which the notes should be executed, the rents for 1887, amounting to \$262, were deducted from the amount due by the defendant to the plaintiff on the store account, and the balance was added to the Hoffman judgment, and the sum was divided into two equal amounts, for which the two notes were executed.

"Conclusions of Law: (1) The land is the homestead of the defendant, John Daniels, and was when the deed of trust was executed. The deed of trust is therefore invalid. (2) The defendant is indebted to the plaintiff in the full amount of the notes, principal and interest; but as there is no lien on the land, and as only one of the said notes is due, and that is for an amount below the jurisdiction of this court, the plaintiff cannot recover for his debt. Judgment will therefore be that the plaintiff has no lien on said land; that his cause of action on his debt be dismissed for the want of jurisdiction; and on the defendant's plea in reconvention restraining the plaintiff from ever selling under the said deed of trust."

We find no error in these proceedings. No

title to the Brenham property had been acquired. The residence there of the wife and children, composing the family, is explained, and was intended to be temporary only. The husband had continued to reside upon and cultivate the farm. The facts show that it was once the homestead of appellee, and sustain the conclusion of the court that it had never lost that character. The judgment is affirmed.

IRVIN v. ELLIS et al.

(Supreme Court of Texas. Jan. 21, 1890.)

SEQUESTRATION—INTERVENTION—ESTOPPEL.

1. A plea that the intervenor, in sequestration proceedings, shows no cause why he should be permitted to intervene, and that the petition is insufficient in law, amounts only to a general demurrer, and is not sufficient to raise the objection that no oath and bond were filed.

2. A petition for intervention in sequestration proceedings, alleging that the intervenor was the owner and in possession of the property when seized under the writ of sequestration, and taken from his possession, and given to plaintiff, is sufficient on general demurrer.

3. The evidence being conflicting as to whether the logs sequestered were cut on land of defendant or intervenor, the verdict will not be disturbed on appeal.

4. A declaration by the intervenor to the sheriff, after the sequestration, that the property did not belong to him, will not estop him from intervening to claim the property.

Commissioners' decision. Appeal from district court, Jefferson county; W. H. FORD, Judge.

Tom J. Russell, for appellant. Hal W. Greer, for appellees.

ACKER, P. J. John P. Irvin brought this suit against J. W. Ellis to recover 150 pine logs of the value of \$600, and sued out a writ of sequestration, under which the sheriff of Jefferson county took possession of the logs, and afterwards delivered them to the plaintiff, upon his executing bond as required by statute. Irvin sold the logs for \$615. Afterwards, appellee W. W. Ellis, by leave of the court, filed his plea in intervention, claiming the logs as his property, and praying judgment against Irvin for them, or, in the alternative, for their value. The plaintiff filed a general demurrer to the plea in intervention, which was overruled, and the trial by jury resulted in verdict and judgment in favor of intervenor for the value of the logs and interest; and plaintiff appealed.

The first assignment of error is: "The court erred in overruling the plaintiff's special demurrer to the plea in intervention of W. W. Ellis, because there was no oath and bond made and filed in said cause by W. W. Ellis as claimant for the trial of the right of property, as the statute law requires in such cases, when a writ of sequestration has issued at the instance of the plaintiff against defendant, and the property in dispute has been levied upon by the sheriff under said writ, and held by him." The pleading referred to

as a "special demurrer" is in the following language: "And now in this cause comes John P. Irvin, plaintiff in the original suit No. 953, styled John P. Irvin v. J. W. Ellis, and moves this court to dismiss the plea of the intervenor in this case, because that said intervenor does not show by his petition of intervention any cause why he should be permitted to intervene in said suit, and further says that said petition is insufficient in law for intervenor to maintain said suit; and of this he asks judgment of the court." No particular ground of objection to the plea in intervention is stated in this pleading, and it is clearly nothing more than a general demurrer. The grounds of objection set up in the assignment of error, not having been interposed by proper pleading in the court below, cannot be considered here, unless those grounds are such as would be reached by general demurrer. The sufficiency of the pleading must be tested by the objections urged against it in the court below. We think, however, that the plea in intervention stated a case that clearly entitled appellee to intervene, whatever objection might have been urged against it. It was alleged that the intervenor was the owner, and in possession, of the logs, when they were seized under the writ of sequestration sued out by Irvin against J. W. Ellis, and taken from his possession, and delivered to Irvin. These allegations certainly showed that the intervenor had an interest in the subject-matter of the suit, which is the ordinary test of the right to intervene. *Peiser v. Peticolas*, 48 Tex. 483; *Pool v. Sanford*, 52 Tex. 632; *Mills v. Swearingen*, 67 Tex. 274, 3 S. W. Rep. 268; *Chandler v. Fulton*, 10 Tex. 2. We think the plea in intervention was proper, and that the court below did not err in so holding.

The next assignment of error presented is: "The court erred in not granting the plaintiff a new trial in this cause, because the verdict of the jury is insufficient, unsupported by the evidence, in this, that the testimony of the witnesses J. A. Bohler and H. L. Byerly and P. Byerly is positive that the logs in suit were taken from the W. B. Greene survey, the property of the plaintiff Irvin. These witnesses are disinterested, and live in the vicinity, and saw the hands of defendant and intervenor every day at work while cutting these logs; and one of the witnesses, J. A. Bohler, says he saw the identical logs cut, put into the water, and came with them to Beaumont, and was present when the logs were sequestered. The testimony of Thomas H. Langham is certain and positive that the intervenor declared the logs that were sequestered did not belong to him, but belonged to his father, J. W. Ellis, the defendant, at the time the writ of sequestration was levied upon the logs at Beaumont, Tex., near the Reliance Lumber Co.'s mill, and other like testimony to the same effect." There was very great conflict in the evidence as to where the logs were cut,—whether on the Greene survey, claimed by the plaintiff, or other sur-

veys, claimed by intervenor and his father. About an equal number of witnesses testified each way. It was a question of fact for the jury and the trial court, and we have no authority, under repeated decisions of this court, to disturb the verdict when the evidence is conflicting. The declaration alleged in the concluding paragraph of this assignment to have been made by the intervenor to the sheriff, Langham, appears to have been made after the writ had been levied, and in reply to the suggestion that the plaintiff was willing to compromise. The logs were in a raft containing logs belonging to the defendant in the writ, J. W. Ellis, and his sons. The intervenor testified that the sheriff told him the writ was against his father, J. W. Ellis, and that he had levied the writ on logs belonging to his father, and that plaintiff was willing to compromise his claim; that he told the sheriff he had no authority to act for his father in making a compromise with the plaintiff; that he did not know at the time of his conversation with the sheriff what particular logs had been seized under the writ; and that he owned the long logs described in the sheriff's return on the writ. Other witnesses testified that intervenor owned the logs claimed by him. This evidence, it seems to us, satisfactorily explains the declaration in a manner entirely consistent with the good faith of intervenor's claim.

Under the fifth and last assignment presented it is contended that "the court erred in its charge, in regard to the claim of the intervenor, in not instructing the jury that the intervenor was estopped from claiming the timber after having made the declaration to the sheriff" in regard to the ownership of the logs. We might dispose of this assignment with the statement that no special charge was requested on the alleged neglected issues; but we think it clear, from the foregoing statement of the evidence relating to the declaration, that the law of estoppel has no application to this case. "An estoppel *in pais* is the effect of the voluntary conduct of a party, whereby he is precluded, both at law and in equity, from asserting the rights which might, perhaps, have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who, on his part, acquires some corresponding right, either of property, of contract, or of remedy." *Bridges v. Johnson*, 69 Tex. 717, 7 S. W. Rep. 506; *Bynum v. Preston*, 69 Tex. 287, 6 S. W. Rep. 428. The plaintiff was not induced by the declaration to change his position at all. The levy had been made. Nor did the intervenor acquire any right thereby. We find no error in the record, and are of opinion that the judgment of the court below should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment affirmed. Digitized by Google

ANDERSON et ux. v. HORN.

(Supreme Court of Texas. Jan. 28, 1890.)

TITLE TO LAND—ESTOPPEL—ASSIGNMENT OF ERROR—TRIAL—FINDINGS.

1. A father and son purchased land on credit, and the son afterwards paid the purchase price under a verbal agreement that he should have the land. He soon after exchanged that tract for another, on which he made permanent, valuable improvements, and occupied it as his own for 15 or 16 years; the father always recognizing his right to it, and expressing his willingness to make a deed to him. *Held*, that the verbal agreement, coupled with the making of permanent improvements and long occupation, vested title in the son to the land received in exchange.

2. The land which the son received in exchange was in the same survey as the land originally purchased; and, upon ascertaining that this survey conflicted with an older one, the certificates were floated, and located elsewhere, by the son and others owning in the survey. This took place in the life-time of both the father and the mother. *Held*, that the heirs could not question the son's title, as the transaction of the father relative to the certificates was sufficient to pass title.

3. An assignment of error that "the court erred in rendering judgment for plaintiff under the law and evidence in the case," and that "the court erred in overruling motion for new trial," are not sufficiently specific to authorize their consideration.

4. The court having orally stated the findings at the time of rendering judgment, and having filed them during the term, appellant cannot complain that they were not, on his request, filed in time to enable him to base a motion for a new trial thereon.

Appeal from district court, Freestone county.

Action by W. L. Horn for specific performance against J. B. Lee, as administrator of the estate of Alexander Lee, deceased, A. G. Lee, and Isophena Anderson and J. R. Anderson, her husband, heirs at law of Alexander Lee. Defendants Anderson and wife appeal from a judgment for plaintiff.

Bell, Bell & Bell, for appellants. *Rufus Hardy*, for appellee.

STAYTON, C. J. It appears from the findings of fact that, in 1866, J. B. and Alexander Lee, son and father, purchased on a credit a part of the Sparks head-right survey, situated in Freestone county, and that, after the purchase the father, Alexander Lee, agreed that his son should have the land if he would pay the purchase money, which he did, and that, soon after this occurred, J. B. Lee exchanged that tract of land for another on the same survey, for which, however, no deed was made until 1874. Whether the deed then made was to the father and son, or to the latter only, the court did not find; but the inference from the evidence is that it was made to the son, and that they joined in the deed for the land given in exchange. The court further found that, after the exchange of lands was made, J. B. Lee settled on the land received in exchange, and thereon made permanent and valuable improvements, and occupied it as his own continuously for 15 or 16 years, paying all taxes until 1884. The Sparks survey was in conflict with an older valid grant, and litigation arose in reference thereto, which in some way was compro-

mised, whereupon J. B. Lee and other persons, who were claiming the different parts of the Sparks survey, floated the certificate and located it on the land in controversy, which is situated in Floyd county. That part of the Sparks survey originally purchased by J. B. and Alexander Lee seems to have embraced five or six hundred acres of land; and, at the time they purchased, the wife of Alexander Lee was living, and so continued until after the certificate was floated and located on the land in controversy, which consists of 374 acres, an undivided interest in the Sparks survey as relocated. Alexander Lee died on February 7, 1885, and the court found that up to the time of his death he recognized the right of his son to the land in controversy, as well as his right to all of the Sparks survey situated in Freestone county, which had been purchased by the two, and repeatedly attempted to make a deed to him, and always expressed his willingness and desire to do so. The wife of Alexander Lee died in 1878, and the court found that he, after her death, made a division of the community property, and conveyed to each of his children more than they were entitled to as heirs of their mother. In this partition all the children seem to have participated personally or by representation, and to have received the property allotted to them. Appellee claims the land in controversy through a conveyance from J. B. Lee; and the court found that before his purchase, which was for valuable consideration, Alexander Lee informed him that the land in controversy belonged entirely to J. B. Lee. Alexander Lee had three children, all of whom were made defendants to this suit brought by appellee to establish his right to the land. J. B. Lee admitted his right, but Mrs. Anderson and her husband, who had acquired the interest of the other child, asserted title to an interest in the land. The court below found that the verbal agreement between Alexander Lee and his son, with the making of improvements and long occupation, vested title in the latter to that part of the Sparks survey in Freestone county obtained by J. B. Lee in exchange for that originally bought by father and son.

Under the past decisions of this court, this ruling seems correct, and no question is here made as to the correctness of the conclusion of fact on which the ruling is based. We see no reason why the same rule, as between Alexander Lee and his son, should not be applied that would be had the valuable improvements been made on the land purchased by them in the first instance, instead of the land received in exchange. All the right claimed by appellants seems to be based on the purchase originally made by the father and son, and, if it be true that the land first purchased by them by virtue of the transactions between them did not equitably vest entirely in the son, then, unless the father parted with his interest therein when the exchange was made by joining in the deed, his

heirs may have an interest in the land in Floyd county yet; but this would not defeat the right of appellee to recover the undivided interest for which he sues. The inference from the evidence is that the father did join in the deed. If he did not, the persons with whom J. B. Lee made the exchange might have ground to complain of failure of consideration in part for their conveyance, which, if made to J. B. Lee alone, would, however, vest such title in him as his vendors had.

The court further found that the transactions between the father and son were such as to pass title to the latter to the certificate when floated from the land in Freestone county, that being susceptible of transfer by verbal agreement; and this seems to be true. All these matters occurred during the life of the mother of Mrs. Anderson, and what bound her father bound her mother, and what bound both binds her and co-heirs. Appellants present the case as though the court had held that the fact of payment by J. B. Lee of all the purchase money for the land bought by himself and father, under an agreement made between them after the purchase, would create a resulting trust in favor of J. B. Lee; but that was not the ground on which the case was decided, and it becomes unnecessary to consider the assignments of error further which controvert the existence of such a trust.

The pleadings of appellee may have been faulty, and it is urged that the court erred in overruling appellants' special exceptions; but it does not appear from the record that they were called to the attention of the court, or that any ruling was had on them.

It is urged that the court erred in permitting the introduction of partition deeds between Alexander Lee and his children, to show that each child had received its full share of the community estate inherited from the mother; but the record does not show that any objection was made to the evidence when offered, and it cannot be made here. The court seems to have held that appellants were estopped, by the declarations made by their father to appellee, from claiming through inheritance from him. It is not now necessary to determine whether all the facts existed necessary to create such an estoppel. If not, the facts brought the case to the very verge of estoppel. *Mayer v. Ramsey*, 46 Tex. 375.

The sixth and seventh assignments are as follows: "The court erred in rendering judgment for plaintiff under the law and evidence in the case." "The court erred in overruling defendants' motion for a new trial." The motion embraced many grounds; and, under the well-settled rules of this court, it must be held that these assignments are not sufficiently specific to require or authorize their consideration.

There is no complaint that the findings of fact were not in accordance with the evidence, and there is but one bill of exceptions

found in the record which relates to the only remaining assignment of error. It appears that the judgment was rendered on September 18th, motion for new trial was filed on September 21st, and an amended motion on 27th of same month. It appears from a bill of exceptions that, on the day the judgment was rendered, appellant requested the judge to file within two days conclusions of fact and law, in order that a motion for new trial might be based thereon, which the court then declined to do, having orally stated the findings at the time of rendering judgment. The court, however, during the term, did file findings of fact and law. Counsel would doubtless prefer to have findings filed within the time required for filing motions for new trials, as the rulings of facts and law could then be definitely known; but we know of no statute or rule which requires a judge to do this, and to require it would often interfere with the orderly progress of the business of a court. We find no error in the judgment, and it will be affirmed.

HILLIARD *et al.* v. WILSON *et al.*

(Supreme Court of Texas. Jan. 28, 1890.)

WRONGFUL ATTACHMENT—VENUE—PLEADING AND PROOF.

1. Under Rev. St. Tex. art. 1198, subd. 8, providing that an inhabitant of the state may be sued for a trespass in the county in which the same was committed, or in the county in which he has his domicile, an action for wrongful levy cannot be maintained against the sheriff's indemnitors, in a county other than that of their residence, unless the charge of misconduct against the sheriff is sustained.

2. The right to maintain a suit in a county other than that in which the statute fixes the venue must depend upon the existence of the facts constituting the exception, and where the defendant pleads his privilege of being sued in the county of his domicile, as provided by statute, the facts relied on to deprive him of this right must not only be alleged, but proved.

3. A sheriff's return, describing property as "a lot of dry goods * * * and an iron safe, situated in a storehouse occupied by" the attachment debtors, describes the property with sufficient certainty.

4. Under an order of sale, requiring it to be made on four days' notice, the sheriff may, by consent, adjourn it to a time less than four days distant.

Commissioners' decision. Error from district court, Burleson county; J. B. McFARLAND, Judge.

Action by J. B. L. Hilliard and Shas Hilliard, copartners as Hilliard Bros., against Sam G. Wilson and the firm of L. & H. Blum, composed of Leon, Hyman, and Sylvain Blum, for damages for wrongful seizure of property. Plaintiffs bring error from a judgment for defendants.

Bassett, Muse & Muse, for plaintiffs in error. *Seth Shepard and Scott & Levi*, for defendants in error.

ACKER, P. J. Hilliard Bros. brought this suit against S. G. Wilson, sheriff of Burleson county, and L. & H. Blum, to recover damages for the alleged wrongful seizure and conversion of a stock of goods of the al-

leged value of \$5,000, under a writ of attachment alleged to have been wrongfully and maliciously sued out by the Blums in Galveston county against Hilliard Bros. Plaintiffs also alleged that the levy on their goods was wrongfully and maliciously made, for the purpose of harassing plaintiffs, and to enable the Blums to obtain possession of the goods at a sum greatly less than their value; that, in order to induce the defendant Wilson to assist in carrying out their unlawful purpose, the Blums indemnified Wilson against any liability he might incur by reason of his acts in the premises; that, said defendants combining and confederating to sacrifice the goods of plaintiffs under legal process to enable the Blums to acquire them at greatly less than their value, the defendant Wilson, at the instigation of his co-defendants, failed and refused to give legal and proper notice of the time and place of the sale of said goods, and also refused to request of plaintiffs to make an inventory of the goods, and to offer them for sale in small lots, but, on the contrary, in pursuance of his fraudulent agreement aforesaid, defendant Wilson sold the goods in bulk without lawful notice, and when few bidders were present, and they were struck off and sold to the Blums for about \$400. It was alleged that if the sale had been properly advertised, and made in a reasonable and legal manner, the goods would have brought their full value. Defendants Blum pleaded, in abatement, their residence in Galveston county, and their privilege of being sued there; and charged that the allegations of misconduct and fraud on the part of defendant Wilson, in levying the writ and selling the goods, and of confederacy and combination between them and Wilson, were fraudulently made, solely for the purpose of giving the court of Burleson county jurisdiction. This is the second appeal in this case, the decision on the former appeal being reported in 65 Tex. 286. On the former trial in the court below, the allegations of the petition then being substantially the same as on the last trial, exceptions to the petition were sustained, and the suit dismissed, on the grounds that the court had no jurisdiction of defendants Blum, and that there was no cause of action shown against defendant Wilson. In the opinion delivered on the former appeal, Chief Justice WILLIE said: "We think, therefore, that the illegal and oppressive execution of the writ by the sheriff made him a trespasser, and that a cause of action was shown against him in the petition, for which, of course, he could be sued in Burleson county, where he resided and the wrong was committed. We think, further, that as the plaintiffs in attachment instigated these acts of the sheriff, and combined and confederated with him to have them performed, they were accessories to his conduct, and participants in his oppressive acts, and trespassers equally with himself, their trespass relating back to the very commencement of the attachment proceedings. In this trespass

they were, under our statute, liable to suit in the county where it was committed, and the court below improperly held that Burleson county had no jurisdiction of the cause." The demurrer admitted the truth of the averments of the petition; so, on the former appeal, it was held that the facts alleged gave the court jurisdiction by bringing the case within the eighth exception to article 1198 of the Revised Statutes, which provides that "no person who is an inhabitant of this state shall be sued out of the county in which he has his domicile, except in the following cases, to-wit." The eighth exception is: "Where the foundation of the suit is some crime, or offense, or trespass, for which a civil action in damages may lie, in which case the suit may be brought in the county where such crime, or offense, or trespass was committed, or in the county where the defendant has his domicile." The last trial in the court below was by a jury, and resulted in verdict and judgment for the defendants, from which this appeal is prosecuted.

By the first assignment of error it is claimed that "the court erred in holding and instructing the jury as it did substantially in the several clauses of the second charge given at the instance of defendants, and elsewhere in the charge, that plaintiff's right of action against said L. and H. Blum was dependent on their sustaining the charges of misconduct on the part of the defendant Wilson." This assignment raises the controlling question in the case. The charges complained of make the question of jurisdiction depend solely upon the truth or falsity of the allegations of misconduct and fraud on the part of defendant Wilson in executing the writ of attachment, without regard to whether or not those allegations were made in good faith. Appellants contend that the question of jurisdiction is determined by the averments of the petition, and that, where the facts alleged give the court jurisdiction, it can be defeated only by a plea to the jurisdiction; and also pleading that the jurisdictional averments were fraudulently made, for the purpose of giving jurisdiction improperly, and a finding that the plea is true. The case of *Dwyer v. Bassett*, 63 Tex. 276, is relied on in support of the view contended for by appellants. We understand that case to decide that, where jurisdiction is dependent upon the amount in controversy, the question is determined by the averments of the petition, for the amount alleged by the plaintiff to be due is the amount in controversy; and, if the defendant believes that the averments of the petition as to amount were fraudulently made, then that must be specially pleaded, and the issue thus raised passed upon. The case of *Dwyer v. Bassett* goes no further than this, and does not decide the question here presented. The right to maintain a suit in a county other than that in which the statute fixes the venue must depend upon the existence of the fact or facts which constitute an exception to the

statute, and not upon the mere averment of such fact or facts. Where jurisdiction of the person of a defendant is claimed under some exception to the general statute of venue, and he pleads the privilege of being sued in the county of his domicile, as provided by that statute, to defeat this plea, and deprive him of that right, we think the facts relied on should be not only alleged, but proved. The jurisdiction of the Burleson county district court was sustained on the former appeal, not merely upon the averment of the facts, but upon the existence of the facts which constitute an exception to the statute of venue, and, if those facts did not actually exist, then, we think, the suit could not be maintained in that county. We think the court below did not err in so holding, and giving the charges complained of.

The next assignment of error is to the effect that the court erred in instructing the jury, as it did in the second and third clauses of the first special charge given at the request of the defendants, in regard to the inventory and sale of the goods, and the advertisement thereof, and refusing the twelfth special charge requested by the plaintiffs, in regard to the advertisement of the sale required under the facts of this case. The attachment was levied on the 4th day of January, and the property described in the sheriff's return as "a lot of dry goods, groceries, hats, boots, shoes, drugs, and flour, and an iron safe, situated in a store-house occupied by Hilliard Bros." No inventory of the goods was made at the time of the levy. On January 6th the judge of the court, out of which the attachment issued, made an order directing the sheriff to sell the goods as under execution, upon four days' notice of the time and place of sale. The sale was advertised to be made on the 13th of January. By agreement of the parties it was postponed until the 16th of January, at which time the goods were sold in bulk, without readvertisement. The charge given at request of defendants was to the effect that the court had the power to order the goods sold on four days' notice, and the sheriff was only required to post the notices of the sale in three public places in the county,—one at the court-house door, and another at the place of sale; that the sheriff was not required by law to make an inventory of the goods, but only to describe them with sufficient certainty; that he was not responsible for the order of sale, nor for the short time within which it was required to be made; that he was not required by law to sell the property by parcel, nor for the few bidders attending the sale; that his duty in such cases is to give the notice required by law, and to perform his duties in connection therewith impartially, honestly, and to the best of his judgment. The special charge requested by plaintiffs, and refused, was as follows: "The order of sale issued by the district judge of Galveston county required the sale to be advertised for four days. This required the sheriff to give at least four days'

notice of the time and place of the sale as actually made on the 16th of January, and an advertisement of the sale to take place on the 13th of January would not be good for a sale to take place on the 16th." We do not think the court erred in giving the charge complained of, nor in refusing to give the special charge requested. If there could be any doubt of the sheriff's power to postpone the sale from the 13th to the 16th, it appears that it was done with the consent of appellants, and we think they have no right now to complain. We find no error in the judgment of the court below, and are of opinion that it should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment affirmed.

KIRBY v. GIDDINGS *et al.*

(*Supreme Court of Texas. Jan. 28, 1890.*)

HOMESTEAD—SALE FOR REINVESTMENT—GARNISHMENT.

In Texas, the sale of a homestead for the purpose of reinvestment in another homestead is a voluntary conversion of the exempt property into money, which becomes subject to garnishment. *Mann v. Kelsey*, 12 S. W. Rep. 43.

Appeal from district court, Washington county.

Writ of garnishment in favor of R. H. Kirby, a judgment creditor of Mrs. M. E. Wood, served on Giddings & Giddings as garnishees. Mrs. Wood intervened. Plaintiff appeals from a judgment in favor of garnishees and the intervenor.

J. T. Steearingen, for appellant. *Bassett & Muse*, for appellees.

STAYTON, C. J. Appellant was judgment creditor of Mrs. M. E. Wood, and caused a writ of garnishment to be served on Giddings & Giddings, bankers, with whom Mrs. Wood had on deposit \$800. The writ of garnishment was served on January 6, 1888, and garnishees answered by admitting the deposit, but setting up that the money in their hands was a part of the proceeds of the homestead of Mrs. Wood, recently sold, which she contemplated investing in another home at once, and was in the act of doing when the writ was served on them. The substance further of their answer will be seen in so much of the petition in intervention of Mrs. Wood as will be here set out. Mrs. Wood intervened, and alleged "that she is the owner of the \$800 in the hands of the garnishees, and that the same is not subject to the plaintiff's writ, for this, that this intervenor is, and has been hitherto, for more than 30 years consecutively, a citizen of Texas, and a constituent of the family composed of herself and her late husband, A. H. Wood, and their children, and since the death of the said husband she has been the head of the family, and, as such, entitled to the homestead and other exemptions reserved by law to every family

against the claims of creditors; that said moneys in controversy are the proceeds of the sale of her late homestead in Washington county, Tex., which she had sold for the purpose, and with the specific intention, of investing the proceeds thereof in another homestead in Grimes county, Tex., to which it was her purpose to remove; and that at time of the service of the plaintiff's writ the same was in process of transmission to Grimes county for the purpose of reinvestment in such other homestead." On trial before a jury, there was a verdict in favor of Mrs. Wood; and the assignments of error question the ruling of the court in overruling exceptions to the answer of the garnishees, and to the petition in intervention filed by Mrs. Wood. Assignments also question the correctness of the rulings in giving and refusing to give charges requested. We find in the transcript what purports to be a statement of facts, duly signed by counsel and approved by the judge; but this was filed after adjournment, so far as the record shows, without any order permitting this to be done. As there is no statement of facts, the charges cannot be considered; but, as they show the theory on which the case was tried, and involve the question submitted by demurrer, the assignment containing them is here given. The sixth assignment is as follows: "The court erred in instructing the jury, in charge in chief, as follows: 'If you believe from the evidence that the money in controversy in this suit was a part of the proceeds of the sale of her homestead in Washington county, and that her said homestead was sold by her for the purpose, and with the present intention, of reinvesting said money in another homestead, and that it was her *bona fide* intention to occupy the new homestead so acquired, you will find for the intervenor, Mrs. Wood, and that the money in controversy is not subject to plaintiff's writ of garnishment.' And in refusing charge No. 1, asked by plaintiff, as follows: 'The law exempts certain property from claims of creditors, but money in bank is not so exempt. If the jury believe from the evidence that the intervenor, Mrs. Wood, converted her homestead, which was protected by law from her creditors, into money, which is not so protected, and that this conversion was voluntary on her part, you will find for the plaintiff, R. H. Kirby.'"

The exception to answer of garnishees and petition in intervention raised the question whether either was sufficient, in absence of averment that the money in question was the proceeds of an involuntary sale of the homestead. This is the sole question in the case necessary now to be considered, and it has been decided in former cases. The facts pleaded present a case in no essential different from the facts shown in *Mann v. Kelsey*, 71 Tex. 609, 12 S. W. Rep. 48, in which it was held that the proceeds of a voluntary sale of homestead were subject to execution. In *Whittenberg v. Lloyd*, 49 Tex. 633, the same ruling was made. In the cases here

referred to, the claim was made that an intent to reinvest the proceeds of the sale of a homestead in another should give protection to the fund; but in the case last cited it was said: "To the broad claim that the proceeds of the sale or exchange of a homestead shall be exempt, the answer is that neither in the constitution, nor in any statute, is provision made for such a case, and that, if such an extension of the exemption be needed, it should come in the shape of additional legislation." *Schneider v. Bray*, 59 Tex. 670, was a case in which one homestead was exchanged for another, and this was sustained because the property acquired in exchange was exempt; but the rule assumed in the cases above referred to was recognized as correct. After citing cases from other states, it was said: "The reason of this general rule is well stated in the last case, and is generally adopted and acted upon in the others. This is, in effect, that 'the law designates the species of property it exempts, and does not allow the debtor to choose for himself in respect to the species or kind of property to be exempted. To allow this would be to substitute the choice of the debtor for the provisions of the statute. When the exempt property is voluntarily sold and converted into money, or other property not also exempted, the right is gone.'" *Watkins v. Davis*, 61 Tex. 414, was substantially the same in its facts as *Schneider v. Bray*, and the same conclusion was reached; but there may be some expressions in the opinion, in commenting on the case of *Watkins v. Blatschinski*, 40 Wis. 347, which seem to hold that the fund now in question was exempt under the averments. The facts of the case did not call for a decision of any such question, and the whole case is summed up in the declaration that "when the sale of the homestead is made with the *bona fide* intention of investing the proceeds in another, and that is done, the latter will be protected from forced sale." The property sought to be subjected to forced sale for payment of debts in that case had actually become a homestead before it was levied upon; and we may say, under that state of facts, that it was unimportant from where came the purchase money, or with what intent the thing from which it was derived was sold. We know of no case, unaffected by statutory provision, establishing a rule different to that declared by the cases before cited; and it must be held, under those decisions, which it seems to us establish the better rule, that the exceptions to the garnishees' answer and petition of intervenor should have been sustained; and, for the contrary ruling of the court below, its judgment will be reversed, and the cause remanded. It is so ordered.

MILBURN WAGON CO. v. KENNEDY.

(Supreme Court of Texas. Nov. 26, 1889.)

TRIAL—RIGHT TO OPEN AND CLOSE—HOMESTEAD.

1. Defendant in attachment cannot controvert the grounds on which the writ has been sued out

for the purpose of defeating it, when he admits plaintiff's cause of action, but denies that the property attached is subject to sale, claiming it as part of his homestead, and he is therefore entitled to open and conclude the trial.

3. Defendant purchased two adjoining lots, which were for a long time embraced in a common inclosure, and occupied by him. He afterwards built a house on one of the lots, separated it from the other by a division fence, and rented it. The day before an attachment was issued against the leased premises he persuaded the tenant to surrender possession, removed the fence, and resumed occupancy and control of the premises. He testified that he did so with the *bona fide* intention of holding it as a part of his homestead against his creditors. The court instructed the jury: "If you believe from the evidence that defendant had abandoned the lot in controversy for home use, and appropriated it for other than home purposes, then you will find for plaintiff, unless you believe that at the time of the levy the defendant had reappropriated said lot for homestead purposes, and was using and occupying the same with the intention of permanently using and occupying the same as a home; then, in that event, you will find for defendant. If you believe from the evidence that the defendant had abandoned the lot in controversy, for the purpose of a home, and that at the time of the levy he was using and occupying it as a sham and pretext to shield it from his creditors, then you will find for plaintiff." *Held*, that the charge fully presented the issues of the case.

3. Where no requests to instruct the jury upon particular points have been made, it is not error if the court fails to do so.

Appeal from district court, Ellis county;
ANSON RAINEY, Judge.

Powell & Harding, for appellant. *Grace & Templeton*, for appellee.

GAINES, J. The appellant corporation brought this suit against appellee upon certain promissory notes, and sued out a writ of attachment, and caused it to be levied upon a certain lot in the city of Waxahachie. The defendant, in his answer, claimed that the lot levied upon was a part of his homestead, and contested the right of plaintiff to subject it to the payment of its debt. When the parties announced ready for trial, the defendant admitted "the plaintiff's cause of action in full," and only denied that the lot in controversy was subject to forced sale. Upon the issue so presented, the court allowed the defendant to open and conclude. The plaintiff objected to this, and reserved an exception to the court's ruling. In addition to the allegations in its complaint setting forth its cause of action, plaintiff alleged that the defendant was about to transfer his property to defraud his creditors; and it is now contended that, in order to acquire the right conceded him by the court, the defendant should also have admitted this last allegation. But in our practice the defendant, in a suit in which an attachment has been issued, cannot controvert the grounds upon which the writ is sued out, for the purpose of defeating it; and hence whether the alleged ground for attachment existed or not was not an issue in the case. We conclude, therefore, that the court did not err in its ruling.

The defendant testified in his own behalf, and was the only witness examined. His testimony shows that he was the head of a

family, which consisted of a wife and children, and that in 1862 he bought lot 1, in block 6, in Waxahachie, and about one month afterwards purchased the lot in controversy, which is lot 4, in the same block, and adjoins lot 1. He built a residence on the latter lot, and has ever since resided upon it with his family. A stable was built upon that lot, which extended over upon the lot in controversy. Both were embraced in a common inclosure, and for a long time lot 4 was used as a family garden. Some six or seven years before the trial the defendant built a house upon this lot, and constructed a partition fence between the two. This house, with the lot, was leased to tenants as a place of residence, and was so leased and occupied by a tenant up to the day before the attachment was levied. Having failed in his business, defendant induced his tenant to surrender the possession, and immediately removed the partition fence, and resumed the occupancy and control. He testified that he did this under the advice of counsel, "for the purpose of holding it as a part of his homestead, and to keep his creditors from levying upon it." He also testified, in another connection: "I at once took possession of it as a part of my homestead, intending to use it as a part of my homestead. This house is about forty feet from the family residence." Such being the evidence, the court charged the jury as follows: "If you believe from the evidence that defendant had abandoned the lot in controversy for home use, and appropriated it for other than home purposes, then you will find for plaintiff, unless you believe that at the time of the levy the defendant had reappropriated said lot for homestead purposes, and was using and occupying the same, with the intention of permanently using and occupying the same as a home; then, in that event, you will find for defendant. If you believe from the evidence that defendant had abandoned the lot in controversy for the purpose of a home, and that at the time of the levy he was using and occupying it as a sham and pretext to shield it from his creditors, then you will find for plaintiff." We think this charge clearly presented the law of the case. The value of the two lots, with their improvements, did not reach the constitutional limit. That in controversy adjoined the residence lot proper, and may reasonably be presumed to have added to its comfort and convenience. A debtor who is in failing circumstances, and who has no homestead, if the head of a family, may appropriate any parcel of land he may own, as his homestead, by making it his place of residence, at any time before the levy of an attachment or execution, and before a lien is otherwise fixed upon it, although the necessary result of such appropriation is to hinder and delay his creditors. We see no reason, therefore, why one who has a homestead and other contiguous property, not then used as an appurtenance to his home, may not appropriate it to such purpose, and make it exempt, at any time before the creditor

has acquired a lien upon it. If the value does not exceed the limit fixed by the constitution, if the property itself be such as may reasonably be deemed an addition to the comfort and convenience of the family residence, and if the intention really be to appropriate it directly to the use or comfort of the family as a part of their home, his creditors cannot legally complain. If, however, the appropriation be without the *bona fide* intention of using the property for the purposes of the family; if it be a mere pretext, designed to shield it from the claims of creditors,—then it is not a lawful “designation” as a part of the homestead, and the property is not exempt from forced sale. The charge having distinctly presented the issue made by the evidence, other instructions were neither necessary nor proper. We think, therefore, the court did not err in refusing the instructions asked by plaintiff.

It is also assigned that the court erred in failing to charge upon the burden of proof. If such an instruction was desired on part of plaintiff, it should have been asked. The same may be said of other assignments predicated upon alleged deficiencies in the charge. We cannot say that the verdict of the jury is contrary to the law and the evidence. It is true that the fact that the defendant leased the lot in controversy indicates that, in his opinion, the pecuniary consideration received for it was sufficient to outweigh, at least for the time being, the comfort and convenience to himself and his family resulting from the use of the lot as a part of his homestead. It does not follow that he did not regard it as a desirable addition to his homestead, and that when he saw that, if he continued to lease it, it was liable to be seized by his creditors, he did not decide to resume the use of it with a *bona fide* intention of making it an appurtenance to his residence. We find no error in the judgment, and it is affirmed.

CONNOR v. CITY OF WAXAHACHIE.

(Supreme Court of Texas. Dec. 10, 1889.)

TAXATION—PROPERTY SUBJECT TO—ASSESSMENT.

1. An assessment is not invalidated by the fact that the property was added by the assessor to the inventory of the tax-payer's estate at the direction of the board of equalization.

2. Acts of two members of a board are valid, without co-operation of a third.

3. Credits are taxable at the place of residence of the owner, and not at the place of deposit.

Following Ferris v. Kemble, 12 S. W. Rep. 689.

Appeal from district court, Ellis county; ANSON RAINEY, Judge.

A. A. Kemble and J. W. Ferris, for appellant. Grace & Templeton, for appellee.

HENRY, J. This case is similar to the case of Ferris v. Kemble, 12 S. W. Rep. 689. The pleadings, statement of facts, and assignment of errors are the same in all essential particulars. In the two cases there are some slight differences in the facts, as follows, viz.: The item of credits in B. G. Connor's case is \$32,-

000, the tax on which is \$240. Connor was an officer in a bank, (vice-president,) and had a private desk in the bank building, and there made occasional loans, and transacted other private business. His notes were mostly taken there, but some at other places, and were mostly against non-residents of the city. He resided outside the city, and had his notes at his residence on January 1st, for the purpose of making up his books. His general occupation, if he had any, is not shown. For the reasons stated in the case of Ferris v. Kemble, (this day decided,) we reverse the judgment of the district court, and render judgment in favor of appellant for the perpetuation of the writ of injunction, and for all costs in this court and of the court below.

ANDERSON v. JACKSON.

(Supreme Court of Texas. Dec. 20, 1889.)

BOUNDARIES—ESTOPPEL—DEPOSITIONS.

1. Plaintiff's father, who conveyed the land to him as a gift, while owner caused the boundary line to be established and permanently marked, and defendant, while the line was so recognized, bought the adjoining tract, relying on such boundary, and made improvements, and occupied the land for many years without adverse claim by plaintiff. Held, that the latter was estopped to deny that such line is the true boundary.

2. It is not error to receive a deposition on the ground that the initial letter “T.” of a party's name was, in the style of the cause, given as “Y.” by the officer, where the judge in signing the bill of exceptions states that, on looking to the entire writing, it was clear that the letter was intended as the true initial.

Appeal from district court, Ellis county; ANSON RAINEY, Judge.

E. P. Anderson, for appellant. J. W. Ferris, for appellee.

STAYTON, C. J. Judgment having been rendered for defendant, any ruling in regard to what would have been the right of the parties as to costs, under the agreement made on the trial, had plaintiff recovered a judgment for any land, becomes unimportant. The real issue between the parties was one of boundary, and there is no complaint as to the charge of the court bearing on that matter, nor is it urged that the evidence was not sufficient to justify a finding that the true boundary line was as it was claimed to be by appellee. There was evidence tending to show that the father of appellant, who conveyed the land to him as a gift, while the owner, caused the line between the two tracts to be established and marked with permanent measurement, and that while the line was so recognized appellee bought the contiguous land, relying on the boundary thus established, after which he placed improvements on the land, and occupied for many years without adverse assertion of right by appellant. We think the facts proved justified the charge upon estoppel given. Objections were made to the depositions of a witness on the ground that one of the initial letters of the appellee's name, given in the style of the

cause, by the officer taking the deposition, was not correct. The first initial letter in appellee's name is "T.," and it was contended that the letter used by the officer was "Y.," but in signing the bill of exceptions the judge states that, looking to the entire writing of the officer, it was clear that the letter intended was that of the true initial. There is no error in the judgment, and it will be affirmed.

ANDERSON et al. v. GOODWIN.

(Supreme Court of Texas. Dec. 20, 1889.)

VEXATIOUS APPEAL.

Where appellants fail to prosecute their appeal, manifestly taken for delay, a 10 per cent. penalty may be added, though they suggest that they have paid the judgment since the transcript was filed.

Appeal from district court, Ellis county; ANSON RAINY, Judge.

W. L. Harding, for appellee.

STAYTON, C. J. This action was based on a promissory note executed by appellants, and the record contains neither statement of facts, bill of exceptions, nor assignment of errors. Appellants filed no transcript, but appellee has, and suggests delay. An inspection of the record shows no error in the proceedings which led to the judgment, nor in the judgment itself. Appellant Anderson has filed affidavits seeking to excuse his failure to prosecute his appeal, but these are controverted. It may be true that he has paid the judgment since the transcript was filed herein, but, if so, this is not shown by him in such way as to authorize this court to notice that fact. If, however, he has paid the judgment since the transcript was filed in this court, this does not relieve him from liability to damages caused by his appeal, which was manifestly for delay. The judgment will be affirmed, with 10 per cent. damages for delay. It is so ordered.

VAN SICKLE et al. v. CATLETT et al.

(Supreme Court of Texas. Dec. 18, 1889.)

TRESPASS TO TRY TITLE—EVIDENCE—DOCUMENTS.

1. Under Rev. St. Tex. art. 2252, providing that certified copies of the records of all public officers shall be admissible as evidence in all cases where the records themselves would be admissible, a certified copy of title from the general land-office is admissible, though the original is not produced or accounted for.

2. Rev. St. Tex. art. 2256, provides that certified copies of conveyances which were filed in the office of any alcalde or judge in Texas prior to the first Monday in February, 1837, shall be admissible in evidence, and have the same force and effect as the originals. Held, that a copy of an act of sale, dated September 5, 1835, certified by the clerk of the county of which the original was an archive, is admissible, though the original was not produced, nor its execution proved.

3. In trespass to try title it is not error for the court to refuse to charge as to the effect of a decree in partition of the land in controversy between plaintiffs' predecessors in title and third persons, where the decree does not make a parti-

tion, but leaves the parties as they were before the suit was brought.

4. Where plaintiffs in trespass to try title established their title by written muniments, except their relationship to the ancestor under whom they claimed, which was not disputed, a charge that they had shown a title which entitled them to recover the lands, unless defendants were entitled to hold under the statute of limitations, is proper.

5. Where it appears that defendant, in trespass to try title, who claims by adverse possession, took from a person who had no title to the land a deed to one B., who afterwards conveyed to defendant, the statute of limitations does not begin to run in defendant's favor until the deed to him from B. is recorded.

Appeal from district court, Rusk county; A. J. BOOTY, Judge.

Trespass to try title by J. E. Catlett and others against A. K. Van Sickle and others. Rev. St. Tex. art. 2252, provides that "copies of the records of all public officers and courts of this state, certified to under the hand and seal [if there be one] of the lawful possessor of such records, shall be admitted as evidence in all cases where the records themselves would be admissible;" and article 2256 provides that "copies of all conveyances and other instruments of writing between private individuals, which were filed in the office of any alcalde or judge in Texas previous to the first Monday in February, 1837, shall be admissible in evidence, and shall have the same force and effect as the originals thereof, provided such copies are certified under the hand and official seal of the officer with whom the originals are now deposited;" and article 3193 provides that "every suit to be instituted to recover real estate as against any person having peaceable and adverse possession thereof, cultivating, using, or enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued, and not afterwards." The plaintiffs had judgment, from which the defendants appealed.

Jones & Gould, for appellants. J. H. Turner, Buford & Hall, and D. Field, for appellees.

STAYTON, C. J. Appellees brought this action to recover 1,207½ acres of land, a part of the east half of a league of land granted to John Piburn, and deraign title thereto through inheritance from William G. Logan. The land was granted to Piburn on August 7, 1835, and, as evidence of the grant, appellees offered a certified copy from the general land-office of the original title, which was objected to, on the ground that the *testimonio* was better evidence, and its non-production not accounted for. The objection was properly overruled. Sheppard v. Harrison, 54 Tex. 96; Nicholson v. Horton, 23 Tex. 50; Rev. St. art. 2252. To show title in William G. Logan, appellees offered in evidence a certified copy of an act of sale, which was an archive of the office of county clerk for Nacogdoches county, the land lying in that municipality, when the act which bore

date September 5, 1835, was executed. That paper purported to convey the east half of the Piburn league to William G. Logan and J. K. Allen, and was objected to because the copy of the original, usually given to vendees, was not produced, or its execution proved. This objection was properly overruled. *Andrews v. Marshall*, 26 Tex. 216; *Cowan v. Williams*, 49 Tex. 395; *Broxson v. McDougal*, 63 Tex. 197; Rev. St. art. 2256. No objection was made to the form or manner of execution of the instrument.

Appellees offered in evidence what purports to be a decree of partition, by which the east half of the Piburn league was partitioned by the district court for Nacogdoches county between the estate of William G. Logan and one Cooke, in which the land in controversy was set apart to the former. It is not made to appear whether Cooke had acquired the interest of Allen in the land, and the decree was objected to on that ground, and on the further ground that it did not appear that Logan acquired Allen's interest, and, further, because the court had no jurisdiction to make partition, and because appellants were not made parties. The district court must be presumed to have had jurisdiction to make the partition, in the absence of some evidence showing to the contrary. Appellants do not show that they had any interest in the land through Logan, Allen, or any other person, and were neither necessary nor proper parties. If Cooke had not acquired the interest of Allen, the partition would not affect the rights of such person as has. If the partition was utterly invalid, it would not affect the right of the parties to this action; for appellees, through inheritance from William G. Logan, have such interest in the entire half league, if that be true, as would enable them to maintain this action against appellants, who seem to be only trespassers; and if the partition be valid, then appellees hold the land in controversy under it. Under the third and ninth assignments of error, appellants made this statement: "There was a decree in the district court of Smith county, dated October 9, 1877, to which the appellees and many others were parties, but to which the appellants were not parties, the object of which was the partition of the land in this suit; but it totally failed to set apart the land mentioned in it to any one." If this be true, appellants suffered no injury by the introduction of the decree, for the interest of appellees in that case would be an interest in the half league, which would entitle them to maintain this action, which they could not do if the land in controversy had been set apart in valid partition to some other person, or if it had, in several parcels, been set apart to appellees. There seems to have been an attempt to partition the land in controversy between appellees, through a decree of the district court of Wood county, but the decree does not make a partition, and leaves the parties, as they were before the suit was brought, tenants in common, and in no way affects their right to

maintain this action. It is immaterial whether the court gave or refused to give charges as to the effect of the decrees or proceedings looking to the partition of the land, for none of them in any manner affected the right of appellees to maintain this action, or gave or took away any right appellants showed.

The court, in effect, instructed the jury that appellees had shown title which entitled them to recover, unless appellants, or some of them, were entitled to hold under the statutes of limitations. All the evidence showing their right was by written muniments of title, except that which showed their relationship to William G. Logan, and there was no conflict in the evidence as to that matter, or suspicion thrown upon its truthfulness. In such case it was not error to give the charge complained of. It seems that Van Sickle bought the land in 1868 from one who had no title, and that for the purpose of placing it beyond the reach of his creditors he caused the deed to be made to B. F. Broyles, which was not recorded until July 29, 1880. Van Sickle claims to have had possession of the land while the title stood in the name of Broyles, who did not convey to him until March 4, 1881. The court instructed the jury, in effect, that the limitation of five years would not run in favor of Van Sickle until the record of the deed to him from Broyles. There was no error in this instruction. *Porter v. Chronister*, 58 Tex. 56; *Medlin v. Wilkins*, 60 Tex. 418. The Piburn grant was in part covered by a junior grant known as the "Berryhill tract." Of the part in conflict, appellants, or some of them, and those through whom they claim, had been in possession for many years, and this they held under the statutes of limitation of 10 years; but whether any of them had been in possession of the part of the Piburn grant not covered by the Berryhill was a matter as to which there was a conflict of evidence. The jury, upon this question, must have found that no such possession was held for five years after Van Sickle's deed was recorded. William G. Logan married in 1830, and died in 1835, his widow surviving, and it was not shown on the trial whether she was living or dead; and it is contended that the property was community property, which descended to her on the death of her husband. If this were true, appellees could not recover without showing that they had in some way acquired title from Mrs. Logan. At the time William G. Logan died, his wife did not inherit his estate. *Babb v. Carroll*, 21 Tex. 765. The presumption, however, from the facts proved is that the interest acquired in the land was community property, one-half of which belonged to the wife, and the other, under the laws in force at the time of his death, passed to his heirs. *Thompson v. Cragg*, 24 Tex. 582; *Veramendi v. Hutchins*, 48 Tex. 550. This, however, would not defeat the right of appellees to maintain this action. There is no error in the judgment, and it will be affirmed.

HURT v. MARSHALL et al.

(Supreme Court of Texas. Dec. 17, 1889.)

**GUARDIAN AND WARD—PARTIES—OBJECTIONS
WAIVED.**

1. In an action to foreclose a vendor's lien on land, it appeared that the notes retaining the lien were received by plaintiff from the vendor, who took them in part payment for the land conveyed to M. as guardian; that they recited they were given by M. as guardian. The other part of the consideration for the land was money belonging to M.'s wards, which she was not authorized to invest as required by Rev. St. Tex. arts. 2560-2563. *Held*, that the recitals in the notes were sufficient to put the plaintiff on inquiry as to the legality of the transaction, and that the wards were entitled to have the land subjected to the payment of their money, with interest, in preference to plaintiff's claim.

2. It is plaintiff's duty to bring the proper parties into court, and where he fails to do so he cannot complain of his own neglect.

Commissioners' decision. Appeal from district court, Red River county; E. D. McCLELLAN, Judge.

Sims & Wright, for appellant. *Chambers & Doak*, for appellees.

ACKER, P. J. Mary M. Marshall was guardian of her minor children, five in number, for each of whom she held the sum of \$125. On the 8th day of December, 1885, J. T. Cox conveyed a tract of land to Mary M. Marshall, E. P. Marshall, and "Mary M. Marshall, as guardian," for the consideration of \$800 in cash, which included the money belonging to the minors, and two notes, for \$350 each, signed "MARY M. MARSHALL, E. P. MARSHALL," and "MARY M. MARSHALL, Guardian," reciting that they were given for the purchase money of the land, and retaining the vendor's lien. The vendor, Cox, knew that the guardian was using the minor's money in purchasing the land. There was no order of court authorizing the guardian to invest the money of her wards in the land. After the maturity of one of the notes, appellant, John W. Hurt, advanced to the payee, Cox, \$318, and took both notes as collateral security. After the maturity of the other note he purchased both of them, and brought this suit for the amount due by both notes, and to foreclose the vendor's lien on the land. The minor defendants answered specially that their money, to the amount of \$125 each, had been invested by their guardian, without authority, in the land against which plaintiff sought to foreclose the vendor's lien, and asking that the land be first subjected to the payment of their money, with interest, and alleged that both Cox and plaintiff knew that their money had been invested in the land without authority. Plaintiff filed a general demurrer to this answer, which was overruled. Mary M. Marshall having died, judgment was rendered against E. P. Marshall for the amount due on the notes, foreclosing the vendor's lien on the land, directing that the land be sold, and the proceeds of sale applied first to the payment of the minors' money that had been invested in it, with interest from the date of the in-

vestment, and next to payment of plaintiff's judgment.

The first assignment of error is: "The court erred in overruling appellant's general demurrer to the answer of the minor defendants." Before a guardian can invest the money of the ward in real estate, he must file an application in writing to the court where the guardianship is pending, asking for an order authorizing him to do so, of which the same notice must be given as of an application to sell the land belonging to the ward. After notice the application must be acted on at a regular term of the court; and, if the court be satisfied that the investment will be beneficial to the ward, an order authorizing the same to be made must be entered upon the minutes. After the order is so entered, and the contract has been made by the guardian, he must report it, in writing, to the court, at the next regular term after it is made, when the court must inquire fully into the same; and, if satisfied that the investment will benefit the estate of the ward, the court may approve the contract, and authorize the guardian to pay over the money in compliance with it. Rev. St. arts. 2560-2563, inclusive. The last article cited concludes as follows: "But no money shall be paid out by the guardian, on any such contract, until such contract has been approved by the court, by an order to that effect entered upon the minutes of the court." The investment of the minors' money by the guardian was not only without authority, but in direct violation of law, and the minor defendants were in no way bound thereby. It appears that Cox knew at the time he received the money that it belonged to the minors, and that the guardian had no authority from the court to invest it. Such transactions being positively prohibited by the statute, it follows that the guardian was guilty of a palpable breach of trust in investing the money of her wards in the land; and, as the vendor knew that it was the money of the minors that he was receiving from the guardian, he is equally liable with the guardian for the breach of trust, and could not be heard to insist that he would be entitled to have his lien enforced against the land as a superior claim to that of the minor defendants for their money, which he had received from the guardian in violation of law. *Boisseau v. Boisseau*, 79 Va. 74. The notes recited that they were given for the purchase money of the land conveyed to the guardian, as such, jointly, with others, and were signed "MARY M. MARSHALL, Guardian." The plaintiff testified that he had no actual notice of the minors' interest when he acquired the notes, "but saw how the notes were signed." In Daniel's work on Negotiable Instruments, (volume 1, § 789,) it is said: "The holder must acquire the instrument without notice of fraud, defect of title, illegality of consideration, or other fact which impeaches its validity in his transferor's hands; and the word 'notice,' in this connection, signifies the same as 'knowledge.'

Knowledge of fraud or illegality impeaches the *bona fides* of the holder, or at least destroys the superiority of his title, and leaves him in the shoes of the transferor." Again, section 789a: "Actual notice of the defect is not required, where the evidence of the infirmity consists of matters apparent on the face of the instrument." Again, the same author says, (section 795a:) "Express notice is not indispensable. There may be evidence of the infirmity in the paper apparent on its face, or such indications as to put the purchaser upon inquiry; and in such cases constructive notice is held sufficient, upon the ground that, when a party is about to perform an act which he has reason to believe may affect the rights of third persons, an inquiry as to the facts is a moral duty, and diligence an act of justice." We think the recitation in the notes that they were given for the purchase money of the land conveyed to the guardian, and the signature of the guardian as such, were sufficient to put the plaintiff upon inquiry, by which he would have discovered the illegality of the transaction, in so far as the minors were concerned; and his rights are not superior to those of his transferor, Cox. We think the answer of the minor defendants set up a good defense to the action, in so far as their rights were sought to be affected, and that the court did not err in overruling the plaintiff's general demurrer thereto.

What we have said disposes of the other assignments, except the fifth, under which it is contended that Cox, the payee of the notes sued on, being dead, his heirs and personal representatives should have been made parties. If there were proper parties not before the court, it was plaintiff's duty to have brought them in by proper process; and, having failed to do so, we do not think he should be heard to complain of his own neglect. We are of opinion that the judgment of the district court is correct, and should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

DALTON *et al.* v. RAINY.

(Supreme Court of Texas. Dec. 20, 1889.)

PROMISSORY NOTES—MATURITY—ACTIONS—VENDOR'S LIEN—RIGHTS OF PURCHASERS—ORDER OF SALE.

1. The maker, after stating the amount due to date on his overdue note, promised to pay an increased rate of interest if the holder would "extend time for payment of this balance for one year." Held, that the extension was for one year from the date of the agreement.

2. Objection that suit was begun before maturity of the debt is cured by an amended original petition filed by leave of court after its maturity.

3. A direction that the order of sale to enforce a vendor's lien may issue to the county where suit was brought, or to the county where the land lies, as plaintiff's attorney may direct, is harmless error, as a sale in the county where the land does not lie, being a nullity, would not be directed by the

attorney, and, if it was, it would only occasion costs of issue and return of the writ, for which defendants could not be taxed.

4. Subsequent purchasers of land subject to a vendor's lien are not released from its operation by an extension of the time of payment granted to their vendors without their consent.

5. Judgment cannot be rendered against subsequent purchasers of land subject to a vendor's lien for attorney's fees stipulated for in notes given for the purchase price, where the deed reserving the lien contained no notice of such fees, nor for an increased rate of interest agreed upon by the original vendee without notice to them.

Appeal from district court, Hunt county; E. W. TERHUNE, Judge.

Action by S. D. Rainey against O. A. Dalton, Lucinda Dalton, and A. S. Simmons, to enforce vendor's lien. Defendants appeal.

Hood, Lanham & Stephens, for appellants. Montrose & Toombs and Grubbs & Hafner, for appellee.

HENRY, J. On the 10th day of March, 1883, A. S. Simmons purchased from appellee a tract of land lying in Palo Pinto county, for which appellee executed to him a deed. The consideration for the land was correctly recited in the deed, as follows: "Eight thousand one hundred and sixty-two dollars, payable as follows: One thousand dollars cash, and four promissory notes, bearing even date with this instrument, for seventeen hundred and ninety and 50-100 dollars each, with interest from date until March 10th, 1884, at the rate of eight per cent. per annum, and ten per cent. per annum after that date until paid; and to secure the payment of said notes a special vendor's lien is retained on the land herein conveyed,—the first note becoming due and payable on March 10th, 1884; the 2d, March the 10th, 1885; the 3d, March the 10th, 1886; and the 4th, March 10th, 1887." This deed contained no recital showing that said notes contained a stipulation for the payment of attorney's fees, and it was never recorded. The first two of the notes were paid off at maturity. This suit was brought for the collection of the two that matured last. The notes were made payable in Hunt county, Tex., and contained a promise to pay an attorney's fee of 10 per cent. on their amount, in case suit should be instituted for their collection. By some arrangement between Simmons and S. H. Milliken, the latter became the owner of an equitable interest of one-half in the land, but he seems never to have had a deed for it. On the 8th day of October, 1884, Simmons, joined by Milliken, sold the land to appellants for a cash consideration, and executed to them a general warranty deed, which was duly recorded, in Palo Pinto county, on the 26th day of December, 1884. The Daltons did not assume the discharge of the unpaid purchase money, but received from Simmons and Milliken their written obligation to protect them from loss on account of said notes. The Daltons lived on the land from the date of their purchase. Simmons and Milliken were solvent at the time when

they sold to the Daltons, and remained so until June, 1887, since when nothing could be made out of either of them. On May 30, 1887, Simmons executed to appellee a written statement of his indebtedness by reason of the note that matured on the 10th day of March, 1886, showing that, with interest calculated up to said date, and after allowing him all payments, he was, by said note, owing on said date a balance of \$1,838.25. Said statement was signed by Simmons, and contained a promise in the following words: "If you will extend time for payment of this balance for one year, I will and do hereby agree to pay twelve per cent. interest per annum on this amount from this date until paid." And on the same date Simmons executed to appellee the following instrument: "If you will extend for one year the note for \$1,790.-50, which was given by me on 10th March, 1883, and which matured on 10th March, 1887, I will, and hereby do, agree to pay interest, at the rate of 12 per cent. per annum, on amount of this note, and interest at maturity, from maturity until paid." Rainey instituted suit in the district court of Hunt county against Simmons and the Daltons to recover the amount of the notes and interest according to said agreements, and attorney's fees as stipulated for in the original notes, and for foreclosure of vendor's lien for all of said amounts. The original petition was filed on the 23d day of April, 1888. It was substituted by an amended original petition filed on the 15th day of January, 1889.

The judge filed his conclusions of law, in substance as follows: (1) That plaintiff is entitled to recover judgment against defendant Simmons for the amount due on the notes, the interest to be computed at the increased rate agreed upon, and for attorney's fees. (2) That the Daltons, having purchased the land in 1884, are not liable for interest beyond what was originally contracted for, and they are not liable for attorney's fees, because the deed to Simmons did not specify them as being part of the consideration for the land, and it is not shown that they had actual notice that the notes contained such a stipulation when they purchased and paid for the land. (3) That plaintiff is entitled to have a foreclosure of his vendor's lien as against the Daltons for the amount due upon the notes, estimating interest according to their face, and not including attorney's fees. A decree was rendered in pursuance of these conclusions, and an order of sale was directed to be issued to Hunt, or to Palo Pinto county, as the plaintiff's attorney might direct. Both parties assign errors.

The first error assigned by appellants is that the court erred in construing the written instruments, dated the 30th day of May, 1887, to mature 12 months from the 10th day of March, 1887, instead of 12 months from the date of said instruments, and therefore in not holding that this suit was commenced before the debts were due. We think appellants are correct with regard to the instru-

ment relating to the note originally made payable in 1886, and that it was not due when the original petition was filed; but, as we have stated, an amended original petition was filed on the 15th day of January, 1889, by leave of court, and, the cause of action having in the mean time accrued, the objection was cured. It would have been proper for the court to have taxed plaintiff with costs of amendment when it was allowed, but, in the absence of anything to show a demand for such a ruling, the one made must be treated as having been acquiesced in by the parties.

The direction that the order of sale might issue to either Hunt or Palo Pinto county is assigned as error. As the land lies in Palo Pinto county, the order of sale should have been directed to that county alone. We think the error an immaterial one. It does not follow that the land lying in Palo Pinto county may be sold in Hunt county, because the order of sale shall be issued to that county. Such a sale would be a nullity, notwithstanding the order of sale may be addressed to the sheriff of Hunt county by the judgment of the court. The judgment does not require the order of sale to be addressed to the sheriff of Hunt county unless the plaintiff's attorney shall so direct. As there could not be a lawful sale made under it in that county, it is not likely that plaintiff's attorney will direct it to be sent there. If it should be, we do not see that it can involve more than the additional cost of issuing the writ to that county, and its return; and, if defendants shall be taxed with such costs, they may be relieved from them by a motion to retax the costs.

Appellants contend that the contracts of extension operated to deprive them of their right to pay off the notes at their maturity, and before their own vendors became insolvent, and that, as they were made without their consent, they ought in equity to be held to have a good defense against the operation of the vendor's lien upon the land. It is well settled that a binding agreement for an extension of the time for payment made between the creditor and principal debtor will release a personal surety who did not consent to the extension. It is equally well settled that property mortgaged by a wife for the debt of her husband, or by any person to secure the debt of another, the mortgagor not being bound for the debt, or, if bound, only as a surety, will be treated as a surety, and released under the same circumstances that a personal surety would be. In this case a vendor's lien was expressly retained in the deed. Under repeated decisions of this court, the title remained in the appellee until the purchase money was paid. If the purchase money was not paid, he had, until he finally enforced his remedy by a decree of court, the right to elect whether he would treat the land as a security, or sue for its recovery. Whatever may be the rule in other cases with regard to property purchased from a mortgagor standing in the attitude of a surety to-

wards a creditor, who has notice of the purchase, in view of the equitable doctrine of subrogation, (about which we now express no opinion,) it cannot be held consistently with former decisions of this court, with regard to this character of title, that the land in controversy, at the date of the extension agreement, occupied towards appellee the position only of a surety, such as would release it because of such extension. The doctrine that releases a surety on account of dealings between the creditor and the principal debtor, applies only to those who are in that attitude at the date of such dealings.

Appellee complains because judgment foreclosing his lien was not entered for attorney's fees as specified in the notes, and for the increased rate of interest contracted for, after the Daltons purchased. It is a very clear proposition, that the debt for which the land purchased by the Daltons was bound could not be increased after their purchase by other parties without their consent. In the absence of notice to the contrary, they had the right to assume that the deed to their vendor correctly stated all of the unpaid consideration for which it was executed. There is nothing in the record to indicate that they had any information or notice to put them on inquiry, outside of the recitals of the deed. The judgment is affirmed.

NOYES *et al.* v. BROWN.

(*Supreme Court of Texas.* Dec. 17, 1889.)

INTERVENTION—GARNISHMENT—LIEN.

In the absence of statutes creating a specific lien by the service of a garnishment process, a creditor of plaintiff, by service of garnishment on defendant, acquires no such lien on the debt in suit as entitles him to intervene.

Commissioners' decision. Appeal from district court, Upshur county; FELIX J. MCCORD, Judge.

C. A. Culberson, for appellants. N. W. Finley, for appellee.

HOBBS, J. Whether the assignments are well taken depends, we think, upon the appellants' right to intervene in the suit of W. H. Brown v. E. & W. T. Lumber Co. Brown, the appellee here, had in June, 1888, sued the E. & W. T. Lumber Company upon a note for \$5,000, and caused an attachment to be levied upon the property of that company, which, it appears, was placed in the hands of a receiver, who sold the property, retaining the proceeds thereof. In October, 1888, Noyes & Fish intervened in this suit, averring in their petition that Brown was indebted to them in the sum of \$3,388.50, by reason of the execution of certain promissory notes described; that he had failed in business; that they had attached his property, subject to prior attachments; that Brown was insolvent, and his property insufficient to pay the prior attachments, etc.; that they had exhausted every effort to find other property, and had found none, save the debt of

\$5,000 due Brown by the lumber company; that they had caused a writ of garnishment to be served upon said company, to secure their debt against Brown. Allegeing, further, the indebtedness of the company to Brown; the suit brought by him against the company; the levy of the attachment therein on its property, now in the hands of a receiver; that the company is insolvent, and, unless the claim sued on by Brown is prosecuted to a judgment and collected in this suit, it will be lost to both Brown and appellants, etc. Such were the material averments contained in appellants' petition for intervention, filed in the suit of Brown against the lumber company. In November, 1888, the court-house of Upshur county was destroyed by fire. On January 11, 1889, appellants moved to substitute the papers lost by this fire. This motion was granted by the court on the 12th January, and at the same time an order was made allowing appellants to intervene, subject to exceptions, etc. The papers substituted on this motion consisted of Brown's petition against the lumber company, and the affidavit and bond for attachment made by him therein, and appellants' petition for intervention. On January 16, 1889, appellee, Brown, also moved to substitute the papers in his suit, also lost by fire. The motion was accompanied by certified copies of his petition, affidavit, and bond for attachment. This motion was concurred in by the lumber company and the receiver; but it was not verified by affidavit, and no notice was given appellants of the motion, nor was their petition for intervention substituted as one of the papers so lost; but the substituted papers were admitted by the lumber company and receiver to be correct. There was a material difference between the papers substituted by appellants and those by appellee. The details of this difference it is not essential to state, further than to say that those substituted by the latter afforded grounds for a motion to quash the attachment proceedings, which the former did not. On the day the motion to substitute, as well as the substitution of appellee, was made, the lumber company and the receiver moved to quash the attachment proceedings, which motion was sustained. On the day following, the appellant filed two motions,—one to set aside the order of substitution made on appellee's application, because they had no notice thereof; and one to vacate the order quashing the attachment, on the ground that the papers were not properly substituted, and because appellee had no interest in the suit, having transferred the same on October, 1888, and that subsequent to that time intervenors' rights attached. Brown conveyed all his right and interest in the suit to one Mings and Williams & Co., with intent to defraud appellants, and to defeat the attachment, etc. Brown moved to strike out the intervention of appellants on the ground that they had no interest in the subject-matter of the suit which gave them a right to intervene. Ap-

pellee also moved to dismiss the suit brought by him against the lumber company. These two motions were sustained, and appellants appealed. The motions of appellants referred to were not heard.

It is claimed by appellee that appellants were simple creditors of Brown, without lien, and that they had no interest in the subject-matter of the suit between appellee and the lumber company, which entitled them to intervene. Appellants, on the other hand, contend that the service of the garnishment on the lumber company to secure the debt due them from Brown constituted a specific lien on the debt which was the subject-matter of the suit between appellee and the lumber company. As the proceeding by garnishment is purely statutory, and is not known to the common law, it cannot be pushed in its operation beyond the statutory authority under which it is resorted to; and if a lien exists, as claimed by appellants, it must be derived from the statutes. Drake, *Attachm.* § 451a; *Bigelow v. Andress*, 31 Ill. 330. Our statute creates no such lien. This writ, it is said, "cannot be extended * * * beyond the mere point of reaching the defendant's effects in the garnishee's hands." Drake, *supra*, § 453b. Neither will it be aided by a court of equity. It will not be supplemented by injunction or other proceeding in equity, nor can a distinct proceeding, not authorized by statute, be based upon this writ, sued out to obtain security for the payment of the judgment which may be recovered against the garnishee. *Id.* § 454. See, also, *Arthur v. Batte*, 42 Tex. 159. Appellants having no such interest in the subject-matter of the suit between appellee, Brown, and the lumber company as entitled them to intervene, upon the grounds alleged in their petition, there was no error in dismissing their petition for intervention. It follows from this that they could not have been prejudiced by the substitution of the papers by appellee, Brown, without notice, nor by the judgment quashing the attachment, and dismissing the suit originally brought by appellee against the lumber company. There being no error in the record, we think the judgment should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

COOPER et al. v. LOUGHLIN et al.

(*Supreme Court of Texas*. Dec. 20, 1889.)

ADMINISTRATORS—TRUSTS—MORTGAGE—FORECLOSURE—PARTIES.

1. In order to enable plaintiff to raise the purchase price of land which he had agreed to buy of several co-tenants, they conveyed to one of their number under a parol trust to procure a loan of the required amount, and then to convey to plaintiff, subject to the mortgage. She procured the loan, but died before executing a deed to plaintiff. *Held*, that the land was subject to administration as her estate for the purpose of paying the mortgage debt, though all the other tenants, who were her heirs, had conveyed to plaintiff, also an heir, in accordance with the original agreement.

2. A mortgagee having no notice that the land was held under a parol trust may foreclose without joining the beneficiaries, and the purchaser will obtain good title, though having notice of such fact.

3. A party cannot be held to be affected with notice, though there is evidence from which it may be inferred, when there are no corresponding allegations in the pleadings.

4. Beneficiaries under a parol trust, being interested in and parties to the administration of the estate of the trustee instituted by the mortgagee for the purpose of obtaining payment of the mortgage debt, are sufficiently made parties to the foreclosure proceedings.

Appeal from district court, Ellis county; ANSON RAINEY, Judge.

Action by D. P. Loughlin, and his minor children, against H. B. Cooper and others. Defendants appeal.

Grace & Templeton, for appellants. *E. P. Anderson and Thompson & Clint*, for appellees.

HENRY, J. Appellees were plaintiffs in the district court. Their petition, in substance, charges that, in January, 1885, M. A. Loughlin, the wife of D. P. Loughlin, M. J. Tucker, the wife of A. W. Tucker, M. S. Worley, wife of C. R. Worley, D. W. Stewart, and W. G. Stewart, each owned an undivided one-fifth fee-simple estate in two tracts of land lying in Ellis county, and particularly described in the petition. It charges that, at the same date, Mrs. V. M. Stewart, the mother of said tenants in common, owned a life-estate in said lands. It avers that at said date all the other owners, including Mrs. Stewart, contracted with said D. P. Loughlin and wife to sell to them their interests in said land for the sum of \$1,900, to be divided equally between them, amounting to \$380 for each of them. It further charges that said Loughlins did not have the money to make said payments, wherefore it was agreed that, to enable them to borrow the money, all of the said owners, including the Loughlins and excluding Mrs. Stewart, would convey their interests in the land by a warranty deed to Mrs. Stewart, so that the required amount of money could be borrowed in her name, by her executing a mortgage upon the land to secure the payment of the debt, after which, and after the said sum should be obtained and distributed as above alleged, it was agreed that Mrs. Stewart should convey the land, subject to the mortgage, to the Loughlins. The petition alleges that the land was conveyed to Mrs. Stewart in pursuance of the agreement, and Loughlin negotiated a loan from J. B. Watkins & Co. for \$2,000, in the name of Mrs. Stewart, for which she mortgaged the land. It is alleged that the expenses of procuring the loan and paying some taxes against the land reduced the sum borrowed to \$1,805; whereupon it was agreed between the parties that the last-named sum should be divided between the vendors so that each should receive in money the sum of \$361, and accept the notes of the Loughlins for the balance due them. It is charged that Mrs. Stewart died without executing

the deed, and that subsequently to her death the Loughlins and the other parties made substantially the same agreement, in pursuance of which the Loughlins executed to the different parties their notes for the sums to which each was entitled, and all of the vendors executed and delivered to the Loughlins a deed for the lands, except that A. W. Tucker, the husband of one of the married vendors, was not present and did not sign the deed; that the deed was acknowledged by the parties who signed it, and was then left with the magistrate who took the acknowledgments for the purpose of being signed and acknowledged by said A. W. Tucker. It is alleged that the said A. W. Tucker refused to sign the deed, for a reason not connected with the original transaction, and that the deed was subsequently delivered by the magistrate to one of the vendors without the knowledge or consent of the Loughlins. Mrs. Loughlin died, leaving some minor children who are co-plaintiffs with their father in this suit. It is not alleged when the mortgage debt matured, nor that any part of it had been paid, otherwise than as hereinafter shown, nor that the mortgagee had any notice of the aforesaid transactions. The aforesaid allegations are supported by the evidence. The mortgage debt matured without being paid, and, administration upon the estate of V. M. Stewart having been opened, it was duly probated. The county court ordered the land to be sold for the payment of the debt. Appellants purchased it at the sale, and, the sale having been confirmed, it was conveyed to them by the administrator. The purchase money was paid, and, after discharging the mortgage debt there remains a balance of it in the hands of the administrator. The judge filed the following conclusions of law: (1) "At the death of V. M. Stewart, the absolute title to the land vested in plaintiffs, incumbered by the mortgage debt." (2) "The probate court had no jurisdiction of said land, and as defendant Cooper bought with notice of plaintiffs' interest in said land, he acquired no title to same." (3) "The funds of defendant Cooper having paid off the mortgage, he is entitled to a lien on the land according to the terms of said mortgage, and a foreclosure of same on said land." A decree was rendered in accordance with these conclusions.

The court erred in the first and second conclusions. The legal title did not vest in plaintiffs before the death of Mrs. Stewart, and to whatever extent it was conveyed to them after her death, it was subject to an administration of her estate. It is very clear that the legal title was vested in her charged with trusts, not shown by the deed, but existing in parol. These trusts were: *First*, to borrow \$2,000 in her own name, and secure its payment by a mortgage on the land, to be discharged by the Loughlins; and, *second*, that she would convey the land subject to the mortgage, or convey the equity of redemption to the Loughlins. This unques-

tionably vested in plaintiffs such an equitable interest in the land as to require that they should be made parties to a suit to foreclose the mortgage, brought by any person having notice of their rights. They had the right to defeat such foreclosure by showing that the debt had been paid, or by paying it then, or at any time before the land was sold. The objection to the maintenance of a suit to which they were not made parties would be that it deprived them of these substantial rights. If, however, the mortgage creditor had no notice of the parol trusts, it would be his right to proceed to a foreclosure of the mortgage without joining the unknown beneficiaries, and a purchaser, with or without notice, under such decree, would be protected. As the question in this case was whether the mortgagee, and not whether the purchaser under the mortgage, had notice, the conclusion of the court with regard to the effect of notice to Cooper was erroneous.

It would have been, as the record now presents this case, equally erroneous to find that the mortgagee had notice of the trusts in favor of the Loughlins, subject to which the legal title was held by Mrs. Stewart during her life, and by her heirs after her death, because, while there is in the record evidence that the mortgagee was affected with notice of such trusts, that evidence, not being in response to any allegation upon the subject, ought to have been disregarded. In the case of Hall v. Jackson, 8 Tex. 311, it is said that "facts not alleged, though proved, cannot constitute the basis of an adjudication." McKinney v. Fort, 10 Tex. 234; Denison v. League, 16 Tex. 408. In the case of Paul v. Perez, 7 Tex. 345, it is said: "The principle that the *allegata* must be broad enough to admit all the necessary proof, and that every material fact must be alleged, has been often declared by this court; first solemnly adjudicated in Mims v. Mitchell, 1 Tex. 443, and sustained by an unbroken train of decisions from that time down to the present. * * * And if there was proof without such *allegata*, it should be disregarded."

But aside from these considerations, and conceding that, under proper pleadings, the Loughlins would not be bound by a sale made under a judgment in a proceeding in which they had not been made parties, it must be still held that they were parties, and as such were bound by the proceedings had in the county court of Ellis county. At the time of these proceedings Mrs. Loughlin was dead, and plaintiffs, as her husband and children, were interested in the estate of Mrs. V. M. Stewart, and as parties to the probate proceedings had the right to be heard, and to prosecute appeals from the judgments rendered therein. The only right that they had, as we have suggested, with regard to a suit to foreclose the mortgage, was to show that the debt or the lien never existed, or that it had been paid in part or wholly; and, failing in either of said defenses, to have opportunity to discharge the debt before the prop-

erty was sold. Unquestionably, they could have asserted all of these rights, and have been fully protected in the county court. When Mrs. V. M. Stewart died, the legal title to the land was in her, coupled with an interest in it that it should be administered for the payment of a debt for which she was primarily bound. Title had been vested in her for the very purpose of paying the debt. When living she could have made the land contribute to that purpose. Upon her death, the proper way for her creditors to proceed to collect their claims against her was through an administration of her estate in the county court. The right of the creditor, and of her administrator, to subject the land by proper proceedings to the payment of the debt, cannot be held to be less than was her own right to do so during her life. The legal title to the land vested in her heirs upon her death, only as it does in all other cases. It descended to her heirs, subject to the administration proceedings. The conveyance of the land by all the other heirs to the Loughlins, after the death of their mother, did not at all affect the administration proceedings, even if such conveyance could be treated as complete without the joinder or consent of the husband of one of the married women. We conclude that, as the case is now presented by the record, independently of the question with regard to the pleadings, the county court had jurisdiction to order a sale of the land, and the title vested in appellants under said proceedings. Appellees ought to have judgment for so much of the proceeds of the sale as remained after the payment of the mortgage debt, and such costs of administration as strictly resulted from the proceedings to foreclose the mortgage. The judgment is reversed, and the cause is remanded.

GARDNER v. WATSON.

(Supreme Court of Texas. Feb. 4, 1890.)

GUARANTY OF OPEN ACCOUNT—CONTINUING GUARANTY—RELEASE.

1. Defendant's intestate agreed with plaintiff's firm to guaranty, to the amount of \$250, the account of G., who was about to go into business, provided they would allow G. credit to a like amount on his own responsibility; and some time afterwards, G. having in the mean time bought and paid for several times the amount of the guaranty, defendant's intestate executed another guaranty, agreeing to become G.'s surety to the amount of \$500, "instead of \$250, as heretofore." *Held*, that the agreement was a continuing guaranty.

2. The guarantor of an open account is released, where the creditor, without his consent, takes property from his debtor, which is credited on the debt, and a note for the balance, for a definite length of time, stipulating for a higher rate of interest, and secured by a transfer of choses in action; and the burden is on the creditor to show the guarantor's consent.

Appeal from district court, Freestone county.

A. G. Anderson and G. A. Bell, for appellant. L. G. Farrar and B. S. Gardner, for appellee.

GAINES, J. This suit was brought by appellee to recover of appellant, as administrator of the estate of L. D. Bradley, deceased, an alleged indebtedness, amounting to about the sum of \$1,000, besides interest. Upon the trial it was agreed between the parties, in effect, that the indebtedness accrued as is alleged in the petition, but that defendant was entitled to an offset of \$300. It was further stipulated that he was entitled to an additional offset of \$500, unless it should be determined upon the trial that defendant's intestate was indebted to plaintiff, as surviving partner of the firm of C. L. Watson & Bro., in the last-named sum, by reason of a contract of guaranty executed by Bradley to plaintiff to secure him in payment of \$500 of an indebtedness contracted by one Grayson. The question was whether Bradley's indebtedness to Watson, arising out of the guaranty, had been discharged or not. The facts in relation to that matter are as follows: Watson & Bro. were merchants, and Bradley and Grayson were brothers-in-law. Grayson, being about to enter into business as a retail merchant on a small scale, applied to Watson & Bro. for credit. Bradley agreed with Watson & Bro. that he would guaranty Grayson's account to the amount of \$250, provided they would extend him, upon his own responsibility, credit for a like amount. This occurred in November, 1881. The proposition was accepted, and the credit given. Grayson continued buying of Watson & Bro. during the remainder of the year 1881, the year 1882, and the early part of the year 1883. He made payments upon his account from time to time during this period, but never fully discharged his indebtedness. Watson & Bro. having declined to sell Grayson any more goods without additional security, on March 27, 1883, Bradley executed the following guaranty: "Groesbeck, Mch. 27th, 1883. Mess. C. L. Watson & Bro., Mexia—Gentlemen: I have to-day seen Charles E. Grayson, and, upon consulting with him, I am willing to become his security to the amount of \$500 worth of goods, instead of \$250, as heretofore; provided you extend to him a credit of \$500 worth of goods additional, on his own individual account or responsibility. Yours, truly, etc., [Signed] L. C. BRADLEY." The guaranty was accepted, and the credit extended, and Grayson continued to buy of the Watsons, and to make them partial payments, until about the 1st of January, 1885, when he failed. At the time he closed his business he was indebted to Watson & Bro. in the sum of \$1,618.40. Shortly after this date he transferred to them certain property, which they took upon account, and for which they gave him credit; and for the balance remaining, amounting to \$1,261, he executed to them his note, and transferred to them certain credits collaterally to secure its payment. From these Watson & Bro. collected the sum of \$306.42, for which they gave him credit. Grayson testified that he made the settlement with the

agent of Watson & Bro., and that he transferred the property and gave the security with the express agreement that Bradley was to be released. The plaintiff testified that when he sent the agent (who was only his book-keeper) to make the settlement, he instructed him not to release Bradley; and that, having heard subsequently that Grayson had stated that Bradley had been discharged, he asked him if he had made such a statement, and that he denied that he had ever done so. Grayson, on the other hand, testified that he had no such conversation with Watson. The court held that Bradley's liability upon his guaranty had never been discharged, and refused to allow defendant the \$500 offset against the indebtedness sued upon.

It is first claimed by appellant that Bradley's contract was not a continuing guaranty, and that, being bound only for one-half of the first \$1,000 credit extended after the execution of the contract, his liability was extinguished by the payment by Grayson of that amount. There is no especial rule by which we can determine whether a contract of guaranty is a continuing one or not. Guaranties, like other contracts, must be construed so as to give effect to the intention of the parties, and if, upon their face, the intention be doubtful, resort may be had to parol evidence of the situation and surroundings of the parties, in order to solve the difficulty. *Hotchkiss v. Barnes*, 34 Conn. 29; *Heffield v. Meadows*, L. R. 4 C. P. 595. If we were confined to the face of the guaranty now in question, it would be very difficult to determine whether it was intended to apply only to the first credit of \$500 extended to Grayson, and was exhausted when goods to that amount were taken up by him, or whether it was to continue in operation and extend to any subsequent purchases he might make, limited only by the amount intended to be secured. Taking the language alone, it would be easy to find precedents warranting a decision either way. See instances in *Brandt*, Sur. §§ 181-187. But when viewed in connection with the situation and the previous transactions between the parties, the question is not difficult of solution. In the first place, Grayson was attempting to carry on a mercantile business, and was almost wholly without capital or credit. It is hardly probable that a guaranty which was to be exhausted by the first extension of a credit to the amount of \$500 would be sufficient to accomplish the object that any of the parties had in view; that is to say, to enable Grayson to prosecute and to continue in his business. Then, again, the guaranty in question is not an original transaction. Its terms show that it is but an extension as to amount of a former contract. The face of the paper shows that the guarantor regarded the former contract as still existing. That contract had been executed more than a year, and secured a credit of \$250; and under it Grayson had bought goods to the amount of \$2,000, and

had paid Watson & Bro. the amount secured, several times over. If it had not been a continuing guaranty, it would have been exhausted when the first goods, to the amount of \$250, were sold upon its faith, and Bradley's liability would have been discharged when they were paid for. Yet the language of the promise is: "I am willing to become his security to the amount of \$500 worth of goods, instead of \$250, as heretofore;" clearly implying, we think, that the writing recognized his former obligation as a continuing one, and was intended to keep it in force, and to increase the amount. We think the court did not err in holding that the contract was intended as a continuing guaranty.

Was Bradley's liability discharged by the transaction between Grayson and Watson's agent? If we should be guided alone by the statement of facts, we should be inclined to answer that question in the affirmative. If, as Grayson testified, it was agreed between him and the agent that Bradley should be released, we think the transaction would have that effect, although the agent exceeded his powers in making that stipulation. In the transaction Grayson transferred to Watson property amounting to about \$300, and also notes and accounts from which his creditor realized \$300 more. Grayson had the right to transfer this property to Bradley directly, to secure him against loss on his guaranty. Hence we do not see why he did not have the right to direct the appropriation of any payment he might make to Watson to that part of his indebtedness, which was guarantied by Bradley. Although the agent of Watson may have had no authority to release Bradley, yet, if it were a fact that he and Grayson did so agree, the property transferred in the transaction ought to be deemed to be applied to the discharge of Bradley's indebtedness. The agreement would at least show a clear intention to make the appropriation, and, the debtor having the right to make the appropriation, it should be given effect, although the agent was not authorized to stipulate for Bradley's release. But the trial judge, in his conclusions of fact, did not find that any such agreement was ever made as was testified to by Grayson. It is not clear whether or not he intended to find the contrary. The court, however, did find that Grayson had never made the application of any payments to the discharge of Bradley's liability, and that the note executed by Bradley at the time of the settlement between him and Watson's agent "was not intended by the parties to discharge the obligation of L. D. Bradley." We infer from these findings that the court did not give full credit to Grayson's testimony. If Watson was to be believed, Grayson had made statements to him inconsistent with the idea that there had been any agreement with Watson's agent for the release of Bradley. Grayson denied that any such conversation had taken place. Still there is a conflict, and the finding of the judge against the existence of the agreement should perhaps

stand, if in fact he did so find. But, should we treat the case as if there had been no distinct finding upon the issue, appellant would not be placed in a better position. There was no request made for additional findings of fact upon this special issue, nor was there any exception to the conclusions of fact on the ground of incompleteness. When there is no finding upon an issue upon which the evidence is conflicting, the court below will be presumed to have arrived at that conclusion which is necessary to support the judgment. If, therefore, the conclusions filed by the judge should be construed as not embracing the issue in question, we should nevertheless be compelled to hold that he had found that the agreement was not in fact made. If there was no appropriation of the property turned over by Grayson to Watson's agent, to the payment of that part of the debt secured by Bradley, then Bradley was not discharged by the payment.

But closely connected with the question just discussed is another, which is presented by an assignment which in effect complains that the court erred in holding that Bradley was not discharged by Watson's taking Grayson's negotiable promissory note. Neither the pleadings nor the evidence very distinctly present the facts bearing upon this issue in the case. But in the conclusions of law the court held "that, in order to maintain a guarantor's claim of discharge from his obligation, there ought to be shown (1) an intention and actual discharge, or (2) some action or conduct on part of the guarantee whereby the condition of the guarantor was rendered worse." From this we infer that it was the opinion of the court that, in order for the guarantor to claim a discharge by reason of a valid contract for an extension of time entered into between the creditor and principal debtor, he must show that he has been actually injured by the extension. That such is not the law is well settled by the decisions of this court. *Lane v. Scott*, 57 Tex. 367; *Ryan v. Morton*, 65 Tex. 258. The cases cited involved the rights of sureties, but the principles announced apply with equal force to the case of guarantors. *Samuell v. Howarth*, 3 Mer. 272. The answer of the defendant states the facts of the extension of the contract by the execution of the note by Grayson, but fails to allege that the extension was granted without Bradley's consent. There was no evidence bearing upon that question. In a different case it might be an important inquiry whether the burden was not upon the defendant to allege and prove he did not assent to the new contract, in order to avail himself of its execution as a defense. But it is alleged in plaintiff's supplemental petition that the debt which was guaranteed (it being an open account for goods sold in previous years) was due in January, 1885, and that Grayson, after having transferred to plaintiff some property, the value of which was credited thereon, executed to him a note for the balance, including

the sum of \$500, for which Bradley had become liable as guarantor. The note, which was made a part of the petition, extended the debt five days, (including the days of grace,) and stipulated for a higher rate of interest, and was secured by a contemporaneous transfer of choses in action as collateral to secure its payment. The plaintiff also alleged, in effect, that the settlement was made and the transaction consummated at the instance of Bradley. According to these allegations, here was certainly a new contract. The length of time is unimportant, provided it be for a definite period, and there be a consideration to support the promise of extension. The promise to pay an increased rate of interest, and the transfer of the collaterals on the part of Grayson, were sufficient to make the new contract binding. The old contract and the new are materially different, and the latter extinguished the former. The amount for which Bradley had bound himself being embraced in the new agreement, he was bound upon that contract, if at all. He could not be bound by an agreement to which he had never assented, and therefore we think that, in order to hold him liable, it was incumbent upon plaintiff to allege and prove his consent. In *Lane v. Scott*, supra, in treating of the right of a surety to pay the debt on or after maturity, and then to proceed against his principal for indemnity, the court say: "This, however, he could not do, if, in the meanwhile, the creditor had made a binding agreement, varying in an essential particular the original contract. In such case the surety is not bound by that contract, for it has ceased to exist; nor by the new contract, for he is not a party to it." As the case is now presented to us, we think the liability of Bradley's estate depends upon the question whether he assented to the new contract or not. There being no evidence to show that he did assent, we think the judgment should be reversed; and, it being impossible to determine the question from the record before us, the cause will be remanded for a new trial.

HOWE v. HARDING.

(*Supreme Court of Texas*. Feb. 4, 1890.)

RAILROAD COMPANIES—RECEIVERS—PRE-EXISTING DEMANDS—ACTION.

Where a railroad company, in consideration of a right of way, contracts with the grantor for the erection of a tank on his land for its use, to be supplied with water from his spring, and agrees to pay him therefor, a lien to secure such payment exists on the earnings of the road in the hands of a receiver subsequently appointed, and an action for the breach of such contract will lie, and judgment may be rendered against the receiver, under Gen. Laws Tex. 1887, p. 121, which provides that all causes of action, when determined, existing against a corporation at the time of the appointment of a receiver, shall be paid out of the earnings of the corporation while in his hands, and the same shall be a lien on such earnings.

Appeal from district court, Polk county.

Goldthwaite & Ewing, for appellant.
James E. Hill, for appellee.

STAYTON, C. J. Appellee alleges that he made a contract with the Houston, East & West Texas Railway Company in 1880, whereby that company, in consideration of the grant of right of way across a tract of land owned by him, and other lands of which he had possession, control, and management, agreed to erect and maintain a water-tank on his land, to be supplied with water from an elevated spring thereon, which was to be used by the company, for which he was to be paid as much per month as the company should pay to any other person on its line for like privilege or service. He alleges that the tank was erected, pipe furnished by the company, at his expense, which was by himself laid from the spring to the tank, a distance of about 1,000 feet, and that he thus furnished the company with water necessary for its uses until July 11, 1885, at which time the railway went into the hands of appellant as receiver appointed by the district court for Harris county, who, since that time, has had exclusive control of all the property of the company, and has operated the road over the way granted as the consideration for the company's promise. He further alleges that appellant permitted the tank to remain and used water from the spring until July, 1887, when the tank was removed, and appellant ceased to use water, and refused from that time until this action was brought to pay therefor. It was alleged that other persons on the line, for similar water service, received \$50 per month. It appears from the evidence that two instruments were executed at the time the contract was made, both of which went into the possession of the railway company. Notice was given to produce them, but only one was produced, and the contents of the other was proved by oral testimony. The contract produced was one signed by and purporting to be made by Nancy S. James, and in the usual form conveyed the right of way over the land, and, as to consideration for the grant of way, contained the following language: "And, as a further consideration for said right of way, the company agrees to erect a tank on said premises, provided there be sufficient water, and contract with the above party, or her authorized agent, to keep the same supplied." The other paper was proved to evidence a contract in regard to tank, furnishing water, and compensation therefor, as alleged, and thereby the compensation was made payable to appellee. It was shown that in 1866 title to the entire tract of land, over which right of way was granted, was in Nancy S. James; but appellee was permitted, without objection, to state that she heard the contents read, and that it was made for his benefit, with her consent, the inference being that the promise was made directly to him, and that he had lived on the land, and been in actual possession, since 1854, claiming it; that his homestead of 200 acres was nearly 1,000 *varas* square, over which the road ran more than one mile circuitously, and that on this was the elevated spring and water-tank.

Miss James was shown to be a near relative, who had been a member of appellee's family for more than 50 years, and the inference from the evidence is that while title to a part of the land, or it may be to the whole, stood in her name, the beneficial interest therein was in appellee. There was a judgment in favor of appellee for water service under the contract from April 1, 1887, to December 20, 1888, amounting to \$662.

There is no complaint that the judgment is too large, but it is contended that, under the facts, no judgment whatever could be rendered against the receiver for the value of water service, as provided by the contract, after he ceased to use the water from the spring. The assignments presenting this question are as follows: "The court erred in its main charge to the jury, wherein it stated, in effect, that if the defendant railway company made with plaintiff the contract stated in the petition before the appointment of the receiver of the former, then this defendant, as receiver, was liable to the plaintiff upon said contract." "The court erred in instructing the jury, both in its main charge and in the special charge given at the request of plaintiff, to the effect that if, prior to the time defendant receiver was appointed, the railway company and plaintiff entered into a contract whereby, in consideration of plaintiff's conveyance of a right of way over plaintiff's land, the railway company agreed to pay plaintiff for supplying water to a tank on said right of way as much per month as was paid any other person for the same service at any other point on said railway, and that defendant receiver, after he took charge of said railway, used the right of way so conveyed in operating said railway, then that he was liable on said contract, and it was binding on him as receiver of said railway company." The proposition under these assignments is that "a receiver is not the representative of, nor in privity with, the company whose property he holds, but is the mere hand of the court appointing him; and the court cannot be bound to the continuance and fulfillment of the company's personal contracts, improvident and disastrous though they be, without destroying the court's independence and success in the management of the trust assumed, and creating a privity that the settled rules of law deny."

It is certainly true that courts have no power to create a privity which the law declares shall not exist, but it is a mistake to assume that a receiver empowered to take possession of, control, and operate a railway is in no sense the representative of the corporation that owns it. But this case does not call for a decision as to the extent of his representation, nor as to the circumstances under which his acts will be binding on the company whose property he controls. It is also erroneous to assert that a court appointing a receiver is under no obligation to continue in force, and in some cases to cause to be fulfilled, the personal contracts of the

company, though they may have been improvidently made. The continuance of the obligation of contracts is not dependent on the will or act of a court, nor can the court in any proper case refuse to execute them. It is true, however, that it is not any contract a company may have made which a court administering its property through a receiver will cause to be satisfied out of the funds subject to its control; for that must depend on the right to be paid out of the earnings or proceeds of the property in the hands of the court. This specific right may depend on the existence of a lien on the property secured by contract or operation of law, or, in the case of public agencies, such as railways, such specific right to compensation to be paid out of earnings of the business, and in some cases out of the proceeds of the *corpus* of the property, will arise; for parties holding liens on such property, knowing that it must continue to be used in the public business for which the corporation to which it belongs was created, must be understood to consent, when they ask that the property be placed in the hands of a receiver, that the costs of operating the business shall first be paid, even though resort to the *corpus* of the property be necessary to accomplish this.

The cases have gone so far as to hold property in the hands of a receiver liable for wages earned before his appointment; for debts contracted to other railway companies in the ordinary course of business; for expenses incurred in completing unfinished road, and making other permanent improvements; as well as for debts contracted for supplies before the appointment. If the receiver appointed to take possession of and operate a line of railway, part of which is held under lease by the company of whose property he is given control, does so, or if under like circumstances he takes possession of and uses cars which the company held under contract to purchase, it has been held that the rents, price of cars, or compensation for their use was properly directed to be paid out of earnings. The contract in question is not shown to have provided, in express terms, how long appellee should render water service, and be entitled to the agreed compensation therefor; but, as compensation to be paid for this service embraced the consideration for right of way, the obligation to make compensation must be held to have been intended by the parties to continue as long as the right for which it was to be paid is exercised, unless appellee should violate his part of the contract. Has appellee the specific right to be paid out of the earnings of the road, or a lien on the property in the hands of the receiver? If he has either, the action was properly brought against the receiver, though based on a contract made with the company before his appointment; for it may be asserted that an action against a receiver may be maintained when the creditor has a specific right to payment out of funds in his

hands. Under the rulings before referred to, we do not see how the liability of the receiver, or rather the earnings and property in his hands, can be held not subject to the claim of appellee. The contract on which appellee relies was valid and binding on the company now represented by appellant. He has used the right secured and existing only by reason of the contract on which appellee bases his claim. This was absolutely necessary to the operation of the road appellant was directed to operate, and the court which appointed him could not have intended that he should enjoy the benefit of the contract without assuming its burdens. If appellant, after making known to the court that appointed him that the contract proved had been made before his appointment, had asked that he be permitted to use the right of way, but that he be relieved from paying for it in accordance with the contract, that court would not, and legally could not, have given such permission without at the same time requiring appellant to make the compensation agreed upon for the right of way which the receiver necessarily had to use, or acquire another, to preserve the continuity of the line. The grant of right of way was on condition that it should be paid for, and without this never could vest absolutely, and no court could direct its receiver to hold and use this, and at the same time refuse to pay for it in accordance with the terms of the valid contract, through which alone possession was obtained and held. That contract, if carried out, would entitle appellee to payment from the earnings of the road as current expenses, if not from the proceeds of the *corpus* of the property, even if no lien existed to secure it. If this were not so, then the inquiry would arise whether a lien existed to secure compensation for the right of way. If so, appellee was entitled to judgment against the receiver, to be paid out of the earnings of the road or proceeds of sale of the property; for other lien creditors cannot be heard to claim that property which came into the hands of the debtor, incumbered with a lien for purchase money, should be subjected to the payment of their claims until appellee is paid. If appellee was the owner of the land over which the railway runs, under the uncontroverted facts, the company has the right to it, whether he signed the conveyance or not; but as compensation provided by the contract for water service was, in part at least, the consideration therefor, a lien on the right of way, though but an easement, exists to secure in so far its payment.

If title to the land was in Miss James, in fact or only apparently, then, under the facts, it cannot be denied that by her act the right of way vested in the company; but as the promise to pay the consideration therefor was made to appellee, with her consent, he has the same right to enforce any existing lien she would have had the promise been made to her. This has been recognized in those cases in which one person sells land to

another on credit, who under agreement of the parties executes notes to a third person for the purchase money. That a lien equivalent to the ordinary lien held by a vendor of land exists in case of grant of right of way, when the consideration for the grant is not paid, seems to be very generally recognized. That such a lien exists was held or recognized in the following English cases: *Walker v. Railway Co.*, L. R. 1 Eq. 195; *Munn v. Railway Co.*, L. R. 8 Eq. 653; *Ferrers v. Railway Co.*, L. R. 13 Eq. 524. In *Railway Co. v. Lewton*, 20 Ohio St. 401, it appeared that the land-owner by binding contract agreed to grant right of way, in consideration of which the company agreed to pay a sum of money at a future day, and to construct road crossings and cattle-guards on the owner's land. The company took possession, and the owner was held to have lien for unpaid purchase money as well as for damages for failure to construct, in accordance with the contract, and that the entire road was subject to sale to satisfy the sum due. In *Provolt v. Railroad Co.*, 57 Mo. 263, the right to lien for unpaid purchase money for right of way seems to have been recognized; and, while it was held that ejectment would not lie, the company having occupied the way without objection made on the ground that compensation was not first paid, the court declared that for the protection of the land-owner "a court of equity would unquestionably interfere, if necessary, and place the road in the hands of receivers, until the damages were paid from the earnings." That a lien existed was recognized in *Gillison v. Railroad Co.*, 7 S. C. 180, and in *McAulay v. Railroad Co.*, 33 Vt. 322, it was recognized that such a lien would exist, if not cut off by statute. Elementary writers generally recognize the existence of such a lien. 1 Redf. R. R. 246; *Mills, Em. Dom.* § 144; 1 Wood, Ry. Law, § 209, 2 Wood, Ry. Law, 785. The price agreed to be paid for water service was not solely the consideration for right of way, for it must be presumed that the water's flowing in a tank ready for the company's use was deemed of some value, and that the sum agreed to be paid was as compensation for both things. The right to recover from the receiver for right of way is clear, and no effort was made in the court below to have the compensation for each ascertained, nor is there any complaint here that the judgment is excessive. Under this state of facts, we are not called upon to decide whether, in the absence of statute, the contract, in so far as it was solely for the purpose of securing water, was one that the receiver would be bound to carry out; but as the contract was valid, and by the company, as well as by the receiver, for a long time deemed advantageous, or necessary to the operation of the railroad, it would seem that the receiver had no right to discontinue the use of the water without direction from the court so to do. Had application been made for leave to discontinue use of and payment for water, this, in good conscience, could not have been

granted, under the facts proved, without making compensation to appellee for expenditures, as well as such loss as he might otherwise sustain through breach of the contract. Under the statute, however, we think there can be no question. That provides that "all judgments, claims, or causes of action, when determined, existing against any corporation at the time of the appointment of a receiver, shall be paid out of the earnings of such corporation while in the hands of the receiver, to the exclusion of mortgage action, and the same shall be a lien on such earnings." Gen. Laws 1887, p. 121, § 15. That a claim and cause of action existed against the railroad company, under the contract sued on, we have already stated, and judgment might thereon have been properly rendered in this case against the company made a defendant. That this was not done does not defeat the right, and, the claim being one payable under the statute out of the earnings of the road, the judgment was properly rendered against the receiver. The direction in the judgment as to the manner of payment does not operate to the prejudice of the receiver or other creditors, and will be affirmed.

CLARK *et al.* v. COLLINS.

(Supreme Court of Texas. Feb. 4, 1890.)

VENDOR AND VENDEE—AGENCY—VENDOR'S LIEN—PLEADING.

1. One E. agreed to sell defendant land for a certain price, and to include an adjoining tract, belonging to plaintiff, if the same did not contain over five acres. E. negotiated with plaintiff's agent for the purchase of the tract, which on measurement was found to contain eighteen acres; and plaintiff made a deed to defendant, which he accepted, and which recited the purchase money as paid, though, unknown to plaintiff, her agent agreed that it should be paid at a future time. Afterwards, plaintiff brought a suit to have the deed canceled, which defendant resisted. Held, that E. was defendant's agent for the purchase of the land, and plaintiff had a vendor's lien thereon for the purchase money.

2. In suit to enforce such lien, defendant cannot obtain a judgment against E. by merely asking, in his answer, that he be made a party, and that he and plaintiff be required to settle the rights between themselves, without asking affirmative relief against him.

Error from district court, Houston county.

W. A. Stewart and *A. A. Aldrich*, for plaintiffs in error. *D. A. Nunn* and *S. A. Denny*, for defendant in error.

STAYTON, C. J. This action was brought by defendant in error against plaintiffs in error to recover from *W. V. Clark* \$117, and to foreclose vendor's lien on land sold by her to him. Under the findings and evidence, the facts are that Clark was bargaining to buy a tract of land from Edmiston which was offered for \$700, but Clark desired that a contiguous tract of land, belonging to Mrs. Collins, should be embraced in the purchase, and proposed to purchase the two tracts at price named. At the time negotiations were pending between Clark and Edmiston, it was sup-

posed that the strip of land owned by Mrs. Collins did not contain more than 5 acres, and Edmiston agreed, if the land could be bought from Mrs. Collins, that he would pay for as much as 5 acres, and sell the two tracts at price named. Edmiston saw the agent of Mrs. Collins, who agreed for her to sell the strip of land at \$6.50 per acre; and upon measurement it was found to contain 18 acres. Mrs. Collins executed a deed to Clark for the land, which recited a cash payment of \$117, which she supposed would be paid to her agent on delivery of the deed; but he made an agreement that this should be paid at a future time, of which agreement Mrs. Collins had no knowledge until some time after the deed was delivered. At the time the agreement was made between Edmiston and the agent of Mrs. Collins, the former stated that Clark would pay the price agreed upon, and a time when this should be done was fixed. After the land was measured, Clark informed Edmiston that he wanted it all, knowing the number of acres, and the deed was afterwards made. The deed was delivered to Clark, and since that was done he has asserted title to it, and resisted an action brought by Mrs. Collins for rescission, asked because the purchase money was not paid. Edmiston also conveyed to Clark the tract which he owned. Nothing passed between Mrs. Collins or her agent and Clark until some time after the conveyances were made; but when called on for the purchase money he refused to pay it, insisting that Edmiston had agreed to sell to him both tracts for \$700, which had been paid. Edmiston was not authorized to sell the land of Mrs. Collins, nor to receive the purchase money; and the court found that neither she nor her agent had done any act to induce Clark to believe that he was her agent. There was some conflict in the evidence as to what the agreement between Clark and Edmiston was, but the court found that the latter was the agent of the former, and that, having accepted the deed and retained the land, Clark was liable for the purchase money; and judgment was so entered, with foreclosure of vendor's lien. We are of opinion that the court's findings are sustained by the evidence, and that, under the facts shown, the contract made by Edmiston must be held binding on Clark. Mrs. Collins had not agreed to sell the land to Edmiston; and, if Clark was unwilling to abide by the agreement made by his agent, he should have consented to cancellation of deed made to him by Mrs. Collins when she sought this. Although there was no lien reserved in the deed made by Mrs. Collins, the purchase money not having been paid, the law gives a lien. There can be no pretense that the lien was waived.

Clark, in his answer, set up his version of the facts, and asked that Edmiston be made a party, and that "he and plaintiff be required to settle the rights between themselves, and that defendants be protected in their rights," but asked no relief against Edmiston. Ed-

miston answered, and stated that the facts were as found by the court, but expressed his willingness at all times to pay the purchase price for five acres of the land. The court held that Clark's pleadings did not authorize the rendition of any judgment against Edmiston, and it is claimed that this was error. If Clark desired any affirmative relief against Edmiston, he should have asked it, and, not having done so, cannot now be heard to complain. Pruitt bought from Clark with full knowledge of the claim and right of Mrs. Collins, and cannot complain of the enforcement of the lien in her favor. There is no error in the judgment, and it will be affirmed.

SABINE & E. T. Ry. Co. v. DEAN *et al.*

(Supreme Court of Texas. Feb. 11, 1890.)

ACCIDENTS TO PERSONS ON RAILROAD TRACK.

Plaintiff's husband was run over by some cars which were detached from the engine, and were being switched to a side track about 1,100 yards long, and nearly straight. On one side of the side track was a saw-mill, and on the other side, about eight feet from the track, was a file-room, in which deceased worked. His business required him to cross the track frequently, going from the file-room to the mill. A brakeman on the cars, which were running faster than usual, after looking ahead, and seeing no one on the track, turned his back. The station engine had been blown on the arrival of the train, but it was not blown during the time the switch was being made, and the noise from the mill would drown that of the cars. The view of the switch track was somewhat obscured from the door of the file-room, but not so to a person advanced a few feet from the door towards the side track. Deceased came out of the file-room, and could have seen the cars, if he had looked up the track, but he was looking towards the mill; and just as he stepped on the track he was run over. *Held*, that the evidence disclosed a case of contributory negligence.

Appeal from district court, Hardin county.
Perryman & Gillaspie, for appellant.
Douglass & Lanier and *Hal W. Greer*, for appellees.

HENRY, J. This suit was brought by the surviving widow and two children of John Dean to recover damages for his death, caused by his being run over by one of defendant's trains. The defendant pleaded a general denial, and contributory negligence. There was a judgment, on the verdict of a jury, for plaintiffs. The errors assigned relate only to the refusal of the court to grant defendant a new trial upon the following grounds: *First*, because there was no evidence showing negligence on the part of defendant; *second*, because the evidence shows that the death of the deceased was caused solely by his own want of care.

The statement of facts shows that the injury occurred on a switch that had been run out from defendant's road at a saw-mill for the purpose, mainly, of loading lumber from the mill. The switch was about 1,100 yards long, extending from the main track to a planing-mill, and was straight, except that it was slightly curved where it joined the main track. The saw-mill was situated about half

way from the main track to the planing-mill, and only a few feet from the track. On the opposite side of the switch from the mill was situated a building called the "file-room." This building was used for filing saws, and was situated seven or eight feet from the switch track. The deceased filed saws in this building. He and all of the other employes about the mill were in the constant habit of crossing and walking along the switch track. On the day that the injury occurred, the conductor had left the train, and some cars were being moved onto the side track. The cars that caused the injury had on them a brakeman. The engine had been detached from them, and they had been kicked onto the switch, the engine not following them. The brakeman, at the moment of the injury, had turned his back towards the direction that the detached cars were going, to draw the coupling-pin. He testified that before he turned for that purpose he was looking ahead, and saw no one on the track. The evidence is conflicting as to how fast the detached cars were being propelled. The weight of it was that the speed was much greater than was usual. The station engine had been blown on the arrival of the train, but had not been before, or during, the time the switch was being made. The mill machinery was making a louder noise than did the detached cars that were going past the mill. The work of the deceased, when he was filing saws, also made a noise which would drown that of the approaching cars. There is some evidence that the view of the switch track, in the direction of the main track from whence the detached cars were coming, was somewhat obscured to a person standing in the door of the file-house, but none that the view would be obscured to a person advanced a few feet from the door towards the switch track. Gordan, a witness for plaintiffs, testified: "I saw Mr. Dean when he was struck. He came out of the file-room. Just as he got on the rail, the cars struck him. Two cars passed over him. Mr. Dean came out of the file-room, going towards the mill, across the track, when the train struck him. Mr. Dean's business called him back and forward across the track. Other men cross it, also. They have to use it to get to the mill." "It is commonly used by the men passing backward and forward. Mr. Dean was coming right straight across the track. He could have seen the train if he had looked up the track after he got out of the house. The cars struck him just as he got to the fireman's rail. That is the rail nearest the file-room. The cars struck him just as he got his foot across the rail." "He was struck by the body of the car on his shoulder." "I don't know whether or not he had both feet over the rail. The cars were very close to him when he got on the track." "He could have seen the cars from the file-room door, if he had looked up. He was not looking that way. He was looking towards the mill." This evidence is not contradicted.

But one conclusion can be drawn from it; and that is that, when there was nothing to prevent his seeing his danger, he heedlessly stepped upon the track at the very moment of the collision. It may be conceded that the manner of propelling the cars was, under the circumstances, an act of negligence upon the part of the defendant; and yet it must be held that the deceased exercised no care, and that his own want of it was the immediate cause of his injury. There is nothing in the record to indicate that, after it became evident that he was going to place himself in a position of danger, it would have been possible for the defendant, by the use of any degree of skill or watchfulness, or by the use of any known appliances, to have stopped the cars in time to have saved him. The fact that, on account of the noise of the mill, he could not hear the approach of the cars, cannot be held to excuse him from the duty of using his eyes to see them. If anything, it emphasized that duty. We think the defense of contributory negligence was sustained by the evidence, without there being anything to the contrary. For the error of the court in overruling defendant's motion for a new trial, the judgment is reversed, and the cause remanded.

HEIDENHEIMER v. JOHNSTON *et al.*

(Supreme Court of Texas. Feb. 11, 1890.)

ATTACHMENT—FRAUD—EVIDENCE—JUDGMENT—INTEREST.

1. A verdict for each of several intervenors, and against plaintiff in attachment of a specific sum, with interest from a certain date, at a certain rate, is sufficiently intelligible to authorize a judgment on it.

2. Where persons holding liens by virtue of judgments rendered in a county court intervene in attachment in the district court against the same defendants, and attack it for fraud, the district court, having jurisdiction of the original action, will retain it to finally dispose of the matters in litigation, though the claims of some of the intervenors are less than the amount necessary to give the district court jurisdiction. Following *Petroleum v. Carpenter*, 53 Tex. 28.

3. Where a former judgment is sued on, interest accrued on it is properly added to the principal, and judgment rendered on the amount to bear interest from the date of the last judgment.

4. An entry against interest made by one who is not connected with the litigation, is admissible in evidence when it is offered after his death, if he could have been examined as to it in his life-time.

5. Evidence that the proceeds of attached property, deposited in a bank to the credit of plaintiff, were drawn out on plaintiff's check by his brother-in-law, who went with the money in the direction of the bank of B.; that soon afterwards defendants were seen to enter the bank of B. by a back door; that an entry in B.'s bank's books shows a deposit made on the same day to the credit of defendants; and that next day B.'s bank sent to plaintiff a sum which, added to defendants' deposit, amounts to the same sum less six cents, drawn on plaintiff's check by the brother-in-law,—is sufficient to support a finding that plaintiff's attachment was the result of collusion between plaintiff and defendants.

6. Where plaintiff in an attachment proceeding receives money which properly belongs to intervenors, he is chargeable with interest from the time he received it.

Appeal from district court, Washington county.

Isaac Heidenheimer sued out an attachment against Charles Wenar & Co., and afterwards other attachments were levied on the same goods by J. H. Johnston & Co. and others, who subsequently filed their petition of intervention in the suit between Heidenheimer and defendants, and attacked the attachment in that proceeding for fraud. From a judgment in favor of the intervenors, Heidenheimer appeals.

McLemore & Campbell, for appellant.
J. T. Swearingen and Beauregard Bryan, for appellees.

GAINES, J. This case was before this court at a former term, and the decision is reported in 65 Tex. 263. That report shows the nature of the litigation. After the cause was remanded, it came on for trial before a jury, and resulted in a verdict and judgment for the intervenors. From that judgment the plaintiff prosecutes this appeal. The appellant's third and fourth assignments of errors are presented together, and call in question the correctness of the judgment upon the following grounds: (1) Because there was no evidence, outside of the verdict, upon which the court should have acted in entering its judgment as was done; (2) the verdict of the jury was not responsive to the charge of the court, or to the issues submitted for their finding; (3) the district court had no jurisdiction over the matters of the debts between the intervenors and Charles Wenar & Co. and I. Heidenheimer, because a large number of claims against Charles Wenar & Co. were not within the jurisdiction, in the amounts, of the district court of Washington county, and were evidenced by judgment for the same in the county court of Washington county, and I. Heidenheimer was not a party to any suit wherein judgments were rendered in any court in favor of intervenors; (4) because the verdict is in favor of several intervenors, for the several amounts found, "and interest," whereas the judgment of the court is for entirely different sums, with interest from the date of the judgment as entered; (5) the verdict, as rendered, does not authorize the judgment on the theory or assumption by the court based on a calculation on facts not found to be true or otherwise by the jury in their verdict; (6) the court should have refused to receive the verdict, because the findings were not sufficient to enable the court to enter judgment on the verdict without looking into the evidence of the case, as was done, in order to render the judgment as entered.

We understand these objections to be: (1) that the verdict is not sufficiently intelligible to authorize a judgment upon it; (2) that the verdict is not responsive to the charge of the court; (3) the court had no jurisdiction to render judgment for any claim, the amount of which was less than \$500, exclusive of interest; and (4) that the judgment is not for the amounts found by the jury. The court, in its instructions, gave the jury

a form in which to return their verdict in the event they found in favor of intervenors; and the verdict returned into court is in a different form. This is no objection to the judgment, provided it is responsive to the issues presented, and its meaning is definite and clear. The verdict of the jury is as follows:

"Heidenheimer v. Chas. Wenar & Co. We, the jury, find for intervenors, and for the amounts as follows, respectively, as stated:

J. H. Johnston & Co., 8 per cent.....	\$1,500 00
8 per cent., March 7, 1885.	
A. H. Motley & Co.....	1,118 86
10 per cent., March 7, 1885.	
Delgado & Co.....	1,522 92
10 per cent., March 7, 1885.	
Huber Wook, Milling and L. S. Co.....	482 84
8 per cent., Feb. 4, 1885.	
Hartwell & Chambers.....	924 34
8 per cent., Feb. 4, 1885.	
F. X. Burton & Co.....	809 06
8 per cent., Feb. 4, 1885.	
D. H. Wilson & Co.....	658 66
8 per cent., Feb. 4, 1885.	
Stewart, Ralph & Co.....	457 95
8 per cent., Feb. 4, 1885.	
Brown Bros.....	294 75
8 per cent., Feb. 4, 1885.	

—And against the plaintiff, Isaac Heidenheimer, for said sums and interest. [Signed] W. E. WATSON, Foreman."

This verdict is sufficiently intelligible. It finds for each of intervenors, against the plaintiff, a specific sum, with interest from a certain date, at a certain rate, and is in effect the same verdict as it would have been if it had been returned in the form submitted by the court. It is a clear finding, and is responsive to the issues presented.

In regard to the question of jurisdiction, it is sufficient to say that the question was settled adversely to the contention of appellant in the case of *Peticolas v. Carpenter*, 53 Tex. 23.

The remaining objection to the judgment is that it is not for the amounts found by the verdict of the jury. This objection is not supported by the record. The intervenors pleaded and proved the amounts of their respective judgments against the defendants C. Wenar & Co., as well as the dates at which they were respectively rendered. The verdict is for the principal of each judgment, with interest from the date of its rendition. In the judgment in this suit, the interest on the former judgments from the date of their rendition is added to the principal, and the whole is made to bear interest from the date of the judgment now appealed from. The verdict clearly warranted the judgments for the amounts as rendered, and we think it in accordance with the universal practice that the interest already accrued at the date of the latter judgment should be treated as principal and be made to bear interest from that date.

After the former judgment in this case, and before the intervenors had sued out their writ of error, the plaintiff's attorney, in accordance with that judgment, received from the clerk of the court the fund in contro-

versy. The money, less \$1,000, the attorney deposited in bank to plaintiff's credit. It was subsequently drawn out upon plaintiff's check. In order to show that a large part of the money was paid to the defendants C. Wenar & Co., and thereby to establish collusion between them and plaintiff, the intervenors, during the trial, offered in evidence an entry in the books of the banking firm of Bassett & Bassett, which showed that, on the same day that plaintiff drew the sum of \$10,148.20 from the bank of Giddings & Giddings, the sum of \$5,200 was deposited in the bank of Bassett & Bassett to the credit of the defendants. The plaintiff objected to the introduction of the evidence, but the objection was overruled. There was no error in admitting the evidence. Some of the objections urged against its admission may have been proper, as applied to books of original entries, when offered for the purpose of establishing an account between the parties to a suit. The rules which apply to the introduction in evidence of books technically known as "shop-books" do not apply to the entry under consideration. The principles applicable to the two kinds of evidence are wholly different. Shop-books, consisting of entries in the interest of the party making them, are admitted, under certain conditions, because of the necessity of the case. On the other hand, an entry made by one not connected with the litigation is admissible in evidence when the fact stated is against his interest, and when the entry is offered after his death. "The principle to be drawn from the cases, * * * is that if a person have peculiar means of knowing a fact, and make a declaration of that fact, which is against his interest, it is clearly evidence after his death, if he could have been examined as to it in his life-time." *Higham v. Ridgway*, 10 East, 109, 2 Smith, Lead. Cas. 287, and notes. In connection with the entry offered in this case, it was proved that the entry was in the handwriting of one Roberson, a book-keeper for Bassett & Bassett, who was then dead, and also that Jefferson Bassett, of the firm of Bassett & Bassett, was also dead. It appeared in evidence that the other member of that firm was not dead, but no objection was made to the evidence upon that ground. It did not appear that he had any knowledge of the transaction; and, if such objection had been urged, it would probably have been shown that he took no part in the management of the business of the firm, and knew nothing of its details. The effect of the entry was to charge the firm of Bassett & Bassett with the sum of \$5,200, and was clearly against their interest. The evidence was relevant because it tended, in connection with the other evidence, to show that the plaintiff divided the very funds collected by him through their attachment in this case with the defendants in the suit.

Appellant also submits the following assignment of error: "The district judge erred in not setting aside the verdict as against the

evidence, because, without the unwarranted inferences to be drawn from evidence as contained in the entries as read from the books of Bassett & Bassett, there was no evidence upon which the jury could have found a verdict against Heidenheimer under the allegations of the intervenors in their pleadings; the truth being that the only evidence in support of the verdict was that these entries in Bassett & Bassett's books showed that Charles Wenar & Co. had received fifty-two hundred dollars from Ed. Newbouer, as the agent of I. Heidenheimer, through a deposit of that amount to the credit of Charles Wenar & Co. on the books of Bassett & Bassett, whereas the entries do not show that Ed. Newbouer made any such deposits, either for himself or as agent for Heidenheimer, and no such inference should have been allowed to be indulged by the jury from the evidence before them." We presume that the object of this assignment is to call in question the ruling of the court in refusing to set aside the verdict on the ground that it was not supported by the evidence. The evidence bearing upon the matter of the entries upon the books of Bassett & Bassett was, in brief: The clerk, after the former judgment, paid to the attorney of plaintiff, from the fund deposited in court as the proceeds of the sale under the plaintiff's attachment, \$11,148.20. The attorney placed this sum, less \$1,000, to the credit of plaintiff in the bank of Giddings & Giddings. This occurred on the 21st of March, 1885. On the 24th, about the close of banking hours, one Newbouer, a brother-in-law of plaintiff, presented the check of plaintiff, and drew out of the bank of Giddings & Giddings the entire deposit. He went with the money in the direction of the bank of Bassett & Bassett, but was not seen to enter. A short while afterward, however, the defendants were seen to enter that bank by the back door. The entries in question show a deposit in Bassett & Bassett's bank, on the same day, to the credit of Wenar & Co., of \$5,200. On the next day, Bassett & Bassett sent plaintiff, by express, the sum of \$4,948.26. The significance of the testimony is shown by the fact that the sum deposited to the credit of Wenar & Co., and the sum transmitted the next day to plaintiff, amount in the aggregate to the sum drawn out by Newbouer upon plaintiff's check, lacking only six cents, which deficiency is perhaps attributed to some clerical error. In the absence of some explanation, the mind cannot resist the conclusion that Newbouer, acting under plaintiff's instructions, paid \$5,200 of the fund realized by the attachment to the defendants in the writ, and caused the balance to be remitted to the plaintiff. The plaintiff was within the call of the court when the case was tried, and did not testify. The circumstance of the amount of the deposit and the money sent to plaintiff making the amount of the fund realized by the judgment remained unexplained. There were other circumstances tending to show that plaintiff's attachment was the result of

collusion between the plaintiff and the defendants, but they need not be detailed. The evidence was sufficient to support the verdict.

Appellant's fifth assignment of error is as follows: "The judgment of the court in favor of the several intervenors against I. Heidenheimer is based on the consideration that I. Heidenheimer wrongfully received the amount of his judgment against Charles Wenar & Co. from the registry of the court; and the said judgment is erroneous because there was no jurisdiction by the pleadings or evidence upon which the district court could have rendered any judgment in favor of any particular intervenors for their claim in the suit, as prosecuted, either against Charles Wenar & Co. or I. Heidenheimer. The jurisdiction of the district court was based alone on the liens claimed against the funds or property attached in the district court proceedings in favor of Heidenheimer against Charles Wenar & Co., wherein all of the said several intervenors were allowed to assert their liens in one petition as against the rights and claims of I. Heidenheimer as first attaching creditor, and not as creditors of Wenar & Co. or of Heidenheimer, for the purpose of recovery of their several judgments as herein allowed and had." This assignment is not supported by the record. After the former judgment was reversed, and the cause remanded, the intervenors filed a supplemental petition in the court below, alleging that the fund in court, the proceeds of the attachment, had been paid to plaintiff in pursuance of the erroneous judgment, and praying that they have judgments against him for the amount of their respective debts. Having wrongfully appropriated a fund to which intervenors were entitled for the satisfaction of their respective claims, and which was sufficient for that purpose, he became liable to them severally to the amount of their respective debts.

The attachments both of plaintiff and of Bassett & Bassett were levied before those of intervenors, and it was agreed between the parties that the validity of the writ of Bassett & Bassett should not be contested, and their right to the satisfaction of their debt from the fund in court should not be questioned. Appellant now complains that, after deducting from the fund the amount of the judgment of Bassett & Bassett, there was not enough remaining to satisfy the judgments of intervenors. A calculation, however, shows that this is not correct. When the money was drawn out by plaintiff's attorney, the fund in court was sufficient to have paid all the judgments except that of plaintiff, and to have left a small balance. If the first judgment had been what the verdict upon the trial shows it should have been, the intervenors then would have recovered their demands from the fund in court. By virtue of the erroneous judgment first rendered, the plaintiff has possessed himself of the fund, and has appropriated it to his own use. The judgment of this court, and the subsequent

judgment of the trial court, have determined that this appropriation was wrongful. The only question to be determined, as it seems to us, is whether or not the plaintiff was chargeable with interest upon the money he has received. If not, the fund is not sufficient to justify the judgment as rendered. If he had converted personal property belonging to another, or upon which another had a lien, the measure of damages for the wrong would have been the value of the property converted, with interest thereon, limited, however, in case of a lien, to the amount of the debt secured, together with its interest. When money has been wrongfully taken instead of property, we see no reason why the same rule should not apply. There is no error in the judgment, and it is affirmed.

DAGGETT v. WALLACE.

(Supreme Court of Texas. Dec. 10, 1889.)

BREACH OF MARRIAGE PROMISE—PLEADING—EVIDENCE—DAMAGES.

1. In an action for breach of promise of marriage, allegations that, by reason of the breach, plaintiff has lost an advantageous matrimonial connection, defendant being a man of wealth and social position, and that her affections have been disregarded and blighted, her feelings lacerated, and her spirits wounded, resulting in mental distress and humiliation, are sufficient to show damage.

2. In such case, seduction may be alleged and proved as an element of damage.

3. Testimony of plaintiff that "she became engaged to defendant" is not objectionable as stating conclusions, and not facts, where the other evidence shows beyond question that the promise of marriage was repeatedly made by defendant subsequent to the time referred to in plaintiff's statement.

4. A charge to find for defendant unless there was a mutual agreement to marry existing within a year of the commencement of the action, is sufficient, where defendant does not request an instruction that the promise must have been to be performed within a year.

5. Defendant was a man of wealth and social position, and had seduced plaintiff; and she alleged wounds and injuries to the affections, and mental distress and humiliation. *Held*, that a verdict for \$7,500 would not be set aside as excessive.

Commissioners' decision. Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

Action by Nancy A. Wallace against Thomas H. Daggett, for breach of promise of marriage. Defendant appeals.

B. P. Ayres, for appellant. R. L. Carlock and Stedman & Furman, for appellee.

HOBBY, J. The first assignment, complaining of the court's action in overruling defendant's general demurrer to the petition, we think, is without merit, and the statement under it, that the allegations of plaintiff do not show in what respect she was damaged by the alleged breach of defendant's promise of marriage, we do not think is supported by the record. It is directly averred that by reason of the breach of defendant's promise she has sustained the loss of an advantageous matrimonial connection, he being a man of wealth and social position, and

that, in addition thereto, her affections have been disregarded and blighted, her feelings lacerated, and her spirits wounded, resulting in mental distress and humiliation. That the plaintiff may recover upon these allegations is well settled. 3 *Suth. Dam.* 316, and cases cited.

We do not think an inspection of the petition will support the second assignment, to the effect that there was error in overruling defendant's exception to the second count in the petition, wherein damages were sought for plaintiff's seduction by defendant. The special exception referred to in this assignment assails that part of the petition which seeks to recover exemplary damages, and does not direct the court's attention to plaintiff's allegation with respect to defendant's seduction of her. There is no attempt in the petition to set up a distinct claim for damages on this ground, and the assignment is not, therefore, well taken. In so far as this exception may be considered as attacking the averment of seduction because it is not a proper element of actual damage in cases like the present, we think it is also untenable. The policy of the law, it seems, refuses to recognize the right of the female seduced to recover solely for the seduction, and this upon the principle that she is not entitled to satisfaction from her partner in crime for the supposed injury to which she consents. But, while this may not afford a separate and distinct ground of recovery, it is settled by the great majority of cases that, in an action for the breach of a promise of marriage, such seduction, if alleged and proved, is proper to be considered in estimating the damages. *Sherman v. Rawson*, 102 *Mass.* 399; 3 *Suth. Dam.* 316. The reason for this is that it cannot be fairly ascertained to what extent the plaintiff is damaged by the breach of the contract or promise, without considering the condition in which she is left by the defendant's conduct which is complained of. *Kelley v. Riley*, 106 *Mass.* 343.

The third assignment complains of the admission in evidence of the plaintiff's statement, that "about 6 months after Christmas of 1876, she became engaged to the defendant." This was objected to because the witness should have stated facts, and not conclusions as to conversations, but the conversations. If appellant's position be correct, that this was a statement of a conclusion, and not a fact, which we are not prepared to admit, still it does not appear to us to be a material error in the case; and it is especially unimportant, we think, in view of the evidence, independently of this statement, relative to the actual promise of marriage by defendant. The testimony shows, beyond question, that the promise was repeatedly made by the defendant subsequent to the time the witness says they became engaged. The last time the promise was made was in the fall of 1885, and the suit was brought in January, 1886.

The remaining assignments, except the

last, relate to the court's charge. The fourth assignment is that the court erred in charging the jury that if they believed that, "within one year prior to the commencement of the suit, the plaintiff was induced, by reason of such agreement, to submit to sexual intercourse with defendant, and that he begat her with child, you may consider that fact in estimating the damages." It is not necessary to say more with respect to this assignment than that it has been already disposed of by what has been said with reference to the allegations of seduction being admissible by way of aggravation in cases of this character. The charge is, in substance, that that fact, if proved, may be considered. As we have seen, this is in accord with the authorities on this subject.

The fifth and sixth assignments may be considered together. They complain of the following charge: "Unless you believe from the evidence that there was a mutual agreement between the plaintiff and defendant to marry each other, and that such agreement existed between them on or after the 2d day of January, 1885, you shall find for the defendant." The objection is that the court should have limited the jury to the consideration of an agreement and promise made to be performed within one year. If the jury believed the testimony of the plaintiff, they were fully authorized to find that the promise was made in November, 1885, and was to be performed by Christmas of that year. The petition was filed January, 1886. If the evidence raised any doubt as to whether the promise was to be performed within one year, the defendant should have requested a charge calling the jury's attention to that issue.

The remaining assignment is that the verdict is excessive. It is for \$7,500. No reason is assigned by appellant in support of this assignment. It is said that damages in this character of cases "rest largely in the discretion of the jury; and this discretion is seldom interfered with, and should be in no case except where it is manifest that the jury were influenced by prejudice, passion, or corruption." *Field, Dam.* § 534. "The loss from the disappointment of expectation, including the money value of a marriage which would have given a permanent home, and an advantageous establishment, to the plaintiff; wounds and injuries to the affections; and the mortification and distress of mind resulting to the plaintiff from the defendant's failure to fulfill his promise, are all to be taken into consideration in computing actual damages." *Field, Dam.* § 72. Eliminating from this case the element of seduction, we are not prepared to say that the elements last referred to are not sufficient to support the verdict. There is nothing in the record which would justify us in the conclusion that the verdict was anything but the honest and candid expression of the jury, based upon the facts before them. We can perceive no error in the record which in our opinion would authorize

a reversal of the judgment, and we think it should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment is affirmed.

HECK et al. v. MARTIN.

(Supreme Court of Texas. Dec. 10, 1889.)

JUSTICE OF THE PEACE—JUDGMENT—COLLATERAL ATTACK.

Where a judgment of a justice's court recites that citation was "returned duly executed on Bowman & Martin and Sam Kline, of Freeberg, Kline & Co.," and that "the parties appeared in person and by attorney," and it was adjudged that plaintiff recover of "defendants, J. A. Martin and R. M. Bowman, lately composing the firm of Bowman & Martin," it appears that the judgment was against each defendant individually, and in a collateral proceeding to recover the land of one defendant, sold on execution issued thereunder, it cannot be impeached by evidence that such defendant was not served with process, and did not appear.

Commissioners' decision. Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

Hunter, Stewart & Dunklin, for appellants. J. A. Holland, for appellee.

HOBBY, P. J. Action of trespass to try title in the usual form, brought by appellee, Martin, against Heck & Baker, appellants, to recover a lot described as lot No. 3, in block 32, in Jennings's south addition to the city of Fort Worth. Defendants answered by general demurrer, general denial, and plea of not guilty. There was judgment for the plaintiff, appellee, from which defendants, appellants, appeal. It was agreed that both parties claim under J. Q. Sandidge as a common source of title. On February 20, 1884, Sandidge executed a deed to appellee for the land, which was duly acknowledged and recorded. The appellants claim title to the lot in question under a deed from the sheriff of Tarrant county, dated the 5th day of January, 1886. On the 13th day of November judgment was rendered in justice's court of precinct No. 1, Tarrant county, Tex., in favor of J. G. Reily, and against the appellee J. A. Martin, and one R. M. Bowman, for the sum of \$103, with interest at 12 per cent. per annum and cost, including 10 per cent. attorney's fees. On the 25th day of November, 1886, an execution issued on said judgment against said J. A. Martin and R. M. Bowman, and was on the 28th day of said month levied on the lot in question as the property of said Martin; and on the 5th day of January, 1886, following, said lot was sold by the sheriff of Tarrant county, and bought by the appellants, Heck & Baker, who paid therefor the sum of \$400. The lot was the individual property of Martin, and had never been the partnership property of Bowman & Martin. The judgment of the justice's court, under which appellants, Heck & Baker, claim, is in due form, and regular upon

its face. It recites that citation was issued on the 26th day of September, 1885, returnable to the October term of said court, and that it was returned duly executed on Bowman & Martin, and Sam Kline, of Freeberg, Kline & Co. The judgment was rendered on the 13th day of November, 1885, and further recites: "This cause this day coming on to be heard, the parties appeared in person and by attorney, and announced ready for trial." After the formal part, the judgment further reads: "It is therefore considered and adjudged by the court that the plaintiff, John G. Reily, do have and recover of the defendants J. A. Martin and R. M. Bowman, lately composing the firm of Bowman & Martin, the sum of one hundred and three dollars, (\$103,) being principal and interest of the note sued on, together with 12 per cent. interest from date hereof, and all cost in this behalf expended, as well as the sum of \$10 attorney's fee stipulated in said note." It was agreed that an execution, issued on the judgment the 25th day of November, 1885, and that the same was in all things regular, and was against J. A. Martin and R. M. Bowman; that it was on the 28th day of November, 1885, levied on the lot in controversy, and on the first Tuesday in January, 1886, the said lot was sold under said execution, and was bought by Heck & Baker, appellants herein, who paid the purchase money therefor, and took the sheriff's deed to the same. Appellee, Martin, testified, over appellants' objections, that he was not served with citation in said case in the justice's court, and that he did not appear in said cause upon the trial thereof, either in person or by attorney, and that he did not authorize any one to appear for him, and that he did not know that said judgment was rendered against him until after said lot was sold. L. N. Cooper was permitted, over objections of appellants, to testify that he was attorney for J. G. Reily in the case of Reily v. Bowman & Martin, in the justice's court, and that it had been a long time ago, and he did not remember distinctly whether J. A. Martin was served with citation or not, but that it was his impression that he was not; that Martin was not represented in said cause by any attorney; to all of which evidence of the said Martin and Cooper appellants duly excepted. The original papers in the suit of J. G. Reily v. Bowman & Martin et al. were lost. First assignment: The court erred in admitting the evidence of Martin and Cooper to the effect that Martin had not been served with citation in the case of J. G. Reily v. Bowman & Martin et al., and did not in fact appear in said case at the trial in the justice's court, nor authorize or employ counsel to appear for him in said case, as is recited in the judgment in said case, because the evidence contradicts the judgment in said case, and is wholly inadmissible on the trial of a collateral action, as in this case, and shown by bill of exception herein filed. Second assignment of error: The finding and judgment of

Advised P. Kirby.

the court is in no wise supported by the evidence, but is wholly contrary to the evidence, in this: The judgment of the justice of the peace is regular on its face, and recites that the parties to the suit appeared in person and by attorneys, and is rendered against J. A. Martin and R. M. Bowman, lately composing the firm of Bowman & Martin, and is not exclusively a judgment against the firm, if it is at all. The agreement of counsel supplied the execution, which was lost. The sheriff's deed is regular, and in all respects good and perfect, and Heck & Baker were outside third parties, who bought, relying on the face of the record in that justice's court case, and the evidence in all respects established the title in Heck & Baker, and showed that it had been divested out of the plaintiff, and the entire evidence of plaintiff impeaches the justice's record, was wholly incompetent, and inadmissible, so that there is no evidence to support the judgment in this case.

The appellee contends that he was not attempting to attack the judgment of the justice's court, collaterally or otherwise, but claims that the judgment was not against him as an individual, but only as a member of the firm of Bowman & Martin; that the execution, by virtue of which the lot was sold, was issued against J. A. Martin and R. M. Bowman, lately composing the firm of Bowman & Martin, and not against appellee as an individual, but only as a member of the firm. The rule is well recognized in this state that justices' courts, being created by the constitution, are, within their defined limits, tribunals of general jurisdiction, and, as such, all reasonable presumptions should be indulged in support of the validity of their judgments. *Holmes v. Buckner*, 67 Tex. 107, 2 S. W. Rep. 452; *Williams v. Ball*, 52 Tex. 603. If the recitals in the record show affirmatively that the court was without jurisdiction as to the person or the subject matter, no such presumption would obtain, because it would contradict the judgment itself, and destroy the rule inhibiting its impeachment in a collateral proceeding. In determining whether such judgment affirmatively shows that there has been the service of citation authorizing it, the entire decree must be looked to and considered, and if that portion of it relating to the question discloses that there was no service, or service so defective that a judgment by default thereon would be void and not voidable, and the remainder of the record is silent, and there appears no finding of the court from which it may be inferred that there was other service or an appearance, then the absence of jurisdiction would affirmatively appear. "If, however, other parts of the record, and particularly the judgment, which is the final act of the court, entered upon full examination and consideration of all the necessary facts, should, as in the case now before us, recite the due service of process, or other facts which would give the court jurisdiction of the person, then this would be a case in

which it would affirmatively appear that the jurisdiction had in fact attached, and the general rule would apply that in a collateral proceeding this recital in the record imports absolute verity," and cannot be contradicted. *Treadway v. Eastburn*, 57 Tex. 209; *Freem. Judgm.* § 130. Applying these principles to the judgment in the case before us, there can be no doubt, we think, from its recitals, that it was against J. A. Martin and R. M. Bowman individually. That the service was on both Bowman & Martin is shown by the language that "the parties appeared in person and by attorney," together with the further recital that the citation was "returned duly executed on Bowman & Martin, and Sam Kline, of Freeberg, Kline & Co." If it had been served on Bowman only, it is reasonable to suppose that the return would have shown service on "Bowman, of the firm of Bowman & Martin," as in the case of "Sam Kline, of the firm of Freeberg, Kline & Co." Again, the recital of the recovery of the judgment, the final act of the court, was against "the defendant J. A. Martin and R. M. Bowman, lately composing the firm of Bowman & Martin." This, it is to be presumed, under the operation of the rule already stated, "was entered upon full consideration of all the facts before the court" necessary to authorize such act, and with the knowledge that the recovery was authorized by the service of process. The appellants were purchasers of the lot involved in this suit for a valuable consideration. They were strangers to the original judgment against appellee. They were required to look only to the judgment and execution. There was nothing upon the face of either showing the want of jurisdiction over the person of appellee. Four hundred dollars were paid by the appellants for the land, and there is no tender of any portion of the same by appellee. We do not think that it was competent, in this collateral proceeding, for the appellee to impeach or contradict the recitals in the judgment referred to. The court erred, we think, in permitting this to be done, by the admission of the evidence to which the appellants objected. There was error, also, in not rendering judgment for the appellants. The judgment should be reversed, and here rendered for appellants.

STAYTON, C. J. Report of the commission of appeal examined, their opinion adopted, and the judgment is reversed, and here rendered for appellants.

CAPPS *et al.* v. TERRY *et al.*

(Supreme Court of Texas. Dec. 10, 1889.)

LAND CERTIFICATES—TRANSFERS—EVIDENCE.

1. From the record of a transfer of a land certificate it appeared that, though it purported to be made and was acknowledged by M. E. T., the owner of the certificate transferred, it was signed by E. M. T. An agent of the transferee testified that when he corrected the field-notes of the survey for them he found the original certificate, and the

transfer from M. E. T. to his clients, on file in the general land-office: that he withdrew them to have them recorded in the county, and they were afterwards destroyed by the burning of the court-house. *Held*, that it was proper to submit to the jury the question whether M. E. T. ever executed a transfer of the certificate.

2. An unconditional certificate issued by a county board of land commissioners to the assignee of a conditional certificate, and the report of the board to the land department, are admissible in evidence in an action between the heirs of the assignor and the grantees of the assignee, without proof of the facts necessary to give the board jurisdiction to issue the certificate.

3. The evidence of this certificate, and report as to the person to whom the certificate was issued, cannot be overcome by the entry in the register required to be kept by the commissioner of claims of all certificates presented to him by the commissioner of the general land-office, which entry showed its issue to the assignor.

4. Where both defendants claim under the same chain of title, nearly to themselves, a certified copy of an instrument in that chain is admissible in favor of both, though the notice of its filing required by statute, and which was in the name of the defendants, was signed by the attorney of one of the defendants only.

5. *Hart. Dig. Tex. art. 2144*, authorizing the commissioner of the general land-office to issue a patent to an assignee, to whom the unconditional certificates had been issued, without an exhibition of the transfer, the issue of the patent to the assignor does not deprive the assignee of the land, but inures to his benefit.

Commissioners' decision. Appeal from district court, Tarrant county; R. E. PECKHAM, Judge.

Action by William Capps and others against F. V. Terry and others, for trespass to try title. Plaintiffs appeal from a judgment for defendants.

James S. Davis, for appellants. *J. C. Scott* and *N. A. Stedman*, for appellees.

COLLARD, J. Plaintiffs below, appellants in this court, claim to own the land in controversy, the William M. Robinson 640-acre survey, in Tarrant county, through the surviving wife and children of William M. Robinson. The defendants claim the land through one M. E. Trimble as assignee of Robinson. Original certificate, second class, No. 21, a conditional certificate, was issued to William M. Robinson on the 7th day of June, 1838, under immigration laws of the republic, of 1837. The board of land commissioners of Fayette county, by virtue of conditional certificate No. 21, on the 20th day of February, 1850, issued the unconditional certificate No. 241 to M. E. Trimble, assignee of William M. Robinson, reciting as follows: "It having been proved to the satisfaction of the board that said Robinson has complied with all the requisitions of the law granting land to immigrants." The certificate is indorsed: "Registered and approved Oct. the 7th, 1857. JAS. O. ILLINGSWORTH, Com. of Claims." Parties claiming under Trimble, and through whom defendants deraign title, had the certificate located; but when the patent issued, 9th of March, 1859, by virtue of certificate No. 241, the grant was made to William M. Robinson. On the trial, over plaintiffs' objections, defendants read in evidence a land-

office copy of the report of the board of land commissioners of Fayette county made to the department, showing the issuance of the unconditional certificate to Trimble as assignee, and the certificate itself issued to such assignee by virtue of conditional certificate No. 21.

By assignments of error, appellants complain of the ruling of the court in admitting the report and the certificate, "for the purpose of proving a right in Trimble," to either of the certificates, when defendants had not shown, or offered to show, "by competent testimony, that the board of land commissioners of Fayette county had obtained the jurisdiction and authority to issue the certificate to Trimble as assignee by prerequisite jurisdictional facts, viz.: The personal appearance of said M. E. Trimble before said board, and taking the oath required of him by law, and producing before the board the original conditional certificate No. 21, upon which the unconditional certificate was based, and proving its transfer to him, and further proving, by two respectable witnesses, that the facts deposed to by him were true." The act in force at the time the unconditional certificate was issued, required the applicant to produce to the board the conditional certificate, and that he should make all other proof required by law. Act March 1, 1848, § 1; *Hart. Dig. art. 2196*. Such other proof as was required by law is prescribed in the act of 1841, that the applicant should make oath of actual residence in the republic for three years prior to the application, and should further prove that the facts deposed to were true, by two respectable witnesses, who were required to be personally present before the board. *Id. arts. 2049-2051*. See act 1839, *Hart. Dig. art. 1924*; *Pasch. Dig. art. 4167*; also, act of 1837, *Hart. Dig. art. 1865*. The conditional certificate was granted June 7, 1838, under the act of 1837, and was consequently not affected by the act of 1839, which prohibited its alienation before issuance of unconditional certificate. *Graham v. Henry*, 17 Tex. 164. *Heirs of Newman v. Dallas*, 26 Tex. 643; *Merriweather v. Kennard*, 41 Tex. 281. But the assignments of error claim that it was indispensable that defendants, in this action, should have shown that the law of 1848 and 1841 was in all respects complied with by Trimble before the board of land commissioners had the authority to issue the unconditional certificate. This is incorrect. It would be presumed from their act in issuing the certificate that the law had been complied with. If the proceeding were direct, or on appeal from the decision of the board, it would be necessary, to establish the claimant's right, that the statute had been fully complied with. *Board v. Reily, Dallam. Dig. 381*; *Board v. Walling, Id. 524*; *Johns v. Republic, Id. 621*; *State v. Casinova*, 1 Tex. 401; *Grooms v. State, Id. 572*; *State v. Manchaca, Id. 586*; *Republic v. Skidmore*, 2 Tex. 261; *Norton v. Commissioner, Id. 357*; *Combs*

sioners v. Riley, 3 Tex. 237. In a collateral proceeding like the one before us, the act of the board, having authority, as a tribunal, under the statute, to grant such certificates, if not conclusive, would at least be presumed to be upon proof of all necessary facts, and upon compliance with the statute. *Walters v. Jewett*, 28 Tex. 192, 200; *Merriweather v. Kennard*, 41 Tex. 281; *Pitts v. Booth*, 15 Tex. 453. It would in this action be presumed that it was sufficiently proved to the board that Robinson was entitled, by residence in the republic and state, to the unconditional certificate, as recited in the certificate issued, and that Trimble produced to the board the conditional certificate No. 21, with a transfer to him by Robinson. In the case of *Merriweather v. Kennard*, the unconditional certificate contained the recital "that the conditional certificate had previously issued to Merriweather, and that Fordtran had presented it together with a transfer from Merriweather;" and the court said that, "the county commissioners having jurisdiction over the subject, the presumption, in the absence of proof to the contrary, is that it was properly exercised, and that the recital in the certificate that Fordtran presented the transfer from Merriweather is correct."

The case from which the above extract is taken is very much like the one at bar. In that case, as in this, the conditional certificate issued under the act of 1837, to-wit, on August 2, 1838, under the same section of the law, the unconditional certificate was issued to Fordtran as assignee of Merriweather, and the patent issued to Merriweather, then deceased, instead of his assignee. The court say: "The patent was issued in 1848, long after the death of Merriweather; and, though it issued to him, it inured to the benefit of Fordtran as his assignee." So in this case the patent was issued to William M. Robinson, but it inured to the benefit of Trimble, his assignee. The patent should have issued to Trimble as assignee. The statute (Hart. Dig. art. 2144) authorized the commissioner of the general land-office to issue patents to the assignee, when the certificates issued to an assignee, without an exhibition to the commissioner of transfer or transfers. The commissioner should have complied with this law; but his failure to do so will not deprive the vendees of Trimble of the land.

Plaintiffs read in evidence a land-office copy from the record of head-rights, registered by the commissioner of claims, and report of the commissioner of claims to the general land-office, containing the following: "No. 241. Date: 20th Feb., 1850. By whom issued: B. L'd Com., Fayette county. To whom issued: Robinson, Wm. M. Quantity in acres: 640. Unconditional. Class 2. Presented by J. A. & R. Green. Alleged owner: Catlett, Toombs & Crawford. Remarks: Approved Oct. 7, 1857." The office of commissioner of claims was created, by an act of the legislature, August 1, 1856. He was re-

quired, among other things, to keep a register of land certificates presented to him by the commissioner of the general land-office, just such a register as the one above. Pasch. Dig. 1112, and following. It is evident that this entry in the register of William M. Robinson as the person to whom the unconditional certificate No. 241 was issued was an error or mistake. Such a register cannot override the established fact that the certificate was issued to Trimble, assignee of William M. Robinson, as shown by the report of the board of land commissioners, and the certificate itself.

Defendants read in evidence, over plaintiff's objection, a certified copy from the record of deeds of Tarrant county, a transfer of certificate 241 to H. G. Catlett, R. Toombs, and G. W. Crawford, of date June 27, 1850, recorded in Tarrant county in 1871. It begins as follows, as appears from the record: "M. E. Trimble to (transfer) Catlett, Toombs & Crawford. State of Texas, County of Bexar. Know all men by these presents, that I, M. E. Trimble, assignee of Wm. M. Robinson." Then follows the transfer to H. G. Catlett, R. Toombs, and G. W. Crawford, with a general warranty. It is signed: "E. M. TRIMBLE." It is acknowledged, in due form, from M. E. Trimble, before James L. Trueheart, clerk of the county court of Bexar county, the next day after its date, to-wit, the 28th day of June, 1850. It is witnessed by George M. Martin. Plaintiffs assign the admission of the instrument as error, having objected to it as evidence because irrelevant, immaterial, and incompetent; it being from a different person to the one named in certificate No. 241; different from the one named in Twombly's answer; because there was no proof of the execution of the original instrument, of which the one offered in evidence purported to be a copy, the same appearing to have been improperly admitted to record; not acknowledged by the person who signed it; and because it was inadmissible in favor of F. V. Terry, because not filed by him, in the papers of the cause, three days before the trial, and notice of such filing given in writing to plaintiff; and because no evidence had been introduced to prove the identity of E. M. Trimble with M. E. Trimble. Plaintiff's attorney was served with notice of filing the certified copy more than three days before the trial. The notice was in the name of defendants, but was signed only by "Attorney for Defendant," who, the record shows, was attorney for defendant Twombly. Defendants offered the same chain of transfers all along down,—which was very lengthy,—nearly to themselves. Under these circumstances, we think the statute as to notice of filing three days before the trial was complied with in its spirit, if not in its letter, as to both defendants.

The main question is that the instrument was not signed by M. E. Trimble. J. P. Smith, who was a deputy district surveyor, and who made a corrected survey of the 640

acres in 1858, says he was attorney for Toombs; that he does not remember whether the certificate was in the name of M. E. or M. L. Trimble. Says the certificate and transfer were on file in the general land-office when he corrected the field-notes of the survey, and remained there until the transfer was by him withdrawn, in 1871, and that he had it recorded in Tarrant county for Catlett, Toombs, and Crawford. He says he was for a long time attorney in Tarrant county for Toombs, and "I know there was a conveyance from M. E. Trimble to Catlett, Toombs, and Crawford. * * * All I know about the unconditional certificate No. 241, and its transfer, is from the written transfer which I found on file in the land-office, from M. E. Trimble to R. Toombs, G. W. Crawford, and H. G. Catlett. I never heard any one say anything about it. All I know is from the transfer itself." He testified that the transfer, and several other original conveyances, were on file in a suit in Fort Worth when the court-house was destroyed by fire, in March, 1876, and were then burned. He corrected the survey in 1858, upon application of Robert Toombs, G. W. Crawford, and M. T. Johnson, executor of the will of H. G. Catlett. He held a power of attorney from H. B. Catlett, son of H. G. Catlett, and represented him, and had the original papers referred to in his possession, and knows they were destroyed by fire in 1876. There are many conveyances by the parties and their representatives, after the patent issued, down to a short time before this suit was brought,—the first one being by G. W. Crawford to William P. Crawford and Samuel W. Mays, on June the 7th, 1869, the next by H. B. Catlett, sole heir of H. G. Catlett, deceased, to the estate's interest, to Robert Toombs, W. P. Crawford, and Samuel W. Mays, on March 5, 1870,—which deeds were duly recorded in a few months after their execution. These deeds put the title to an undivided half of the land in Toombs, and the other half in W. P. Crawford and Samuel W. Mays. The next deed was by William P. Crawford, of his one-fourth interest, to Samuel W. Mays, James T. and Samuel E. Bothwell, April 2, 1875, recorded December 14, 1877, and so on, following with eight additional deeds of trust and conveyances, some of which left the title to all the land in Toombs, from whom, under mesne conveyances, defendant Twombly derails title; Toombs conveying directly to defendant Frank V. Terry by deed of date October 29, 1883. The latest deed was by Kennedy and wife to R. T. Twombly, father of defendant Frank L. Twombly, and bears date March 1, 1884. The widow and two daughters of Robinson paid no attention to the land, and made no claim to it, so far as the record shows, until the 17th day of April, 1884, when they appointed John T. Duncan their agent and attorney to act for them in recovering the land; to represent them in suits; and to sue, and do all things in the premises

he may deem proper to secure their interests; and to sell the lands, if he deemed expedient, agreeing to give him one-half of the land he might recover for them, he agreeing to pay all expenses in the matter, and they to be at no expense whatever. This power was filed for record October 29, 1886, and recorded in Tarrant county October 30, 1886. On October 26, 1886, Duncan, by virtue of the powers of attorney, conveyed the land to plaintiffs Capps and Canty by special warranty deed, for \$325, which deed was affirmed by the special warranty deed of Mrs. Robinson and her two daughters, heirs of W. M. Robinson, on the 5th November, 1886. The deeds were duly and promptly recorded. At the time of the trial, Mrs. Robinson, who had never married the second time, was 72 years old; one of the daughters, who was married to J. H. Cord, was aged 45 years; and the other, who was a Widow Ragsdale, was aged 42 years. Mrs. Robinson testified as follows: "There was no person to look after the land. I myself knew nothing about it. I had no money to spend, and did not care to take any chances, and made an agreement that I would be at no expense. I reckon it is so that I did not care to assume any risks for my chances of title. I did not know if we could recover the land, and therefore accepted the \$325, and for that reason gave a quitclaim deed." Mrs. Cord and Mrs. Ragsdale testified to substantially the same facts, adding that they first learned about having land in Tarrant county from Mr. Duncan, of La Grange, in 1884 or 1885. It was in proof that Robinson died in 1848, away from his family, in Kentucky or in Louisiana. He was married in Texas in 1841, and his family have resided in the state ever since.

The court instructed the jury substantially to find for plaintiffs under their claim from the heirs of Robinson, unless they should find otherwise under other following instructions, and then they were told that if they found, among other things, that M. E. Trimble executed the transfer to Toombs, Catlett, and Crawford, their verdict should be for defendants; thus making a recovery by defendants depend upon this fact. We think the court was correct in admitting the certified copy of the transfer together with other evidence tending to explain its apparent ambiguity. A proper subscription of an instrument is not always indispensable to its validity as a conveyance. In the case of *Newton v. Emerson*, 66 Tex. 143, the petition alleged that the grantor had a conveyancer to draft a deed of gift to his wife; that, without signing it, he appeared before the proper officer, and requested him to take his (the grantor's) acknowledgment, and file and record the instrument, all of which was done; and it was alleged that he afterwards said he had no property of his own. It was held that these facts showed an execution of the deed. The opinion in the case is abundantly supported by authority, and no doubt could exist as to the correctness of the rule. See *Willis v. Lewis*, 28 Tex. 186;

Fulshear v. Randon, 18 Tex. 277; *Rogers v. Kennard*, 54 Tex. 45; *Hollis v. Dashiell*, 52 Tex. 187; *Coddington v. Goddard*, 16 Gray, 444; *Nye v. Lowry*, 82 Ind. 320. The doctrine is clearly established that an acknowledgment will take the place of an absent signature, where the instrument on its face shows that it is the act of the person so acknowledging. In the case before us the owner's name is correctly stated in the body of the instrument, and in the acknowledgment, but the initials of the name are transposed in the signature subscribed, as appears from the copy. The authorities above cited will not explicitly justify the holding that the acknowledgment, agreeing with the name written in the body of the instrument, will prevail over the one subscribed, but they go far to show that such might be the case where there is a wholly irrelevant name subscribed, which might be equivalent to no name at all under some circumstances. At least it is clear that the law attaches great importance to the concurring facts of the maker's name in the face of the instrument and in the acknowledgment. The name "E. M. TRIMBLE" is subscribed to the copy of the instrument before us, while it is written "M. E. Trimble" in face of the deed, and in the acknowledgment. If the subscribed name cannot be treated as surplusage, or as no name at all, there being no such a man as E. M. Trimble, we at least see there is an ambiguity or a contradiction which may be explained, and which should be left to a jury to decide. The original instrument having been destroyed by fire, we must look to the copy, and such surrounding facts as were able to be proved. The matter being submitted to a jury, they concluded that the facts showed that M. E. Trimble signed the original instrument, upon the presumption, most probably, that the clerk, in copying the original into the record, committed the error of transposing the initials of the grantor's signature. All the facts are consistent with this conclusion, and inconsistent with the one that some person other than M. E. Trimble executed the instrument. He was the owner of the certificate. His name is written in the instrument as its maker. He acknowledged it, when he must have stated that he had executed it. It must have been delivered to the vendees, as we find it on file in the land-office, with the certificate, before the patent issued to evidence their title; and when the patent issued to W. M. Robinson, instead of to them, in 1859, their agent, in 1871, soon after the war, withdrew the transfer, and had it recorded in the county where the land lay to evidence the title of claimants under it. It was proved by the agent of these vendees, who withdrew the transfer from the land-office in 1871 to have it recorded, that he knew there was a transfer from M. E. Trimble to the very persons named as grantees in the copy; and he distinctly states in his testimony that such transfer was the one he withdrew from the general land-office. There are potent facts sus-

taining the assumption that M. E. Trimble executed the original transfer. There are other facts which raise a presumption that such was the case, in aid of the proof made, if it should be needed. Neither Trimble, nor any one in his name, has ever claimed the land. The heirs of Robinson had not claimed it until a short time before this suit was brought, and when they did they seemed to have but little confidence in it. They would risk no expense in the prosecution of it, and when they sold it to plaintiffs did so by quitclaim deeds; while, on the other hand, we find the grantees in the transfer having the field-notes corrected for patent in 1858, one of them selling in 1859, and from that time down to a short time before suit, they and their vendees having been asserting ownership of the land by various sales and purchases; Toombs at one time owning all the land, and then conveying again portions of it. We think the copy of the transfer was admissible in evidence over the objections made, and that it, together with other testimony offered, warranted the submission of the question by the court as to whether M. E. Trimble executed the original, and that there was ample evidence to sustain the verdict. *Gullett v. O'Connor*, 54 Tex. 408; *Lindsay v. Jaffray*, 55 Tex. 632, 633; *Cox v. Bray*, 28 Tex. 247.

The court admitted in evidence, over plaintiff's objections, a certified copy from the record of deeds of Tarrant county of a deed from H. B. Catlett, as sole heir and legatee of H. G. Catlett, of H. G. Catlett's interest in the land to Robert Toombs, W. P. Crawford, and Samuel W. Mays, of date March 5, 1870. The error assigned to the ruling is that the abstract of title filed by defendants described the deed as of date March 5, 1850, and that defendant Terry had not filed the copy three days before the trial, and served plaintiffs with written notice of the fact. The filing and notice of defendants' deeds and copies were made more than three days before the trial, and the list so filed included the copy above named. The notice was in the name of both defendants, though it was signed only by defendant Twombly's attorney as "Attorney for Defendant." We have already seen that this was a sufficient notice to plaintiffs of filing for the benefit of defendant Terry. There is no abstract of title in the record, unless the foregoing notice is to be so styled. In that notice the deed is described as of date March 5, 1870, and not 1850. If there has been an abstract of title in addition to the notice of filing, the notice giving the correct date of the deed would be sufficient to prevent surprise on the part of plaintiffs, in which case no injury was done, and the copy would be competent evidence. The original deed was destroyed by fire, and it was proved that H. B. Catlett was the sole heir of H. G. Catlett. The copy was properly admitted in evidence.

It is insisted by appellants that the court erred in admitting in evidence the answer

of witness J. P. Smith to the following interrogatory: "For whom did you make a survey of 640 acres of land in the name of Wm. M. Robinson? I see the surveyor's records show the survey appears to have been made for 'M. L.' Trimble, as assignee of Wm. M. Robinson. Please state whether it was for M. L. Trimble or M. E. Trimble; and, if any mistake occurred, please state how." Plaintiffs had objected to the interrogatory because the surveyor's records were not shown to be lost, and the records would be the best evidence, and for other reasons stated in the bill of exceptions. This assignment cannot be considered, because neither the assignment nor the bill of exceptions shows what the answer of the witness objected to was. The only reference to the subject of inquiry in Smith's testimony is that he does not remember particularly about the original certificate located on this land, whether it was in the name of M. E. or M. L. Trimble. So, if the answer had been disclosed in the bill of exceptions, there would still have been nothing for the court to consider. We find no reversible error in permitting the witness Smith to give a chain of the transfers, as he remembered them, from M. E. Trimble, and what land was conveyed. The witness gave a list of the successive conveyances, with the relations and kinships of some of the parties, down to the conveyance that vested the title to all the land in Robert Toombs. He stated that several of the original deeds had been destroyed by fire, and we see from the record that defendants introduced certified copies of them—all of them—to Toombs. They may have thought it was necessary to prove by such testimony outside of the record that Smith, who was at one time agent for the parties, had in his possession all of the originals, so as to account for their non-production. If, from any cause, the non-production of the originals had become a subject of inquiry, the evidence would have been legitimate. If, however, the proof was unnecessary, the error was harmless, because certified copies of them were admitted in evidence.

There was no error in the charge of the court in which the jury are instructed that the patent was issued by virtue of unconditional certificate No. 241, issued to M. E. Trimble, assignee of W. M. Robinson. Appellants complain of the charge because they say the patent does not show that the unconditional certificate issued to M. E. Trimble, assignee of W. M. Robinson. The patent recites that it was issued by virtue of unconditional certificate No. 241, issued by the board of land commissioners of Fayette county on the 20th day of February, 1850. The certificate itself, a copy of which was in evidence, and the report of the board to the land-office, both show that it was issued to M. E. Trimble, assignee of William M. Robinson. As before observed, the report of the commissioners of claims afterwards made in the form of a register could not affect or weaken the force of the fact shown by the certificate, and

the report of the board that issued it. The fact being indisputable, it was not error to charge it as a fact proved. It was not necessary to prove that Catlett, Toombs, and Crawford paid Trimble a valuable consideration for the unconditional certificate. The transfer recited that it was made for a valuable consideration. His deed of gift to them would have been sufficient. It is certain that the Robinsons did not own the land, notwithstanding the patent issued to their ancestor. The superior and the real title was in Trimble and his assignees, as shown by the certificate by virtue of which the patent issued. This is a sufficient answer to the assignment of error upon the subject.

Appellants say that defendants did not connect themselves with the Trimble title, which, being only the equitable title, cannot in such case be set up by them as an outstanding title. In reply, it may be simply said that defendants deraigned their title to all the land from M. E. Trimble, and not only connected themselves with his title, but proved that they were the owners of it. But, if the title had been outstanding in Trimble, would it have been an equitable title? *Adams v. House*, 61 Tex. 639.

We have already shown that it was not incumbent upon defendants to show a transfer from Robinson to Trimble, and that the act of the board of land commissioners in issuing the unconditional certificate to Trimble is conclusive, and that all the facts necessary to such decision by the board will be presumed, in the absence of proper opposing facts; and we need not again discuss the subject, as requested in the fifteenth assignment of error, which complains that the court erred in refusing to give instructions to the jury asked by plaintiffs to enforce their view of the law of such case. We may say the same as to the charge asked concerning the discrepancy as to the name of M. E. Trimble in the transfer to Toombs, Catlett, and Crawford. The views before expressed will show that the seventeenth and eighteenth assignments of errors are not well taken.

In reply to the nineteenth assignment of error, it is only necessary to say that the inadvertence of the clerk in entering up the judgment against defendants for costs, which was not corrected in the court below, is not such error as appellants can complain of. Finding no error upon the trial, in the rulings of the court, we conclude the judgment should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

HOUSTON, E. & W. T. RY. CO. v. FERGUSON
et al.

(*Supreme Court of Texas. March 19, 1889.*)

Commissioners' decision. Appeal from district court, Tyler county; W. H. FORD, Judge.

West & Chester, for appellant. *Douglass & Lanier*, for appellees.

ACKER, P. J. The pleadings and facts in this case are substantially the same as in the case of *Ferguson v. Railway Co.*, 73 Tex. 344, 11 S. W. Rep. 347, appealed from Hardin county, (decided at this term.) In this case, as in that, the trial judge filed no conclusions of fact and law, and we are without information as to the reason upon which the judgment rests. Under the same pleadings and facts, in the two cases, tried by different courts, precisely opposite results were reached. This is probably due to the fact that the evidence was conflicting upon the point whether or not the appellant in the other case, and the appellee L. T. Ferguson in this, had received his share of the proceeds of the sale of the land. His brother, who sold the land under the power of attorney, testified that he had received his full share of the purchase money, while he testified that he had not received any part of it. The court that tried the other case evidently believed the testimony of the brother, while the court that tried this case gave credit to the testimony of appellee L. T. Ferguson. In both cases the proof was clear that A. H. Ferguson, one of appellees here, had not received any part of the purchase money, and the judgment in both cases was in his favor. The way this case is presented here, we are of opinion that the judgment of the court below should be affirmed.

STAYTON, C. J. Report of commission of appeals examined; their opinion adopted; judgment affirmed.

WILLIS et al. v. MIKE et al.

(*Supreme Court of Texas*. Feb. 11, 1890.)

HOMESTEAD—LIENS.

Under Const. Tex., art. 16, § 50, which provides that "no mortgage, trust-deed, or other lien on the homestead shall ever be valid except for the purchase money therefor, or improvements made thereon," an attachment levied on the store-house of an insolvent debtor, used as a business homestead by him, does not create a lien on the property; and a conveyance of the property by the debtor to his son, though voluntary, passes title free from the claim of the creditor of the father.

Appeal from district court, Galveston county.

G. E. Mann and J. E. Butler, for appellants. J. D. Thomas, for appellees.

STAYTON, C. J. Appellants were creditors of D. Mike, who was insolvent. Other creditors had caused writs of attachment to be levied on a stock of goods which belonged to the debtor, and on December 26, 1887, appellants caused a writ of attachment to be levied on the store-house in which he had conducted a mercantile business. On January 21, 1888, D. Mike, joined by his wife, made a voluntary conveyance of the store-house to John Mike, their son; and the court found that, up to the time that conveyance

was made, D. Mike continued to use the house in such manner, and for such purpose, as to continue its exemption from forced sale. John Mike having been made a defendant, appellants, on final hearing, asserted lien through the levy of attachment, and asked its foreclosure; but this the court refused, on the ground that the levy of attachment gave no lien.

The constitution not only protects the homestead from forced sale, except for enumerated debts, but goes further, and declares that "no mortgage, trust-deed, or other lien on the homestead shall ever be valid except for the purchase money therefor, or improvements made thereon, as hereinbefore provided." In view of this broad declaration, it is clear that no lien can be acquired on any part of a homestead by the levy of a writ of attachment, or any other process. In this respect the law makes no difference between that part of the homestead used to shelter the family, and that part used as a place where the head of the family pursues his business. As said in *Inge v. Cain*, 65 Tex. 80: "We are of opinion that the clause quoted from the constitution of 1876 renders all liens upon the homestead, not expressly excepted, absolutely void, and that they are not vitalized by the divestiture of the homestead character. The owner is no longer tempted to stake the home of his family upon desperate or delusive ventures, and the creditor can no more gamble upon the chances of the cessation of the homestead use." The proposition asserted is that "court erred in finding that there could be no foreclosure of lien of attachment because the store-house levied on was homestead of D. Mike, because the facts show that after the levy, but before the decree, D. Mike abandoned the intention of using said store-house for business, or applying it, by sale, for the support of the family, and conveyed it by deed of gift to his son, John Mike, and John Mike was then made a party defendant to the attachment suit, and D. Mike had no interest in property at date of decree, and the homestead exemption of D. Mike abandoned by intention, shown in giving away the property pending the *de facto* levy, could not defeat the foreclosure of a levy that *eo instanti*, on abandonment, became a *de jure* levy." By whatever name we may designate the levy of a writ intended as a step in the course of procuring a forced sale of property, if the levy does not give lien, it cannot arise from the fact that the condition of the property as to use or ownership may be changed subsequently to the levy. The proposition assumes that the levy gave lien which could not be enforced so long as the property remained the homestead of the debtor, but that when it ceased so to be owned and used the lien might be enforced. The vice in the proposition consists in its assumption that the levy gave any lien whatever. This is a proceeding to foreclose lien claimed, which in so far must fail for want of lien. If appellants, as creditors, were in sit-

nation to attack the conveyance to John Mike, we do not see that they would have any standing. By the very act through which the property ceased to be homestead, it became the property of John Mike; and under the former decisions in this state we would be required to hold that the conveyance to him, though voluntary, passed title freed from all claim of creditors of his father. *Miller v. Menke*, 56 Tex. 559; *Inge v. Cain*, 65 Tex. 81; *Wood v. Chambers*, 20 Tex. 247; *Cox v. Shropshire*, 25 Tex. 113; *Martel v. Somers*, 26 Tex. 559; *Hargadene v. Whitfield*, 71 Tex. 488, 9 S. W. Rep. 475.

John Mike, not being a resident of the county in which this action was brought, by plea asserted his privilege to be sued in the county of his residence, which was overruled, and this ruling he assigns as error. In view of the disposition questions before referred to will require to be made of the case, it does not become necessary to pass on this assignment. There is no error in the judgment, and it will be affirmed.

HILL et al. v. KIMBALL.

(Supreme Court of Texas. Feb. 14, 1890.)

TRESPASS—INJURY BY FRIGHT—VENUE.

1. A petition which alleges that a tenant's wife was *excited*, and that, knowing that fact, and that excitement was likely to injure a woman in that condition, the landlord violently assaulted two negroes on the tenant's premises, and in his wife's presence, whereby she sustained a fright which eventually produced a miscarriage, and otherwise injured her health, states a cause of action.

2. The injury to the tenant's wife, being in the nature of a trespass on the case, is within Rev. St. Tex. art. 1198, which declares that no inhabitant of the state shall be sued out of the county of his domicile except, *inter alia*, for some crime or offense or "trespass" for which a civil action lies, in which case he may be sued in the county where it was committed, or where defendant is domiciled.

Appeal from district court, Freestone county.

J. D. Childs, for appellants. *Gammage & Gammage*, for appellee.

GAINES, J. The case presented by the petition in this suit being novel, we were in doubt whether the facts alleged showed a cause of action, and for that reason set aside the submission at the last term, and requested counsel to submit arguments upon that question. The question has been argued, and the cause again submitted for determination. The defendant below, the appellee here, interposed an exception to the petition on the ground that he was not sued in the county of his residence, and the exception was sustained by the court. The correctness of that ruling depends upon the nature of the suit. The petition alleges, in substance, that plaintiffs were husband and wife, and were in possession under a lease of a dwelling-house and land belonging to defendant; that the wife was well advanced in pregnancy, and that defendant knew the fact, and that he was also aware that any undue excitement to a lady in that condition was likely to produce a serious in-

jury to her health; that, notwithstanding these facts, he came to plaintiff's house, and in the yard, and in the immediate presence of the wife, he assaulted two negroes in a boisterous and violent manner, and that the assault was accompanied with profane language, and resulted in drawing blood. It was also alleged that defendant's conduct frightened Mrs. Hill, and brought on the pains of labor, and eventually produced a miscarriage, and otherwise seriously impaired her health.

After a very careful consideration of the petition, we are of opinion that its allegations show a cause of action. We have found no exact precedent for such an action, but that is no sufficient reason why an action should not be sustained. That a physical personal injury may be produced through a strong emotion of the mind there can be no doubt. The fact that it is more difficult to produce such an injury through the operation of the mind than by direct physical means affords no sufficient ground for refusing compensation, in an action at law, when the injury is intentionally or negligently inflicted. It may be more difficult to prove the connection between the alleged cause and the injury, but if it be proved, and the injury be the proximate result of the cause, we cannot say that a recovery should not be had. Probably an action will not lie when there is no injury except the suffering of the fright itself, but such is not the present case. Here, according to the allegations in the petition, the defendant has produced a bodily injury by means of that emotion, and it is for that injury that the recovery is sought. If, in his assault upon the negroes, he had discharged a missile at one of them, and it had missed its aim, and had struck Mrs. Hill, and produced a miscarriage, there is no doubt that he would be liable to an action; and it seems to us he should be equally held liable for the same result, produced by the same conduct, except that in the one case the means of the injury is a material substance, and in the other a mental emotion. Of course, since there is no intent to injure Mrs. Hill alleged, it will be a question for the jury to determine whether his conduct, so far as she was concerned, was negligent or not; that is to say, whether, under the circumstances, and with the lights before him, a reasonably prudent man would have anticipated the danger to her or not. We have been cited by counsel for appellee to the case of *Renner v. Canfield*, 36 Minn. 90, 30 N. W. Rep. 435. In that case the defendant shot a dog near the residence of the plaintiff, and thereby frightened his wife, and caused a miscarriage. The court say, in effect, that the charge to the jury was erroneous because the jury could, and would probably, infer from it that the defendant was liable in the action if the killing of the dog was unlawful; and for this error the judgment was reversed. In the opinion the court say: "If the acts of defendant amounted to any tort which, in any

possible view of the case, could be held to be the proximate cause of the injuries complained of, the gist of it must be negligence in shooting in such proximity to a human residence as might naturally and reasonably be anticipated to be liable to injure the inmates by fright or otherwise. We are by no means prepared to say that upon the evidence a verdict for plaintiff could be sustained even upon that ground. But it is enough, here, to say that the case was not submitted to the jury upon any such theory." It is evident that the court did not decide that no action would lie even under the peculiar facts of that case. Besides, it appeared in that case that the defendant was not aware of the proximity of the plaintiff's wife at the time he discharged the gun.

We think the petition in this case discloses a cause of action, and this conclusion brings us to the question originally presented in appellant's brief. The petition alleged the residence of defendant to be in Leon county, and that the injury was inflicted in Freestone county, in which the suit was brought. The defendant excepted to the petition because the action was not brought in the county of his residence. The ruling of the court in sustaining the petition is assigned as error. Our statutes provide that no person who is an inhabitant of the state shall be sued out of the county of his domicile except in certain cases. Rev. St. art. 1198. Among the exceptions is the following: "Where the foundation of the suit is some crime or offense or trespass for which a civil action in damages may lie, in which case the suit may be brought in the county where such crime or offense or trespass was committed, or in the county where the defendant has his domicile." Rev. St. art. 1198, (Exception 8.) It is clear that, unless the action in this case can be classed as a trespass within the meaning of that term in the provision quoted, the suit was improperly brought in Leon county; and the determination of that point depends upon the further question whether the word is used in that statute in its most restricted, or in a more enlarged, legal sense. In its widest significance, it means any violation of law. In its most restricted sense, it signifies an injury intentionally inflicted by force either upon the person or property of another. But it still has a signification in law much more narrow than the first, and more enlarged than the second, meaning given, and embraces all cases where injury is done to the person or to property, and is the indirect result of wrongful force. Abb. Law Dict. "Trespass." In this last sense the word would include injuries to persons or property which are the result of the negligence of the wrong-doer, and it seems to us more in consonance with the purpose and spirit of the exception to hold that it was in this sense that it intended that the word should be understood. We presume the exception was made in the interest of the injured party, and not of the wrong-doer; and we see no good reason why a distinction

should be made between an injury resulting from intentional violence and one resulting from negligence. It occurs to us the consideration which induced the exception was that one who had been injured in his person or his property by the willful or negligent conduct of another should not be driven to a distant forum to get a redress of his wrongs. In the case of *Ten Eyck v. Runk*, 31 N. J. Law, 428, the supreme court of New Jersey construed the word "trespass," as used in a statute of that state, as descriptive of a class of actions, and held that it was not used in its most restricted sense, but applied, also, to all actions of trespass on the case. See, also, *Cook v. Heitman*, 2 White & W. Civil Cas. 770. If, as we think, the word "trespass," in our statute, was intended to embrace, not only actions of trespass proper, as known to the common law, but also actions of trespass on the case, it is clear that the action in this case was properly brought in Freestone county, and that the court had jurisdiction over the person of the defendant.

We conclude that the court erred in sustaining the exception to the petition; and for this error the judgment is reversed, and the cause remanded.

GALVESTON OIL CO. v. THOMPSON.

(Supreme Court of Texas. Feb. 14, 1890.)

MASTER AND SERVANT—NEGLIGENCE—PROVINCE OF JURY—NEW TRIAL—APPEAL.

1. In an action by defendant's employe for injuries sustained in its oil-mill, the court instructed that plaintiff should recover if defendant's superintendent ordered him to perform a service not within the purview of his employment, which was dangerous, if the superintendent did not use due care therein, provided that plaintiff was injured while attempting, in the exercise of due care, to obey the command. *Held* not objectionable, on the ground that the jury were thereby prevented from considering plaintiff's recklessness in undertaking to obey the order, in the absence of a request by defendant for fuller instructions.

2. It is the province of the jury to determine whether plaintiff exercised the proper degree of care under the circumstances.

3. Where the two witnesses who testified as to whether plaintiff was acting under the superintendent's order when he was injured directly contradict each other, and the evidence that the superintendent was not at the mill when the order was alleged to have been given is uncertain and unreliable, a finding for plaintiff will not be disturbed on appeal.

4. A new trial will not be granted on the ground that plaintiff's witnesses did not testify correctly, where the affidavits only show ability to furnish cumulative evidence, and were considered by the trial court, together with the counter-affidavits, when it overruled the motion.

5. Where a minor sues by his next friend, a judgment for the minor, and not for the next friend, is proper, when the latter has not qualified as the guardian of the minor's estate.

Appeal from district court, Galveston county.

McLemore & Campbell, for appellant.
Wheeler & Rhodes, for appellee.

STAYTON, C. J. Appellee's version of the facts of this case is that he was employed to work as a sweeper on the lower floor of the

oil-mill, and while thus engaged he was directed by the superintendent to go aloft, and remove a scantling on the joists, or perhaps rafters, above. That, in obedience to the order, he ascended and walked along a narrow plank, to the place where he could reach the scantling, still above him, when, in an effort to remove it, his clothing was caught on a revolving shaft, around which he was drawn until his clothing, by which he was held, gave way, when he was thrown to the floor below, and in the accident greatly injured. He states that the immediate cause of his clothing being caught on the shaft was protruding bolts, with which the shafting was coupled, these being, as he and others state, unnecessarily and improperly so left, making it perilous for persons to work about or around the shaft. He further shows that the place to which he was directed to go was one not visited by employees, except the man whose business it was to oil the machinery. The superintendent denied that he directed appellee to remove the scantling; that there was any reason why it should be removed; or that he had any knowledge whatever of any intent on part of appellee to attempt to remove it; and there was some evidence tending to show that he had gone to his home at the time appellant claimed to have been directed to remove the scantling, but this evidence was of uncertain character. Before the accident occurred appellee had but one hand, and, at the time he was caught in the shafting, was standing with the side from which the hand was gone next to the shafting, which caught the loose sleeve. That the place to which appellee was directed to go was one of danger, and this greatly increased by the protruding bolts, the evidence tends strongly to show. Appellant offered evidence tending to show that the bolts used in coupling shafting did not protrude as claimed by appellee, but that, on the contrary, the coupling was in all respects carefully made, in the manner usual for such couplings.

The court, in effect, charged the jury that appellee would be entitled to recover, if the superintendent ordered him to perform a service not "within the purview of the plaintiff's employment," which was dangerous, if in this the superintendent did not use due care, provided appellee was injured while attempting, in the exercise of due care, to obey the command. It is urged that the court erred in the charge given, in that "thereby the jury were prevented from considering as a matter of defense the reckless disregard of plaintiff for his own security in undertaking to obey the order of defendant's agent." Such was not the effect of the charge. On the contrary, the jury were authorized, under the charge, if they believed the undertaking was one so obviously dangerous that a prudent person would not have attempted it, to find appellee guilty of contributory negligence, which they were informed would defeat his right to recover, notwithstanding the super-

intendent may have also been at fault. The charge may not have been so full as it might with propriety have been made, but was correct so far as it went, and, if appellant desired the proposition now insisted upon more clearly presented, a charge doing this should have been requested. No request was made, doubtless because counsel for appellant, at the time, believed that the issues were fairly and with sufficient fullness presented.

It is now urged that the evidence showed such negligence on the part of appellee as to preclude a recovery, and this proposition is based on the theory that it was negligence *per se* for appellee to stand, while attempting to take down the scantling, with his partially empty sleeve next to the revolving shafting. The jury were fully informed of the position of the scantling, the narrow standing to which appellee was confined, the position of the revolving shaft with reference to them, as well as the manner of its coupling; and it was for them to decide, under all the circumstances, whether appellee used such care as he ought to have used.

The third assignment is that "(3) the jury were not authorized by the evidence to disbelieve the testimony of defendant, and credit that of plaintiff, on the question as to whether this agent of defendant gave the order to plaintiff to take down the scantling while the machinery was in motion, or at any other time, because there was a direct conflict of testimony between the two, (and only witnesses as to the main question,) and all the internal evidence arising out of facts testified to by others showed the impossibility that such an order could or would have been given; the facts testified to being that there was no use to have done that which plaintiff says was ordered, and certainly no possible reason for having such thing done while the machinery was in operation, and all the evidence went to show that the defendant's agent was absent at the time of the alleged order." There was a direct conflict between the two witnesses, and that condition presents the very case in which this court is not authorized to set aside the finding of a jury, whose province it is to pass upon the credibility of witnesses, and the weight to be given to their testimony. It is not denied that appellee was injured while attempting to take down the scantling, and, when the jury came to consider what may be termed "internal evidence," they may have inquired, why did this one-handed sweeper, whose duties were on the lower floor, undertake, if unbidden, to perform an undesired service, which defendant says was exceedingly dangerous? Why should he undertake, unbidden, to interfere with the management of the superintendent, and to move the scantling which was placed where the management desired it to stay? It is not true that the evidence was all to the effect that the superintendent was not at the mill when the order to appellee is claimed to have been given, and that offered, in addition to the testimony

of the superintendent, was of the most uncertain and unreliable character,—evidence as to the superintendent's usual dinner hour, and hour of return to mill, and like testimony.

A motion for new trial was made, on the ground that witness for appellee had not made correct statements in regard to the bolts with which the shaft coupling was made, and in support of this affidavits were filed, which were met by counter-affidavits. That issue was made on the trial, and the affidavits only showed ability to furnish cumulative evidence of the same character as that offered. Besides, the court had the affidavits made for both parties before it when the motion was overruled.

Appellee is a minor who sues by next friend, and complaint is made because the judgment is in favor of the minor, and not in favor of the next friend. The judgment is correctly entered. *Railroad Co. v. Hewitt*, 67 Tex. 482, 8 S. W. Rep. 705. The next friend has no right to collect or receive the money, unless he shall qualify as guardian of the estate of the minor, though he subjects himself to liability for costs. There is no error in the judgment, and it will be affirmed.

GALVESTON, H. & S. A. RY. CO. v. GARRETT.

(*Supreme Court of Texas*. March 12, 1889.)¹

MASTER AND SERVANT—DEFECTIVE APPLIANCES.

In an action against a railroad company for personal injuries received by a brakeman while coupling a box-car to a locomotive, it appeared that the locomotive was intended for use on passenger trains, and that it had a coupling apparatus known as a "goose-neck," which is useless on freight trains, and, according to plaintiff's evidence, very dangerous. Plaintiff, who had been in defendant's employ some months, testified that he had always worked with the usual freight train locomotives; that he did not know of the use on freight trains of locomotives having this appliance; that this particular locomotive was sent out of the round-house without warning; and that he undertook to couple it to the box-car in the usual way, when he received the injuries complained of. *Held* that, though defendant's evidence showed that plaintiff had been notified of the goose-neck before he attempted to make the coupling, a finding by the jury that defendant was negligent in using the engine without warning plaintiff of the increased hazard arising from the goose-neck attachment would not be set aside.

Commissioners' decision. Appeal from district court, Harris county; *JAMES MASTERSON*, Judge.

Action by W. A. Garrett against the Galveston, Harrisburgh & San Antonio Railway Company for personal injuries. Plaintiff, who was a brakeman in defendant's employ, had his hand mashed in coupling a box-car to a locomotive. There was a verdict of \$3,500 in his favor, and defendant appeals.

W. N. Shaw, for appellant. *Goldthwaite & Ewing*, for appellee.

COLLARD, J. There is an implied contract on the part of a railway company to furnish its employees reasonably safe and suitable machinery,—not the best and most improved,

but such as is reasonably safe and adapted to the work to be performed. It is bound to ordinary care in this respect. *Beach, Contrib. Neg.* §§ 124, 125. If the company by negligence fail to furnish such machinery and appliances, by reason of which its employe in the discharge of his duty, ignorant of the defect, and not chargeable with constructive notice of it, and at the time exercising due care, is injured, the company would be liable. If the employe does not know of the defect, and could not have ascertained it by ordinary care, and the company does know of it, or is under the circumstances chargeable with such knowledge, it is required to warn the servant. Authorities at close of the opinion. The law is the same where there is any superadded risk not usual to the employment.

The plaintiff was a brakeman on freight trains of defendant, had been so six or seven months, when he was injured while coupling a box-car to a locomotive. He engaged to serve as a brakeman on a freight train. The locomotive in use at the time was intended for a passenger train having a coupling apparatus with an attachment commonly called a "goose-neck," which, when used on freight trains, was a useless attachment, and, according to plaintiff's evidence, was very dangerous to the employe in the act of coupling. Defendant had several of these locomotives, equipped with this attachment, on the division of the road where plaintiff was employed, and some without it, provided with the ordinary coupling apparatus used on freight train locomotives; some of defendant's witnesses testifying to as many as five, others to only three, and plaintiff's witnesses not more than two, with the goose-neck appliance in operation at one time on the division. And it may be fairly deduced from evidence offered by plaintiff that these appliances were broken off or taken off of all these engines but one—the one causing the accident—before plaintiff was hurt. Plaintiff himself swore that he had never before seen one of these appliances on defendant's freight train locomotives, was not informed and did not know they were in use, and while he was in the service had always worked with the ordinary locomotive, furnished with the simple draw-head coupling apparatus. It was in proof that the coupling with the goose-neck appliance is not made in the same way it is without it.

Plaintiff testified that he had been working with the usual engine, and that this particular engine was sent out of the round-house without warning, and he, not knowing or expecting it had the goose-neck attachment, undertook to couple it to a box-car in the usual way, and so got hurt, as alleged. The engineer in charge of the locomotive and the fireman both swore they warned him about the goose-neck, and the engineer swore that he moved the engine back within six inches of the box-car, and then got off of the engine, and went around, and showed him how to

¹Publication delayed by failure to receive copy.

make the coupling. The conductor also testified to certain expressions of plaintiff immediately after he was hurt, tending to show that he was not looking and attending to his business, or exercising any care, at the time he was hurt. Plaintiff in his testimony denies the statements of the fireman, engineer, and conductor. The jury, as was their privilege, believed the testimony of plaintiff. Under the evidence adduced by plaintiff, we cannot say the verdict of the jury is so clearly wrong as to authorize us to set it aside. There is evidence tending to show that defendant was negligent in using the McQueen engines in its train service, and in doing so without warning plaintiff of the increased hazard of his employment it violated its implied obligation to him. He was warranted in acting under the assumption that the machinery was safe, and was adapted to the service in which it and he were employed. He had the right to expect that the machinery was safe and suitable. He assumed the risks ordinarily incident to such employment, and such other only as he knew existed, or might have known by ordinary care. *Railway Co. v. Drew*, 59 Tex. 10. Plaintiff's evidence shows that there was unusual risk, not common in such employment; that he was not warned of it,—did not know it; and that he had been working the whole time of his employment with the ordinary train engine,—from which the jury may have concluded that he was not chargeable with knowledge of the defect, or the want of the exercise of ordinary care. It was also clear that plaintiff did know of the dangerous character of these engines. All these questions were submitted to the jury by clear and appropriate charges, the law of the case, and verdict was for plaintiff, and we do not think it ought to be set aside. There were more witnesses against than for plaintiff's case on the vital point of his knowledge of the defect in the coupling apparatus, and there was a serious conflict in the evidence as to plaintiff's opportunities and means of information, by which it was attempted to show on defendant's side that plaintiff had constructive notice of the condition of the engine, that he ought to have known it, and could have done so by the exercise of reasonable care; but the jury solved all these conflicts in favor of plaintiff, accepting his testimony, and rejecting that of defendant.

The law of the case was correctly given in the charge of the court, and we are of opinion the judgment of the court below should be affirmed. See *Railway Co. v. Somers*, 71 Tex. 700, 9 S. W. Rep. 741; *Railway Co. v. Callbreath*, 66 Tex. 526, 1 S. W. Rep. 622; *Railway Co. v. Fowler*, 56 Tex. 452; *Railway Co. v. Hester*, 64 Tex. 401; *Shear. & R. Neg.* §§ 92-96; *Beach, Contrib. Neg.* §§ 135-137 et seq., including section 140.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment affirmed.

WALLIS v. ADOUE et al.

(Supreme Court of Texas. Feb. 4, 1890.)

MORTGAGES—FRAUDULENT CONVEYANCES.

A mortgage given by an insolvent debtor for \$5,500, \$4,500 of which represent past indebtedness, and \$1,000, money advanced on the execution of the mortgage, is fraudulent, as to other creditors, where the mortgagee knew at the time that the debtor was insolvent.

Commissioners' decision. Appeal from district court, Galveston county; WILLIAM M. STEWART, Judge.

Davis & Davidson and *F. D. Minor*, for appellant. *Waul & Walker*, for appellees.

HOBBY, J. Adoue & Lobit, who were bankers in the city of Galveston, sued R. P. Sargeant and George Anderson, who, under the firm name of Sargeant & Co., were engaged in the drayage business in the same city, to recover a debt of about \$6,500, and to foreclose, as against them and appellant, two mortgages, conveying the personal property described in the petition, given to secure said debt. The mortgages were executed, respectively, on June 3 and December 16, 1886. No defense was made by Sargeant & Co. It was alleged that appellant had purchased the mortgaged property at an execution sale under a judgment in her favor rendered in the district court of Galveston county against R. P. Sargeant, and that she had actual and constructive notice of appellees' lien. Appellant, Kate Lee Wallis, answered, alleging an indebtedness to her by Sargeant prior to and since the execution of the mortgages, and the recovery of a judgment by her, against him, in the district court of Galveston county, for about \$3,021.98, on November 22, 1886, and the purchase of the mortgaged property under execution issued on said judgment April 4, 1887, and that the mortgages executed to appellees were fraudulent," etc.

It appears from the evidence that there had been frequent and extensive business transactions between the firm of Sargeant & Co. and appellees from August, 1885, up to and including the time of the execution of the mortgages, resulting in an indebtedness to appellees on June 3, 1886, of about \$5,500. The mortgage of that date was executed to secure a note for \$1,000, which sum was then advanced to Sargeant & Co. Although the latter firm were largely in debt to appellees at that time, only the \$1,000 mentioned was secured by the mortgage. On the 16th December, 1886, the indebtedness of Sargeant & Co. to appellees had reached the sum of about \$9,269.96, and a second mortgage was executed, which appears to have taken the place of the former. This latter mortgage, however, secured only the sum of \$5,500, consisting of two notes,—one for \$3,000, and one for \$2,500. One thousand dollars of this indebtedness consisted of that amount, paid to Sargeant & Co. on that day, December 16, 1886; and the balance, \$4,500, was money owing to appellees by Sargeant which accrued between June 3 and December 16, 1886. The proper-

ty embraced in the second mortgage was the same as that conveyed in the mortgage of June 3, 1886, with the addition of eight mules, seven floats and harness, and one dray and harness. There was testimony to the effect that the property mortgaged was not equal in value to the amount of Sargeant & Co.'s indebtedness to appellees, and there was evidence that it exceeded it in value. The outside cash value of the property, one witness testified, was worth \$4,750. The proof showed that appellees knew of the insolvency of the firm of Sargeant & Co. On May 28, 1886, appellant filed suit in the district court of Galveston county, against S. P. Sargeant and others, on a bond to recover \$3,000. He was cited to answer on May 29, 1886; and in November, 1886, she recovered judgment for \$3,021.98. Appellant claims title to the mortgaged property by virtue of a sale under the foregoing judgment in March, 1887.

There are but two assignments of error presented in the brief of appellants which we regard as necessary to be considered. The questions embraced in these are, in our opinion, decisive of this appeal.

The fifth assignment is that the court erred in charging the jury as follows: "As to the notes of 16th December, 1886, for \$3,000 and for \$2,500, and the mortgage of 16th December, 1886, given to secure their payment, I charge you that if, in addition to the \$1,000 note, Sargeant was actually indebted to Adoue & Lobit the amount of said two notes, for an indebtedness theretofore existing, then the said two notes and mortgage of 16th of December, 1886, would be valid, although Adoue & Lobit may have known of Sargeant's insolvency, and although the effect of the mortgage would necessarily defeat or delay Kate Wallis in the collection of her judgment, as Sargeant had a legal right to secure one creditor to the hindering, delay, or defeat of other creditors, and would entitle Adoue & Lobit to a verdict for the amount due on said two notes and interest, and foreclosure of the mortgage of 16th of December, 1886, against Sargeant and Anderson and Wallis. But if you believe from the evidence that at the time of the execution of said two notes and mortgages of 16th of December, 1886, Sargeant was not indebted to Adoue & Lobit said \$2,500 and \$3,000 for past indebtedness then owing by Sargeant to plaintiff, then said mortgage would be fraudulent in law as to Kate Wallis." The third subdivision of the eleventh assignment is that the court erred in overruling appellant's motion for a new trial, because "it appeared from the evidence that the notes and mortgage of December 16, 1886, were for moneys actually advanced upon that day, and not for an indebtedness theretofore existing."

The uncontroverted evidence supported the negative of the issue correctly submitted to the jury in the charge quoted. That is to say, the fact was not disputed that the two notes for \$3,000 and \$2,500, respectively, referred to in the charge, did not represent past

indebtedness due to the appellees, but \$4,500 only of such indebtedness was embraced in these notes. The balance, of \$1,000 was paid in cash to Sargeant & Co. by appellees upon the execution of the mortgage. So standing the proof, and the law having been correctly announced in the above charge, it follows, necessarily, that the verdict finding the mortgage valid was against the law and the evidence. Under these instructions and the testimony, which, as we have said, was not conflicting upon this issue, the verdict should have been that the mortgage was fraudulent as to appellant. The question is raised in the assignments mentioned; and for the error indicated we think the judgment should be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment reversed, and cause remanded.

GULF, C. & S. F. RY. Co. v. HODGES.

(Supreme Court of Texas. Feb. 14, 1890.)

RAILROAD COMPANIES—NEGLIGENCE—INSTRUCTIONS—PLEADING.

1. In an action against a railroad company for personal injuries, an instruction that the company had the right to run its cars on the street where the accident occurred, and was required "to use such care and prudence as the most skillful and careful and prudent engineers would use under similar circumstances," and that, in the absence thereof, the company would be guilty of negligence, and liable for a resulting injury, tends to induce the belief that a greater degree of care is required than the law exacts.

2. A requested instruction that the company had the right to use the track, and that an engineer was not required to stop his engine merely because he saw a person driving up the street parallel with the track; that if the managers of the train kept a proper lookout, and saw plaintiff driving up the street parallel to the track, and that his horse appeared to be gentle, and there was nothing to indicate that it would get frightened, and collide with the cars, and that if the engineer managed the train with such care and prudence as a reasonably prudent man would have observed under the circumstances, plaintiff cannot recover,—while not unexceptionable, correctly suggests the required degree of care.

3. The petition alleged that, while plaintiff was driving along the street, defendant's cars came around a curve in front of him, and that defendant's servants, seeing his dangerous position, "refused to slow up or stop the engine, but went right on puffing and blowing its smoke and steam, and so frightened plaintiff's horse," etc. Held, that the allegation of negligence related to and included the emission of smoke and steam, and that it was proper to refuse to instruct that, as the petition did not allege that smoke or steam was unnecessarily or negligently emitted, the jury could not find for plaintiff on that ground.

Appeal from district court, Galveston county.

J. W. Terry, for appellant. S. T. Fontaine, F. W. Fickett, and W. B. Denson, for appellee.

HENRY, J. Appellee instituted this suit to recover damages for injuries to himself, and to his horse and dray, charged to have been caused by the negligent operation of one of appellee's steam-engines upon Post-

Office street, in the city of Galveston. Plaintiff recovered a judgment for \$3,000. Plaintiff was driving his horse, attached to the dray, along a narrow space between the railroad track and the curbing of the street. There was evidence that when the engine passed him, in the narrow space, steam and smoke were blown from it in such manner as to frighten the horse, and cause it to back the dray into collision with the engine, causing the injury complained of. The court gave the jury the following charge, which is complained of as erroneous: "The defendant company had the right to run its engine and car on its track on Post-Office street, and, in the operation of its engine and car upon the street, was required to use such care and prudence as the most skillful and careful and prudent engineers would use under similar circumstances, and if they failed to use such care and prudence they would be guilty of negligence; and if such negligence causes an injury to another the company would be liable in damages for such injuries."

In the case of *Cotton-Press Co. v. Bradley* the rule on the subject is stated in the following language: "The standard to test the question of negligence *vel non* is the common experience of mankind, and implies, generally, the want of that care and diligence which ordinarily prudent men would use to prevent injury under the circumstances of the particular case." 52 Tex. 599. What is ordinary care or diligence will vary with the surrounding circumstances and conditions.

The defendant requested, and the court refused to give, the following charge: "You are charged that the defendant, having the permission of the city council of Galveston to construct and operate its railroad on Post-Office street, had the legal right to run its engines and trains on said street, and you are further instructed that an engineer is not required to stop his engine merely because he sees a party driving up the street parallel with the track; and if you believe from the evidence that the managers of the train were keeping a proper lookout, and saw the plaintiff driving up the street parallel with the railroad track, and that his horse appeared to be gentle, and there was nothing in the surrounding circumstances to indicate to the managers of the engine that the plaintiff's horse would get frightened, and collide with the engine or train, and that the engineer managed the train with such care and prudence as a reasonably prudent man would have observed under the circumstances, then you will find for the defendant." We think the charge given by the court was calculated to impress the jury with the belief that a greater degree of diligence was required of defendant's servants than the law exacts; and, while we are not prepared to say that the charge requested should have been given, if the charge of the court had been unexceptionable, especially without something on the subject of the escaping smoke and steam,

we think it suggested to the court the correct general statement of the degree of care that the engineer was required to exercise.

Appellant complains of the refusal of the court to give the following charge: "The second amended petition, upon which the case is being tried, does not allege that smoke or steam was unnecessarily or negligently let off or blown from the engine; and therefore you cannot find for the plaintiff on the ground that smoke or steam came from the engine, although you may believe that either or both did come from the engine, and, unless you find for the plaintiff on some other issue in the case, under the charge of the court, you will find for defendant." If the pleading had been as represented, the charge would have been a proper one to give. The petition charges that plaintiff was, "by the negligence and carelessness of defendant, its agents and employees, run into by an engine and cars owned and controlled by the defendant, and operated and managed by its agents, as follows: That, while plaintiff was driving along said street, * * * defendant's cars and engine came around the curve in said street, a short distance in front of plaintiff, * * * and, although they (defendant's servants) saw the great danger to which plaintiff was exposed if they should pass him in such a narrow way, they refused to slow up or stop said engine, but went right on puffing and blowing its smoke and steam, and so frightened plaintiff's horse," etc. We think the allegation of negligence relates to and includes the emission of the steam and smoke, and that the charge was properly refused.

We find in the record no other error. The judgment is reversed, and the cause remanded.

MISSOURI PAC. RY. CO. *et al.* v. WHITE.

(Supreme Court of Texas. Jan. 28, 1890.)

MASTER AND SERVANT—DANGEROUS APPLIANCES—VERDICT.

1. A railroad company is liable to an inexperienced brakeman for injuries received while coupling foreign cars, the injury being caused by the unusual construction of the couplings, materially differing from those of its own cars, unless it has cautioned him against the danger.

2. A verdict "for the plaintiff, damages to the amount of \$7,500," is sufficiently definite.

Commissioners' decision. Appeal from district court, Leon county; SAMUEL R. FROST, Judge.

Action by Hugh L. White, against the Missouri Pacific Railway Company and the International & Great Northern Railway Company, to recover for personal injuries. Defendants appeal from a judgment for plaintiff of \$7,500.

F. M. Etheridge and *B. D. Dashtell*, for appellee.

AKER, P. J. Appellee brought this suit to recover damages for personal injury, which caused the permanent loss of the use of his

hand, while he was employed by appellants as a brakeman on their freight trains, in which capacity he had served from the 31st day of October to the 24th of November, 1887, when he received the injury. There was verdict and judgment for plaintiff for \$7,500. It was alleged, and the plaintiff testified, that the injury was caused by the unusual and hazardous construction of the couplings of certain foreign cars composing a circus train which defendant companies received at Palestine, to be transported over their road to Tyler, Tex.; that he was familiar with the construction of the cars belonging to, and in general use by, the defendants and other companies, but had never before seen cars constructed like those composing the circus train, which were extrahazardous because of having dead-woods or buffer blocks on each side of the draw-heads; that these buffer blocks prevented the coupling being made in the usual way, and required the brakeman to hold the pin with one hand above the blocks, and to guide the link with the other below the blocks, in making couplings; that in attempting to make a coupling between these cars at Tyler, in obedience to an order of the conductor of the train, his hand and wrist were caught between the buffer blocks, and crushed, rendering him a cripple for life; that he had had but a few weeks' experience as a brakeman; that he was not informed of the peculiar construction of the circus car, nor warned of the extra danger therefrom; that if the couplings of these cars had been such as were in use on defendants' roads he would not have been injured; that when he was ordered to make the coupling the cars were within two or three feet of each other, one moving towards the other, and he stepped in between them, and attempted to make the coupling in the usual way, without knowing of the existence of the buffer blocks, which he did not notice until he received the injury.

The only proposition submitted under the first assignment of error is: "That a servant is presumed to have assumed all the risks ordinarily incident to the business or employment in which he engages; also, all other open and visible risks, whether usually incident to the business or not." In the case of *Railway Co. v. Callbreath*, 66 Tex. 528, 1 S. W. Rep. 622, a case very similar in every particular to this, it was said: "As a general principle, the law is well established that one who accepts the employment of another assumes all ordinary risks incident to such employment, and cannot recover for injuries resulting therefrom. * * * And as a general rule it is not the duty of the employer to instruct him as to the rules of service, or warn him of the dangers incident thereto, unless information be asked. *Railway Co. v. Watts*, 64 Tex. 568. But this rule is subject to some qualifications. It was held by this court, in the case last cited, that, the servant being inexperienced, and ignorant of the dangers of the service upon which he was

just entering, it was the duty of the company to have informed him of these dangers. The law is thus stated by a well-known text-writer: 'Where there are * * * hazards incident to an occupation which the master knows, or ought to know, it is his duty to warn the servant of them fully, and, failing to do so, he is liable to him for any injury that he may sustain in consequence of such neglect; and this rule applies, even where the danger or hazard is patent, if, through youth, inexperience, or other cause, the servant is incompetent to fully understand the nature and extent of the hazard.' *Wood, Mast. & Serv.* 714. * * * In the case before us it appears that the car which caused the injury was used only in connection with a patented invention, and only upon the lines of two railroad companies, so far as the evidence discloses, and that the proportion of these cars to those of the usual and regular construction was not more than one in a thousand. It further appears that appellee, though of long experience as a brakeman, had never seen a car like the one in question, and never saw the peculiarity of this until the injury was inflicted. All other cars were capable of being safely coupled by the 'helper' standing between them, and this was the usual mode of making the coupling. Under these circumstances, can it be said that appellee's experience availed him in avoiding the danger in this case? * * * We think, therefore, it was the duty of appellants to have informed appellee of the use of these construction cars upon their roads when he entered their service upon the yards, and of the danger of attempting to couple them in the usual way, and that their failure to so do was negligence, and renders them liable for the injury."

The analogy between the case from which the foregoing lengthy quotation is made, and this case, is so striking that but little is left for us to say in disposing of the question presented by the first assignment of error. Callbreath was an experienced brakeman, having been engaged in that service for years on different roads, and consequently familiar with the construction of cars in ordinary and general use upon railroads, but had never seen such a car as caused his injury until at the time his injuries were received. In this case, while White had had very little experience as a brakeman, he had become accustomed to the construction of the cars in the service of defendants, and which were in general use by railroads, and could couple and uncouple them with safety. The cars which caused his injury were of peculiar, unusual, and extrahazardous construction, with which he was entirely unacquainted, never having seen such before, or noticed these, until at the time of the accident; and we think the companies should have notified him of their unusual construction, and warned him of the danger therefrom. The conductor testified, it is true, that he notified the plaintiff of the unusual construction of the circus cars, and

warned him to be careful; but this was contradicted by plaintiff, which made a question peculiarly within the province of the jury. It appears from the evidence that the construction of the circus cars make them extra-hazardous; and it was the duty of the defendants to know that they were so, and to warn the plaintiff of the increased danger he was subjected to in handling them. We therefore conclude that the first assignment of error is not well taken.

The next assignment of error presented is claimed to be on "fundamental error of law apparent on face of record," and is as follows: "The court below erred in overruling appellants' motion in arrest of judgment, because the verdict of the jury was so vague and indefinite and uncertain that no valid judgment could be rendered thereon." We think it is a sufficient answer to this assignment to set out the verdict: "We, the jury, find for the plaintiff damages to the amount of \$7,500. T. T. SHERMAN, Foreman." Our attention has not been called to any particular in which the verdict is vague, indefinite, and uncertain; and we are unable to detect any defect or insufficiency in it.

The fifth and only other assignment of error presented is to the effect that the verdict of the jury is contrary to the evidence. Without quoting the evidence, we deem it sufficient to say that we think the evidence previously stated in this opinion sufficient to sustain the verdict. We have read the facts carefully, and think the verdict in accordance with the preponderance of the evidence. We are of opinion that the judgment of the court below should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment affirmed.

SAMPSON v. SOLINSKY.

(Supreme Court of Texas. Jan. 28, 1890.)

APPEAL-BOND—SURETIES.

A surety on a bond for costs does not, on judgment in the action against his principal, become a party to the suit, and therefore incompetent as a surety on an appeal-bond.

Appeal from district court, Jefferson county; W. H. FORD, Judge.

Tom J. Russell and G. W. Trenchard, for appellant. Douglass & Lanter, for appellee.

GAINES, J. Appellant brought this suit in a justice's court against appellee, and filed a cost-bond, with two sureties, as required by law. The jury returned a verdict for appellee, and thereupon the justice entered a judgment against appellant that he take nothing by his suit, and against him and his sureties on his cost-bond for the costs of the action. He appealed to the district court, and filed an appeal-bond with two sureties, one of whom was a surety upon his bond for costs. In the district court the appellee moved to dismiss the appeal, on

the ground that the bond was not sufficient. The objection was that the surety upon the cost-bond was incompetent as a surety upon the appeal-bond, and that, therefore, the obligation stood as if it were signed by one surety only. The court sustained the motion, and dismissed the appeal, and from that judgment the appeal to this court is prosecuted.

Our decisions upon the question of competency of sureties to an appeal-bond, who are sureties upon the principal's bond in the court below, and against whom judgment has been rendered as such, are somewhat in conflict. In Trammell v. Trammell, 15 Tex. 291, there was a judgment against the defendant in a sequestration suit, and against the sureties on his replevy bond. The defendant appealed. The sureties did not appeal, but signed his appeal-bond as sureties. Upon a motion to dismiss, after a very careful consideration of the question, the court held the bond to be good. Daniels v. Larendon, 49 Tex. 216, holds a contrary doctrine. There the question came up on a motion to reinstate the case, which had been dismissed for want of prosecution. The motion was refused, one of the grounds of the refusal being that the bond was not sufficient to give the court jurisdiction. The appellant had given an injunction bond in the court below, and judgment had been rendered against him and his sureties for costs. They were the sureties on the appeal-bond. Labadie v. Dean, 47 Tex. 90, is frequently cited in favor of a similar doctrine, but the case bears very remotely upon the question. In that case there were several plaintiffs, and judgment had been rendered against all of them in the court below. One alone appealed, and two of his co-plaintiffs became sureties on his appeal-bond. The bond was held insufficient. But in Saylor v. Marx, 56 Tex. 90, the question came up again. In that case the sureties on the cost-bond in the district court became the plaintiff's sureties upon his appeal to this court. A motion to dismiss was not made in the time prescribed by the rules of the supreme court. See rules 8, 9. The question was presented whether the court should dismiss the cause notwithstanding a motion to dismiss was not filed in proper time; and it was held that the bond was not absolutely void, and that the court had jurisdiction of the case. Whether or not the appeal would have been dismissed, if the motion had been made in time, was not decided. In Daniels v. Larendon, supra, (which is the only case which supports the ruling of the court below,) the decision is based upon the ground that the sureties to the injunction bond are parties to the suit. They do become parties to the litigation by becoming sureties upon the injunction bond, and are liable to have a judgment rendered against them in the suit in which it is filed. Whether this is a sufficient reason for adhering to the ruling in the case last cited, or whether we should return to the doctrine of

Trammell v. Trammell, we do not here decide. But we are of opinion that the sureties on a bond given merely to secure the costs of the suit do not become parties to the action. The costs are the mere incident of the litigation, and for this only they are bound. We therefore conclude that, in the event their principal be cast in the suit, they may become his sureties upon his bond to appeal the case. As was said in *Trammell v. Trammell*, supra: "The question is not whether the appeal-bond will give any additional security, but whether it gives sufficient security." This ruling is in accordance with the decisions of our court of appeals. *Heidenheimer v. Bledsoe*, 1 Civil Cas. Ct. App. § 317; *Word v. Reither*, 2 Civil Cas. Ct. App. § 778. For the error of the court below in dismissing the appeal from the justice's court the judgment is reversed, and the cause remanded.

BROUSSARD v. SABINE & E. T. RY. CO.

(*Supreme Court of Texas*. Jan. 31, 1890.)

APPEAL—RECORD.

1. An entry, "General demurrer to plaintiff's trial amendment overruled. Special exceptions, except the one of injury to cattle, overruled,"—does not sufficiently show that any exception was sustained, or, if any, which one; there being several relating to the subject mentioned.

2. A statement of facts filed two days after final adjournment of the trial court will not be considered on appeal, where no order is shown to have been entered during the term authorizing the statement to be made up in vacation, as required by Rev. St. Tex. art. 1379.

Error from district court, Jefferson county; **W. H. FORD, Judge.**

Action by *Theo. Broussard* against the *Sabine & East Texas Railway Company*. Plaintiff being deceased, writ of error is prosecuted by his executors, *D. W. Lewis* and *Margaret Broussard*.

Tom J. Russell, for appellant.

HENRY, J. Appellant sued to recover damages alleged to have been caused by floods resulting from the negligent construction of defendant's railroad. The items of damage as stated by him were as follows: *First*. The loss of his corn crop in 1884. *Second*. The death of 13 cows, caused by the overflow of 1884. *Third*. The death of 20 cows and 40 yearlings, and depreciation in value of 50 yearlings, caused by overflow in 1885. *Fourth*. The death of 200 cattle by reason of the overflow of 1885. *Fifth*. The loss of the use of pasture land, and the value of the grass on the land, in May, 1884, and for three months while the water continued on the land, and thence until October following, before the grass grew upon the land again. *Sixth*. The loss of inclosed pasture of 840 acres during the months of January and February, 1885, while overflowed, and thence until the 1st of June; because the water had so injured the sod that grass would not grow. Special exceptions to the manner of pleading these facts in his petition were sustained by

the court, upon which plaintiff filed a trial amendment, in which he again set up all of said facts. The pleadings, as amended, were again excepted to, but the exceptions were overruled, except in one particular. The only entry of the action of the court on the exceptions to the pleadings, as they read after plaintiff's trial amendment was filed, is in the following words: "General demurrer to plaintiff's trial amendment overruled. Special exceptions, except the one of injury to the cattle, overruled. Defendant excepts." It is only by construction that this order can be held to have sustained any exception; and if, by that means, we could determine that "one," relating to the injury of cattle, was sustained, we still would not be able to know which one of several relating to that subject was intended. The judgment entry ought to be made to affirmatively show what exceptions are sustained, and we will not, when such an omission to do so exists as we find in this case, aid the judgment by construction or otherwise. There being nothing in the record to show that the court sustained exception to plaintiff's pleadings after they were amended, it presents no error in that respect for our consideration. The record before us shows that the term of the court at which the judgment appealed from was rendered was finally adjourned on 8th day of June, 1887, and that the statement of facts was not filed until the 10th day of June, 1887, or two days after the adjournment of the term. It is not shown that an order was entered during the term authorizing the statement of facts to be made up in vacation. Rev. St. art. 1379. In the absence of such an order, we cannot consider the statement found in the record.

Other assignments, insisted upon by appellant, are such as cannot be considered in the absence of a proper statement of facts. The judgment is affirmed

RUFF et al. v. LIND.

(*Supreme Court of Texas*. Jan. 31, 1890.)

QUIETING TITLE.

Deed for land was given, in 1861, reserving a vendor's lien until payment of purchase-money notes. The grantee soon afterwards left the state, and was never heard from again; and shortly after the war the notes were given to an attorney for collection, but he failed to find the maker, and in 1878 returned them to the owners' agent, who afterwards moved away, and the notes were not produced at trial. *Held*, that plaintiffs, claiming under the original grantor, having taken possession, were entitled to a decree quieting title in them.

Appeal from district court, Jefferson county; **W. H. FORD, Judge.**

James H. Rachford, for appellants.

HENRY, J. Appellants, claiming to have the title of one *Otto Ruff*, brought this suit by publication to remove cloud from their title to two lots lying in the town of *Beaumont*. The cause was tried without a jury, and judgment was rendered in favor of the

defendant. No conclusions of law or fact appear, and in their absence the only assignment of error that we can consider reads: "The court erred in holding that plaintiffs were not entitled to the remedy prayed for." The statement of facts shows, without any conflicting testimony, that on the 19th day of February, 1861, Otto Ruff conveyed the land in controversy to Charles Lind. The deed states the consideration to be "the sum of forty dollars in hand paid, and note of hand, at three months from date, for the sum of twenty dollars, and also note of hand, for twenty dollars, due six months from date, by Charles Lind." The deed expressly retains vendor's lien until the payment of the notes. It was proved that Lind left Texas "about" the year 1861, and was never afterwards heard from; that shortly after the war between the states the notes were placed in the hands of an attorney at Beaumont for collection; that the attorney made diligent search for Lind, but was unable to find him; that he kept the notes in his hands until 1878 or 1879, when he returned them, uncollected, to the agent of the owners. The evidence shows that, by the advice of an attorney, plaintiffs had taken possession of the lots, and had possession of them when they instituted this suit. It was proved that the agent of the owners of the notes, to whom they were returned, uncollected, in 1878 or 1879, moved away from Beaumont about that time. The notes were not produced at the trial. The court appointed an attorney to represent the absent defendant, who pleaded only a general denial. We think the evidence allows of but one conclusion, and that is that the notes were never paid. The vendor never having divested himself of the title to the land, and the notes remaining unpaid, under the circumstances of this case, and under the issues made by the pleadings, plaintiffs were entitled to a judgment canceling the deed to Lind, and removing the cloud cast by it upon their title. The judgment of the court below will be reversed, and judgment rendered by this court in favor of appellants.

WILLIAMS *et al.* v. WILSON *et al.*

(Supreme Court of Texas. Feb. 11, 1890.)

SAN JACINTO DONATION LANDS—CONVEYANCES—JUDGMENT.

1. Pasch. Dig. Tex. art. 4062, provides for the granting of 640 acres of land to all soldiers of the republic of Texas who participated in the battle of San Jacinto, and declares that the lands shall "not be subject to sale or alienation, mortgage or execution," during the life-time of the grantees. *Held*, that an instrument executed by a grantee who had received his certificate, but before he obtained his patent, purporting to authorize another to locate the certificate and receive the patent, and to hold the land for 99 years free of rent is void.

2. Where defendants claim under an attempted conveyance of San Jacinto donation lands which recites a consideration, those claiming under the original donee cannot recover the lands without refunding the purchase money.

3. A lease of San Jacinto donation lands, though void, and the mesne conveyances based on it, may be introduced in evidence to show the right of

those claiming under them to have the purchase money refunded, though the mesne conveyances attempt to convey an absolute title.

4. Where plaintiffs in trespass to try title for the recovery of San Jacinto donation lands, which had been conveyed by the donee to defendants, do not offer to refund the purchase money, and defendants plead only a term of years, a general judgment for defendants is not erroneous, as the judgment does not affect plaintiffs' right to the reversion after the expiration of defendants' term.

Appeal from district court, Austin county.

M. M. Kenney, for appellants. *Chesley & Haggerty*, for appellees.

GAINES, J. The plaintiffs sued as heirs of Matthew R. Williams, deceased, to recover a tract of 640 acres of land, located and patented by virtue of a certificate issued to him, in accordance with the act of congress of the republic of Texas of December 21, 1837. That act granted 640 acres of land to all soldiers of the republic who participated in the battle of San Jacinto; and provided that the lands granted by virtue thereof should "not be subject to sale or alienation, mortgage or execution, during the life-time of the person to whom" the warrant or patent should be granted. Pasch. Dig. art. 4062. Both the certificate by virtue of which the land was granted and the patent itself contained the limitations upon the powers of the grantee which are expressed in the act. The certificate issued to Matthew R. Williams on the 31st day of January, 1839. On the 14th of March, 1840, the grantee, for the consideration of \$640, executed to one David Ayres an instrument, which purported to authorize Ayres to locate the certificate, and to receive the patent, and to hold the land to be granted by virtue thereof for the term of 99 years, without the payment of any additional rent. A patent to the land in controversy issued to the original grantee of the certificate on the 7th day of October, 1845. April 7, 1846, Ayres executed to Peter McGreal his special warranty deed, conveying to the grantee all his right, title, and interest in the land in controversy. McGreal in like manner conveyed to one Miller, who in his turn conveyed to one Hagadon, who next conveyed to one Furst. Furst died having devised all his property to Frederick E. Van Roy, who conveyed the land in controversy to the defendants in this suit. The plaintiffs proved that Matthew R. Williams died in 1852, and that they were his heirs. The defendants proved the other facts stated above, and the court gave them judgment.

There are no conclusions of fact and law in the record, and we are left to conjecture as to the grounds upon which the court based its judgment. If, however, the court held, in accordance with the appellees' contention, that the lease from Williams to Ayres was not in contravention of law, and was a valid conveyance, we do not concur in its opinion. In *Ames v. Hubby*, 49 Tex. 705, a similar conveyance of a San Jacinto donation certificate was held void. In that case the contract provided that, at the end of the term, the

lessee, his heirs or assigns should have the right to hold possession of the land as long as he or they saw fit, upon payment of rent of one cent per annum. That was a very obvious evasion of the law, which prohibited an alienation of the certificate, and to our minds the intent to evade the law is equally clear in the present case. It is true that, according to the literal terms of the lease, the property was to revert to heirs of the lessee at the end of 99 years. But we do not hesitate to say that a lease of property in Texas during the days of the republic, which was to continue for the average period of three generations of men, was considered both by the lessor and lessee as virtually equivalent to a conveyance of the absolute title, and that it should be treated as such an alienation as the statute was intended to prohibit. We conclude, therefore, that the lease from Matthew R. Williams to David Ayres was void, and that it neither conveyed title to the certificate nor to the land.

In 1848 the prohibition against the conveyance of the lands granted to the participants in the battle of San Jacinto was repealed, (Pasch. Dig. art. 4066,) and it appears from the evidence that Williams lived until 1852 without taking any steps to set aside the conveyance. What effect, if any, these facts had upon the transaction, we need not inquire. The defendants specially pleaded and proved their claim of title. The lease from Williams to Ayres was fully alleged in the answer, and was introduced in evidence, in connection with a chain of conveyances sufficient to pass whatever right Ayres acquired by that instrument to the defendants in this suit. In *Ledyard v. Brown*, 27 Tex. 393, in speaking of a contract by a colonist to convey his lands before the expiration of six years from the extension of the title, Mr. Justice MOORE says: "The title which the defendants, who claim under it, derive from the contract between Cottle and Brown, is one which, under the former decisions of this court, they cannot enforce, without additional equities from any that are presented in this case against the heirs of Cottle. * * * But it has also been more than once decided by the court that in such cases the heirs of the grantee cannot enforce their legal title against the parties claiming under such a contract, without refunding the consideration received by their ancestor. If the question were one of the first instance, we might perhaps hesitate, yielding it our assent; but it must now be regarded as no longer open for discussion." See, also, *Mills v. Alexander*, 21 Tex. 154; *Hunt v. Turner*, 9 Tex. 385. In *Mills v. Alexander*, supra, it was held that in such a case, after a lapse of 20 years, in the absence of any proof of a consideration, it would be presumed that a fair and adequate consideration was paid. In this case the attempted lease shows the consideration, and plaintiffs have made no offer to refund the purchase money. Their failure to do so must be held fatal to their suit.

The assignments of error complain of the introduction in evidence, over the objection of plaintiffs, of the lease from Williams to Ayres, and of the mesne conveyances down to defendants. The lease, though void, authorized the parties rightfully claiming under it to have the purchase money refunded, and was therefore properly admitted. It is no objection to the other conveyances that they attempt to convey an absolute title, although the grantor, at best, had but a leasehold estate. The conveyances were sufficient to pass whatever right or title the grantors had.

It is complained that the judgment is erroneous, because it is a general judgment for defendants, whereas in their pleadings they claimed only a term of years in the land. The plaintiffs brought an action of trespass to try title, and failed to offer to refund the purchase money, and to place themselves in position to demand a judgment. Therefore the proper judgment was that they take nothing by their suit, and that defendants go hence without day. The judgment does not affect the plaintiffs' right to the reversion in the land after the expiration of defendants' term. There is no error in the judgment, and it is affirmed.

WESTERN UNION TEL. CO. v. KIRKPATRICK.

(Supreme Court of Texas. Feb. 14, 1890.)

TELEGRAPH COMPANIES—DELAY IN DELIVERING MESSAGE.

In the absence of other notice than the message itself, a telegraph company is not liable to a husband for the mental suffering of his wife, caused by its delay in delivering a message addressed to the husband, requesting him to come with "Ferdinand" to the latter's father, who was very low, though the agent to whom the message was transmitted knew that the information related to the wife's father.

Appeal from district court, Galveston county.

Stemmons & Field, for appellant. *Wheeler & Rhodes*, for appellee.

GAINES, J. This suit was brought by appellee to recover of appellant damages for mental suffering of appellee's wife alleged to have resulted from a failure to deliver according to contract a telegraphic message. The plaintiff resided with his wife at Highland, and his wife's father was upon his death-bed in Galveston. Jerry Lordon, a relative of the family, delivered to the agent of the defendant company in Galveston a message for transmission to plaintiff which read as follows: "C. S. Kirkpatrick, Highland Station: Come on first train. Bring Ferdinand. His father very low." [Signed] JERRY LORDON. The message was received for transmission between 5 and 6 o'clock in the evening, but was not delivered until 10 o'clock at night. The wife of plaintiff was at his residence at Highland, and it is claimed was prevented by the delay in the delivery of the message from being with her father in his last moments. As plaintiff claims, the message was delivered too late to take the evening train to Gal-

veston, and that but for the delay the wife would have taken the train, and would have gone at once to the bedside of her father. After the receipt of the message, she took the next morning train, but arrived in Galveston after her father's death.

In the cases of *Telegraph Co. v. Adams*, 12 S. W. Rep. 857, and of *Same v. Feegles*, 12 S. W. Rep. 860, (decided at the last Tyler term,) we held that, in telegraph messages conveying information of sickness and death, if the language was sufficient to suggest that a near relationship existed between the person mentioned in the message and the person addressed, and that the object of the communication was to afford the latter the opportunity of going to his relative, it would be sufficient, without further notice, to render the company liable for damages for any mental suffering that should result to him from his being deprived of the consolation which his visit would have afforded, provided the negligence of the company in failing to make a prompt delivery was the cause of the injury. Those cases have been followed at the present term. *Telegraph Co. v. Moore*, 12 S. W. Rep. 949. It was not the purpose of the court, in the cases cited, to depart from the ruling that in these actions only such damages are recoverable as were in contemplation of the parties at the time the contract was made. We held, merely, that from the face of the message, in those cases, the company was to be presumed to have contemplated the damages which were claimed to have resulted from the breach of the contract of delivery. That rule cannot be applied in the case before us. There is nothing upon the face of the message under consideration to apprise the company either that plaintiff had a wife, or that she was at Highland Station, or that the object of the communication was to afford information upon which she was expected to act. There was no evidence that any extrinsic notice was given to the agent who received the message for transmission, and who made the contract on behalf of the company. In order to surmount the difficulty of a want of notice to the contracting agent of the alleged object of the message, it was alleged, and proof was offered to show, that the agent at Highland was acquainted with the plaintiff and his wife, and knew that the message referred to her father. We need not decide whether or not notice at that end of the line would be sufficient; for, should we hold the affirmative of that question, we should still be bound to decide that the facts known to the agent at Highland would not affect the case, because the message does not indicate that it was expected that Mrs. Kirkpatrick should go to Galveston as the result of the information conveyed. There is nothing in the language to show that it was intended for the wife's benefit, or that necessarily suggested this to the agent, although he may have known both the lady and her father. The message suggested only that it was sent

for the benefit of the person addressed, and of "Ferdinand," who was shown to be the brother-in-law of plaintiff; and the agent knew nothing bearing upon the case, except that the plaintiff had a wife, and that the information related to her father.

It follows from what has been said that we are of opinion that appellant's assignments of error are well taken. The petition sought expressly to recover for the injury done to the wife only, and failed to show a state of facts from which it could be legally inferred that damages to her feelings were in contemplation of the parties at the time the contract was made. The charges requested, which also presented this view of the law of the case, should have been given. For the errors pointed out by the appellant's assignments the judgment is reversed, and the cause remanded.

HOLT v. COMMONWEALTH.

(*Court of Appeals of Kentucky. Feb. 22, 1890.*)

HOMICIDE—EVIDENCE—CONTINUANCE.

1. On a trial for homicide, in which the evidence tends to show a killing in self-defense, a statement made by defendant about an hour after the killing, and while under arrest, that he would kill any man "for a dollar," is irrelevant.

2. Where there is a conflict of testimony as to whether deceased was armed, and as to his object in approaching defendant at the time of the killing, evidence that deceased was a violent and dangerous man is material to defendant, and will justify a continuance to procure the attendance of absent witnesses to prove that fact.

Appeal from circuit court, Russell county.

"Not to be officially reported."

J. E. Hays, W. W. Jones, and F. R. Winfrey, for appellant. *P. W. Hardin*, Atty. Gen., for the Commonwealth.

LEWIS, C. J. The evidence shows that, a short time before the homicide, appellant and the deceased had a dispute about a bottle of whisky, which, however, was composed, or attempted to be, by appellant; that while afterwards walking along a road, by the side of one Brown, appellant was seized by the deceased, who approached from the rear, and attempted to stab him with a knife a witness says he had previously opened and hid in his coat sleeve, and was prevented from using the knife by appellant's getting out of his way; that Brown, although admonishing the deceased not to use the knife, put his pistol to the head of appellant, who had drawn his to defend himself against the deceased, threatening to kill him if he hurt deceased, and compelled him (appellant) to put up his pistol. That appellant and Brown then proceeded along the road, quarreling, with their pistols drawn, until they reached forks, when appellant started along one fork, leading a different direction from that Brown was going, admonishing Brown and the deceased not to follow him, and about that time the wife of Brown came up, and seized him, thus preventing any further hostility between them. But about that time the deceased came

up, and twice asked Brown for his pistol, saying he was not afraid of appellant, and would kill or shoot with him; but, being refused the pistol by Brown, he started, as appellant says, with a knife in his hand, towards appellant, who warned him not to come to him. He, however, did, after pausing a while, again move towards appellant, and was then shot and killed.

There is some difference in the testimony as to whether the deceased approached appellant with a hostile design; one witness testifying he said he wished to be friendly, which, however, is utterly inconsistent with his attempt just before to get the pistol from Brown. There is also testimony that the deceased had no knife, and approached appellant unarmed. But, notwithstanding we think, from the testimony and circumstances, the deceased did approach appellant with a hostile design, and was at the time armed with a knife, still there was room for doubt on the subject, the benefit of which the jury seems not to have given to the accused. It was therefore damaging, and we think prejudicial, to appellant, to hear irrelevant statements made by him about one half hour after the killing, at the house of one Smith, a short distance off, and where appellant was under arrest. The statements made by him were that he would "kill any damned man for a dollar," and was, we think, irrelevant and illegal.

The evidence of the absent witness, Wolford, to the effect the deceased was a violent, reckless, and dangerous man, was material and important, in view of the discrepancy of the testimony upon the question of fact as to the deceased's being armed, and the object of his approaching appellant when killed; and appellant ought to have had an opportunity to procure his attendance of the absent witness, which we think he did not have.

We perceive no valid objection to the instruction given, nor was it error to refuse the instructions asked for appellant. But for the errors indicated, which we think were prejudicial to the substantial rights of appellant, the judgment is reversed, and cause remanded for a new trial consistent with this opinion.

SPENCER *et al.* v. PARSONS *et al.*

(Court of Appeals of Kentucky. Feb. 20, 1890.)

JUDGMENT AGAINST MARRIED WOMEN—COLLATERAL ATTACK—PLEADING.

1. In Kentucky, a personal judgment against a married woman, on a claim which does not authorize a personal judgment against her, is void, and she is not estopped from resisting its enforcement afterwards on that ground, though it is attempted to be enforced in another court.

2. An averment that a married woman and her husband, in a former action, in which the judgment sought to be enforced was rendered, availed themselves of all defenses, both legal and equitable, is a sort of legal conclusion of the pleader, and is insufficient as a plea that in the former action the *feme covert* set up her coverture, and that the court decided the question of her legal status.

Appeal from circuit court, Marion county.

"To be officially reported."

Harrison & Beiden, for appellants. *Samuel Ayritt*, for appellees.

HOLT, J. This is an effort to enforce a judgment against the separate property of a married woman, rendered when she was such *feme covert*. The lower court, upon demurrer to the petition, dismissed the action. This court, upon appeal, said, in substance, that the judgment sued upon might, or might not, be void. If based upon her tort, or a contract executed by her *dum sola*, or rendered when she was a *feme sole*, it would not be void; but, if founded upon a claim of such a character as would ordinarily support only an ordinary action, then, as it would be void as to her, so would any judgment against her upon it. This view was taken after as careful an examination and consideration of the authorities as was possible, and the opinion of the court will be found in 88 Ky. 305. As the character of the claim upon which the judgment had been rendered did not appear from the petition, this court reversed the judgment, dismissing it, and remanded the cause for further preparation. The issues having been formed by proper pleading, and a part of the record of the suit in which the judgment sought to be enforced was rendered being in evidence, the lower court rendered a decree enforcing the judgment against the property of the *feme covert*, and she has appealed.

The record of the old suit filed in this one sufficiently identifies it as the action in which the judgment sued upon was rendered. The pleadings in this suit give the style of the action, and the court in which the judgment was rendered, and the record in evidence conforms thereto. It shows, also, that the claim was not of a character authorizing the personal judgment against the female appellant, who was then a married woman; and the question is therefore presented whether she can now resist its enforcement against her property upon the ground that it is void by reason of her coverture when it was rendered. The opinion upon the former appeal substantially decided the question. It is contended, however, with earnestness and ability, that it must be treated as erroneous only; that it cannot, therefore, be assailed collaterally, and the party can obtain relief from such a judgment only by vacating it by a direct proceeding, or an appeal from it. The proceedings authorized by our Code of Practice for reversing or vacating a judgment apply where it is merely erroneous, and therefore voidable. If it be void, however, it may be resisted in any court of general jurisdiction, and not merely in the court which rendered it. Although, therefore, the judgment in question was rendered in a different circuit court from that in which this action was brought, yet if it be void the appellant may defend against it, because no subsequent proceedings can be based upon a void judgment. It is well settled that a

judgment which is merely erroneous cannot be assailed collaterally. If the court has jurisdiction of the person and the subject-matter, then, however irregular may be the proceeding, the judgment is merely erroneous, and is binding until reversed or vacated in the manner provided by law. This is what the cases decide which are cited by counsel for appellees.

It is equally well settled that a void judgment will not support further proceedings. So the question is, at last, is this judgment void, or merely erroneous? Generally, a *feme covert* has no personality in law. She is not recognized by it save in a few excepted cases, so that a personal judgment can be taken against her. The contracts of an infant are in general voidable only, while those of a married woman are void. True, she may, under certain circumstances, bind her separate estate, but not herself personally; the reason being that she has no personal identity in law. It does not follow because, as an exceptional case, a personal judgment may go against her for tort, or upon a contract made by her when single, the reason being that her *status* at the making of it is regarded as following it to its completion, that therefore all personal judgments against her are merely erroneous, and not void. If she has no legal *status* in court, certainly it should have no jurisdiction to render a judgment binding her personally. Her existence is merged in that of the husband, and she can make no contract binding herself personally, or subjecting her to a judgment *in personam*. Her contract is void in law. In equity, it may be enforced against her separate estate, if she so intended; but she incurs no personal liability by it, because she has, legally speaking, no personal existence, and it must be satisfied out of her estate by *in rem* proceedings. She is by law incapacitated from retaining an attorney, and no personal liability arises, because she has no legal existence. There is, therefore, so far as she is concerned, no person within the court's jurisdiction. If a personal judgment be rendered upon a claim, the alleged liability is merely placed upon an advanced footing, and if originally it was void as to her, then the unauthorized judgment should not estop her from resisting it, from the fact that she was not *sui juris*, and had no such legal existence as authorized a personal judgment. We are aware there is a conflict of authority in this country upon this question; but the views above advanced seem to us not only supported by reason, but we know they are sustained by such high authority as the supreme courts of Pennsylvania, Missouri, and other states. In this case the rights of no innocent or third parties have intervened. The present action is between those who were parties to the unauthorized judgment; and its entry, inasmuch as the claim upon which it was founded was void as to her, and she could have no voice or control of the suit, should not prejudice her. Her helplessness must protect

her. In the case of *Green v. Page*, 80 Ky. 368, notes were given by a husband and wife for an interest in a hotel building. In an action by the assignees against the assignors, it was claimed that the failure to take a personal judgment upon the notes against the wife absolved the assignors from liability; but this court said that such a judgment would have been a nullity. The views of this court, as given in the opinion upon the former appeal of this case, and as now again stated, have since been followed in the case of *Stevens v. Deering*, 9 S. W. Rep. 292.

It is averred in the reply, and not denied, that in the action in which the judgment now sought to be enforced was rendered the appellant and her husband availed themselves of all defenses, both legal and equitable. This is a sort of legal conclusion of the pleader. It is not averred that she in that action set up her coverture, and that the court then decided whether such was her *status*, and passed upon the question; nor does this otherwise appear. The original appeal is sustained, and judgment below reversed, with directions to dismiss the action. This disposes of the cross-appeal, and it is dismissed.

ALLEN et al. v. WORTHAM.

(Court of Appeals of Kentucky. Jan. 23, 1890.)

LIBEL—PUBLICATION—PLEADING.

1. It is libelous to charge a person with having uttered "foul lies," in reference to another, and possessing a "vile, slanderous tongue."

2. Sending a letter containing libelous matter through the mail to a person, who, because of illiteracy, is obliged to have it read by others, is a publication of the libel.

3. Though a letter from defendant to plaintiff, stating that defendant had been informed that plaintiff had charged him (defendant) with being a "thief," in response to which information defendant used libelous words, was made part of a petition for libel, the petition is not demurrable as showing a privileged communication, but defendant must plead and prove that he received the information stated in his letter.

Appeal from circuit court, Grayson county. "To be officially reported."

W. R. Haynes, for appellants. J. S. Wortham, for appellee.

LEWIS, C. J. Appellants, husband and wife, brought this action to recover of appellee for libel, alleging in the petition that he maliciously wrote and published, by sending through the United States mail, to the address of appellant Arthur Allen, a letter, filed with the petition, which, among other things, contained the following: "I have never said or done anything to you or your wife, or any one else, to call forth the foul lies your wife has uttered about me. * * * I would care nothing for your wife's vile, slanderous tongue, if her words could reach no further than where I am known, or where she is fully known. There it would be no slander; but the slanderous tongue is confined to no place,"—which letter, it is stated, was received by appellants, and because of their illit-

eracy had to be and was read by, and thus became known to, others.

As any defamatory words, calculated to degrade and injure the reputation of a person in society where maliciously written and published, are libelous, it seems to us a cause of action is stated in the petition of appellants; for to be accused of having uttered in reference to a particular matter or person foul lies, and of possessing a vile, slanderous tongue, is unquestionably calculated to degrade and injure the reputation of a person in public estimation. And there was also, in legal contemplation, sufficient publication to support the action; for although the letter was sent through mail to the private address of Arthur Allen, and was read by another or others, without the immediate procurement or agency of appellee, still such exposure of the subject-matter of it was the proximate, and, under the existing condition, inevitable, consequence of his act of writing and sending, and he should therefore be held to have published it.

But in the letter, only excerpts of which are set out in the body of the petition, it is stated that appellee had been informed by a person, whose name is mentioned, that appellant Nancy Allen charged him (appellee) with being a thief, and it was in response thereto the language quoted in the petition was used. It is well settled, and in accordance with natural justice, that a person has a conditional privilege to publish, by speech or writing, whatever he honestly believes to be and is essential to the protection of his own reputation, and therefore may, without subjecting himself to an action for libel, publish a communication containing a refutation or denial of any charge affecting it; for such communication, when made *bona fide*, and without malice, is privileged, although it contains criminatory matter which without the privilege would be slanderous and actionable. And, consequently, if the occasion on which a communication is made furnishes *prima facie* such legal excuse for making it, the presumption of malice does not arise, and the burden is upon the plaintiff to prove there was malice in fact; that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made. Townsh. Sland. & Lib. 319, 220. But whether appellant Nancy Allen did make the charge that appellee was a thief depends upon information he stated in the letter was given to him by another person, which may or may not be, and consequently cannot be, assumed as true. Therefore, even if the whole letter be taken and considered as part of the petition, a legal excuse would not be thereby manifested; for it would be an unreasonable application of the rule of privileged communications to decide a person can, upon the pretext of defending or protecting his own reputation, that may not have been assailed at all, write and publish defamatory matter of another. It thus results appellant must plead and show

as matter of defense, if it be a fact, that the cause or occasion of the communication was such as to make it privileged, and until done the letter is to be regarded as having been written and published without legal excuse, and the presumption of malice will continue. Wherefore the judgment is reversed, and cause remanded, with directions to overrule the demurrer to the petition, and for further proceedings consistent with this opinion.

LYNN v. COMMONWEALTH.

(Court of Appeals of Kentucky. Feb. 22, 1890.)

RAPE—EVIDENCE—INSTRUCTIONS.

The jury may convict of rape on the evidence of the prosecutrix alone; and, where there are circumstances tending to support or discredit her, it is not error in the court to refuse to single out certain circumstances, and instruct the jury as to their effect.

Appeal from circuit court, Crittenden county.

"Not to be officially reported."

Nunn & Cruce and James & Moore, for appellant. P. W. Hardin, Atty. Gen., for the Commonwealth.

HOLT, J. The appellant, Morrison Lynn, has been convicted to the penitentiary for 10 years upon the charge of raping his step-daughter when she was not quite 15 years old. He admits the intercourse, but, *contra* to her testimony, denies the force. Whether she consented or not is therefore the only question of fact. As to it, the evidence is conflicting. Only the two parties to the transaction testify as to it. They contradict each other. It was the province of the jury to pass upon the question. They saw the witnesses, and had a better opportunity to judge of the credit to be given to the one or the other than a mere reading of the evidence affords.

The main complaint of the appellant is that the whole law of the case was not given to the jury. They were, in substance, told that if they believed from the evidence, beyond a reasonable doubt, the act was done contrary to the will of the daughter, then they should convict. It is urged that they should have been told not to convict upon her evidence alone, or that they should have been cautioned against doing so, and directed to scrutinize her testimony closely. In cases of this character, the aggrieved party has so far been considered a witness *ex necessitate* that in Lord Audley's Case, Hut. 115, she was admitted to testify against her husband, who had assisted another in the ravishing of his own wife. It is true that leading text-writers—for instance, Greenleaf, Wharton, and others—say, in speaking of the credit to be given her, that various circumstances should be considered,—thus, her character; whether she presently told of the offense, if she had opportunity to do so, and made search for the offender; whether she might have been heard at the time of the outrage, and yet made no

outcry; whether she be supported by other evidence; whether the accused fled,—and that, while no unreasonable suspicion against her should be indulged, yet courts and juries should scan her evidence carefully, and guard themselves from the influence of sympathy for her. The jury are, however, to judge of the credibility of witnesses. The court should not, by its instructions, do so, or to any extent infringe upon this right of the jury. The circumstances above enumerated as giving strength or weakness to the evidence may all be proven. The existence or non-existence of nearly all of them appeared from the evidence in this case. Manifestly, it would have been error in the court to have singled out certain circumstances, and instructed the jury as to their effect. The entire testimony was before them. Whatever strengthened or weakened the evidence of a witness, and the degree of it, was for their consideration, and determination; and equally had the court no right to tell them what was weak, and what strong, testimony. They were properly left to measure the credibility of the witness, and the credit to be given to the testimony, without hint from the court. The testimony offered by the accused, and rejected by the court, relating to threats by his wife and her mother towards him, was incompetent. It in no way tended to exculpate him from the charge under investigation, and the mother-in-law had not been questioned as to them.

In our opinion, the attorney for the state did not go beyond the domain of proper argument in his speech to the jury. While the court should interpose, when asked to do so, whenever this is done, yet considerable latitude must necessarily be allowed. It is often necessary by way of response; and this appears to have been the case, in this instance, as to a part of the language objected to, and the remainder related, in the main, to the enormity of the offense, and the need of punishment as a protection to the virtue of our women. Judgment affirmed.

Ex parte GRIFFIN.

(Supreme Court of Tennessee. Feb. 20, 1890.)

COSTS—TAX UPON DEFENDANT IN CRIMINAL PROCEEDINGS.

Under Act. Tenn. 1889, c. 180, entitled "An act to provide revenue for the state," and imposing a tax on the unsuccessful party in civil suits, and on each indictment or presentment, and that all such taxes "shall be taxed in the bills of costs, and are hereby declared part of the costs in the case," the tax thus imposed on defendant upon conviction in a criminal proceeding cannot be collected, as costs, by imprisonment.

Appeal from circuit court, Davidson county; WILLIAM K. MCALISTER, Jr., Judge.

Application of John Griffin for writ of *habeas corpus*.

G. W. Pickle, Atty. Gen., J. M. Quarles, and A. J. Caldwell, for appellant. Colyar & Colyar and J. W. Gaines, Jr., for appellee.

FOLKES, J. The question presented for

determination here is the right or power of the keeper of the work-house of Davidson county to hold in custody the petitioner, Griffin, until he pays or works out, at the rate of 40 cents per day, the state and county tax in litigation. The petitioner was convicted of the offense of carrying a pistol, and sentenced to pay a fine of \$50, and was by the usual judgment in such cases committed to the work-house, in default of paying or securing the fine and cost. The fine was remitted by the governor, and petitioner has remained in the work-house long enough to work out all the items in the cost-bill, except the state and county tax. Thereupon he filed his petition for *habeas corpus*, returnable before his honor, W. K. MCALISTER, judge of the circuit court, who upon the foregoing facts ordered that the prisoner be discharged. The state has appealed in error. It is urged by the attorney general, on behalf of the state, that the items in the cost-bill covering this tax are by the act of 1887 made cost, and as such can be collected by imprisonment, as other costs in criminal causes. This act is entitled "An act to provide revenue for the state of Tennessee, and the counties thereof." See Acts 1889, c. 180, p. 247. In the fourth section, among other taxes therein imposed, we find, under the head of "Litigation," a tax imposed upon the unsuccessful party in civil suits, in the several courts of record in the state, and upon each indictment or presentment, the sum of five dollars. Following the enumeration of the suits and courts, and amount of tax thereon, it is enacted: "All the above taxes shall be taxed in the bills of cost, and are hereby declared part of the costs in the case." Does this legislative declaration make this tax cost? If so, it must follow that the prisoner can be held until he pays this, just as he may be held to pay the other items of cost of conviction; for, independent of the work-house law, the courts have the power to imprison for fine and cost. *Hill v. State*, 2 Yerg. 247; *Moseley v. Gallatin*, 10 Lea, 494; *Eaton v. State*, 15 Lea, 200. See, also, Mill. & V. Code, § 6114, 6267, et seq. The imposition of this tax being clearly embraced within the subject and title of the act, the means or manner of its collection could be provided in the same act. *Cannon v. Mathes*, 8 Heisk. 504. This act, so far as it declares this tax cost, was no doubt passed by the legislature to obviate the difficulty pointed out by the decision of this court in the case of *Johnson v. State*, 1 Pickle, 825, 2 S. W. Rep. 802. This case, following a line of cases beginning with *State v. Nance*, 1 Lea, 644, and coming on down to *Eastman v. Nashville*, 13 Lea, 717, held that this tax on litigation, imposed upon the party against whom costs are adjudged, is manifestly a tax imposed for revenue purposes only, and not by way of punishment; that it is no part of the cost, and no part of the fine; and, as a tax, can no more be collected by imprisonment in a criminal, than in a civil suit.

It is true, as now insisted by the attorney

general, that these adjudications were predicated in part upon the idea, as expressed by Judge COOPER in State Tax Cases, 12 Lea, 746, that "all the recent revenue acts still levy the tax as a specific tax, and not as costs." And as was said in State v. Stanley, 3 Lea, 524, "the claim of the state for taxes has precedence over a mere private debt of the citizen," where this tax was held to be payable out of the first money coming in, in preference to the fees of officers, where there was not enough to pay both. It is equally true that the act of 1889 now undertakes to declare it costs, and collectible as such. But the fact remains that it is a specific tax imposed for revenue only, and that, if it is to be collected by imprisonment, it is a tax that is so collected, unless the legislative declaration changes its nature. We are of opinion that the legislature has not by such declaration changed its nature; it is still a tax, and as such may be put in the bill of costs, and collected with the costs, so far as judgment and execution may be efficacious for that purpose. But so long as it remains in the revenue bill as a specific tax, it cannot, by a mere declaration in such bill that it is costs, become costs in fact, so as to justify imprisonment for its payment. We have no disposition to abridge in the slightest the power of the legislature to imprison for the payment of fine and costs, but we do not feel at liberty to recognize as fine or costs what are not so in fact, simply because of a declaration in the revenue bill that a tax shall be called costs. The personal liberty of the citizen, even though he be under presentment, indictment, and conviction for a violation of the criminal law of the land, is too sacred to be at the mercy of erroneous legislation or definition, by whatever department of the government such declaration may be made or definition given. Costs and fees, though unknown to the common law, have in modern times a fixed and well-understood signification. "Costs are the expenses incident to the conduct of a suit, either in the prosecution or defense, and such disbursements as are allowed by law as fees to witnesses and officers of court." 1 Bouv. Law Dict. 376. However desirable it may be to place upon the violators of law some of the burdens which the cost of criminal trials imposes upon the state, we are of opinion that it cannot be done by imprisoning the offender until he pays the tax on litigation, under the declaration that such taxes "shall be taxed in bills of costs, and are hereby declared part of the cost in the case." It is urged by the attorney general that if this tax cannot in criminal cases be collected by imprisonment under the act of 1889, the act will also be inoperative in civil cases, when the effort is made to collect it from the surety on the prosecution bond, or by motion over against the successful party, and such like cases. Even if this were so, it should not influence our judgment in the case at bar. But it does not follow that the tax may not be collected as and with costs in civil cases,

for as a tax it may be collected by execution, but as a tax it may not be collected by imprisonment. Such was the view of the learned circuit judge who discharged the prisoner, and his judgment is affirmed, with costs.

McDANIEL v. NASHVILLE, C. & ST. L. R. Co.

(Supreme Court of Tennessee. Feb. 20, 1890.)

SPECIAL JURY—SUMMONS BY COURT EX PROPRIO MOTU.

Under M. & V. Code Tenn. § 4805, providing that on motion of either party, in any civil action, a special jury may be ordered and summoned, if in the opinion of the court it is proper, it is not within the power of the circuit court to summon such special jury on its own motion.

Appeal from circuit court, Franklin county; M. D. SMALLMAN, Judge.

Williams, Alexander & Lefebvre and Davis & Martin, for appellant. *Marks & Gregory and C. D. Porter*, for appellee.

CALDWELL, J. This case was before this court at the December term, 1888, and was remanded for a new trial. The opinion then delivered is reported in 12 Lea, 386-389. After being remanded, there were several mistrials, on account of the failure of the jury to agree upon a verdict. At one time there was a verdict for the plaintiff for \$1,000, but it was set aside, and a new trial granted, on motion of the defendant. Some of the mistrials were before, and some after, this verdict. At the August term, 1888, the case was continued on the application of the defendant; and thereupon, on "the court's own motion," 16 citizens were named by the court, and directed to be summoned to the first day of the next term, for the purpose of making a special jury to try this case. At the succeeding term, and before the jury was made up, the plaintiff moved the court to discharge the special panel on two grounds: *First*, because the county court had appointed a full panel of good and lawful men, who were then present, and not subject to any legal exception; *second*, because the circuit court had no authority to appoint the special panel. This motion was overruled, and a special jury impaneled. The trial resulted in a verdict and judgment for defendant; and, a motion for a new trial being overruled, plaintiff appealed in error.

The first assignment of error calls in question the action of the trial judge with respect to the special jury, and denies that it was authorized by law. Primarily, the power to appoint citizens to serve as jurors in the circuit court is conferred upon the county court. Code, Mill. & V. §§ 4756-4758. If the county court fail to nominate, or the persons nominated fail to attend, then the circuit court may designate other good and lawful men, and direct that they be summoned as jurors. Id. § 4768. So, if the panel be exhausted before the jury is completed, or if, in the progress of the trial, any of the jurors become unable to serve, the circuit judge may order the necessary number of additional jurors to be

summoned. Id. §§ 4803, 4804. The panel may be reduced by challenges for cause, (Id. § 4784,) and without cause. (Id. § 4788.) "When, by reason of challenges, or any other cause, it is rendered necessary, the court may cause petit jurors to be summoned from the by-standers, or the county at large, either to supply the deficiency in juries, or to form one or more entire juries, as the occasion requires." Id. § 4806. Again: "On motion of either party, in any civil action, a special jury may be ordered and summoned, if in the opinion of the court it is proper; the additional cost to be taxed to the losing party." Id. § 4805.

These are the material provisions of our law relating to the question in hand. None of them in terms, or by proper construction, cover this case, or confer the power exercised by the trial judge. The county court had not failed to appoint, nor had those appointed failed to attend. There was no diminution or exhaustion of the regular panel, by challenges or otherwise, before the jury could be completed; nor was any juror discharged for inability occurring during the progress of the trial. No misconduct of the regular panel, nor of any individual juror, is shown or claimed. The record fails to disclose anything by which it was "rendered necessary" to summon additional jurors, either to supply a deficiency in the regular jury, or to form another jury entire. In fact, the directions for a special panel were made at the term before the trial, when it could not be known that the panel to be nominated by the county court would prove defective or inadequate in any particular.

Nor was the special panel ordered, or the special jury made up, "on motion of either party," as allowed by the other section of the Code. It was done "on the court's own motion," and over the objection of the plaintiff. The trial judge misconceived his authority, and exercised a power not conferred upon him by any law, or sound practice. Had his action been based upon a motion of either party, this court would presume that the discretion contemplated by the statute had been properly exercised, and would not reverse because the propriety of the ruling did not appear affirmatively. *Clingan v. Railroad Co.*, 2 Lea, 726. But in the case before us it is a question of power, and not of discretion. We hold that the power did not exist. Reverse and remand.

REEVES v. BARRETT *et al.*

(Supreme Court of Arkansas. Feb. 15, 1890.)

EJECTMENT—ADMINISTRATORS—PUBLIC LANDS.

1. In ejectment it appeared that one J. had entered the lands in suit at the state land-office on time; that after his death his son W. was appointed administrator *de bonis non*, and as such, in order to avoid the payment of back interest on the purchase price, surrendered the certificates of entry; that by preconcerted arrangement the lands were immediately entered by a friend of W.'s. A short time afterwards this friend assigned the cer-

tificate of entry to W. individually, and not as administrator. W., and the rest of the family of J., lived on the land for some years. It appeared that W. had no means with which to purchase the land individually, his only income being from the estate of which he was administrator, and that he paid the taxes out of the proceeds of the estate; that he had claimed that the land belonged to the estate, though plaintiff testified that he had represented to him, for the purpose of obtaining credit, that he owned the land. *Held*, that W. did not acquire any interest in the land individually, but his title was that of administrator only.

2. A deed from W.'s administrator purporting to convey the whole estate is valid only as to that portion of the estate to which W. was entitled as one of the heirs of J.

Appeal from circuit court, Dallas county; C. D. WOOD, Judge.

This was an action in ejectment brought by J. A. Reeves against J. W. Barrett and others, heirs of James W. Barrett, deceased, to recover a tract of land containing 520 acres. It appeared that James W. Barrett had entered the lands in 1858 at the state land-office, giving his notes therefor; that he died in the same year, leaving a will, and these defendants and other sons, W. C. Barrett and Peter B. Barrett, as his heirs at law. By the will the property in controversy was left to his widow and children. Peter B. Barrett was appointed administrator with the will annexed, and as such held and controlled the lands until his death. Upon the death of Peter B., W. C. Barrett was appointed administrator *de bonis non*, with the will annexed, by letter issued in 1865. In 1872, W. C. Barrett, for the purpose of saving the accumulated interest on the notes given for the purchase of the land, surrendered the certificates to the state under the act of 1869; and by agreement previously made the lands were immediately entered by one Mallett in his own name, and in two parcels, two certificates being taken. A few days after, Mallett assigned one of the certificates to W. C. Barrett individually, and not as administrator; and a few months afterwards the second certificate was assigned in a like manner. The deeds to the lands were afterwards issued to W. C. Barrett in his own name. The receipts for taxes on the land were in the name of W. C. Barrett individually; and it also appeared that W. C. Barrett had represented to plaintiff, for the purpose of obtaining credit, that the lands belonged to him individually. It appeared, further, however, that W. C. Barrett had no money or property of his own, but lived on the farm with the rest of the family. It also appeared that he had represented to other parties that the land belonged to the estate, and not to him individually; that he had no means of paying for the land except from the proceeds of the estate; and that the taxes were paid out of such proceeds. It also appeared that he had entered a portion of the land as administrator of the estate of his father. In 1881, W. C. Barrett died, and N. A. Clark was appointed administrator of his estate. Under an order of the probate court he sold the lands as the property of W. C. Barrett, plaintiff becoming

the purchaser. There was judgment for defendants, and plaintiff appealed.

H. G. Bunn and M. M. Duffie, for appellant. *T. B. Martin*, for appellees.

PER CURIAM. The proof amply sustains the decree, and it is affirmed except in so far as it cancels the deed of Clark, administrator, to plaintiff. This should be annulled only so far as it purports to convey interests other than those received by W. C. Barrett under the will of his father. Reverse and remand, with instructions to so modify the decree.

WOOLUM v. KELTON.

(*Supreme Court of Arkansas. Feb. 15, 1890.*)

EXECUTION—MOTION TO QUASH—JUDGMENT ON APPEAL.

1. Upon appeal from an order of a justice of the peace, denying a motion to quash an execution on the ground that it had been paid, judgment should be rendered against the appellant, and the sureties on the appeal-bond, for costs only, and not for the amount of the original judgment on which such execution was issued.

2. Where there is a conflict of evidence, the finding of the jury will not be disturbed on appeal.

Appeal from circuit court, Washington county; *J. M. PITTMAN*, Judge.

This was an appeal from a judgment of a justice of the peace, refusing to quash an execution issued against the property of *E. J. Woolum* in an action brought against him by *M. S. Kelton*, as administratrix for the estate of *J. B. Kelton*, deceased. The jury found against the execution debtor, and judgment was rendered against him and his sureties on the appeal-bond for the whole amount of the judgment rendered in justice's court; whereupon plaintiff appealed.

C. R. Buckner, for appellant.

PER CURIAM. The questions arising upon the motion to quash the execution should have been tried by the court, but were, by consent, submitted to a jury. The evidence was conflicting, and their finding will not be disturbed. But upon finding against appellant upon his motion to quash the executions the court rendered judgment against him, and the sureties upon an appeal-bond, for the amount of the justice's judgments. This was error. Reverse the judgment, and enter judgment here against the appellant and his sureties for the costs of the justice's and circuit court.

NICKLE *et ux.* v. EMERSON MERCANTILE & MANUFACTURING CO.

(*Supreme Court of Arkansas. Feb. 15, 1890.*)

HUSBAND AND WIFE—BUSINESS CONDUCTED IN WIFE'S NAME—RIGHTS OF CREDITORS.

When an insolvent debtor conducts his business in his wife's name, she, however, taking no part in the management of the business, the management being left entirely in the control of the husband, the avowed purpose being to place the property beyond the reach of the creditors of the husband, the property accumulated in such business will be subjected to the husband's debts.

Appeal from Pulaski chancery court; *D. W. CARROLL*, Chancellor.

Bill to subject lands held by *Katherine Nickle*, wife of *William Nickle*, to the payment of a debt owing the *Emerson Mercantile & Manufacturing Company* by said *William Nickle*. It appeared that *Nickle* and one *Joseph A. Martin* had been in the butcher business together as *Martin & Nickle*, and that plaintiff's claim was based on a judgment against this firm; that the firm quit business, claiming to be insolvent. Afterwards, *William Nickle* went into the butcher business again in his wife's name, and gradually accumulated a large amount of real estate and other property, all of which was in the name of the wife. This separate business of the wife was begun in April, 1882, and in April, 1886, they had accumulated property to the value of \$12,000. *Nickle* and his wife claimed that their money was derived entirely from their business, and there was nothing in the testimony to show that at the time they started they had more than \$650 derived from the sale of their homestead. *Nickle* was a bright, shrewd business man, and an excellent manager. The business was entirely in his control, and he decided all questions relating to the business, though everything was done in the wife's name. It appeared, too, that he had no fixed salary as manager for his wife, but used the money derived from the business as his own, and conducted all negotiations of a business character, whether pertaining to the butcher business or to purchasing and selling real estate. There was some testimony to show, too, that at the time the business was started *Nickle* had stated to several that he was going into business again, but in his wife's name, in order to keep his creditors off. There was judgment for plaintiff, and defendants appealed.

Marshall & Coffman, for appellant.
Blackwood & Williams, for appellee.

PER CURIAM. The evidence discloses that the property in question was purchased with funds raised from a business owned and conducted by the insolvent husband under the cloak of his wife's name, which he used as a subterfuge to cover his property from claims of his creditors. The creditors have the right, therefore, to subject the property to the payment of their debts. Affirm.

ADAMS v. URQUART.

(*Supreme Court of Arkansas. Feb. 15, 1890.*)

CONTRACT TO ASSUME ANOTHER'S DEBTS—CONSTRUCTION.

Where defendant agreed to assume "the payment of [plaintiff's] portion of the indebtedness of the firm [of which plaintiff was a member] and all obligations or contracts of said firm," the words, "and all obligations or contracts of said firm," must be construed as simply defining the liability with certainty, and not as extending defendant's liability beyond the plaintiff's proportionate share of indebtedness.

Appeal from circuit court, Pulaski county; J. W. MARTIN, Judge.

John D. Adams brought this action against E. Urquart to recover the amount of \$1,079.20. It appeared that the amount thus claimed had been paid out by plaintiff on account of the indebtedness of the firm of Adams & Green, of which firm the plaintiff had been a member. It further appeared that on November 15, 1883, Adams & Green conveyed to defendant certain lands, the deed of conveyance containing the following clause: "Said Urquart assumed the payment of John D. Adams' portion of the indebtedness of the firm of Adams & Green, and all obligations or contracts of said firm." On trial, judgment was rendered for the plaintiff for one-half of the amount paid out by him on the indebtedness of Adams & Green, from which judgment plaintiff appealed, claiming that, under the contract with defendant, he was entitled to the full amount.

U. M. & G. B. Rose, for appellant. *Caruth & Erb*, for appellee.

PER CURIAM. Urquart, by the express terms of his contract, assumed Adams' portion of the indebtedness of the firm of Adams & Green. That was one-half of the indebtedness. *Ringo v. Wing*, 49 Ark. 463, 5 S. W. Rep. 787. The subsequent clause, "and all obligations or contracts of said firm," was intended to extend with certainty Urquart's liability to unliquidated demands, such as the one sued on, and not otherwise to enlarge his liability. The court below so construed the contract, and the judgment will be affirmed.

FREEMAN v. WATKINS *et al.*

(*Supreme Court of Arkansas*. Feb. 15, 1890.)

SALES UNDER ATTACHMENT—CONFIRMATION.

Under Mansf. Dig. Ark. § 350, providing that all sales under attachment shall be subject to the confirmation of the court, such a sale is not complete, and no action can be maintained for purchase money until such confirmation.

Appeal from circuit court, Carroll county; M. R. BAKER, Special Judge.

This action was brought by T. C. Freeman against John Watkins and James P. Foucher, upon a promissory note executed by defendants for the purchase price of certain lands sold by plaintiff as sheriff under and by virtue of an attachment. It appeared from the record, among other things, that the sale had never been confirmed by the court. Judgment having been rendered for defendants, plaintiff appealed.

Crump & Watkins, for appellant. *U. M. & G. B. Rose*, for appellees.

PER CURIAM. Attachment sales are, by the terms of the statute, subject to confirmation by the court. The contract of sale is not complete until the bid of the purchaser is accepted by the court, and until accept-

ance there can be no enforcement of the contract by either party. The purchaser cannot, therefore, be compelled to comply with the terms of sale by payment of the purchase money, until his bid has been accepted by the court. *Freem. Ex'ns*, § 304a; *Bell v. Green*, 38 Ark. 78; *Greer v. Powell*, 8 Metc. (Ky.) 124. There had been no confirmation in this case when the action to collect the purchase money was brought, and it was therefore premature. If the plaintiff shall move a confirmation of the sale, the defendant can raise the other questions argued by him in that proceeding. When the sale is confirmed, the plaintiff can renew his action to recover the purchase money. Affirm.

NUNNALLY v. BECKER.

(*Supreme Court of Arkansas*. Feb. 15, 1890.)

WITNESS—TRANSACTIONS WITH DECEDENTS—CONVERSION.

1. Under Const. Ark. art. 7, § 23, providing that in actions by or against executors or administrators neither party shall be allowed to testify against the other as to any transaction with or statement of the deceased, it is not competent, in an action against an administrator for conversion, for plaintiff to testify to the fact of the delivery of the property converted to the intestate.

2. Where plaintiff alleges that the property so converted was in a box, which he delivered to the intestate to be placed in intestate's safe, he cannot testify as to the contents of the box until he has shown by competent testimony that the box was actually delivered to intestate.

Appeal from circuit court, Lee county; M. T. SANDERS, Judge.

This action was brought by B. B. Nunnally against F. Becker, as administrator of the estate of M. Kohn, deceased, to recover \$183.57 alleged by plaintiff to have been deposited with deceased, and converted by him to his own use. It appeared that plaintiff was postmaster, and, having no safe, was in the habit of placing his funds in the safe belonging to deceased, for keeping over night; that he had on February 8, 1886, taken into the store of deceased a box containing the amount sued for, for the purpose of placing it in the safe. The plaintiff testified as follows: "On the evening of that day, after business hours, as was my usual custom, I took the post-office funds on hand, amounting to \$183, in a small wooden box, in which I always kept the funds, and carried them to defendant's intestate, to be locked up for safe-keeping during the night, in his iron safe, and I was standing within a few feet of said intestate when I saw him place said box of funds in said iron safe. The box containing the funds was locked, and I kept the key. The safe was an old-fashioned one, and was locked by means of a key, which said intestate always carried with him. There was no other key to the safe, that I know of. After the funds were placed in the safe, I went home. The next morning before breakfast said Kohn came to my house, and informed me that his safe had been burglarized the night before, and its contents stolen. I

immediately went to the post-office, and on my arrival there found quite a crowd of citizens, who had gathered on the announcement of the alleged burglary. I found, on the counter in the store, the wooden box in which the funds were kept, and the box was open, and the funds missing; and Kohn stated that he found the box on the sidewalk that morning, while on the way from his residence to the store. The iron safe showed no signs whatever of violence. Neither door nor windows of the storehouse showed any signs of a forcible entry. Kohn kept the post-office funds in his safe at night without charge therefor. A few days after said alleged burglary, said intestate bought from me a post-office money order, and in paying for it I instantly recognized some peculiarly marked silver money which was a part of the \$183 deposited in the safe on the night of the alleged burglary, and I called said intestate's attention to it at the time. He answered me evasively, and in a somewhat offended manner, and went back down the store." The introduction of this testimony was objected to by defendant, and the objection was sustained. There was no other testimony regarding the alleged transaction between plaintiff and deceased. Judgment was rendered for defendant, and plaintiff appealed.

James P. Brown, for appellant. *McCulloch & McCulloch*, for appellee.

PER CURIAM. The proffered testimony of the appellant, to the effect that he had delivered to the defendant's intestate a box of money to be deposited in his safe, was a "transaction" with the intestate, within the meaning of the proviso to article 7, section 22, of the constitution, and inadmissible for that reason. The witness' knowledge that the box was in the safe was not competent evidence, because it was derived solely from the transaction between the parties. The distinction contended for between the appellant's counsel seems to be sustained by the case of *Tisdale v. Maxwell*, 58 Ala. 40, where a witness, who was incompetent to prove the delivery of a horse to a person who had since died, was held to be competent to prove the possession of the horse subsequent to the delivery; but the facts of the case here prevent the application of that rule, for the reason stated, viz., the knowledge of a witness to the effect that the box was in the safe was a part of the transaction with the deceased. It may be admitted that the appellant was a competent witness to prove the contents of the box, under the common-law rule announced in *U. S. v. Clark*, 96 U. S. 37; but the testimony was incompetent until the foundation was laid by competent evidence tending to prove that the deceased had received the box, and converted its contents. There was no testimony offered, outside of the incompetent testimony of the appellant, to prove these facts, and he was not, therefore, prejudiced by the ruling of the court. **Affirmed.**

COOK v. COUGH et al.

(Supreme Court of Missouri. Feb. 24, 1890.)

WILLS—ESTATES—FEE-SIMPLE.

A testator devised all his property to his wife and five children, to be equally divided among them, and directed that the wife should be guardian of the minor children, and that no partition of the estate should be made until the youngest child should become of age, and that the wife should still retain her lawful dower, and be privileged to will to whom she pleased her portion of the real estate. *Held*, that the wife took, in addition to her dower, an undivided one-sixth in fee-simple, under Rev. St. Mo. § 4004, which provides that in all devises of land in which the words "heirs" and "assigns" are omitted, and no expressions are contained in the will whereby it shall appear that such devise was intended to convey a life-estate only, and no further devise is made to take effect after the death of the devisee, it shall be understood to be the intention of the testator to devise an estate in fee-simple.

Error to circuit court, Johnson county; C. W. SLOAN, Judge.

J. W. Suddath and *S. P. Sparks*, for plaintiff in error. *O. L. Houts* and *Sweeney & Walker*, for defendants in error.

BLACK, J. This is a suit for the partition of about 280 acres of land. Solomon T. Taylor died in 1870, and by his last will devised the land to his wife and five children. That part of the will which gives rise to this contest is in these words: "I will and bequeath unto my beloved wife, Elizabeth I. Taylor, and my children, namely, Samuel S. Taylor, George Taylor, William J. Taylor, Richard P. Taylor, and Nancy I. Taylor, all my personal and real estate, to be equally divided unto them, without favoring one more than the other, under the following limitations and restrictions, namely: That my beloved wife, Elizabeth I. Taylor, is to be the sole guardian of all my children during their legal minority, and not be required to give any security in law for the performance of the guardianship, and she is to keep possession of the farm, and all the stock and farming utensils that she wishes, together with all the household and kitchen furniture, and provide for the maintenance and education of all my children during their minority; and, further, I ordain that no partition or division of my landed or personal estate shall take place, or be allowed by my executor, until my youngest child, Nancy I. Taylor, shall have arrived to years of legal majority, and then my wife shall still retain her lawful dower in all my real estate during her natural life, and be privileged to will to whom she may see proper her portion of my real estate." The widow died intestate in October, 1883, but prior to that date she and two of the children sold, and by deed conveyed, their interest in the property to George Couch, through whom defendants claim. Nancy I. Taylor, the youngest child of the testator, attained her majority in June, 1884; and in that year she and the two remaining children conveyed their interest in the land to the plaintiff, William Cook.

This cause turns upon the construction of

the will of Solomon T. Taylor, and the question is, what estate did the widow take? The circuit court held that she took, besides dower, an undivided one-sixth in fee-simple, thus giving to the plaintiff but three-sixths of the property. The claim of the plaintiff may be expressed as follows: By the will the widow took a quantity equal to an undivided one-sixth, limited in duration to the time when the youngest child attained the age of majority. Then the widow became seized of an estate equal to that of her dower right, coupled with a power to dispose of the one-sixth by will only. By reference to the will it will be seen the testator devises to his wife and five children all of his property, real and personal, to be equally divided between them, without favoring one more than the other. Thus far the widow and each of the children would take a one-sixth in fee. This result is expressed in terms too plain to be questioned. But the will goes on to say, under the following restrictions and limitations, namely: *First*, the wife is to be the sole guardian of the children, and is released from giving security; *second*, she is to keep possession of the farm, stock, farming utensils, and household furniture, and provide for the maintenance and education of all of the children during minority; *third*, no partition of the real or personal property is to take place until the youngest child shall attain her majority. All of these limitations and restrictions apply to the interest devised to the children as well as that devised to the wife, and there is not one of them that expresses or discloses any purpose or intention to cut down the estate in fee to the one-sixth before devised to the wife. This devise of a one-sixth would be in lieu of dower unless the testator by his will otherwise declared, (section 2199, Rev. St.,) and hence he goes on to say that she shall still retain her dower; thus not only devising to her a one-sixth, but also in terms preserving to her her dower. Then, speaking of her, he adds, "and be privileged to will to whom she may see proper her portion of my real estate." These are the only words in the will from which any plausible argument can be made that she took a life-estate, with power to dispose of the same by will only. The cardinal rule of construction of wills is to ascertain the true intent and meaning of the testator, and in doing this we are to look to the whole will, and every clause thereof; but each clause must have accorded to it no greater force or effect than that intended by the testator. The leading object of the testator seems to have to keep the whole of the property in the possession and use of the wife so long as the duty or rearing and educating any of the children devolved upon her, and to give her, in addition to dower, a part equal to that of a child. There is not a thing in the will to overcome all this evidence of a design to give her a one-sixth in fee, save the single expression that she should be privileged to will it to whom she

saw fit; and to give to that expression the effect of creating a life-estate only, with power to dispose of the fee, is to make what appears to be a casual expression override what otherwise appears to have been the leading purpose of the testator, and this ought not to be done. Our statute, in substance, declares that in all devises of land in which the words "heirs" and "assigns" are omitted, and no expressions are contained in the will whereby it shall appear that such devise was intended to convey an estate for life only, and no further devise is made to take effect after the death of the devisee, it shall be understood to be the intention of the testator to devise an estate in fee-simple. Section 4004, Rev. St. 1879. There are no words expressly limiting the wife to a life-estate in the one-sixth, and there is no disposition of the remainder after her death; and the words saying that she shall be privileged to will to whom she may see proper her portion do not alone indicate an intention to devise an estate for life only. The most that can be said in behalf of the theory advanced by the plaintiff is that there is here a devise generally of the one-sixth, with a superadded power to dispose of the same by will. The general rule is that a devise of an estate generally or indefinitely, with a power of disposition over it, carries a fee. *Rubey v. Barnett*, 12 Mo. 8; *Gregory v. Cowgill*, 19 Mo. 416; *Green v. Sutton*, 50 Mo. 186. A distinction must be made between those cases where there is a devise generally or indefinitely with a power of disposition, and those cases where there is a devise for life with a power of disposition. In the former the devisee takes the property in fee. *Reinders v. Koppelman*, 68 Mo. 482-490. The cases cited for the plaintiff do not support the proposition which he seeks to maintain. In *Chiles v. Bartleson*, 21 Mo. 346, the testator gave his land to his wife, and then provided that upon her death it should be divided between his children; thus showing clearly an intention to give the wife a life-estate only. In *Bryant v. Christian*, 58 Mo. 98, the will in express terms gave the wife only a life-estate, and of course the addition of a power of sale would not enlarge that estate to a fee. *Carr v. Dings*, Id. 400, is more in point. But in that case there was a disposition of the remainder. The case turned upon the question whether the testator intended to give in remainder to his brother's children the residue of his estate, after carving out a one-fourth, over which the wife had the power of disposal, or the whole estate undisposed at the death of the wife; and the conclusion was reached that he intended the children should take whatever remained. And in *Harbison v. James*, 90 Mo. 417, 2 S. W. Rep. 292, the testator gave all of his property to his wife, with power to sell and reinvest, for her use and benefit, but with the further provision that at her death any portion of the estate remaining undisposed of should go to his three daughters. There was in that case a plain purpose indi-

cated to give the daughters whatever of the estate remained at the death of the wife, and this court gave full force and effect to that intention.

The testator evidently designed to dispose of the whole of his estate, and to die intestate as to no part or portion thereof. As to the one-sixth devised to the widow, there is no limitation over, nor has he used any words showing an intention to give her a life-estate only, or any estate to one-sixth less than a fee; and we have seen that a power of disposal will not of itself cut down a fee-simple to which it is added. As Elizabeth I. Taylor took the fee of the one-sixth, she could dispose of it as she saw fit. The construction given by the circuit court to the will was the correct one, and the judgment is therefore affirmed. All concur.

BENNE v. SCHNECKO *et al.*

(*Supreme Court of Missouri. Feb. 24, 1890.*)

FRAUDULENT CONVEYANCES—SUBROGATION—JUDGMENT—ACTION BY ASSIGNEE—EQUITY.

1. In an action to set aside a conveyance by a husband in trust for his wife, as in fraud of creditors, it appeared that the conveyance embraced all of the husband's land as well as his personalty, consisting of farming implements, household furniture, farm stock, etc.; the expressed consideration being \$12,000. The evidence showed that the land was worth only \$5,000 or \$6,000, and that it was incumbered by a deed of trust for \$2,500. The husband and wife testified that on their marriage in 1865, 15 years before the conveyance was made, the wife had \$3,000 in money, and also land which she then sold for \$2,000; that the husband borrowed this money; and that he made the conveyance to repay her for the loan. *Held* that, in view of the discrepancy between the actual value of the land and the price mentioned in the deed, and of the fact that the transfer embraced all of the husband's property, as well as of the further fact that in 1865 the husband acquired title to all the wife's personalty in possession by virtue of the marriage relation, as at common law, the conveyance would be set aside.

2. On the same day that plaintiff's judgment by default was recovered against the husband, a third person, by "mutual consent," also recovered a judgment against him. A motion to set aside the default in plaintiff's case was made in behalf of the husband, and matters were so managed that the "consent" judgment obtained a priority over plaintiff's. *Held*, that the wife's purchase of the land for \$145 at the execution sale under the "consent" judgment was in furtherance of and tainted with the original fraud.

3. In equity, payment of a debt by a surety does not extinguish it, but operates as an assignment to the surety, with all the creditor's rights.

4. One to whom a judgment has been assigned for the benefit of himself and another may sue thereon in his own name.

5. In equity cases, the supreme court is not concluded by the chancellor's findings of fact; and remarks in former cases that the supreme court will defer somewhat to his findings, where the witnesses testify orally, apply only where the testimony is conflicting or evenly balanced, and the finding of the chancellor appears to be correct.

BARCLAY, J., dissenting.

Appeal from St. Louis circuit court; W. W. EDWARDS, Judge.

Action by William Benne against Mary Schnecko and others, to set aside two conveyances alleged to be fraudulent. The petition

alleges that on the 17th of September, 1879, the defendant Richard C. Schnecko as principal, and Herman Benne and William Benne as securities, executed their promissory note for \$700 to Jacob Bittner, payable one year after date; that the security William Benne died in 1881, and the other security, Herman Benne, is his administrator; that Bittner had his note allowed against the estate of the deceased security, and also sued Schnecko and the other security in the circuit court upon the note, and obtained judgment against them, November 19, 1883, for \$821.35, which was a lien on all Schnecko's real estate in St. Louis county; that Schnecko, at the time of the execution of the note, was the owner of a tract of about 33 acres of land in said county, which he and his wife, by a deed made on the 23d day of August, 1881, conveyed to the defendant Koeser in trust for her; and that said conveyance was without any valuable consideration, and was made and accepted to hinder, delay, and defraud Schnecko's creditors. The petition further alleges that one Holthaus obtained a judgment against Schnecko for \$114.60 on the same day that Bittner's judgment was obtained; and Schnecko and his wife, contriving further to hinder, delay, and defraud Bittner, prevented the issue of an execution upon his judgment by a motion to set the judgment aside, and while the motion was pending caused an execution to be issued on the Holthaus judgment, and the said real estate to be sold at execution sale to Mrs. Schnecko for \$145, while Schnecko's title was under the cloud of the former fraudulent deed; and by reason thereof she was enabled to purchase said real estate at much less than its full value, and to place the same still further beyond the reach of Schnecko's creditors; and that said purchase, although in her name, was in fact made for Schnecko, and with his means. The petition further alleges that thereafter the security Herman Benne, for himself and as administrator of the deceased security, was compelled to pay to Bittner the amount of the judgment, and at the time of paying the same he caused the judgment to be assigned to the plaintiff in this suit, in trust for him individually and as such administrator, for the purpose of retaining the lien of the same against the said real estate. The answer denies the allegations of fraud, and alleges that Mrs. Schnecko purchased at the sheriff's sale with her own means, "to buy her peace." At the trial the plaintiff proved the execution of the note by Schnecko with the Bennes as securities, the payment of the judgment on the same to Bittner by Herman Benne, for himself and as administrator of William Benne, and the assignment of the judgment by Bittner to plaintiff, to keep the judgment alive and retain the lien, for the protection of the securities. Plaintiff then offered documentary and record evidence, as follows: The note; the allowance of the same against William Benne's estate; the judgment on the same

against Schnecko and Herman Benne, November 19, 1883; the motion to set aside default and judgment, filed November 23d; order overruling the same; the assignment of the judgment, and allowance to plaintiff; the assignee's acknowledgment of the trust; the deed by which Schnecko acquired the property in controversy, February 26, 1879; and the deed (alleged to be fraudulent) by which he and his wife conveyed the same to her trustee. The consideration expressed in this deed was \$12,000, and it conveyed, besides the land here in controversy, all the personal property of the said Richard C. Schnecko, whatsoever, consisting of horses, mules, cows, hogs, wagons, plows, farming implements, and farm machinery, 50 tons of hay, and all the household and kitchen furniture contained in the house occupied by him. The evidence showed that the land was worth \$5,000 to \$6,000. This was not disputed. Plaintiff then offered the judgment of Holthaus against Schnecko, with an order staying execution for 60 days, November 19, 1883; an order setting aside the stay of execution, December 7, 1883; an execution issued on said judgment; and sheriff's deed under the same to Mrs. Schnecko for \$145.

Mr. Broadhead, the attorney for Holthaus, testified that Mr. Taylor, representing Schnecko, requested that the stay of execution be set aside, and an execution issued at once, and the stay of execution was set aside by consent; that Mr. Taylor bid for the property at the execution sale, and bought it in the name of Mrs. Schnecko; and she was not present, but Schnecko was. Mr. Garrett, the deputy-sheriff at the sale, testified that Mr. Taylor was there representing Schnecko, and purchased the property for Mrs. Schnecko; that Schnecko was present, but his wife was not; and that Taylor and Schnecko instructed him not to set aside homestead. Defendant Schnecko, on behalf of plaintiff, testified that the deed in question conveyed to his wife all the property he owned. J. W. McElhinney, attorney for plaintiff in this case, testified that on the "law-day," when the motion to set aside default in the case of Bittner v. Schnecko was called and overruled, Mr. Taylor, the defendant's attorney there, said: "It might as well be overruled; it has accomplished its purpose." The testimony for the defendants was given by Schnecko, Mrs. Schnecko, Koeser, and Taylor, and was substantially as follows: Schnecko and his wife were married in 1864 or 1865. She then had a house and lot in Memphis and \$3,000 in money. She loaned the money to him then, and soon after the marriage, in March or April, 1865, she sold the house and lot for \$2,000, and loaned that to him also; and in payment of these loans he conveyed his property to her by the deed in question. No fraud was intended. As to the Holthaus execution sale, they testified that Mrs. Schnecko was advised by Mr. Taylor that the cheapest way to meet the claim that her deed was

fraudulent was to have the stay of execution set aside, and the property sold to herself under execution. She was sick in bed, and for that reason Schnecko carried the money from her to Mr. Taylor to purchase the property at the sale. The money was carried in a sealed envelope. Her son-in-law and trustee, the defendant Koeser, obtained the money for her. Schnecko and his wife further testified that there was an unsettled account between him and Benne; but no note or account was produced, and no amount was stated. In rebuttal, Benne denied that he owed Schnecko, or that anything had ever been demanded of him. The court found the issues for the defendants, and dismissed the bill. From an order overruling his motion for a new trial, plaintiff appeals.

John W. McElhinney, for appellant. *M. F. Taylor* and *Robert L. McLaran*, for respondents.

SHERWOOD, J. This is a proceeding in equity to set aside, on the ground of fraud against creditors, two conveyances of about 38 acres of land in St. Louis county, one of them dated in 1881, conveying the land in controversy to Koeser, as trustee for Mary Schnecko, the wife of the grantor. This deed, which expressed a consideration of \$12,000, not only conveyed the land in suit, but also everything the grantor, Richard C. Schnecko, possessed in the world, as he testifies, in the way of personal property, horses, mules, cows, hogs, wagons, plows, farming implements and machinery, 50 tons of hay, and all the household and kitchen furniture in the house occupied by him, on the premises. The testimony showed that the land thus conveyed was only worth \$5,000 to \$6,000. There was no dispute on this point. The property was also incumbered by a deed of trust, securing a debt of \$2,500. In 1879, Schnecko became a principal in a note for \$700 to Jacob Bittner, with Herman and William Benne as sureties. Judgment by default was recovered on this note, November 19, 1883, and on the same day one Holthaus also recovered judgment against Schnecko for \$114.60, by "mutual consent," with a stay of execution for 60 days. Matters were so managed, however, between Schnecko, the husband, his wife, and their attorney that Bittner's judgment was tied up with a motion made by Schnecko to set aside the judgment by default, which was filed on the 23d day of November, 1883, and not determined until December 27th of that year, but two days before the sale under the Holthaus judgment occurred. By "mutual consent," also, the stay of execution on the Holthaus judgment was set aside; and on the same day, December 7, 1883, execution issued on that judgment, and the sale was made thereunder, on the 29th day of December, 1883, but two days after the motion to set aside the judgment by default, taken against Schnecko and in favor of Bittner, had

been overruled. At this sale Mrs. Schnecko became the purchaser of the land for \$145, through her attorney, who had advised this course. The deed made by the sheriff in consummation of this sale was also asked to be set aside as fraudulent. It is in evidence that when the motion to set aside the judgment by default in favor of Bittner and against Schnecko came on to be heard the court spoke about its insufficiency, in that it failed to set up any meritorious defense; whereupon the attorney for the husband and wife remarked: "It might as well be overruled; it has accomplished its purpose."

The claim is made on the part of the wife, Mrs. Schnecko, that she was a widow in 1865, in Kentucky. That her first husband left her \$3,000, and a house and lot in Memphis, Tenn., which sum her present husband borrowed, and after that, at his instance, she sold the house and lot for \$2,000, and loaned him the proceeds. This latter transaction was in the spring of 1865. No note or memorandum was taken for these loans, nor does it appear that the wife had any separate estate. In 1881, at her request, the husband was induced to make her the conveyance mentioned, in order, as she says, to repay her for the money loaned some 15 years before, and which was never before demanded, either principal or interest. Where this loan occurred does not appear, whether in Kentucky, Tennessee, or Missouri. If in the last-named state, then, the time specified being before the act of 1875 took effect, (see section 3296, Rev. St. 1879,) the *status* of the husband, as towards the wife, was as at common law, and he acquired, *jure mariti*, the title to all of her personal property in possession. *Woodford v. Stephens*, 51 Mo. 443; *Alexander v. Lydick*, 80 Mo. 341; *Modrell v. Riddle*, 82 Mo. 31. So that, according to the showing made, the wife had no money to loan to her husband, because it belonged to him already. Nor would the case be altered for the better for Mrs. Schnecko were the supposition indulged that the alleged loan occurred in either Kentucky or Tennessee, because, the statute law of those states as to married women not being established by the evidence, the presumption must be indulged that the common law prevailed, and that the husband became entitled accordingly. *Meyer v. McCabe*, 73 Mo. 236.

But, apart from these considerations, there is no attempt made to account for or to explain the discrepancy between the actual value of the land and the price mentioned in the deed. This false recital was a badge of fraud; and it was also another badge that the debtor transferred by the deed made to his wife's trustee all of his property. Honest transfers do not commonly occur in this way. Indeed, anything out of the usual course of business is a sign of fraud. *Bump, Fraud. Conv.* pp. 34, 42, 51; *Baldwin v. Whitcomb*, 71 Mo. 651. There is no doubt but what a husband may make a valid settlement upon

his wife, for a valuable consideration. "Such settlements, however, are always watched with considerable jealousy, on account of the relative situation of the parties, and the convenient cover they afford to a debtor to protect his property, and impose upon his creditors, and the payment of a valuable consideration must be made out by proof of the most unquestioned character." *Bump, Fraud. Conv.* (3d Ed.) 306; *Besson v. Eveland*, 26 N. J. Eq. 468; *Humes v. Scruggs*, 94 U. S. 22.

But the sale under the Holthaus execution would undoubtedly have given Mrs. Schnecko a good title to the land, had it not been for the fact that this sale was but in furtherance of, and tainted with, the original fraud already developed in the foregoing remarks.

And the sureties, having paid the debt of their principal, Schnecko, became entitled to an assignment of the judgment Bittner had recovered. Such payment did not extinguish the debt, at least in equity. Mere payment of the debt by the surety is considered to operate as an assignment of it to the party paying, with all the rights and liens which attached to it as incidents in the hands of the creditors. *Bisp. Eq.* §§ 335, 336; *Brandt, Sur.* §§ 269-271; *Furnold v. Bank*, 44 Mo. 336; *Berthold v. Berthold*, 46 Mo. 557.

Nor is there any doubt that this proceeding was properly instituted in the name of William Benne, to whom the judgment was assigned, for the benefit of himself and the other surety. But, if the suit were not properly brought, there was no objection taken either by demurrer or answer as to plaintiff's capacity to sue, and so any such objection, even if existing, was waived.

It is proper to remark, just here, that on numerous occasions we have said that in equity cases, where the witnesses testify orally, we will defer somewhat to the findings of the chancellor. *Chouteau v. Allen*, 70 Mo. 336; *Erskine v. Loewenstein*, 82 Mo. 309; *Springer v. Kleinsorge*, 83 Mo. 159; *Berry v. Hartzell*, 91 Mo. 138, 3 S. W. Rep. 582; *Bushong v. Taylor*, 82 Mo. 666; *Mathias v. O'Neill*, 94 Mo. 530, 6 S. W. Rep. 253. But by such remarks we are not to be understood as meaning that we are concluded by the finding of facts by the court below. Far from it. Such remarks do not mean that we have abdicated our supervisory control over questions of fact in equity causes. They only mean that when there is conflict of testimony, or where the testimony is evenly balanced and the finding of the chancellor appears to be correct, then we will so far defer to his finding as to sanction it by our affirmance; "that, and nothing more." The cases above mentioned have no applicability to the case at bar. It is no case for nicely balancing probabilities as to whether or not the deeds in question were fraudulent, since the evidence establishes this beyond peradvent-

ure. For the reasons given we reverse the judgment, and remand the cause, with directions to enter a decree as prayed in the petition. All concur, but BAROLAY, J., who dissents.

99 Mo 677

BOHART v. CHAMBERLAIN.

(Supreme Court of Missouri. Feb. 24, 1890.)

EQUITY—JURISDICTION—LOST INSTRUMENTS.

1. In an action to establish a trust-deed alleged to have been lost or destroyed, plaintiff testified that before the execution of the deed defendant was indebted to him in the sum of \$2,503.29, part of which was secured by notes deposited by defendant as collateral; that subsequently defendant executed his note for the indebtedness, and also a trust-deed on a quarter section of land, to secure the note; that, after satisfying himself that the deed had been properly executed, plaintiff handed it to his book-keeper; that the collaterals were surrendered to defendant, who returned them to plaintiff for safe-keeping; and that the deed of trust had not been recorded, and had subsequently been lost. Plaintiff's book-keeper testified substantially to the same effect. Defendant's note, containing a memorandum that it was secured by a deed of trust, was also introduced in evidence. Both plaintiff and his book-keeper testified that plaintiff made the memorandum on the delivery of the note and deed. Plaintiff's books also showed that defendant's old indebtedness had been canceled, and that a note had been executed therefor, secured by a deed of trust. *Held*, that the evidence warranted a finding that the deed of trust had been executed and subsequently lost, though defendant testified that he never executed a deed of trust to plaintiff or any one else; that the collaterals were never returned to him, but collected by plaintiff, and credited on the note; and that he was not the owner of the west half of the quarter section covered by the alleged trust-deed, but that the same was owned by his wife.

2. A court of equity may either direct a re-execution of a lost instrument affecting the title to land, or make a declaratory decree establishing the existence of the instrument.

Appeal from circuit court, Clinton county; GEORGE W. DUNN, Judge.

This proceeding, an equitable one, was instituted to declare and establish a deed of trust on the S. W. $\frac{1}{4}$ of section 30, township 55, of range 30, the petition alleging that the deed had been executed, but subsequently lost or destroyed; and there was a prayer for general relief. The answer was a general denial. The evidence, as preserved in the bill of exceptions, is as follows:

"The plaintiff, to maintain the issues on his part, testified in his own behalf: 'About Sept. 1, 1882, the defendant was indebted to the Lathrop Bank on several notes, amounting in the aggregate, including interest, to \$769.34. These notes were secured by several notes payable to defendant, which were deposited as collateral. In addition to these liabilities, the defendant was indebted to the bank for overdrafts to the amount of \$1,735.95. I asked the defendant to secure the amount of his overdraft. Defendant proposed to execute deed of trust on his farm just east of Lathrop to secure the whole amount of his indebtedness, provided I would permit him to withdraw the collaterals, so that he could collect them, and pay the pro-

ceeds on his indebtedness. I consented to this, and drew up a note for \$2,503.29, being the amount of his notes and overdrafts which he signed. In a short time he came back with a deed of trust, and handed it to me. I examined it, and found that it was properly signed and acknowledged, securing the note of \$2,503.29. I then compared the description of the land in the deed of trust with my county map, and found it to be correct; being the south-west quarter of section 30, in township 55, of range 30, in Clinton Co., Mo. Having satisfied myself that it was properly executed, I handed the deed of trust and note to J. R. Pope, my book-keeper, with directions to register the same, and I delivered to the defendant his notes and collaterals, and credited his account on the bank-books the amount of his overdrafts, \$1,735.95. Chamberlain (the defendant) handed back the collaterals, which were placed in an envelope with Chamberlain's private papers for safe-keeping, and subject to Chamberlain's order. Several of the notes were subsequently paid, and the amounts passed to the credit of Chamberlain on the books of the bank. These amounts were checked out by Chamberlain, and credited on his note of \$2,503.29, as appears by indorsement of credit on the back of note and by the books of the bank. I think the deed of trust was acknowledged before B. J. Burk, and that J. R. Pope was named in it as trustee. At the time of the transaction I made a pencil memorandum on margin of note that it was secured by deed of trust. The deed of trust is lost. I have looked for it diligently, and cannot find it. The deed of trust was executed September 15, 1882, to cover interest, as I charged interest on overdrafts of each month.' On cross-examination the witness said: 'The deed of trust I think was acknowledged before B. J. Burk. I don't know why I failed to have it recorded; it is my habit to have them recorded. After the execution and delivery of the note and deed of trust, on September 15, 1882, I sold the bank, on February 1, 1883, to my brother, James M. Bohart, and this note and deed of trust were turned over to him as part of the assets of the bank.' On re-examination the witness said: 'The note was not indorsed or assigned to my brother, and was turned over to him with the understanding that it was secured by a deed of trust. I instituted a suit, and recovered a judgment on the note in this court.' Witness being shown the petition, and note attached thereto, in said suit, stated: 'This is the note referred to, and the credit of one thousand dollars was paid by Chamberlain by check on his account in bank. The pencil memorandum on the margin of note was placed there by me at the time the note was executed and delivered.'

"The plaintiff then offered in evidence the note, and petition for suit thereon, which are in words and figures as follows: '\$2,503.29. Lathrop, Mo., Sept. 1st, 1882. (Nine months after date I promise to pay to W. H. Bohart,

cashier, or order, at the Lathrop Bank, in Lathrop, Mo., twenty-five hundred three and 29-100 dollars, for value received, negotiable and payable without defalcation or discount, with ten per cent. interest per annum after date; the interest, if not paid annually, to become part of the principal, and bear the same rate of interest. No. 832. L. C. CHAMBERLAIN. Deed of trust, 160 acres, S. W. $\frac{1}{4}$ Sec. 30, 55, 80.' Said note is indorsed on the back as follows: '\$1,000. Received on within note one thousand dollars, Jan. 2, '82. Received on the within note five hundred dollars, July 27, 1883.' The petition is as follows, to-wit: 'In the circuit court of Clinton county, Mo. April term, 1885. Willard H. Bohart, Plaintiff, vs. Lucien C. Chamberlain, Defendant. Plaintiff states that defendant, by his promissory note herewith filed, dated September 1, 1882, promised, for value received, to pay plaintiff at the Lathrop Bank, in Lathrop, Mo., twenty-five hundred three and 29-100 dollars, nine months after the date thereof, with interest thereon from said date at the rate of ten per cent. per annum, and stipulating thereon that, if the interest should not be paid annually, the same should become as principal, and bear the same rate of interest. Plaintiff states that defendant on the 2d day of January, 1883, paid on said note the sum of one thousand dollars, and on the 27th day of July, 1883, defendant paid thereon the sum of five hundred dollars; that defendant is entitled to a credit on said note for fifty-eight 80-100 dollars on account for brick sold by Jas. M. Bohart; that the balance and interest thereof remain due and unpaid, and for which plaintiff prays judgment. THOS. J. PORTER, Atty. for Plf.'

"J. R. Pope, being duly sworn, said: 'I was book-keeper from September, 1880, to May, 1883, in the Lathrop Bank. The entries on the bank-books here shown me were made by me at the date therein given. Those entries are as follows: The individual ledger which I have before me shows September 15, 1882, L. C. Chamberlain's account amount of overdrafts to be \$1,733.95. The discount register of the bank (which I have before me) shows, of date May 25, 1881, note against Chamberlain, \$225.00; June 25, 1881, \$100; March 22, 1881, \$350. On cash-book of September 15, 1882, cash is charged, interest Chamberlain notes, \$94.34 on that date. Chamberlain's indebtedness to bank on account of notes and interest thereon, together with overdrafts, amounted to \$2,503.29. On that day, September 15, 1882, the check and deposit book shows that Chamberlain's account was credited \$1,733.95 to balance overdrafts. Referring to the cash-book of date September 15, 1882, it shows the three notes, for \$225, \$100, and \$350, respectively, and interest on same, \$94.34, amounting in all to \$769.34, were paid. On the same date (September 15, 1882) the discount register (which I have in my hands) shows that L. C. Chamberlain executed his note for \$2,503.29, dated

September 1, 1882, due three months after date, bearing 10 per cent. from date, and secured by deed of trust. Corresponding with that entry, of date September 15, 1882, and referring to the No. on discount register, cash is credited with \$2,503.29 on cash-book, which I now have before me. Previous to making these entries referred to, of September 15, 1882, I heard plaintiff and defendant in conversation about defendant's liabilities to the bank. Plaintiff wanted defendant to secure the amount of his overdraft. Chamberlain proposed to give a deed of trust on the farm to secure the overdrafts and the several notes he owed the bank, provided plaintiff would allow him to withdraw his collateral placed in bank to secure the old notes, so that he could collect them, and apply the proceeds on his indebtedness due the bank. Afterwards, and on date of these entries, the defendant came into the bank, and handed plaintiff a note for \$2,503.29, and another paper. Plaintiff made a memorandum on the margin of the note that it was secured by deed of trust, and handed it to me, and went to his county map, and seemed to be comparing the paper handed him in connection with said map; after which he folded it up, and handed it to me, and instructed me to put it away. The entries I have testified to were made to carry out the agreement of plaintiff and defendant; the note for \$2,503.29 being the amount of all defendant's indebtedness to the bank, with interest to September 1, 1882. I accordingly balanced defendant's overdraft, \$1,733.95, and applied the residue, to-wit, \$769.34, on the three old notes, of \$100, \$225, and \$350, respectively, and interest on same, \$94.34, and surrendered them to him, and entered the amount of new note, \$2,503.28, on cash-book, and registered it on discount register as secured by deed of trust in pursuance to the memorandum on the margin. I did not examine the paper handed to me, to see if it was a deed of trust. On the individual ledger of the bank, now before me, I find credited to L. C. Chamberlain's account, of dates December 29, 1882, \$492, and December 30, 1882, \$507.96. On January 3d his account was charged with check of \$1,000. On July 28th he is credited with \$500, and on same day charged with check of \$500.'

"James M. Bohart testified as follows: 'I am the owner of two-thirds of the Lathrop Bank, W. T. Clark owning the other one-third interest. I told Mr Clark to notify Chamberlain in regard to the payment of his note, as it had been long past due. Chamberlain paid no attention to these notices, and afterwards I met him on the streets of Lathrop, and asked him in regard to the payment of the note. He told me that he did not intend to pay it. Then I went back to the bank, and examined for the security, and found memorandum on margin of note showing it to be secured by deed of trust. I then searched for the deed of trust, and, failing to find it, I examined the records, and, finding

no record, I placed the matter in the hands of an attorney.' This was all the evidence introduced by plaintiff.

"The defendant, to maintain the issues on his part, introduced evidence as follows: Lucian C. Chamberlain, in his own behalf, testified as follows: 'I never made a mortgage or deed of trust to the plaintiff to secure any sum of money, or any one. He asked me once to make a mortgage to secure the note mentioned by him, but I refused. I told him that the notes which the bank held as collateral, with what would be coming in to me from brick that were to be put in a building for them, would be sufficient to pay what I owed at the bank. The notes held as collateral were not returned to me, but were collected by the bank, and credited as collected on my note. I could not have made a mortgage or deed of trust on the south-west quarter of section 30, in township 55, of range 30, as one 80 acres of this quarter was never owned by me. The west eighty acres was bought by my wife, with her money, and the deed was made to her, and I have never had any interest in it.' B. J. Burk testified: 'I am a justice of the peace and notary public, residing in Lathrop. I have no recollection of taking the acknowledgment of a deed of trust or mortgage from the defendant to the plaintiff. I keep a record of such transactions, and have examined since I was subpoenaed in this case, and find nothing of the kind there. From this fact, and the further fact that the defendant has been unfriendly to me for several years, I am sure I never took such an acknowledgment.' On cross-examination witness said: 'It is possible that I might have taken such acknowledgment, and failed to make any record of it.' This was all the evidence."

Thereupon the court found for the plaintiff, and entered a decree as prayed, and the defendant appeals.

Thos. E. Turney, for appellant. *Thos. J. Porter*, for respondent.

SHERWOOD, J., (after stating the facts as above.) The facts detailed in the foregoing statement afforded a sufficient basis to warrant the finding of the lower court that a deed of trust, as charged in the petition, was executed by the defendant, and that the same was lost without being recorded.

And no doubt is entertained that a court of equity would have jurisdiction to afford the relief prayed for in the petition. One of the most common interpositions of equity is in the case of lost deeds and instruments. A court of equity, in case of the loss of an instrument which affects the title or affords a security, will direct a re-execution to be made. *Stokoe v. Robson*, 19 Ves. 385; 1 Story, Eq. Jur. §§ 81, 84; *Lawrence v. Lawrence*, 42 N. H. 109; 1 Madd. Ch. Pr. 24; *Fonbl. Eq. bk. 1, c. 1, § 3*. And accident is one of the most ancient foundations of equitable jurisdiction. So that, even if a remedy could be had at law, this would not oust the

original jurisdiction of a court of equity. 1 Story, Eq. Jur. § 81; 2 Pom. Eq. Jur. § 831; 1 Pom. Eq. Jur. § 280. In the case at bar the petition made out the requisite allegations to invoke equitable relief. Under the authorities cited, the lower court might have directed a re-execution of the deed of trust; but, as its powers were flexible, it could accomplish the same object by a declaratory decree, establishing the existence of the deed in question. 2 Pom. Eq. Jur. § 827; *Garrett v. Lynch*, 45 Ala. 204; 1 Pom. Eq. Jur. §§ 171, 429. Holding these views, we affirm the judgment. All concur.

FINLEY v. ST. LOUIS REFRIGERATOR CO. et al.

(Supreme Court of Missouri. Feb. 24, 1890.)

FALSE IMPRISONMENT—MALICIOUS PROSECUTION.

1. An action for false imprisonment will not lie where the arrest and imprisonment are made, in due course, on regular proceedings of a court having jurisdiction of the offense charged.

2. In an action for malicious prosecution, where injury to plaintiff's good name and reputation in his business is alleged as an element of damage, there is no error in allowing proof that at the time of the prosecution plaintiff was not of good credit.

3. In an action for malicious prosecution, it is sufficient to show that defendant either commenced or continued the prosecution, maliciously.

Appeal from St. Louis circuit court; *GEORGE W. LUBKE*, Judge.

This case presents two causes of action,—the *first*, for an "unlawful and wrongful" arrest and imprisonment; and the *second*, for malicious prosecution of the plaintiff in the St. Louis court of criminal correction on a charge of obtaining money by false pretenses. The answer was a general denial. At the trial, plaintiff's evidence disclosed that he had been arrested upon a warrant regularly issued in a criminal prosecution before the St. Louis court of criminal correction upon information duly filed. The court admitted, against plaintiff's objection, evidence that he was not of good credit at the time of the prosecution. It also gave, among the instructions at defendants' instance, the following: "(3) Although the plaintiff succeeds in satisfying you from the evidence that the prosecution complained of was commenced by defendants without probable cause, yet you will find your verdict for the defendants unless you further find from the evidence that the defendants commenced and continued the prosecution against the plaintiff maliciously." There was a finding for defendants on each of the two causes of action, and judgment accordingly, from which plaintiff appealed after the ordinary preliminaries.

E. F. Stone, for appellant. *Campbell & Ryan*, for respondents.

PER CURIAM. 1. The evidence did not support plaintiff's first cause of action. It was predicated on the illegality of plaintiff's arrest, but his own evidence revealed that the arrest and imprisonment complained of

were made, in due course, upon regular proceedings of a court having complete jurisdiction of the offense charged. No cause of action for false imprisonment could be maintained on his own showing. It is hence unnecessary to consider any error assigned by plaintiff with reference to that count, as the finding for defendants thereon was for the right party, and will not be disturbed.

2. As to the second cause of action, plaintiff complains of the admission of defendants' evidence to the effect that he was not of good business credit and repute at the time of the alleged malicious prosecution. But, as that count expressly mentions injury to his good name and reputation "in his business as carpenter and builder" as an element of damage, we have no doubt of the correctness of the ruling of the trial court on that point.

An error, however, was made in the instruction for defendants which told the jury to find for them unless they found from the evidence that defendants "commenced and continued the prosecution against the plaintiff maliciously." Malice is an essential fact to be proven to maintain an action for malicious prosecution, though it may often be inferred as a fact from the proofs which establish a want of probable cause; but it was not vital to plaintiff's recovery that he should show that defendants commenced and continued the prosecution maliciously. If he proved that it was either so commenced or continued by them, it would be sufficient to support his case, under the pleadings and evidence. The instruction in question required plaintiff to bear a greater burden of proof than the law, in strictness, demanded. It is hence necessary to reverse the judgment and the finding on the second count of the petition, and to remand the cause for a new trial thereon. The finding on the first count is affirmed.

The other points of criticism on the instructions can doubtless be avoided on a retrial, and therefore do not call for remark at present. The costs of this appeal will abide the event of the action.

CARDER *et al.* v. CULBERTSON.

(*Supreme Court of Missouri.* Feb. 24, 1890.)

SALE OF INFANTS' LAND.

Under Gen. St. Mo. 1865, c. 116, § 30, relating to sales of real estate by a curator, providing that "no real estate of any minor, sold under the provisions of this chapter, shall be sold for less than three-fourths of its appraised value," a deed showing a sale for a less amount is void on its face. BARCLAY, J., dissenting.

Appeal from circuit court, Carroll county; J. M. DAVIS, Judge.

J. W. Seabee and Prosser Ray, for appellants. Mirtick & Young, for respondent.

SHERWOOD, J. Ejectment for 60 acres of land in Carroll county. Plaintiffs were minors when this, their land, was sold for their education, in 1869, by their curator, under an order made by the probate court for

the sale of the land at public vendue. The land was appraised at \$150, and sold for \$10 to William H. Long. Six years thereafter he sold by warranty deed to Andrew Hendricks for \$3,000. In April, 1884, Hendricks conveyed by like deed for same consideration to defendant. By stipulation filed, it is agreed that the sole question to be determined is whether the curator's deed is valid. There can be no hesitation on this point; it is a plain matter of statutory provision. Sections 28-30, c. 116, Gen. St. 1865, control this case. The last-named section declares: "No real estate of any minor, sold under the provisions of this chapter, shall be sold for less than three-fourths of its appraised value," etc. The probate court had no jurisdiction to approve such a sale. Its order of approval was therefore *coram non judio*, and the deed showing the facts already recited was void on its face. We reverse the judgment, and remand the cause, with directions to enter a judgment for plaintiffs after having taken an account of rents and profits. All concur, but BARCLAY, J., who dissents.

STATE v. MAYORS.

(*Supreme Court of Missouri.* Feb. 24, 1890.)

BILL OF EXCEPTIONS—TIME OF FILING.

Under Rev. St. Mo. 1879, § 3636, as amended by act of March 28, 1885, providing that exceptions may be written and filed during the term of the court at which they are taken, "or within such time thereafter as the court may by an order entered of record allow," the judge has no authority to make an order in vacation extending the time for filing a bill of exceptions, without the consent of the opposing party.

Appeal from circuit court, St. Charles county; W. W. EDWARDS, Judge.

T. S. Cunningham and F. E. Luckett, for appellant. The Attorney General, for the State.

BLACK, J. The defendant was tried and convicted at the March term, 1888, of the St. Charles circuit court for seducing a female under 21 years of age, under promise of marriage. The question presented at the threshold of the case is whether there is any bill of exceptions which we are at liberty to consider. On the 9th of April, 1888, and at the said March term, the court made an order that the bill of exceptions be signed and filed on or before the 20th day of June, 1888, in vacation. This order was made with the consent of the prosecuting attorney and the attorney for the defendant. The bill of exceptions purports to have been signed by the judge on the 20th June, 1888, but it was not filed with the clerk of the court until the 21st July, 1888. The bill was not, therefore, filed within the time specified in the order, and is no part of the record, unless made so by the stipulation filed in this court, and signed by the attorney general and attorneys for defendant. In that stipulation it is agreed "that the following entry was made on the reporter's notes, by Judge W. W. EDWARDS, who

tried said cause: "Presented June 20, 1888, and bill of exceptions to be signed as of this date, when examined and settled." This entry of the judge was made in vacation, and it does not appear that the prosecuting attorney was present or gave his consent to the extension of time, and the entry was simply indorsed "on the reporter's notes." It is clear that the bill of exceptions had not been prepared and presented to the judge for his signature at that date, and the entry of the judge amounts to simply a vacation order extending the time for filing a bill of exceptions, and that, too, without the consent of the prosecuting attorney. He had no power to make the order. Section 3636, Rev. St. 1879, as amended by the act of March 28, 1885, provides that exceptions may be written and filed during the term of the court at which they are taken, "or within such time thereafter as the court may by an order entered of record allow." This statute allows the court to extend the time for filing the bill of exceptions beyond the term at which the exceptions were taken, and this, too, with or without the consent of the opposite party; but the order must be made by the court, and entered of record, and it furnishes no authority to the judge to extend the time by a vacation order. Section 2168, Rev. St. 1889, gives the judge power to extend the time before allowed for filing the bill of exceptions by a vacation order, but such was not the law when the judge made the order in this case. The order made in term time by the court in this case was not complied with, and the objection made to the bill of exceptions is well taken. There is therefore no bill of exceptions in the case which we can consider, and, as there are no errors upon the face of the record proper, the judgment is affirmed. All concur.

KEATING v. HANNENKAMP *et al.*

(Supreme Court of Missouri. March 10, 1890.)

CHattel Mortgages—AFTER-ACQUIRED PROPERTY—SALE—POWERS OF MORTGAGEE.

1. The lessee of a building, who was intending to fit it up with suitable furniture for a restaurant, but who had not yet purchased or put it in the building, executed a mortgage on all the furniture that should be contained in the building. *Held*, that the mortgage was good in equity, and that the lien which attached when the furniture was put in the building was valid against the mortgagor and a subsequent mortgagee with notice.

2. The mortgage set out and recited the lease, and both were executed at the same time; the mortgage being for the purpose of securing the payment of the rent. *Held*, that the lien of the mortgage attached to furniture put in the building by an assignee of the lease.

3. Where the equitable mortgagee takes possession of the property for a default under the terms and stipulations of the mortgage, he has the right to sell and execute the powers contained in the mortgage without the aid of a court of equity, and his sale passes a legal as well as equitable title.

4. The sale was not void either for the reason that the property was sold in bulk, or that more was sold than was necessary to pay the debt.

Appeal from St. Louis circuit court; SHEPARD BARCLAY, Judge.

Chester H. Krum, for appellant. *Geo. E. Smith* and *Alex Young*, for respondents.

BLACK, J. The plaintiff brought this suit to recover the value of a quantity of furniture and fixtures. The case was tried by the court without a jury, resulting in a finding and judgment for defendant Cottrill, and a finding and judgment for plaintiff against defendant Hannenkamp, in the sum of one dollar, and the plaintiff appealed. The evidence discloses the following facts: Defendant Hannenkamp and others, being the owners of a three-story building, leased the same to C. W. Herbert for a period of five years, at \$1,800 per year for the first three years, and \$2,000 per year for the last two years, the rent to be paid monthly, in advance. The lease bears date the 5th November, 1883, though the term began on the 1st December, 1883. Herbert executed to Hannenkamp a mortgage dated the 13th November, 1883, to secure the payment of the rents reserved in the lease as they should fall due. The mortgage makes reference to the leased property, and assigns and transfers "the personal property, as described below, together with all furniture not mentioned herein, or that may be acquired by purchase or otherwise, and contained in the three-story brick house, [describing the house again,] the counters, shelving, mirrors, tables, chairs, stoves, ranges, glassware, and table-ware." This mortgage was duly acknowledged and recorded in December, 1883, though the lease was not recorded. The lease, it will be seen, bears date the 5th November, and the mortgage is dated the 13th of the same month. The evidence, however, shows that they were in fact both executed at the same time. The building was a new one, and Herbert, the lessee, rented it with a view of fitting it up for a restaurant, saloon, and lodging-house. The furniture was not in the building when the lease and mortgage were executed, and it is clear that some, if not all, of it had not then been purchased by Herbert. It had been purchased and placed in the house at or before the term of the lease began. Herbert assigned the lease and sold the furniture and fixtures to A. C. Hall in July, 1884, and Hall, after occupying the premises a short time, assigned the lease and sold out to Weiman. Both of these assignments were made by and with the written consent of the lessors. Weiman assigned the lease and sold the furniture to Barton prior to September, 1885. The lessors refused to give their consent to this assignment. Barton, however, took possession and paid rents until the 1st December, 1885. On the 12th September, 1885, Barton and wife executed a chattel mortgage on the furniture to secure a note for \$1,500, payable to the plaintiff, Keating. Barton made default in payment of the rents for the months of December, 1885, and January, 1886, and thereupon Hannenkamp took possession of the furniture and fixtures under the terms and provisions of his mortgage, and sold the

same at auction, and the defendant Cottrill became the purchaser. Keating then commenced this suit against Hannenkamp and Cottrill. The evidence is clear that when Keating took the mortgage from Barton and wife he had actual notice of the lease, and the mortgage executed by Herbert to Hannenkamp to secure the rents.

1. Herbert, the lessee and mortgagor, leased the building for the purpose of furnishing and fitting it up as a restaurant and saloon, and contemplated the purchase of furniture and fixtures suitable for that purpose when he executed the mortgage. Though the property described in the mortgage was not in the building at that date, still the mortgage was good in equity, and the property became subject to the equitable lien as soon as it was placed in the building. This doctrine has been so often declared by this court that it is only necessary to refer to the following cases: *Wright v. Bircher*, 72 Mo. 179; *Frank v. Playter*, 73 Mo. 672; *Rutherford v. Stewart*, 79 Mo. 216. Such equitable lien is valid as against the mortgagor, and also as against Keating, who had both actual and constructive notice of the mortgage.

The appellant insists that as the mortgage only created an equitable lien on the property purchased and put in the house by Herbert, Hannenkamp had no right to take possession and sell for default in payment of rents, as he could if the mortgage had been good at law; and in support of this he cites *France v. Thomas*, 86 Mo. 80. In that case the plaintiff claimed after-acquired property under a deed of trust on a lot of hotel furniture. The suit was one for the recovery of the specific personal property against the sheriff who had seized it on executions against the mortgagor. The opinion concedes the proposition that the deed of trust created a good equitable lien, but it holds the trustee could not recover in replevin, because neither he nor the beneficiary had ever acquired possession under it. It is also conceded that there may be exceptions to the rule laid down. A mortgagee seems to have been allowed to recover after-acquired property in an action of replevin in *Drug Co. v. Robinson*, 81 Mo. 18. See same case, 10 Mo. App. 588. *Frank v. Playter*, supra, was also an action of replevin, and the defendant relied upon a mortgage of after-acquired property, and it was held he should succeed, though it does not appear that the answer set up an equitable defense. But, without pursuing the question whether the equitable owner can recover the property in an action of replevin under our Code, it is certain that the present case differs from *France v. Thomas* in this: that here the mortgagee took possession of the property for a default, under the terms and stipulations of the mortgage. "Though a grant of a future interest is invalid, yet a declaration precedent may be made, which will take effect on the intervention of some act." Under this maxim of Lord Bacon it is held that possession taken by a mortgagee of after-ac-

quired property, under authority given in the mortgage, before rights have been acquired by others, makes it a valid lien upon such property. *Jones, Chat. Mortg.* (3d Ed.) § 164. The rule just stated is, of course, one at law; but it must follow that possession acquired by a mortgagee under the terms of the mortgage will also vest the legal title in him in those cases where the mortgage of after-acquired property creates an equitable lien. The circumstance that it creates an equitable lien, good against creditors and subsequent purchasers with notice, cannot affect the legal consequences arising from taking possession. Hannenkamp had the right given to him in the mortgage to take possession upon default, and, when he took possession, he stood in the same position as if his mortgage had been one good and valid at law from the beginning. He had the right to sell and to execute the powers contained in the mortgage without the aid of a court of equity, and his sale passed a valid title both at law and in equity.

2. While Weiman was in possession under the lease, he made some addition to the furniture, costing \$250 or \$275, and the question is made whether this property became subject to the lien of the mortgage executed by Herbert. Barton, of course, had actual notice of the lease when he took the assignment, and he had constructive notice of the mortgage. Keating had actual notice of both the lease and mortgage. Upon this question, whether, under the circumstances, the property put in the house by Weiman became bound by the mortgage executed by Herbert, we are not cited to any authorities on either side. There seems to be no doubt but the lease and the mortgage were executed at the same time. The mortgage sets out and recites the lease, and the two instruments relate to the same subject-matter, and are in fact but different parts of the same transaction, and we can see no reason why they should not be treated as if they constituted a single instrument. A lease and a mortgage made by the lessee upon a crop to be grown upon the leased lands were treated as a single instrument in *Booker v. Jones*, 55 Ala. 266. Had this lien on the furniture been created by the lease, without any mortgage, there would be no doubt but the assignee of the lease would be bound by all the covenants of the lease. Taking the mortgage and lease to be a single instrument, the same result must follow.

3. The property was sold in bulk at the price of \$387.50. There was evidence tending to show that it was of the value of \$3,000, and there is other evidence that when removed and repaired it was not worth more than \$700. The rents due for the two months amounted to only \$500. The proceeds of the sale paid this debt and the costs attending the sale, leaving a surplus of 15 cents. The objections that the property was sold in bulk, and that more property was sold than was necessary to pay the debt, do not appear from the abstracts to have been made in the trial court, and hence cannot be made in this court.

Besides, it cannot be said that the sale was a void one for either or both of these reasons, and Keating does not offer or propose to redeem.

The judgment in this case should have been for both defendants, but, as Hannenkamp is not complaining, the judgment is affirmed. All concur. BARCLAY, J., not sitting.

BRIANT v. JACKSON et al.

(Supreme Court of Missouri. Feb. 24, 1890.)

MORTGAGES—FORECLOSURE—PURCHASE BY HEIRS OF MORTGAGEE.

1. The heirs and administrator of a deceased mortgagee may purchase the mortgaged premises at the foreclosure sale under a decree of the circuit court.

2. At the sale of mortgaged premises under judicial process, the heirs of the deceased mortgagee were the purchasers, and the sheriff's deed to them acknowledge the receipt of the purchase price. *Held*, that mere uncertainty in the evidence, years afterwards, as to when this was paid to the administrator, would not be conclusive that it was paid with money in the hands of the administrator, or that the transaction was in fraud of decedent's creditors.

3. The premises were worth \$8,000, but the amount bid was only \$900. Before the sale the heirs had agreed among themselves to buy the land, if it did not go too high; but there was nothing to show that they in any way tried to deter others from bidding, or in any way intimated that it was being bought for the estate. On the other hand, there were many present at the sale, and the mortgagor, who was in possession, gave notice at that time that any one who bought the premises would simply be buying two lawsuits. Moreover, at that time there was a great depression in the real-estate market. *Held*, that these facts did not show fraud as against a creditor of the estate, especially where at that time a judgment stood unreversed in favor of the estate, and against such creditor.

Error to circuit court, Cass county; JOHN B. GANTT, Special Judge.

Bogges & Moore, for plaintiff in error. *A. Comingo and Railey & Burney*, for defendants in error.

RAY, C. J. The plaintiff herein seeks by the present bill to have two certain deeds declared fraudulent as to him, and to have the title and interest of defendants in the lands covered thereby sold to satisfy a judgment in his favor, for some \$4,416.57, rendered in April, 1878, against defendant John L. Jackson as administrator of the estate of one Jacob Fudge, deceased. The first of said deeds, of date July 7, 1876, was executed to certain of defendants, children and heirs at law of said Jacob Fudge, deceased, by the sheriff of Cass county, under a sale upon execution pursuant to a judgment for \$11,518.93, rendered by the circuit court, in March, 1876, in favor of defendant Jackson as administrator of said Jacob Fudge, and against one Newton S. Erwin, on certain notes executed by said Erwin to said Jacob Fudge, and also for the foreclosure of the mortgage given by said Erwin on the land described in the present bill, to secure the payment of said notes, in favor of said Jacob Fudge.

The other deed referred to is a certain deed of trust on said lands executed in March, 1878, by said heirs and purchasers at said sheriff's sale, to defendant Hall as trustee, to secure the payment of two notes, in favor of one Thomas Bainbridge, for the aggregate sum of \$1,845. The present bill charges that said sale by the sheriff under the judgment in favor of one John L. Jackson as said administrator of the estate of said Jacob Fudge, deceased, and against said Erwin, was made by the order and procurement of said Jackson, administrator, etc.; that, at his instance and request and procurement, his wife, defendant Martha Jackson, and other designated defendants, children and heirs at law of said Jacob Fudge, deceased, became the purchasers of the land at said sale, for the inconsiderable sum of \$900, whereas the lands were worth, and would have sold, under fair circumstances, for \$8,000; that said heirs and purchasers paid no consideration for the lands so purchased, but that said John L. Jackson, as such administrator, receipted to the sheriff for the said \$900, being the amount of bid at the sale by the defendant purchasers; that said sum was credited on said execution; and that the lands were bought in under a fraudulent combination between said Jackson, administrator, etc., and said purchasers, heirs at law of said Jacob Fudge, for the fraudulent purpose of delaying and defrauding plaintiff in the collection of his said judgment, debt, and demand against the estate of said Jacob Fudge, deceased. The bill further charges that said purchasers, said John L. Jackson, said defendant Hall, and one Bainbridge, with full knowledge of, and in pursuance of, said fraudulent purpose, entered into and executed the deed of trust aforesaid on said land; that plaintiff does not know whether there was any consideration for the notes so given in favor of Bainbridge, and so avers that there was none; that, if there was, the same has long since been paid; that said notes were after maturity indorsed and delivered to defendant Elizabeth Farmer, who had at the time full knowledge of the fraudulent purpose of her co-defendants in the execution of said deed of trust; and that the estate of Jacob Fudge, deceased, is and was insolvent at the dates said deeds were given, as all the defendants well knew. The answer of defendants is a general denial. The judge of the circuit court being disqualified, Judge GANTT, of an adjoining circuit, was chosen, by consent of parties entered of record, to try the cause, who, after hearing the evidence, and taking the cause under advisement, at the next March term, 1886, dismissed the plaintiff's bill; and plaintiff thereupon, in due season, sued out this writ of error.

The sheriff's deed for the lands is made to certain of these defendants who were the children and heirs at law of their father, Jacob Fudge. Disregard for the moment the question of conspiracy and actual fraud, or fraud in fact, which the bill alleges. We

may observe that, so far as the heirs were concerned, they stood in no relation of trust to the estate of their father, and were at liberty, if they saw fit, to bid at the sale, and to buy the land in like manner as if they had been in all respects entire strangers. The market was open to them, as well as others. Nor was the administrator prohibited from becoming the purchaser thereat, the sale being by the sheriff, under judgment and process of the circuit court. *Dillinger v. Kelley*, 84 Mo. 565. In the case just cited the administrator bought at the sale foreclosing the mortgage held by one Keith on the land belonging to the intestate, while in the case now before us the decedent was the mortgagee, and not the mortgagor, as in the former case. But whether the deceased is mortgagor or mortgagee makes, we think, no difference in the rule as to the right of the administrator to buy where the sale, as in these cases, is made by the sheriff under judgment and process of the circuit court. The land, we may remark, was not in the possession or under the control of said Jackson as administrator or otherwise, nor did he have any rights of duty in respect to it, beyond the right to have the sheriff levy upon it, and sell it at public sale to pay off and discharge the said judgment. Having, as said administrator, recovered said judgment, it was his privilege and duty to direct the clerk to issue the execution, and this, we suppose, was done by the administrator in this case, or perhaps by his attorneys; but, after the execution came to the hands of the sheriff, the sheriff, and not the administrator, was charged by law with the execution of the process, with the return and application of the purchase money, with the due execution of proper deeds to the purchasers, and, in short, with the entire responsibilities of the sale. As we said in the case above mentioned, the provisions of section 166, Rev. St. 1879, which prohibit an administrator from purchasing the land of his testator, have no reference to sales other than probate sales. So that, if the administrator was in effect and in fact the purchaser, as is charged by the bill, he had, we think, a right to beat that sort of sale, provided his conduct was fair and just in all respects. The case of *Dillinger v. Kelley*, 84 Mo. 561, above mentioned, goes over the general question as to the right of the administrator to buy the land of his intestate when sold by the process of the circuit court, and holds that there is nothing in the way of the validity of such purchases. Numerous authorities are cited and quoted in that opinion showing that our ruling there had is well supported by the decisions of other courts. In the course of that opinion the case of *Harper v. Mansfield*, 58 Mo. 17, cited and relied on by plaintiff herein, while held to be correctly decided on the facts of the case, is criticised so far as some of the observations therein are concerned, which we hold should not be extended to cases where fraud does not appear. Our

said ruling is decisive as to the right of the administrator to purchase at such sales the same as if he was a stranger to all the parties. Such judicial sales are favored by the courts, which incline to maintain the title of purchasers acquired thereat, in the absence of bad faith, conspiracy, or collusion in respect to the same.

But the record does not show, as we apprehend and construe the evidence, either that the administrator in fact bought the land himself, or procured the same to be bought in, in the name of his wife and the other heirs, or that the administrator paid therefor out of trust funds belonging to the estate, which seems to be the claim, in part, of counsel for plaintiff. In the first place, he did not bid at the sale, nor is he named as a grantee in the sheriff's deed; but his wife, defendant Martha Jackson, however, is one of the grantees therein, and the administrator, as is admitted, paid for her interest. The transaction, as we apprehend the same, seems to be about this: Several of the heirs, including the wife of the administrator, agreed among themselves to purchase the lands, if it did not sell too high, and to allow the absent heirs, who resided in other parts of the state, to come in afterwards, if they wanted to. A. R. Fudge, for example, testifies, in plaintiff's behalf, that the understanding was that Coleman Fudge, Mrs. Jackson, and himself were to buy the property, and the other heirs could come in. The testimony of Jackson and his wife, sworn in plaintiff's behalf, and that of Hall and Coleman Fudge, in defendants' behalf, is, we apprehend, to about the same effect. The administrator seems to have advised and acted with the heirs in behalf of his wife, who was one of them; but the heirs were, we think, the purchasers through said Hall, who did the bidding, and gave their names to the sheriff as the purchasers, and their names were accordingly inserted as grantees.

As to the alleged payment by the administrator for the land out of the trust funds, or funds of the estate, we may observe, in the first place, that the bill alleges that the estate was insolvent, as defendants well knew, at the date of the sale. There is, we apprehend, no dispute as to the insolvency of the estate. The administrator, introduced as a witness in plaintiff's behalf, testified that he had no money of the estate in his hands. He further testified that he had only received \$80 or \$85 as such administrator; and, excluding for the present all question as to the \$900 of purchase money arising from the sale of the land, there is nothing to show that he ever received any other sum. So far as this sum is concerned, the same is offset by the credits allowed him, by vouchers duly approved, for medical and burial expenses alone. He is charged in the inventory with certain notes, principally the Erwin notes, on which it is not claimed that he ever collected anything, and the appraisement bill for \$100, being the appraised value of the watch and compass,

which was the balance of the property or assets that came to his hands. At the most, the administrator could not be charged with more than \$1,000; that is, the amount of the purchase money arising from said sale and said \$100, being the said appraisal bill. This is undisputed. But the evidence given by witnesses whom plaintiff himself produced, and especially that given by the administrator, at plaintiff's instance, and in his behalf, shows that nearly \$1,400 was expended by the administrator in behalf of the estate, consisting of over \$700 attorneys' fees, and the amounts covered by vouchers allowed in the administrator's favor in his annual settlements, and amounting to \$670.

Besides this litigation between the administrator and said Erwin to collect said notes, and to foreclose said mortgage, the case of Briant v. Jackson had been pending since 1872, perhaps, and at the date of said sale was in this court for the second time; and the evidence indicates that these sums had been advanced and expended by the administrator and heirs, in behalf of the estate, for costs, fees, and other liabilities of the estate growing out of the litigation in which it had been involved. There is, however, some obscurity and uncertainty, perhaps, in the evidence as to the dates and application, and modes of paying, the said purchase money. The administrator testifies that money derived from the sheriff's sale was paid to the sheriff; but how much, and when, he does not say. He further says that none of it was paid to him. In the settlement, in June, 1877, the administrator did not charge himself with this \$900, the purchase price of the land; but in a subsequent settlement, called a "corrected settlement," there is an item like this, "to cash realized on judgment against Erwin, \$915," charged against himself. Why it was omitted in the former settlement, and charged in the other, is not made clear by the evidence, and is a matter of conjecture. The latter settlement was prepared for the administrator by the law firm of Hall & Givan, and was in the handwriting of Mr. Hall, who, however, was not able to remember much, if anything, about it. The deputy-sheriff, called in plaintiff's behalf, seems unable to recall or explain his memoranda or indorsements on the execution returned in said cause. Some indefiniteness and uncertainty exist, also, in other evidence as to the dates and mode of paying the sheriff's costs of sale. The witnesses, however, were testifying after the lapse of some 10 years; and, so far as dates were concerned, generally, or so far as the dates of the receipts and indorsements on the execution returned by the sheriff were concerned, and the particulars as to how and when these were made, some deficiency and uncertainty was, we think, to be expected. Some of these parties, whose memories are imperfect in these regards, such as the deputy-sheriff and said Hall, are not in any way beneficiaries of the disputed or contested sale, or af-

fected thereby, in this suit; and their failure to explain when and how the indorsements on said execution were made, or the dates and modes of paying the costs of said sale, are not remarkable, or justly calculated to arouse suspicions. At most, they affect the value, rather than the honesty, of the testimony. In view of the great lapse of time, however, we do not think we ought to give the importance to defects of this kind in the evidence that counsel for plaintiff do. About all we can say in this behalf is that the dates of some of the receipts, and the want of certainty as to other dates, make it possible that some portion of the costs and fees may have been derived from other sources. Courts, however, cannot assume fraud from mere obscurity, or apparent error, (*Picot v. Bates*, 47 Mo. 390,) nor disturb titles upon plausible conjectures. *Evans v. David*, 98 Mo. 411, 11 S. W. Rep. 975. The sheriff's deed acknowledges receipt of the \$900 by the sheriff, and this is *prima facie* evidence of its payment; and the bill charges that this sum was credited on the execution. So that, while the evidence may fail to show that it was paid on the day of sale, or any particular date, with entire certainty, yet, after the lapse of so many years, we do not think this ought to be controlling. As to the said fraudulent purpose or combination of the heirs in borrowing said sum of \$1,845, and executing the trust deed in favor of Bainbridge to secure the notes given therefor, we deem it sufficient to say that there is no evidence to so show, but that the evidence shows the transaction to have been *bona fide* in all respects. This branch of the case is, we believe, not seriously urged in this court.

Having, now, thus disposed of the above matters, we will next consider the remaining substantial facts and circumstances in evidence, as to the fraud alleged in respect to the said sheriff's sale, in 1876, at which the heirs became the purchasers of the land now sought to be subjected to this bill in behalf of the judgment creditors of the estate of the father. It will be useful and necessary, perhaps, in this behalf, to give some preliminary facts and dates, which we will do as briefly as we can. In April, 1860, one Bills and said Fudge executed to one Hays, as sheriff, two certain notes for 1,000 and odd dollars each, for certain lands sold in a certain partition suit in which Hansbrough et al. were plaintiffs, and Fudge et al. were defendants. Said Briant, plaintiff herein, became successor in office to said Hays; and, said notes not having been paid, he began suit to collect the same in March, 1872. Defendant had judgment in the circuit court, but this judgment was subsequently reversed by this court. See *Briant v. Fudge*, 63 Mo. 489. On retrial of the cause, and in April, 1878, plaintiff obtained the judgment which he now seeks to have paid, and which, on defendant's appeal therefrom, was affirmed by this court in 1884. See same case. *Id.* 80 Mo. 319. The sale, under process of the

circuit court, in the case of Jackson v. Erwin, at which these defendants bought, was had, as heretofore stated, in July, 1876. No motion was made or proceedings had in said cause to set aside the sale; nor was any effort made to disturb the same until this suit was begun, in 1884, some eight years or more thereafter. So that we see that, while the defendants and heirs were unquestionably aware, at the time of the sale, of the pendency of the suit of Briant v. Jackson, Admr., there had been a judgment in defendant's favor therein, in the circuit court, which was at the date of said sale unreversed, and still pending, on the appeal to this court taken therefrom on the part of the plaintiff. The mere existence of such suit, and defendant's knowledge thereof, were not, in this *status* of the case, circumstances, in themselves, of any probative value upon the question of defendant's fraudulent purpose to hinder and delay plaintiff in the collection of the said claim. The obvious tendency of this knowledge, if important at all, would be, we think, the other way, as the litigation in that behalf had so far resulted in a judgment against plaintiff.

But to proceed. The evidence varies somewhat as to the value of the land, but a fair average would make the value, perhaps, about \$8,000. The amount bid, to-wit, \$900, is obviously a very low and inadequate sum. But mere inadequacy is not enough, though a circumstance of great weight. *Robinson v. Robards*, 15 Mo. 459. If gross, it is usually esteemed a badge of fraud, and, with other circumstances, may be decisive. *Curd v. Lackland*, 49 Mo. 451. In all cases, great inadequacy justifies and requires a court of equity to closely examine the sale, when properly called in question by parties having substantial interests in the property sacrificed. So that it becomes necessary to examine the circumstances of the sale in question, in order to give this feature of the case its due and proper weight and influence in the premises. In the first place, the sale occurred at the usual place, and at a usual hour, taking place at the court-house door about 11 o'clock in the day. There seems to have been quite a crowd present at the time; and, so far as we can see, there was nothing unusual in the immediate transaction itself. The land failed to bring a proper and adequate price, but this, we think, was for the following reasons: Said Erwin, the mortgagor in the mortgage foreclosed at said sale, and defendant in said suit, was, it seems, still in possession of the land so sold; and what is most important in this connection is the undisputed evidence that Erwin's attorney, W. J. Terrell, was present at the sale on July 7, 1876, and gave notice that there were two suits pending, and whoever bought had two lawsuits on hand. The first suit was for damages, N. S. Erwin against the heirs of Jacob Fudge, on account of the notes given for land sold; the other and subsequent one, by administrator against Erwin. The suit

for damages was, we believe, pending for trial; and in the foreclosure suit the defendant had prepared and filed his bill of exceptions, and had, under the law, three years in which to prosecute his writ of error to reverse the judgment therein. Under these circumstances, no one would much desire to bid, and no one would in fact buy, unless at an unusual bargain. While, then, the land went for a very low price, still, in view of these suits then pending, and other probable litigation to obtain the possession and settle the title, this sum was not, in connection with these facts and circumstances, so grossly inadequate as to show fraud, or to require us to annul the sale under judicial process to the highest bidder, which, as before said, the courts are inclined, in the absence of fraud or bad faith, to uphold. Nor can we see any conspiracy or fraudulent conduct or combination on the part of defendants to prevent bidding at the sale. There were no appeals, false or otherwise, to the benevolence of bidders, such as exist in some of the cases; no pretense that defendants were acting for the interest of the judgment debtor, or his family, or for any one else; and no statements on their part, either public or private, intended or calculated to keep purchasers from attending the sale, or bidding thereat. In short, we see no evidence of any resort by any of these defendants to any trick or artifice to deter bidders, or depress the price, or to secure the land at less than its value; and the low sum realized was unquestionably due to the sufficient causes already mentioned, and, it may be, also to the further condition of the land market in that locality in that year, which is spoken of by one witness as being about as flat as could well be, while another witness testifies that times were hard, money scarce, and property low. Their desire, as shown by their agreement to buy if the land went cheap enough, was the usual one, natural to all purchasers alike. There was nothing in the agreement as to how much or how little they should bid, this being necessarily contingent and dependent upon the competition of other bidders. The witnesses, being some of the defendants, testifying as to this matter in plaintiff's behalf, deny that anything was said about purchasing the land for less than its value, or that any mention was made of the debts of their father's estate, or the claims thereon by plaintiff or others; and there is, we think, and as already said, no evidence of any practices, impositions, or deceits on the part of any of the defendants to depress the value in the estimation of others, or to induce them to forbear to bid at the sale. The nature of their said agreement has been already intimated, and, more fully stated, is to this effect: Certain of these heirs, being defendants A. R. Fudge, Coleman Fudge, and their sister, Martha Jackson, wife of the administrator, John Jackson, agreed among themselves on the day, or shortly before the sale, that they would "buy the land if it did not

go too high," and that the other heirs, who were absent, and resided in other parts of the state, could come in afterwards if they secured the land. The administrator may have also been a party thereto, at least to the extent of his wife's interest, for which he paid. There is no evidence to show that any one was prevented from attending or bidding at the sale in consequence of this agreement, nor is there any evidence that any one of these heirs would have individually gone into the market, or bid at the sale. This agreement among the heirs representing one interest, probably, would have increased the competition on their part as against the bidders, generally, at the sale, if the latter had not been influenced not to bid by the said warnings and matters hereinbefore mentioned. It is, we think, plain enough that other bidders were not influenced thereby, for it was not known to them; and there is no evidence that, in its absence, any of the parties thereto would have bid at the sale, or had ever manifested any such intention. They naturally would act together, as the land was the old homestead of their father, on which he had lived for 20 years; and for that reason, among others, the heirs wanted to buy it, and would take more risk to purchase it, on that account, than others would likely take.

It is also urged that the administrator, who was present, ought to have bid in behalf of the estate. But we hold, upon the grounds stated and authorities cited in this behalf, that the administrator could bid in his own behalf, at this sheriff's sale under process of the circuit court, which is incompatible with the duty to bid on behalf of the estate. Besides this, the estate was insolvent, as is conceded; and the administrator, being without funds, could not enter the market, for that reason.

It is also said that, as there was only one bidder, he should have stopped the sale. This also transfers, we think, the responsibility from the sheriff to the administrator. Besides this, the adverse circumstances then operating against the sale of the land for a good price would have operated, in all probability, to the same extent at any adjourned sale which might have been had. Erwin, or his attorney, would probably have been present again to warn bidders. The time in which he could prosecute his writ of error from said judgment was three years, and the lien of the judgment would expire in that time. These considerations would, we apprehend, occur to the administrator and sheriff, and their legal advisers; but, for reasons already given, we do not think the administrator, under these facts and circumstances, was under any obligation of this character in sales of this sort.

We are accustomed to defer somewhat, even in equity cases, to the findings of the lower courts, and see no sufficient reason for a departure from our rule in the case before us. There is, we apprehend, no serious claim that the actual, intentional fraud which the

bill charges is made out in the evidence; and, for the reasons given, the case, we think, is not one of fraud in law. The authorities cited for plaintiff are for the most part applicable, we think, to a different sort of a case. The judgment should be affirmed, and it is so ordered. All concur.

WEST, Public Administrator, v. BRISON.

(Supreme Court of Missouri. Feb. 24, 1890.)

POWERS OF ADMINISTRATORS—RELEASE OF SURETIES—PRESUMPTION OF PAYMENT.

1. Plaintiff, as administrator *de bonis non*, obtained judgment against a former administrator and his sureties. Execution was issued on the judgment, and levied on property of the principal and the sureties sufficient to satisfy the judgment; but the execution was recalled by plaintiff, who extended time to the principal, and took a deed of trust from him as additional security, and notified the sureties that they were released. The sureties acted on the assurance that they were released, and the principal became insolvent. Held, that plaintiff, as administrator, had the power to extend the time, and give the release, and that the sureties were thereby discharged.

2. No presumption of payment of a judgment will arise from lapse of time short of 20 years; but it is not necessary, to make out a plea of payment, that payment should be positively shown; it may be presumed from lapse of time short of 20 years, with other circumstances tending to show payment.

Appeal from circuit court, Cass county; D. A. DE ARMOND, Judge.

Woodbridge & Daniel, for appellant. *W. J. Terrell and Bailey & Burney*, for respondent.

BLACK, J. On the 7th May, 1872, letters of administration were issued upon the estate of James R. Cline to his widow, Nettie Cline, and her father, James Blair, Jr., and they gave bond in the sum of \$35,000 for the performance of their duties, with James Blair, Sr., William T. Brison, J. C. and A. H. Boggs, and G. W. Feely as sureties. The letters of administration were revoked in May, 1873, and the estate ordered into the hands of Newton P. Brooks, public administrator of Cass county. On the 6th September, 1873, Brooks, as such administrator, recovered a judgment against the former administrator and administratrix, and the sureties on their bond, in the sum of \$10,611.40. Brooks died in 1879, and Cummings was appointed administrator of the Cline estate; but he died before he entered upon the discharge of his duties, and in February, 1880, the Cline estate was ordered into the hands of the present plaintiff, public administrator. William T. Brison, one of the sureties of Cline and Blair, Jr., died in 1885, and Lucy H. Brison is the administratrix of his estate. In the year last mentioned, the plaintiff presented the judgment before mentioned for allowance against the Brison estate, and the probate court allowed the demand in the sum of \$3,517, and the defendant appealed. A

trial anew in the circuit court resulted in a judgment for defendant, and the plaintiff appealed to this court.

The defenses set up to the demand are: *First*, payment; and, *second*, that Brison, as a surety on the bond, was released and discharged from all liability by Brooks, the former administrator *de bonis non*.

The further facts disclosed by the evidence are in substance as follows: An execution was issued upon the judgment against Cline and Blair, Jr., and their sureties, on 9th September, 1878, and levied upon real estate of the principals and sureties, of a value more than sufficient to pay the judgment. This execution was returned not satisfied, and without a sale, on the 23d January, 1874, by order of Brooks, the plaintiff therein. On the 6th day of September, 1876, one day before the judgment lien expired, Nettie Cline and Blair, Jr., being joined by the widow of James Blair, Sr., executed to Brooks, administrator *de bonis non* of the Cline estate, a deed of trust to secure the balance then due upon the judgment. This deed of trust included the property of the principal debtors, which had been levied upon, except one parcel, which had been sold, and the proceeds applied on the judgment, and also property belonging to them not covered by the lien of the judgment. There was also included therein the property known as the "Blair Hotel," in Harrisonville, which belonged to James Blair, Sr. A recital in the deed of trust states that \$7,752.40 had been paid on the judgment. The annual settlement of Brooks as administrator, made in April, 1878, more than a year and a half after the date of the deed of trust, shows a payment to him by Blair, Jr., in allowed demands procured and turned over to Brooks, in the sum of \$3,486.59. Defendant insists that this payment was additional to that recited in the deed of trust, and plaintiff contends that it was a part thereof. The settlement of Brooks, filed in 1879, shows a further payment of \$1,562.45. In 1882, and after the death of Brooks, the present plaintiff caused the property in the deed of trust to be sold; the sale producing only the sum of \$2,384. The evidence shows that Blair, Jr., acting for himself and Mrs. Cline, had frequent interviews with Brooks from and after the levy of the execution, in 1873, with a view of saving the sureties; and the evidence tends to show that Brooks agreed to give these principal debtors time to pay off the debts of the Cline estate, and to take the receipts of Mrs. Cline, for herself, and as guardian of her child, for any balance, provided the probate court would accept these receipts in the final settlement to be made by Brooks. Pursuant to this arrangement, Mrs. Cline and Blair, Jr., made the payments mentioned in the deed of trust, amounting to \$7,752.40, and then executed the deed of trust to secure the balance due as the judgment; but Mrs. Cline did not produce the receipts. There is other evidence to the effect that Brooks, as administrator *de bonis*

non, on various occasions, extending over a period of three or four years from 1873 or 1874, stated that Mrs. Cline and Blair, Jr., had made arrangements to pay off the debts of the Cline estate, and were to have time to do so, and that the sureties were released, and he had notified them that they had been released. This evidence of Brooks' declarations finds support in the undisputed fact that the sureties were never called upon to pay any part of the judgment from 1874 to 1885, and in the further fact that Brooks paid Brison an allowed demand of \$181.60, and the present plaintiff paid to him, as late as 1882, allowed demands amounting to \$1,191. In the mean time the principal debtors became non-residents, and they, and all the sureties except Brison, became insolvent.

1. For the plaintiff, the court instructed the jury that no presumption of payment of a judgment would arise from lapse of time short of 20 years. The defendant then asked, and the court gave, an instruction to the effect that it was not necessary that payment should be positively shown, but it might be presumed from lapse of time short of 20 years, with other circumstances, if any, tending to show payment, and, if they believed from all the evidence that the judgment had been paid, they should find for the defendant. The evidence does not tend to show that Brooks took the deed of trust in payment of the balance due upon the judgment, for it only professes to be additional security. The only substantial issue of fact over the payments was whether the \$3,486.59 was included in the payments recited in the deed of trust, and as to this the instructions might have been more specific. But the plaintiff asked, and had given, the general instruction as to presumption from lapse of time short of 20 years; and there was no error in modifying it by the one given at the request of the defendant. Most of the parties to these transactions were dead, and 10 or more years intervened between the date of the alleged payments and the trial; and the time which had elapsed, though short of 20 years, was an element which might be considered in connection with the other circumstances.

2. The court, on the request of plaintiff, refused to instruct the jury that, although Brooks, as administrator *de bonis non* of the Cline estate, did agree to release the sureties on the bond of Mrs. Cline and Blair Jr., still he had no power or authority to make such release, and the sureties were not thereby discharged, but, of its own motion, directed the jury that, if the execution was returned not satisfied, by order of Brooks, in 1874, pursuant to an agreement with the principal debtors to the effect that he would extend the time of payment of the judgment, release the sureties, and look to them alone for payment; that Brison was informed of the agreement, and was told by Brooks that he was discharged; that Brison acted upon that assurance to his death, in 1885; that the property of the principal debtors levied

upon was sufficient to satisfy the judgment; and that they became insolvent and non-residents in 1881,—then the finding should be for defendant. There is no doubt but the administrator holds the property of the estate for the sole purpose of administration, and his duties are, for the most part, defined by statute; and there is no statute which in terms allows him to discharge a surety on a debt due the estate. But he is charged with the collection and preservation of the assets, and there are many things which he may do because included in his general powers, though not specifically designated by the statute. In the case of *Smarr v. McMaster*, 35 Mo. 349, Smarr presented a note for allowance against the estate of McMaster; and the defense was that the holder of the note had given the principal debtor time for the payment thereof after the death of McMaster, who was a surety only on the note. The plaintiff offered to show that the time of payment had been extended with the consent of the administrator of McMaster, but the trial court excluded the evidence. This court held that the evidence should have been received, saying, in effect: We are of opinion that, under the general authority of the administrator to preserve the estate, the power of consenting to an extension of time might be exercised. That ruling was approved in *North v. Walker*, 66 Mo. 454, where it was held that an executor had the power to make a valid agreement for the extension of the time of payment of a debt held by another against the estate which he represented. It is certainly within the power of an administrator to take additional security, and in doing this it will often become necessary to give further time to the principal debtor. The fact that such a power may in some instances be exercised to the detriment of the estate is no reason why it should be denied in all cases. The administrator, by extending the time of payment to the principal debtor without the consent of the sureties, may make himself and his own sureties liable. The cases cited are quite to the point, and justify the conclusion that the administrator, Brooks, had the power to give the principal debtors an extension of time in which to pay the judgment. The judgment against the principals and sureties on the bond did not extinguish the relation of principal and surety; and the rights of the sureties, as such, remained the same as before judgment. *Rice v. Morton*, 19 Mo. 263; *Dodd v. Winn*, 27 Mo. 501. Again, where the surety claims to have been discharged by reason of an agreement between the creditor and principal debtor, extending the time of payment, it must appear that the agreement was upon a valuable consideration, and that the extension was for a definite period of time. In this case the evidence does not show, nor were the jury required to find, that the time of payment of the judgment had been extended for a defined period. Brooks appears to have been at liberty

to pursue his remedy whenever he saw fit to do so. There are, however, other principles of law applicable to this case. If the creditor gives the surety to understand that he will look to the principal debtor alone for payment, and the surety is thereby lulled into security, to his loss, the creditor should suffer the consequences. Thus, it was held in *Harris v. Brooks*, 21 Pick. 195, that a parol declaration of the holder of a note to the surety, that he would exonerate him, and look to the principal only, and the surety, by reason thereof, omitted to take up the note and secure himself, constituted a good defense for the surety. Though a promise to look to the principal debtor alone for payment, standing by itself, would be a *nudum pactum*, still, as has been said, "when, however, the surety is induced by such an assurance to surrender the securities which he has received from the principal, or to forego any means of indemnity or protection, an estoppel will arise to the extent of the resulting loss." 2 Amer. Lead. Cas. (5th Ed.) 481. Here Brison, the surety, was lulled into security by the assurances of Brooks for a period extending from 1874 or 1876 to 1885, and in the mean time the principal debtors, and all of the other sureties, became insolvent. The principal debtors had furnished security by the deed of trust, executed in 1876, sufficient to satisfy the balance due upon the judgment; but this security became depreciated by the laches of Brooks. It would be nothing short of giving effect to a fraud to require the Brison estate to pay any part of the judgment, under these circumstances. It can make no difference in the result that Nettie Cline has thus far failed to furnish receipts for any money that may be coming to her and her child after the payment of the debts of the estate. Brison had nothing to do with that arrangement, and his release does not depend upon its performance.

The plaintiff makes the further point that there is no evidence tending to show that the property of the principals, Nettie Cline and Blair, Jr., levied upon, was sufficient to satisfy the judgment; and this point seems to be well taken. While the property of the principals and sureties levied upon was sufficient in value to have paid the judgment of \$10,000 and over, that of the principals did not exceed in value \$3,500. This error, however, should not reverse the judgment. The other facts stated in the instruction are well supported by the evidence, and are of themselves sufficient to support the judgment. The release of Brison stands upon the ground that he had been assured by Brooks that he was discharged, and upon that assurance he rested and relied for a period of 10 or more years, and in the mean time the principals and other sureties became insolvent. These facts are so clearly disclosed by the evidence that the judgment should not be disturbed for the error before mentioned. The judgment is therefore affirmed. All concur.

BARBER ASPHALT PAVING CO. v. HUNT.

(Supreme Court of Missouri. Feb. 24, 1890.)

MUNICIPAL CORPORATIONS—ORDINANCES—CONTRACTS.

1. The St. Louis city charter, art. 8, § 22, (Rev. St. Mo. 1879, p. 1584,) which prescribes that, "before the presiding officer shall affix his signature to any bill he shall suspend all other business, declare that the bill will now be read, and that, if no objection be made, he will sign the same," is merely directory; and where the journal shows that the signature of the officer was affixed in open session, and that no objection was made, the ordinance will not be declared invalid because the journal fails to show that the other formalities were observed.

2. Where both houses adjourn on the day a bill is presented to the mayor, and the bill is signed by the mayor, and filed in the city register's office, it becomes a valid ordinance, though it is not returned to the house in which it originated, as required by article 8, § 23, of the charter; as there is no provision in the charter which prescribes that no bill shall become an ordinance which shall not be returned to the house in which it originated.

3. Article 6, § 27, of the charter of St. Louis, provides that the board of public improvements shall let out work by contract to the lowest responsible bidder, subject to the approval of the council. *Held*, that the council is not prohibited from letting a contract for paving a street because the work prescribed by the ordinance is covered by letters patent, under which the contractor holds the exclusive right.

Appeal from St. Louis circuit court.

Action by the Barber Asphalt Paving Company against Mary C. Hunt. The cause was tried without the intervention of a jury, and resulted in a judgment for plaintiffs, enforcing the lien of certain tax-bills, and from this judgment defendant appeals.

Chas. M. Napton, for appellant. *Hitchcock, Madill & Finkelnburg*, for respondent.

SHERWOOD, J. The grounds upon which the defendant resists the payment of the tax-bills in suit are two: *First*, that the ordinances in question were not passed and approved as required by the charter; and, *second*, that the work provided for in the ordinances was not let as provided in section 27, art. 6, of the charter. The charter provisions in respect to passing ordinances (article 8, § 22) are as follows: "No bill shall become an ordinance until the same shall have been signed by the presiding officer of each of the two houses, in open session; and, before such officer shall affix his signature to any bill, *he shall suspend all other business, declare that such bill will now be read, and that, if no objections be made, he will sign the same*, to the end that it may become an ordinance. The bill shall then be read at length, and, if no objection be made, he shall, in the presence of the house, in open session, and before any other business is entertained, affix his signature, which fact shall be noted on the journal, and the bill immediately sent to the other house." 2 Rev. St. 1879, p. 1584. Defendant put in evidence the journal of the house of delegates for March 20, 1883, which, after giving in full the report of the proper committee that these two bills were truly

enrolled, proceeds as follows: "The bills, as above, were read at length. No objection being made, Mr. Speaker Marriot, in the presence of the house, in open session, affixed his signature thereto, as required by the charter." Upon this fact being thus shown by the journal, the defendant contends that the charter provisions marked above in italics were not complied with, and therefore the ordinance passed is null. These provisions of the charter are copied from section 37, art. 4, of our state constitution; and upon that section it has been ruled that a bill passed by the legislature became a law where the same was signed by the presiding officer of each of the two houses in open session; that this provision was mandatory, but the other provisions, relating to mere matters of detail, were but directory, and, as no objection was noted on the journal, the presumption would be indulged that the matters of detail were complied with; that the legislature proceeded by right, and not by wrong. *State v. Mead*, 71 Mo. 266. Here the journal expressly recites that the signature of the speaker of the house was affixed in open session. On the authority of the case cited, it must be ruled that the bills in question become ordinances, as against the objection already considered.

But it is urged that the bills failed to become laws, because never returned to the house in which they originated. Section 23 of article 8 of the charter provides: "Every bill presented to the mayor, and returned within ten days to the house in which the same originated, with the approval of the mayor, shall become an ordinance." The testimony shows the bills, though signed by the mayor, were not thus returned; both houses having adjourned March 27, 1883, *sine die*,—the day on which the bills were presented to the mayor for his approval. But the testimony also shows that the mayor on the same day filed the bills in the city register's office on the day of their approval. Section 23 of article 8 of the charter contemplates that cases will arise where a bill shall not have been returned to the house where the same originates; and, besides, there is no provision in the charter that "no bill shall become an ordinance" which shall not be returned by the mayor to the house where the same originated. The same considerations, therefore, apply here as were applied in *Mead's Case*, supra; and we held the ordinance as valid, as against this objection also.

Section 27 of article 6 provides how bids for work shall be awarded, to-wit, that the board of public improvements shall "let out said work by contract to the lowest responsible bidder, subject to the approval of the council." Upon this point it is insisted that such provision was violated, because the work of street paving prescribed by the ordinances was covered by letters patent, under which plaintiff held the exclusive right, and therefore there was no competition for said work. This point, though adjudicated in

other jurisdictions, is a case of first impression in this state. In New York it has been ruled, under a statute requiring all city work to be let "to the lowest bidder," that the common council were not prohibited from letting a contract for paving a street with material or in a manner not admitting competitive bids or proposals. In *re Dugro*, 50 N. Y. 513. This ruling was approvingly followed in *Baird v. Mayor*, 96 N. Y. 567. Prior to the time the subject was discussed in New York, a similar ruling had been made in Michigan. *Hobart v. Detroit*, 17 Mich. 246. These cases seem to us to rest upon the correct basis. It certainly was never intended that the city authorities should be unable to make a contract, however necessary to the public welfare such contract might be, if the article desired, or the manner of the performance of the contract required the use of a patented article. Such a construction of the charter we regard as "sticking in the bark," and as subordinating the whole powers conferred on the common council to the meaning of two or three words contained in a single section of the charter. Besides, the rights of those interested are protected by the necessity of obtaining the approval of the council to any contract. A different view of the matter under discussion has been taken in Wisconsin, (*Dean v. Charlton*, 23 Wis. 590.) but by a divided court; and it is noteworthy that the legislature of that state did not approve the view of the statute taken by the court, and so changed the statute, so as to prevent the continued prevalence of the objectionable ruling. (*Mills v. Charleton*, 29 Wis. 400; *Dean v. Borchsenius*, 30 Wis. 239.) For these reasons we affirm the judgment.

All concur, but BARCLAY, J., not sitting.

BURGESS *et al.* v. BOWLES.

(Supreme Court of Missouri. Feb. 24, 1890.)

WIDOW'S ELECTION—HOMESTEAD.

Wag. St. Mo. p. 698, § 5, provides that, on the death of the head of a family without minor children, his homestead, to the value of \$1,500, if situated in the country, or in a town of less than 40,000 inhabitants, or to the value of \$3,000, if situated in a town of over 40,000, shall pass to and vest in the widow. *Held*, that a widow who, under her husband's will, has accepted property, whether real or personal, greater in amount than that to which she would otherwise be entitled by law, cannot insist on her homestead, if repugnant to the terms of the will. *Davidson v. Davis*, 86 Mo. 440, followed.

On motion for rehearing. For former report, see 12 S. W. Rep. 341.

Ejectment by Martha Burgess and others against Susan J. Bowles. Judgment for plaintiffs, and defendant appeals. Wag. St. Mo. p. 698, § 5, is as follows: "If any * * * housekeeper or head of a family shall die, leaving a widow or any minor children, his homestead, to the value aforesaid, [\$1,500, if situated in the country or in

a town of less than 40,000 inhabitants, or \$3,000, if situated in a town of over 40,000,] shall pass to and vest in such widow or children, or, if there be both, to such widow and children, without being subject to the payment of the debts of the deceased, unless legally charged thereon in his life-time; and such widow and children, respectively, shall take the same estate therein of which the deceased died seised: provided, that such children shall, by force of this chapter, only have an interest in such homestead until they shall attain their majority."

BARCLAY, J. During the consideration of this motion it has become apparent that the question whether the doctrine of election might be applied, under the homestead law prevailing in 1872, will be a controlling one on a retrial of this cause. We deem it, consequently, desirable to express now the conclusion reached on that point, with a view to speed the termination of this litigation. The subject was fully considered by this court in *Davidson v. Davis*, (1885,) 86 Mo. 440. It was then held that where a widow accepted, under the will of her deceased husband, property (whether real or personal) greater in amount than that to which she would otherwise have been entitled by law, she could not then insist upon her homestead right, if repugnant to the terms of the will. That decision interpreted the same statute (Wag. St. p. 698, § 5) applicable in the present controversy. Its ruling that the doctrine of election then applied to homestead estates we approve, adding the following observations: The section in question was transplanted from the laws of Vermont. We have held that we adopted with it the interpretation that had been previously given it in that state. *Skouten v. Wood*, 57 Mo. 380. We find, on investigation, that the precise point now under consideration arose there in *Meech v. Estate of Meech*, 37 Vt. 414, and substantially the same ruling was then made that has since been declared here in *Davidson v. Davis*, 86 Mo. 440. The section in question was amended in 1875 (Sess. Acts 1875, p. 60, § 1) into the form it now presents. (Rev. St. 1889, § 5440.) Under it (1879) the case of *Kaes v. Gross*, 92 Mo. 647, 3 S. W. Rep. 840, originated. In that opinion it was inadvertently assumed that *Davidson v. Davis*, 86 Mo. 440, arose under the present statute; whereas we find, on further examination, that the provisions of law applicable to the two cases were different,—*Davidson v. Davis*, being governed, as is the case at bar, by the section as it stood prior to the amendment of 1875. *Kaes v. Gross*, therefore, should not longer be considered as disturbing the ruling announced in *Davidson v. Davis*, regarding the doctrine of election, in cases arising under the old law. Whether the facts of the present case bring it within the control of the doctrine referred to cannot be satisfactorily determined from the record now before us. We

hence adhere to the order for reversal and remandment, and overrule the motion for rehearing, with the assent of all the judges.

COUNTY OF BOLLINGER v. McDOWELL.

(*Supreme Court of Missouri*, Feb. 24, 1890.)

MORTGAGES—DESCRIPTION.

A mortgage, after stating the county and state in which the land was situated, described it as "beginning on a Spanish oak," and then gave the courses and distances, as well as monuments, stating that the described area contained 242½ acres. It then excepted all of the described land lying west of a certain stream, and 7¼ acres on the east, which excepted parts "were sold off by Henry Yount, Sr.," leaving 142½ acres remaining in the tract, all on the east side of the stream. Held, in ejectment between the original parties to the mortgage, that the mortgagee could introduce parol evidence that certain land in the county had long been known by the description contained in the mortgage; that the land had been conveyed, by persons in privity with the mortgagor, by the same description; and that the tract was also popularly known as "Henry Yount's Land," as well as deeds of the excepted parts executed by Henry Yount, Sr.

Error to circuit court, Bollinger county; **JAMES D. FOX**, Judge.

Moses Whybark, for plaintiff in error. *W. K. Chandler*, for defendant in error.

BARCLAY, J. This is an action of ejectment, in which there was a judgment for defendant in the trial court, to reverse which plaintiff has brought this writ of error. Plaintiff's claim of title rests on a mortgage overdue, in which the land conveyed is thus described: "The following described lots, tracts, or parcels of land lying, being, and situated in the said county of Bollinger, and state of Missouri, to-wit: Beginning on a Spanish oak; thence south, nine degrees east, 35 chains, to a hickory; thence north, 81 degrees east, 63 chains, to a white oak; thence north 9 degrees west, 35 chains, to a stake; and thence south, 81 degrees west, 63 chains, to the beginning,—containing in all, of the above description, two hundred and forty-two acres and a half; except, however, all that portion of said tract of land which lies on the west side of Whitewater, a stream of water running through said tract as above described, and also seven acres more of said tract, lying on the east side of Whitewater, which said parts so excepted were sold off by Henry Yount, Senior, during his life-time, leaving one hundred and forty-two acres and a half remaining in said tract, and all lying on the east side of said Whitewater."

The circuit judge who tried the case ruled that this description was so vague and uncertain as to render the deed void, and excluded the parol evidence offered to elucidate it. This ruling is decisive of the case on the present record. The mortgage in question was made by several parties, including defendant, to secure payment of a school-fund bond, also executed by defendant and others to the county of Bollinger. Both are in the usual forms employed by counties in making loans of public school moneys.

It is to be noted at the very outset that this action is directly between the immediate parties to the conveyance, and what is said in the course of the opinion should be understood as limited to the exact case thus presented.

That parol evidence is sometimes admissible to clear up ambiguity in the descriptive part of a deed is elementary law, but the difficulty of determining in what particular cases such evidence should be admitted has not been entirely removed by such rules as the adjudged cases on the subject may be said to establish. Examining the description in the deed here in question without the aid of any extrinsic evidence, we find that it furnishes the following materials for the identification of the land: The tract is in Bollinger county, Mo. It is included within four lines. Its shape is an oblong square, 35 chains north and south, and 63 chains east and west. Its north-west corner is a Spanish oak; its south-west corner, a hickory; its south-east corner, a white oak; and its north-east corner, a stake. The area of these boundaries is 242½ acres. Whitewater is a stream flowing through it. That part of the tract on the west side of Whitewater is excepted, as well as seven acres more on the east side of Whitewater. These excepted portions were sold off by Henry Yount, Sr., during his life-time. One hundred and forty-two and a half acres remain in the tract, and are conveyed, all on the east side of Whitewater. To supplement it, plaintiff offered evidence tending to show that a certain body of land in the county had been long known in that locality by that description; that it had been previously conveyed, by parties in privity with defendant, by the use of language substantially the same; that the tract was also popularly known in the vicinity as "Henry Yount's Land;" and further showing the location on the ground of the monuments mentioned in it. This evidence was excluded, but we think it should have been admitted. It is not essential to a description of a tract of land that its position with reference to township or section lines should be established. It may be defined by monuments or boundaries, or sometimes by yet more general description. The touchstone of validity is, does the description indeed describe? If it does, it is of little moment what form is chosen for the purpose. If a certain tract of land is generally known in the community by a particular designation, that fact may be developed to explain a deed in which it has been used as a description to pass the title. This we held where the only descriptive words were "Cedar Cabin," but other evidence disclosed that a definite tract of land generally was known thereabout by that name, though at first glance, unexplained, such language would seem to apply only to a building. *Cravens v. Pettit*, (1852,) 16 Mo. 210. The same view was taken by the house of lords, where the words, "all my estate in Shropshire called 'Ashford Hall,'" were used. *Ricketts v.*

Turquand, (1848,) 1 H. L. Cas. 472. It is not necessary to multiply illustrations on this point, as the subject has been considered here quite recently, and fully. *Hammond v. Johnston*, (1887,) 93 Mo. 198, 6 S. W. Rep. 88.

In the case before us, much of plaintiff's excluded evidence tended to show that the description in the mortgage had been generally applied to the land for years by the owners and the public. Other parts of it tended to identify the land as that described in the petition, and to show acts of the parties indicating their interpretation of the description to the same effect now claimed by plaintiff. The plaintiff also tendered evidence of the recorded deeds made by Henry Yount, Sr., in his life-time, to show the exact extent of the exceptions recited in the principal instrument, and thus define with entire precision the tract in dispute. All this evidence was excluded, in harmony with the theory which the trial court applied to the case. We consider that the court erred in that ruling, and accordingly all agree to reverse the judgment, and remand the cause for retrial.

CALDWELL et al. v. TRUESDELL.

(*Court of Appeals of Kentucky.* Feb. 6, 1890.)

HOMESTEAD—PLEADING.

An answer which claims certain attached property as defendant's homestead is insufficient, where the only allegations as to acquirement and possession thereof are that at the date of the answer defendant was occupying and claiming the land as a homestead, as he must have acquired it before the creation of the debt, and been a *bona fide* housekeeper with a family, and in possession, when the levy was made, to entitle him to the exemption.

Appeal from circuit court, Campbell county.

"Not to be officially reported."

Action by George F. Truesdell against James Caldwell and others. Judgment for plaintiff, and defendants appeal.

M. R. Lockhart, for appellants. *T. M. Hill*, for appellee.

LEWIS, C. J. The land, consisting of 10 acres, in controversy in this case, was attached by appellee to satisfy a debt created by payment of a note in which he was the surety of appellant James Caldwell, who, after the action was submitted for trial and judgment, offered to file an answer in which he claimed the land as his homestead, and exempt under the statute from sale to pay the debt. As the answer was offered to be filed in due time, the only reason there could have properly been for overruling the motion to file it is that it did not contain such a statement of facts as, if true, entitled appellant to the homestead exemption claimed. It is well settled that the debtor, to avail himself of a homestead exemption, must be a *bona fide* housekeeper with a family, and in possession of the land when levied on by the attaching or execution creditor, claiming it as his homestead, or, if not in possession, his absence from it must be temporary, and with

intention to occupy it, and he must have also acquired it before creation or existence of the debt or demand to satisfy which it is sought to be subjected and sold. Neither of the essential conditions are stated in the answer to have existed, the only allegations relating to either being that he (appellant) was, at date of the answer, occupying and claiming the land as a homestead. As therefore a general demurrer should have been sustained to the answer if it had been filed, the motion to file it was properly overruled, and the judgment is affirmed.

DEPOSIT BANK OF OWENSBORO v. DAVIESS COUNTY COURT.

DAVIESS COUNTY COURT v. WORTHINGTON's ADM'ER et al.

(*Court of Appeals of Kentucky.* Feb. 22, 1890.)

DEPOSITARIES—COUNTY FUNDS.

A bank duly selected as the depository of money collected by way of taxes, to satisfy county bonds issued in aid of a railroad company, cannot be held responsible for money which it pays out by order of the committee appointed by the county court to take charge of and pay out the fund, on the ground that an excess of bonds had been illegally issued, in the absence of fraud or collusion between it and the committee in an appropriation of the fund to a purpose known to be unauthorized.

On petition for rehearing. For former report, see 12 S. W. Rep. 930.

"Not to be officially reported."

W. N. & J. J. Sweeney and Weir, Weir & Walker, for the bank. *Stuart & Atchison*, for the county court. *G. W. Williams, L. P. Little*, and *Geo. W. Jolly*, for appellees.

PRYOR, J. The vigorous, but dignified, assault made on the opinion delivered in these cases demands a response. Counsel in his zeal for the tax-payers he represents, and in his endeavor to rectify a wrong that we think was committed by the county court of his county through agents authorized to execute the order of the county court in the issuing of these bonds, is assuming that parties having no connection with the action of the county court with reference to this over-issue of bonds should be held responsible for the action of the county court, that at the time and now represented in every aspect of this case the tax-payers of the county of Daviess. This county court, approving the act of its committee, coerced through its tax-gatherer taxes from the people to meet the payment of every bond and coupon issued, legal and illegal, and is now insisting that a mere depository of the fund is liable, not by reason of any authority assumed by the bank, but for doing that which the agents of the county required it to do. The tax collected was paid out in the precise manner the county court said it should be paid, and as the county insisted in the Case of Howard, 13 Bush, 101, in which the overissue was held to be illegal.

It is contended, however, that the county court never authorized the committee, Trip-

lett, Tyler, and Berry, to pay out this money in satisfaction of these bonds; and therefore the act was illegal, and the bank should be held liable. We understand this record to show that these bonds and coupons were made payable at appellant's bank; that the bonds executed by the collectors of this tax bound them to pay the money to this committee; they were authorized to receive it; and it was all placed to the credit of the committee in the bank, and paid out in discharge of these bonds. It was a rightful appropriation by the committee of the money for the very purposes for which the tax was imposed. It is scarcely candid to say that the bank or the committee had no authority to pay out this fund, when looking to the facts before us, and the question really presented is, can the principal make the agent liable for doing that which the principal authorized him to do? This is the question involved here, and there is no more reason for making the bank liable than there would be for making the tax collector liable, on the idea that he had collected tax improperly and illegally imposed by the county court. It will be argued that the tax collector was in discharge of his legal duty, and could not well question the authority of the court, and this might be said of the bank; still it will be said in reply that the collector had the authority by law to collect the tax, and the bank had no authority, by law or otherwise, to pay out this money. The very bond that Worthington, the collector, gave for the performance of his duties, shows the authority to this committee from which the right of the bank to pay originated. This collector was required "to faithfully collect and pay all of said railroad tax * * * into the Deposit Bank of Owensboro, * * * the whole to be paid into said bank to the credit of George W. Triplett, E. E. Berry, and W. B. Tyler, a committee appointed by said county court to manage and control said tax, to meet and pay off the coupon interest on the capital stock in said railroad subscribed by the county of Daviess, and for which bonds have been issued and sold." It is useless to discuss the right of the committee to direct the payment of this money by the bank. It is too plain for argument; and equally so the liability of Worthington for the money he checked out of bank placed to his individual credit, although his pass-book may show a different state of case. We perceive no reason for granting a rehearing. The chancellor, on the return of the case, can make or have made such a settlement with Worthington's representative as is equitable and just, and the original opinion is modified to that extent. The transaction between Worthington and Scott can have no bearing on the claim of the county against the former, nor is it scarcely to be supposed that the county would exact of Worthington's representative moneys justly due Scott by the county on account of Worthington's collections. The judgment on the cross-appeal is affirmed, and the reason this order was not

originally made was that the reversal on the original appeals determined the controversy.

Petition overruled.

CLEM v. COMMONWEALTH.

(Court of Appeals of Kentucky. Feb. 25, 1890.)

HOMICIDE—EVIDENCE—INSTRUCTIONS.

1. On a trial for murder, it appeared that one C., on the day of the killing, or shortly before, had stated to some one that deceased "had a pretty pistol, and he intended to have it, if he had to kill him to get it." This statement was admitted, as against the accused, upon the idea that the accused, C., and others, had conspired to kill the deceased. Held that, the jury having before them the real tragedy, detailed by eye-witnesses for and against the defendant, could not have been misled or influenced by such testimony, even if incompetent.

2. There was no ground for reversal in the fact that the court, in its charge on manslaughter, used the word "riot," instead of "heat and passion," in defining manslaughter: "If the accused, in sudden riot and passion," committed the offense, he is guilty of manslaughter.

Appeal from circuit court, Harlan county.
"Not to be officially reported."

John Dishman and William Cromwell, for appellant. *P. W. Hardin*, Atty. Gen., for the Commonwealth.

PRYOR, J. We perceive no reversible error in this record; and, if the accused had been guilty of voluntary manslaughter, the instruction on that branch of the case was by no means prejudicial, if erroneous. The accused has been convicted of murder, and the principal ground alleged for a reversal is that the instruction as to manslaughter was so framed as to prevent the jury from understanding it. There is some conflict in the testimony; but we think it apparent, from all the facts, that the killing was unnecessary, and in cold blood. The defense is that the appellant killed the deceased, Stewart, to save the life of his [the appellant's] father, and that but for the shooting of Stewart the father would have been shot, and not Stewart. There is proof conducing to sustain this defense, and, at the same time, evidence, of the strongest character, showing a pre-conceived purpose on the part of the accused and others to take the life of Stewart. The latter had been previously convicted of a felony, and, although his life had been taken, and there was no one but the state to prepare the prosecution, when the case was tried in a county where all the parties had lived, the jury, with the influences of the accused and his friends surrounding them, with a case fortified by circumstances, real or imaginary, constituting self-defense in the killing, have said that no excuse existed for this cruel act of the accused, and in that conclusion we concur. The manslaughter instruction gave the accused the right to defend himself or his father from any deadly assault by the deceased, and is in the usual form, except the word "riot" is used, instead of "heat and passion," in defining manslaughter: "If the accused, in sudden riot and passion," etc.,

committed the offense, he is guilty of manslaughter.

There were no facts, however, upon which a verdict for manslaughter could have been based. It was either murder or self-defense in the accused, and that a lighter punishment was not imposed affords no ground of complaint in this court. Nor do the facts show that the deceased was such a wild, reckless, and dangerous man as demanded that he should have been hunted down like a wild animal, and shot without warning. The ordinary doctrine of self-defense was given, and was all that the appellant was entitled to have. It seems that John Clem, on the day of the killing, or shortly before, had stated to some one that Stewart, the deceased, had a pretty pistol, and he intended to have it, if he had to kill him to get it. This statement was admitted as against the accused upon the idea that the accused, John Clem, and others had conspired to kill Stewart. Whether there was proof sufficient to enable the jury to say that such a conspiracy existed is immaterial. This testimony could have had no weight with the jury. They had before them the real tragedy, detailed by eye-witnesses for and against the appellant, and could not have been misled or influenced by such testimony, even if incompetent. The judgment is affirmed.

HERMAN v. WHITESCOVER'S ADM'R.

(Court of Appeals of Kentucky. March 1, 1890.)

SALE—WHEN TITLE PASSES.

Where, under a contract for the sale of logs, the logs are to be of certain kinds of timber, of specified dimensions, free from defects described, and to be rafted in a certain manner, and delivered at a fixed place, and none of these things are done or ascertained previous to the death of the seller, the title does not rest in the purchaser, but in the seller's personal representative.

Appeal from circuit court, Daviess county.
"To be officially reported."

G. W. Williams & Son, for appellant. Weir, Weir & Walker, for appellee.

LEWIS, C. J. This action was brought by appellant to recover of appellee, administrator of the estate of J. F. Whitescover, possession of a raft of saw-logs. It appears from finding of facts by the court, trial by jury having been waived, that December 2, 1886, Whitescover purchased of A. Settle certain standing timber, to be cut, measured, and paid for before removal from the land; and December 10, 1886, Whitescover entered into a written contract with appellant, in substance as follows: "That J. F. Whitescover has sold to H. Herman the poplar, ash, gum, and walnut timber on the land of A. Settle, which he agrees to cut, haul, and deliver to Herman at Evansville, Indiana, on or before May 1, 1887, in such length and diameter, at prices as below mentioned; to be received at mouth of Green river, less cost of tonnage, and measured, Evansville log rules, on or about time of delivery, by H. Herman. Said logs

to be new, sound, and straight, and free of shakes, hollows, large or unsound knots, and other defects, and of the dimensions of 12, 14, and 16 feet long, and to be well rafted, and no wedge-pins used in rafting. And should either party, by death or otherwise, fail to comply with the within contract, H. Herman to have the right to move sufficient amount of timber to cover the amount of money so advanced. In consideration of said sale and delivery of said logs, said H. Herman promises and agrees to pay said Whitescover, when said logs are delivered, the following prices," etc. The number of logs of each kind of timber agreed to be received, of the dimensions mentioned, is also set out in the contract. Whitescover received \$283.25 advanced, but died in January, 1887, before any of the logs were delivered or rafted; and, not long thereafter, appellant removed the logs in contest from the land from where they had been cut, and rafted them. But appellee, who had been appointed administrator before they were removed by appellant, took possession of, claiming title to, the raft, and, adding other logs, carried it down the stream in which it was to Green river. And thereupon this action was instituted by appellant; and, under an order of delivery, possession being acquired by him, he took them to Evansville, where they were worth, at the contract price, \$241.50.

Appellant's right of recovery in this action depends upon whether he had, under the contract, acquired title to the logs prior to the death of Whitescover; for the only claim set up, or remedy sought, in his petition, is the possession. It is well settled that when, according to a contract of sale, there is anything to be done to personal property by the seller to put it in that state in which the purchaser is bound to accept, or when anything remains to be done for the purpose of ascertaining the price, as by weighing, measuring, or testing the property, where the price is to depend upon the quantity or quality of it, the performance of these things is a condition precedent to the transfer or vesting of the property. Benj. Sales, § 319. By the terms of the contract in this case, the logs were to be of certain kinds of timber, of specified dimensions, free from defects described, and to be rafted in a certain manner, and delivered at a fixed place; and, as none of these things had been done or ascertained previous to the death of the seller, the purchaser was not bound to accept, and consequently the property had not vested in him. It is true the contract contains a provision that, in case of the death of the seller, or failure to comply with it, the purchaser was to have the right to remove sufficient amount of timber to cover advances made. But we do not think that provision did, or was intended to, vest such title in the purchaser as to enable him to take possession after appointment of the administrator, or at any other time, of his own will. It served, at most, only to create a lien on the timber to

pay the amount advanced. But whether it comes under the rule in *Brooks v. Staton*, 79 Ky. 174, and *Cook's Adm'r v. Brannin*, 87 Ky. 101, 7 S. W. Rep. 877, and, in the language there used, created merely an inchoate lien, not enforceable against intervening rights of others, it is not necessary to decide; for no lien is, in this case, asserted, or asked by appellant to be enforced. It is true section 8, Civil Code, provides that an error of the plaintiff as to the form of action shall not be cause for abatement or dismissal of an action, but merely for a change into the proper proceedings, by an amendment of the pleadings, and a transfer of the action to the proper docket. But in this case there was no amendment of the pleadings, nor motion to transfer. Consequently, the only issue to be tried, or presented by the pleadings, was whether appellant had the legal title to, and was entitled to recover possession of, the logs; and upon that issue the law and facts were, we think, properly decided by the lower court, and the judgment must be affirmed.

CUNNINGHAM v. COMMONWEALTH.

(Court of Appeals of Kentucky. Feb. 23, 1890.)

BURGLARY—INDICTMENT.

An indictment for burglary, which alleges that defendant "willfully, feloniously, and maliciously broke into the depot belonging to and in the possession of the L. & N. R. Co., with intent to steal," is not vitiated by the omission of the word "forcibly."

Appeal from circuit court, Whitley county. "Not to be officially reported."

R. S. Crawford, for appellant. P. W. Hardin, Atty. Gen., for the Commonwealth.

BENNETT, J. The proof shows beyond a doubt that the appellant was guilty of the crime charged. There was no error of the court in admitting or refusing evidence, or in its instructions to the jury, or in refusing instructions. The allegation of the indictment is that the appellant willfully, feloniously, and maliciously broke into the depot belonging to and in the possession of the Louisville & Nashville Railroad Company, with the intent to steal, etc. It is objected to the sufficiency of the indictment that the word "forcibly" was not used. We think that the expression "willfully broke," etc., is tantamount to the word "forcibly." To say that one willfully broke into a house necessarily means that he used force, however slight, which is all that the statute requires. The judgment is affirmed.

KENTUCKY MUTUAL SECURITY FUND CO. v. TURNER et al.

(Court of Appeals of Kentucky. March 6, 1890.)

MUTUAL BENEFIT INSURANCE—LIMITATION OF ACTIONS—JURISDICTION—TRANSFER OF ACTIONS.

1. Where a certificate of membership in a mutual benefit company, by which a certain amount is to be paid on the holder's death, provides that suit must be brought within a certain time there-

after, the limitation is arrested by, and begins to run anew from the date of, a part payment of the amount.

2. Under the Civil Code of Kentucky, a suit brought in equity, which should have been brought at law, will not be dismissed, but the court may, on motion of plaintiff or defendant, or on its own motion, transfer it to the proper docket or court; and if neither party moves to transfer it, and it is not transferred on the court's own motion, it is the duty of the court to render judgment according to the rights of the parties.

Appeal from Louisville law and equity court.

"To be officially reported."

Marc Mundy, for appellant. Wm. Overton Harris, for appellees.

BENNETT J. The appellant issued to William A. Turner, now deceased, a certificate of membership in its company, by which it agreed to insure his life for the benefit of the appellees. Said insurance was on the mutual benefit plan, and entitled the appellees, upon the death of said William A. Turner, provided he kept his premiums and mortuary assessments paid up, to receive pay from the appellant not exceeding \$3,000, provided the mortuary assessments, on the policies then in force according to the graduated plan as provided in a table attached to said policy, would amount to as much as \$3,000. It is alleged, and not denied, that said William A. Turner in his life-time complied with all the requirements of said certificate, and consequently the appellees were entitled to the benefits of the same; and they had made proper proofs of death, and had presented the same to the appellant, accompanied with a demand of payment; and the appellant had paid \$800 and \$202.29, but had refused to pay the balance of said sum of \$3,000. The appellees also alleged that they did not know whether the appellant had made the assessments upon the holders of certificates then in force, for the purpose of paying said policy in full; but, if it did make said assessment, it yielded more than enough to pay said \$3,000. The appellees called upon the appellant to state the number of members it had at the time it should have made the assessment, and the amount that was assessed on each, and that was realized, or should have been realized, for the benefit of the appellees. The appellant, in its answer, does not state the number of members it had liable to assessment, nor the amount that each member was assessed for the purpose of paying said policy. It says that it did make assessments on all of the holders of certificates then in force, according to the table of graduated assessment rates, for the purpose of paying the appellees' and eight other certificates; that the fund raised by said assessments was paid *pro rata* on said certificates; the appellees' *pro rata* amounting to the above-named credits, which was all that they were equitably entitled to receive. It will be seen that it is alleged, in substance, that there were members enough in said company holding live certificates, had they been assessed according to the graduated

plan of assessment, to have paid the maximum amount of the appellees' policy; and the appellant is called upon to state the number of members subject to assessment, and the amount of the same. The appellant failed to answer this interrogatory, but stated that it did make assessments to pay this and eight other policies, and the same aggregated the sum of \$29,500, which was equitably prorated among the nine policies. These allegations do not respond to the interrogatories and the allegations of the petition in reference to that matter. Besides, the allegations of the answer, in reference to said matter, are wholly evasive. It is not stated what amount was assessed to pay the appellees' policy, or what amount was assessed to pay either of the other policies, or what was the amount of either policy. The statement that the appellees received as much as they were equitably entitled to receive was a mere conclusion of the pleader. It is certain that no certificate could have been issued for an amount exceeding \$3,000, but could have been issued for a less amount; and, presuming that each of the nine certificates called for \$3,000 as the maximum amount, the aggregate sum would be \$27,000, and the answer admits that \$29,500 was raised on said assessments,—apparently enough to pay the maximum sum of each certificate in full. Why only \$800 was the appellees' *prorata* is not explained. Also the appellant had no right to prorate the sum raised by assessments. The appellees were entitled to an assessment on all the members subject to it, for the purpose of paying the amount of their policy, and each of the others was entitled to an assessment for the same purposes; and it was not right to prorate the sums, thus raised, among the beneficiaries. The appellant relies upon the agreement contained in the policy not to bring suit on the same after the lapse of one year from the death of the insured, as a bar to the appellees' action, and, the same having been brought after the lapse of one year from the death of the insured, it should have been dismissed. The death of the insured was proven, and the appellees' claim was presented to the appellant for acceptance and payment within said year, and the appellant accepted it, and agreed to pay it within said time, and did actually pay a part of it. It is well settled that parties may make a binding agreement as to the time in which an action shall be brought for a violation of their contract, which agreement will have the same effect as the statutory period of limitation in such cases. It is well settled that a partial payment on a demand takes the case out of the statute of limitation as to the balance of the demand, and the statute as to said balance commences to run only from the day of said payment. A contract limitation is governed by the same principle, and the partial payment will take the case out of the agreed period of limitation, and the same will commence to run again from the time of said payment.

The action was brought in equity, and the appellant contends that it ought to have been brought at law; consequently a court of equity had no jurisdiction of it, and the same should have been dismissed. It is sufficient to say that the Civil Code has changed the old chancery rule upon that subject. By said Code it is the duty of the court not to dismiss the action, but, on the motion of the defendant when he files his answer, or on the court's motion, to transfer it to the proper docket or court. The plaintiff may also move said transfer; and if neither party moves to transfer it, and it is not transferred on the court's motion, it is the duty of the court to render judgment according to the rights of the parties. Neither of the parties made a motion to transfer, nor was a transfer ordered by the court. Instead, the court rendered judgment for the full amount claimed. This was right. The judgment is affirmed.

BROWN'S ADM'R v. BROWN'S EX'RS.

(Court of Appeals of Kentucky. March 6, 1890.)

ANTENUPTIAL CONTRACTS—WIFE'S SEPARATE ESTATE—RIGHTS OF HUSBAND.

A parol antenuptial contract in consideration of marriage, by which it is agreed that the intended wife shall hold as her separate estate the property then owned or thereafter acquired by her, free from the use and control of her intended husband, but vesting in the wife no power of disposition thereof, takes from the husband the use and control thereof during her life, but on her death bank-stock owned by her before marriage or afterwards acquired goes to the husband.

Appeal from circuit court, Owen county.
"Not to be officially reported."

Lindsay & Botts and *Pryor J. Foree*, for appellant. *Joseph Blackwell*, for appellees.

PRYOR, J. This action is based upon a parol antenuptial contract between F. Brown and his wife, who prior to the marriage was Lou Moody. It is alleged in the petition that, in consideration of the agreement on the part of Mrs. Moody to marry Brown, he agreed with her that she should have and hold as her separate estate the property she then owned, or should thereafter acquire, free from the use, control, or claim of the said Brown; that said marriage was consummated, and therefore, under the contract, he had no interest whatever in her estate at her death. The action is in the name of the personal representative and next of kin of Mrs. Brown, who died leaving her husband surviving her, against the personal representatives of her husband, he having taken charge of her estate, claiming it as his own, and dying since his wife left the appellees his executors. The property consists principally of bank-stock in the name of the wife, issued to her before the marriage, and some of it since the marriage. The only question presented is, did the property pass to the husband or the next of kin of the wife? There was no agreement on the part of either as to the mode of distribution at the death of the par-

ties, or any stipulation by which the husband surrendered his marital rights at the death of the wife, nor is there any averment in the petition of the power or right of disposition on the part of the wife; the plain proposition being, did the husband, by the antenuptial contract by which the estate was to be held for the wife free from his control or claim, divest him of all interest, either during the marriage or at the death of the wife? The case of *Brown v. Alden*, 14 B. Mon. 114, and the authorities there cited, determine this question. In *Stewart v. Stewart*, 7 Johns. Ch. 229, a case cited in *Brown v. Alden*, the *feme*, in contemplation of marriage, conveyed her estate, real and personal, in trust for her future use, free from the control of her intended husband, reserving a power of appointment. The husband in that case, having no vested interest during the coverture, was held to be entitled at the death of his wife as if no such conveyance had been made, and the entire doctrine in that case sustains the judgment below, giving to the husband the property in controversy. In fact, the agreement in this case, as alleged, vests in the wife no power of disposition, and takes from the husband the control and use during the life of the wife.

The judgment below is affirmed.

MATTHEWS *et al.* v. LLOYD *et al.*

(Court of Appeals of Kentucky. Feb. 27, 1890.)

INSOLVENCY—PREFERENCES—PARTIES—COMITY.

1. A transfer, by an insolvent, of corporate stock, to a third person, for the purpose of drawing the value of the same, and paying it over to a creditor of the transferer, which transfer is made a few hours before executing an assignment for the benefit of creditors, is not within Rev. St. Ohio 1886, § 6343, providing that "all assignments in trust to a trustee or trustees, made in contemplation of insolvency, with the intent to prefer one or more creditors, shall inure to the equal benefit of all creditors, in proportion to the amount of their respective claims."

2. In a contest between the transferee and the trustee in the assignment to settle the right to the property transferred, the insolvent is not a necessary party.

3. A transfer of property, made in contemplation of an assignment for the benefit of creditors, with intent to prefer a particular creditor, which is valid in Ohio, where it is made, will be enforced in Kentucky, unless it appears that some citizen of Kentucky will be prejudiced by it.

Appeal from chancery court, Campbell county.

"To be officially reported."

John S. Ducker, for appellants. Chas. L. Raison, Jr., and Harlan P. Lloyd, for appellees.

HOLT, J. June 21, 1887, E. L. Harper made an assignment for the benefit of his creditors. A few hours before doing so, he directed the brother of the appellant Hattie A. Matthews to get John Otten to go to an officer of the Fidelity Loan Company, and get from him his (Harper's) pass-book, evidencing his ownership of 20 shares of stock in the

company, then worth from four to five thousand dollars, and draw the value of it by a withdrawal from the company, and pay it over to the appellant Hattie A. Matthews. Otten got the pass-book, but found he could not draw the money without an assignment of the stock from Harper. He was selected to do so because it was supposed that his relations with the company would enable him to readily get the money. Not succeeding, he took the pass-book to the brother, who filled up an assignment of the stock upon a leaf of it in Otten's name, and procured Harper to sign it. It was then delivered to her brother for the appellant Hattie A. Matthews. He then gave it to Otten, in order that he might draw the value of it from the company, and pay it to her. The company declined, however, to comply with the request, as, when it was made, Harper had made the assignment for the benefit of his creditors. The transfer of the stock did not show that it was for the benefit of Hattie A. Matthews, but this was the understanding at the time of all the parties, as is indisputably shown by the evidence. It, aside from that of the appellant Hattie A. Matthews and Harper's wife, whose testimony was objected to because he was then in the penitentiary, and one of them was his wife, also shows that at the time of the transfer he was indebted to the appellant Matthews in a sum greater than the value of the stock, and that it was made by way of part payment. It is therefore unnecessary to determine the competency of the appellant and Harper's wife as witnesses, or whether any portion of their testimony is competent.

It appears that the appellant received from her father's estate, in 1880, about \$1,000. She then resided with Harper, who was her brother-in-law, and continued to do so up to the time of his failure, and perhaps longer. She turned the money over to him for investment. He was then a wealthy man, and continued to be so regarded until shortly before his failure. He was utterly wrecked financially, and became an inmate of a prison through reckless speculation, which, *ignis fatuus* like, led him on even to the commission of crime. The investment for her by him resulted in great gain in a short time; and, in settlement of what was coming to her through it, he, on August 8, 1881, executed to her his note for \$5,000, no part of which had been paid at the time of his failure, save the interest to January 1, 1882. June 24, 1887, certain of his creditors sued out attachments in the Campbell chancery court, and attached the interest in the loan company that had been transferred to the appellant, but in the name of Otten, for the purpose of collection for her. September 16, 1887, she, by answer and cross-petition against the trustee of Harper under the deed of assignment, became a party to the consolidated suits of these creditors. She claimed the stock; her pleading setting forth the grounds of her claim, and Otten joining with her in

it. January 4, 1888, the trustee, in answer to her cross-action, set up a claim to the stock under the deed of assignment. The creditors are not parties to this appeal, nor are their pleadings made a part of the record before us.

In the consideration of the matters involved, we will waive the question of the right of the trustee to assert in a suit a claim to the stock when the assignor in the voluntary assignment could not do so. The evidence fails to show that the appellant's debt was a fraudulent one, nor is a state of circumstances shown from which we are authorized to presume it. This is also true as to her claim to the stock in the loan company, based upon the transfer in Otten's name. No fraudulent purpose is shown, even by inference. It was, however, undoubtedly intended as a preference of the appellant as a creditor by Harper as a debtor. Indeed, this is expressly admitted by her pleadings. The parties all resided in Ohio, and the entire transaction occurred there. Its validity is therefore to be tested by the law in force there. The deed of trust was also made there. At common law, a debtor had a right to prefer a creditor either by a payment, or an express preference in a deed of assignment. He has a right to pay his debt; and it is only by virtue of statutory law that such a payment can be held invalid, and the creditor be compelled to surrender his advantage. In the absence of any showing of the existence of such a statute in another state, it must be presumed that the common law is in force there. *Miles v. Collins*, 1 Metc. (Ky.) 308; *Honore v. Hutchings*, 8 Bush, 687. The appellee has, in his pleadings, set out a section of an Ohio statute which reads thus: "All assignments in trust to a trustee or trustees, made in contemplation of insolvency, with the intent to prefer one or more creditors, shall inure to the equal benefit of all creditors, in proportion to the amount of their respective claims; and the trusts arising under the same shall be administered in conformity with the provisions of this chapter,"¹—and which he claims invalidates a preference like this one. We are unable to judge of it by its title and its other sections, as the entire statute is not before us. It does not appear to us, however, to embrace a case like this one, but to relate alone to preferences made in deeds of assignment to trustees for creditors generally. Certainly, no such trust was created as this statute contemplates. None was intended. Otten was not named as trustee for the appellant. He was but an agent to draw the value of the stock for her, and then at once pay it over to her. The preference was a *bona fide* one. It was made by the assignment and delivery of the written evidence of the ownership of the stock. This was before the making of the assignment by Harper for the benefit of his creditors, and it is therefore to be governed by the rules of the com-

mon law; and, when so considered, it is not invalid, because a payment of a pre-existing debt, in view of coming insolvency, is not forbidden by them.

It is urged that such a preference is contrary to the statute of this state, and will not, therefore, be upheld by its courts. It is true, comity does not require one state to violate its own laws to enforce those of another. Such a preference is not fraudulent or void, however, under our statute. Upon the contrary, it operates as an assignment, not only of the particular property embraced by the preference, but of all the debtor owns, for the payment of his debts *pro rata*, provided advantage be taken of it in the manner, and within the time, prescribed by the statute. It merely inures to the benefit of all the creditors, if they, or any of them, so ask, in proper time and manner. It is a privilege given them. If an assignment made in another state, and valid there, be contrary to the law, or the settled policy, of this state, it will not be enforced here to the prejudice of our own citizen creditors. It does not appear, however, that any citizen of this state will be prejudiced by the preference in question. The appellant may certainly come into court and assert her claim. She may sue. Her adversary is a non-resident. It does not appear that any of the creditors are residents. If any presumption is to be indulged, it is that they are residents of Ohio, where this transaction occurred, because the deed of assignment was made there, and the trustee resides there. No citizen of this state is questioning her right. Under this state of case, the appellant, inasmuch as the preference was valid where made, should not, in our opinion, be turned out of court.

The appellee is not in a position to deny the right of the appellant to relief because Harper was not before the court upon the cross-pleadings. She is claiming to be the owner of the stock, and did become at least the equitable owner by the transfer to Otten; the legal title being in him. The appellee claims it under the deed of assignment to him. In any event, Harper is not the owner; and he was not, therefore, a necessary party to the contest over the ownership between these two claimants. He had parted with the right to it, to one or the other of them, beyond all question.

It is urged that the second paragraph of the answer and reply of the trustee, in which it is averred, in affirmative form, that the transfer was fraudulent, is undenied, and that it must therefore be so held. Its averments must, however, be regarded as statements negating those of the cross-petition of the appellant. It is therein averred that the transfer was *bona fide*, and upon sufficient consideration; and these averments of the answer, and reply of the appellee, are but contradictory of them, although couched in affirmative language. The transfer was in fact made. It was not fraudulent, nor, as a preference, was it forbidden by the *lex loci*;

¹ Rev. St. Ohio 1886, § 6848.

and it must be upheld. The judgment is reversed, with directions to render one for the appellant, in conformity to this opinion.

COMMONWEALTH v. KAMMERER.

(Court of Appeals of Kentucky. Feb. 25, 1890.)

GAMING DEVICES.

The game of "oontz," played with dice on a table or other surface by betters, does not come within the meaning of the terms, "other machine or contrivance," used in Act Ky. March 25, 1886, making it a felony to "set up, carry on, or conduct, or aid and assist in setting up, carrying on, or conducting, a keno-bank, faro-bank, or other machine or contrivance used in betting, whereby money or other thing may be won or lost."

Appeal from circuit court, Jefferson county.

"Not to be officially reported."

P. W. Hardin, Atty. Gen., for the Commonwealth.

HOLT, J. The indictment against the appellee, Gus Kammerer, charges that he did "unlawfully and feloniously set up, carry on, and conduct a machine and contrivance used in betting, to-wit, a game of oontz, played with dice, and upon which money was won and lost." It is based upon an act of the legislature approved March 25, 1886, which provides: "Section 1. Whoever, with or without compensation, shall set up, carry on, or conduct, or shall aid and assist in setting up, carrying on, or conducting, a keno-bank, faro-bank, or other machine or contrivance used in betting, whereby money or other thing may be won or lost; or whoever shall, for compensation, percentage, or commission, set up, conduct, or carry on a game of cards, whereby money or other thing may be won or lost, or shall, with or without compensation, percentage, or commission, aid and abet in setting up, conducting, or carrying on a game so set up, carried on, or conducted for compensation, percentage, or commission,—shall be fined five hundred dollars and costs, and confined in the penitentiary, not less than one nor more than three years, shall be deemed infamous after conviction, and be forever thereafter disqualified from exercising the right of suffrage, and from holding any office of honor, trust, or profit, whether it be state, county, city, or municipal. * * * The provisions of this section shall not include, nor be applicable, to persons who play at such games, unless they take other part in setting up, conducting, or carrying on such games. Sec. 2. The change of the name of any of the games, tables, machines, or contrivances included in this act shall not prevent the conviction of any person violating the provisions thereof." Gen. St. 692.

At the close of the testimony for the state, the accused moved the court for a peremptory instruction to the jury to find him not guilty, the ground of the motion being that the indictment did not state a public offense, as it fails to describe any machine or contrivance the setting up of which is denounced by the

statute, but simply charges a game played with dice, and without any machine or contrivance, they being ordinarily used for amusement, and not a machine or contrivance within the meaning of the statute; also because the facts proven did not constitute an offense, within the meaning of the statute. The motion was granted, and the commonwealth has appealed. The evidence introduced shows that the game played was that commonly known as "craps" or "oontz," in which no machinery or implements are used, save two ordinary dice. They are shaken up in the hand, and then rolled or thrown from it. The player wins if he throws the numbers 7 or 11; otherwise he loses. It can be played with any four-cornered thing or cube, with numbers on it, that can be thrown or rolled, and upon any surface, as the floor, the ground, a box, a hat, etc. In this instance an ordinary table was used. Unquestionably the accused was liable to punishment for suffering gaming on his premises, and the lower court in its opinion says he had already been convicted for allowing it. The averments of the indictment and the evidence offered in support of it present the question, when a game of oontz is played with dice on a table or other surface, by betters, does it come within the meaning of the terms, "other machine or contrivance," used in the statute? In other words, what constitutes such "other machine or contrivance?" This court, recognizing, as it does, the evil of gambling, and the legislative desire to suppress it, is far from being disposed to cramp the force of this statute. It must be remembered, however, that the punishment denounced by it is severe. The offender is made a felon. One should not be thus branded unless the law clearly makes him so. If it takes a doubtful construction to bring him within the statute, it should not be done. If the legislature really intended it to embrace such a party, it can by additional legislation make it plain.

We turn, then, to precedent and rules for the construction of statutes for guidance. The statute first enumerates a keno-bank and a faro-bank,—contrivances which are used notoriously and solely for gaming. It then adds, "or other machine or contrivance used in betting." It is a rule of construction that where a statute or any instrument enumerates certain things, and then uses a term which may be construed to include other things, it is generally to be confined to those of a like class or character. The term is to be restricted to those *ejusdem generis*. The general words following the particular ones must be construed as applying to things of the same general class. Here the statute first names certain machines or contrivances in well-known use for gaming. Keno and faro are banking games. Keno-banks and faro-banks are contrivances for gaming, in every sense of the word; so recognized and generally understood. This is not true of dice, which, while they may and often are used for gaming, as indeed almost anything

can be, usually serve for amusement. Nor can it be said that the table or floor or whatever surface may be used constitute the machine or contrivance, within the meaning of the statute. Such things are not ordinarily used for gaming. Our law provides for the seizure and destruction of gaming implements, and this statute could not well be applied to the surfaces upon which this game might be played. As well might it be claimed that, if persons gamed by the throwing of coppers upon an ordinary table or floor, the money or table fell within the terms, "other machine or contrivance," used in the statute, and that the party suffering it to be done was liable to this severe penalty. The language of the act and the severity of the punishment makes it obvious that it was the intention of the legislature by means of it to suppress gaming with such contrivances as are ordinarily and notoriously used for such purpose. It must be a machine or contrivance constructed for such purpose, and not one ordinarily used for amusement or an innocent purpose. The "machine or contrivance" referred to in the statute must, under the rule of *ejusdem generis*, be one similar in character to a faro or a keno bank. In the case of *State v. Gilmore*, 11 S. W. Rep. 620, a statute of the state of Missouri, providing that "every person who shall set up or keep any table or gambling device commonly called 'A, B, C,' 'faro-bank,' 'E, O,' 'roulette,' 'equality,' 'keno,' or any kind of gambling table or gambling device, adapted, devised, and designed for the purpose of playing any game of chance for money or property," should be guilty of felony, was held not to embrace a case where a saloon keeper furnished to his customers cards and chips, with which they played upon ordinary tables in his saloon for drinks and money. In the case of *Chappell v. State*, 27 Tex. App. 310,¹ where a game like the one now under consideration was played upon an ordinary table with dice, it was held not to be a gaming table. It was in no way essential to the game. It could have been played, as the court says, upon any surface, and neither the table nor the dice were a requisite of the game. In *State v. Hardin*, 1 Kan. 474, the court decided that the general words "gambling devices," used in the statute, after mentioning certain implements or contrivances designed for gaming purposes, did not include a pack of cards. A keno or faro bank is the implement of a professional gambler. Our legislature was arriving at the suppression of the use of such devices and contrivances, and not at what is ordinarily used for amusement, although the article may be used or is in some sense adapted to gaming; as dominoes, checker-boards, chess-boards, and the like. The act specifically names certain of the most notorious and obnoxious implements used for the forbidden purpose, and the general words following

were intended to include others of a similar character, and, like them, designed for gaming. The cases we have referred to and the views above expressed are supported by those of this court in the cases of *Ritte v. Com.*, 18 B. Mon. 35, and *Com. v. Monarch*, 6 Bush, 298. If the legislature intended by this statute to make one guilty of a felony, for any game of chance, without regard to how it might be played, or what might be used in doing so, it should, and doubtless would, have employed language more definite in character for such a purpose; and that it did not so intend is made plainer by the fact that we have another statute punishing one for permitting gaming upon his premises. Judgment affirmed.

ABELL'S ADM'R *et al.* v. PHILLIPS *et al.*
(Court of Appeals of Kentucky. March 1, 1890.)
PARTNERSHIP—SETTLEMENT.

A settlement of partnership accounts made by arbitrators, without concealment or fraud, will not be disturbed.

Appeal from circuit court, Bullitt county.
"Not to be officially reported."

Avritt & Russell, for appellants. *Thompson & McChord* and *Rountree & Lisle*, for appellees.

PRYOR, J. In the year 1865 the two Phillips and one W. J. Abell entered into a partnership for the sale of goods in the town of Lebanon, the partnership to continue for the period of three years. The Phillips were to put in each the sum of \$15,000 in cash or goods, or so much as the requirements of the trade demanded. Abell put no capital into the concern, but was entitled to the one-fourth of the profits for his services. This firm continued in business until August, 1884, and there seems to have been no settlement of the partnership transactions between the partners at any period from the beginning to the close of the business. In January, 1884, Abell, whose rights as a partner in the mercantile firm at Lebanon are not denied, became an imbecile, by reason of a stroke of paralysis, and was unable to conduct the business or to manage his own affairs, and C. C. Cambron was appointed a committee for him, and undertook the control of his business, and to close up the partnership existing between Abell and the two Phillips. It seems that, after the formation of the partnership, a mercantile firm was created at Columbia, Ky., under the firm name of Phillips, Bradshaw & Co., and was succeeded by the firm of J. G. Phillips & Co., also a mercantile establishment in Campbells-ville, Ky., under the firm name of Phillips & Hoskins, and that firm was succeeded by Bryant & Co., then by Phillips, Putnam & Co., and then by J. G. Phillips & Co. In 1881 the firm of Phillips & Bro. & McAtee organized a firm in Owensboro, Ky. There was also a milling firm in Lebanon of Foster, Ray & Co., that did business for three or

¹11 S. W. Rep. 411.

four years. With this multitude of firms Cambron had to deal and settle with when he undertook to manage the estate of Abell. It seems that the outside firms were furnished goods by the Lebanon house, and the goods charged to the particular firm receiving them; the books of the Lebanon house showing the accounts between the firms doing business as merchants, as well as the firm conducting the milling operations. Cambron claimed that Abell had an interest as a partner in all these undertakings, and undertook to make an investigation of the books, and visited personally or by agents the towns in which this outside business was conducted, with a view of ascertaining whether Abell's partnership extended further than the Lebanon house. The firm at Owensboro sustained a loss or made nothing, and it is therefore immaterial to notice that branch of the case in this investigation. In order to a full settlement of this partnership, and the parties differing as to the extent of Abell's interest, Cambron and the Phillips selected three arbitrators to examine the books and adjust the rights of the partners. These were men experienced in business, and one of them had been employed by Cambron to examine the books of the firm thoroughly, and for four months or about that time devoted his time and attention in reaching a conclusion that resulted in a settlement of the entire business. The parties making the settlement were Ray, Thompson, and Kirk; the first-named arbitrator did the principal labor. He was an experienced book-keeper, a man of business experience, and to some extent conversant with the business relations existing between Abell and the Phillips. The settlement made by these three men was adopted by all the parties,—Cambron and the Phillips. Abell having died in the year 1885, the administrator of his goods, etc., brought this action, attacking the settlement as fraudulent, upon the ground that the two Phillips had concealed from Cambron the fact that Abell was interested in the firms outside of Lebanon, and the milling operations conducted in that city.

It is insisted by the Phillips that the settlement was final; that there was no concealment of facts; and that Abell was not a partner in this outside business. If there was fair dealing between the Phillips and Cambron and the committee in making this settlement, it should not be disturbed. The only evidence of any partnership, or the extent of it, between Abell and the Phillips, is the written contract of January, 1865, making Abell a partner in the mercantile house at Lebanon. It is evident that Cambron made a thorough investigation of all these questions, with a view of ascertaining the extent of Abell's interest. The books of the firm were at all times made accessible to him, and the Phillips insisting that Abell's interest was confined to the principal house. Not only so, Cambron, through an experienced book-keeper, was four months examining

these books; and, as they were in a confused condition, it was finally understood that, if the outside houses were charged with interest on what was owing the Lebanon house, the parties would be satisfied, and settle on that basis. Cambron and Ray both say they used every effort to ascertain whether Abell had any greater interest than that admitted. Such was the subject of investigation, and, in adopting as the basis for a settlement the plan suggested, made a showing of interest for Phillips & Bro., in addition to what appeared from the books, of a sum exceeding \$30,000, and of this Abell obtained his share. There was no fraud practiced by any of these parties, but a full settlement had that, in our opinion, was just to all concerned. If the appellees had made any concealment of facts in regard to the interest of Abell, there would be a reversal in this case; but none appears, and the appellant, in making this attack upon the settlement had, produces only the evidence that Cambron and the arbitrators had when the final adjustment was made. That errors and discrepancies will appear in the course of a partnership existing for near 20 years is manifest; but the appellant's contention is that there is convincing proof of his intestate's interest, and, if that fact was made to appear from the proof before us, we would be inclined to disregard the award; but with an investigation, thorough and complete, by competent and intelligent men, and the facts now before us being of the same character as those known and considered by the committee and the arbitrators, there is no reason for the chancellor to interfere.

It is apparent, we think, from this record, that Abell was not a partner, as contended for by the appellant. All three of the partners were active business men,—two of them with capital, and Abell without means. It must have taken a large amount of capital or an unbounded credit to conduct these extensive operations in merchandise, and it is unreasonable, it seems to us, that the Phillips should contribute their means or credit and their services to so many enterprises, taking in also other partners, and giving to the insolvent partner at Lebanon the one-fourth of the entire net profits. It was known that Abell was a partner in the Lebanon house, at least by the clerks aiding in conducting that establishment, and what is remarkable in this case, if Abell was a partner during the entire period that these outside operations were conducted, he manifested no interest in the branch houses, either by personal supervision, or by taking any notice whatever of the manner in which this outside business was being conducted. The clerks in the Lebanon house were satisfied he had no interest, and his entire conduct would indicate clearly, regardless of any other fact, that these enterprises were independent transactions in which he had no interest whatever. The Phillips Bros. gave their time and attention to the Lebanon firm, as well as

Abell, and it was just, at least, that interest should have been allowed on their capital, and particularly when the original contract of partnership allowed them interest. Whether or not this interest, if the question was presented here for the first time, would be allowed, is not necessary now to consider, as the settlement was made in that way, and, in the absence of fraud or mistake, ought not to be reopened. It is alleged in the petition that the profits on some of the outside enterprises amounted to near \$40,000, and it appears from the proof that there was a loss in the Owensboro adventure, as well as the firm of Phillips & Hoskins. What those losses were is not shown, and the effect of a judgment for a readjustment of the accounts would be simply to determine whether another settlement would be more favorable to the appellant than the first settlement. The persons who were familiar with the business transactions of the Lebanon firm, including the book-keepers, who were necessarily intimate with both the Phillips and Abell, say that Abell had no interest in the branch houses. The persons with whom the two Phillips were connected as partners in the outside enterprises did not know or hear of Abell being a partner. They made written contracts of partnership, and Abell's name was not mentioned. Putnam, Bryant, and Bradshaw, interested in what is termed the branch houses, say that Abell had no interest; and in fact every one familiar with the business interests of these men, including the partners in the branch houses, (book-keepers, salesmen, and employes,) make statements showing satisfactorily, if not conclusively, that the original settlement, upon the basis that no such partnership existed as claimed, was the correct one. There is but one witness connected with a branch house who speaks of the interest of Abell in the branch house, and this is Hoskins, whose testimony is in seeming conflict with the facts and circumstances connected with the business affairs of these parties. He may be right in his version as to the partnership in which he had an interest with the Phillips, but, when looking to all the other testimony, it affords no ground for granting the relief. If the testimony is conflicting as to what Abell's interest was, or the extent of it, and this may be conceded for the purposes of the case, if a settlement has been had of these conflicting interests, why should the chancellor reopen the case, in the absence of convincing proof as to either fraud or mistake? If an error has been committed to the prejudice of the appellant or her intestate, as shown by an expert called to testify for her, the expert for the appellees shows as many errors on their side; and there being no pretense that the committee, Cambron, was misled or the parties making the settlement, by any false representations made by the appellees, and the settlement having been made by business men of their own selection, and living within the same

town where the principal business was conducted, it seems to us that to order another settlement would involve the parties in further litigation that would result in no profit to either. The mill property and its earnings, in which it is claimed the discovery was made that Abell was jointly interested, was purchased by the Phillips, and a conveyance made to them and recorded in the county where all the parties lived years before the intestate of appellant was rendered, by reason of disease, unfit for business. If the intestate had been jointly interested, it is scarcely to be supposed that this act would have escaped his notice, or that the Phillips would have had the conveyance made in that way; and, besides, the books of the Lebanon house show that the profits from the mill, or the interest of the two Phillips after dividing between their other partners, were credited to them individually, and not to the firm. It is, we think, manifest that no such partnership existed, and that the committee and the Phillips adopted an equitable basis of settlement by requiring interest to be paid by the branch houses on the advances made by the principal house. We have considered the letters, headings, and general correspondence from the principal house on behalf of the branch houses, and, while such evidence would indicate a partnership, the evidence, on the other hand, is against such a conclusion, and, when a settlement has been made with no concealment or fraud, it will not be disturbed.

Judgment below affirmed.

CITY OF LOUISVILLE v. HENDERSON'S TRUSTEE *et al.*

(*Court of Appeals of Kentucky.* March 6, 1890.)

INTEREST ON PRICE OF WORK.

Where the price for certain work is definitely fixed by contract, and payable on its completion, the debtor is liable for interest from the time of its completion, though the amount of material furnished under the contract was uncertain, and though the contractor's claim was contested in good faith.

Appeal from Louisville law and equity court. For prior report, see 4 S. W. Rep. 187.

"Not to be officially reported."

H. S. Barker, for appellant. Brown, Humphrey & Davis, for appellees.

HOLT, J. Under a contract made in April, 1873, with the appellant, the city of Louisville, Isham Henderson undertook to construct for the city an embankment or fill, a part of which was to be made in Beargrass creek, where it was not known how far the dirt would sink before it would reach a sufficient foundation, at the price of 44 cents per cubic yard. The work was completed within the contract period, and received by the city on December 31, 1874. It made certain payments upon the work as it progressed; and on November 7, 1878, the assignee of Henderson brought this action, claiming there was a balance due him of \$28,646.01, and asking judgment for this sum, with in-

terest from January 1, 1875. Prior to the doing of the work, an estimate was made of the quantity of dirt it would require; but, from the character of the undertaking, this could only be approximated. Indeed, it was only conjecture. The city defended, however, upon the ground that the pay for the work should be confined to a theoretical fill, shaped according to this estimate, instead of the one of broader shape, which was in fact made by Henderson under the direction of the city's engineer. This was a mistaken claim upon the part of the city. It was sustained by the lower court, and the action dismissed. This court, however, denied it, and reversed the judgment below, inasmuch as the measurements named in the estimate were but guess-work, and intended, as far as possible, to merely approximate the extent of the work, and not control the final estimate, or pay it. The city was therefore at fault at the outset. It appearing, however, that some of the dirt furnished had slid out with the soft mud at the bottom of the creek, and formed no part of the embankment, the case was remanded with directions to ascertain its quantity, and allow the contractor for the remainder. Upon the return of the cause, the chancellor, upon a second hearing, held that he was unable to say how much dirt had slid away; and he therefore again dismissed the action. Upon a second appeal, his action was again reversed, (4 S. W. Rep. 187;) this court holding that as the quantity of dirt for which pay was claimed was shown to have been furnished to the work, and, as it was done under the supervision of the city's engineer, it should lose the price of the dirt which slid away, unless it succeeded in showing the quantity of it. Upon the third hearing of the cause below, a judgment was rendered for the full sum claimed in the petition, with interest from February 1, 1875. The city now appeals from so much of the judgment only as allows interest, and this is the only question presented upon this third appeal in this case.

It is therefore established by a final judgment that the entire claim sued for should have been paid by the city without suit. In other words, that it was owing to the contractor for work done under a contract which fixed the price of it, and the time within which it should be completed. This, of course, meant that it should be paid for upon completion. The specifications for the work, were, however, made a part of the contract, and they substantially provide that the entire price of the work shall be paid upon its completion. It is urged that the city acted in good faith; that it paid the contractor, without suit, all that it believed was due him; that the balance of the claim, and which was for dirt in excess of the estimate, was disputed; that it could not be known until judgment what sum it would have to pay, if anything; and that therefore it is not chargeable with interest. Conceding all this to be true, yet this is not an action for dam-

ages, or upon a *quantum meruit*, but for the price of labor done under, and fixed by a contract. The only question was, how much dirt had been furnished under the contract? The judgment allowing the entire claim establishes the fact that the city has been a delinquent debtor. The creditor has been kept out of his money. The city has had the use and benefit of the work and improvement, and, while it may not have intended to harass its creditor by vexatious defense to the suit, yet interest is given to compensate the creditor, and not to punish the debtor; and, when it denied the quantity of work done under a contract fixing the time of payment, and the price, it took the risk of the issue thus made by it being determined against it. If, in such a case, a creditor, after the lapse of years of litigation, is not entitled to interest, then he will, in effect, lose a part of his debt. He would be kept out of the use of his money; the debtor, in the mean time, getting the benefit of it. The latter would, in effect, pay but a part of his debt. He could contest the claim until the use of what is really the creditor's money equals half the debt, and then, by payment without interest, escape the payment of a part of his debt. Indeed, he might unjustly thus delay payment until the use of the money would equal the entire debt, and thus, in effect, be out nothing. Even if the amount be in dispute, yet, if it be finally determined that the defendant in fact owed it, and that it ought to have been paid at a particular time, he cannot complain, with good grace, if he be made to pay interest, because he has had the use of money to which his creditor was entitled. Thus, it will hardly be contended that, if a policy of insurance be payable 60 days after proof of loss, the insured would not be entitled to interest from that time, although the amount of the loss might be disputed, and therefore not definitely known for years, if the claim were finally made good by judgment. In such a case, the claim is *eo nomine* for interest, as a debt, and, where it is payable by contract at a certain time, interest should be allowed from that time as a matter of right and of law, although the debtor may, by reason of an unsustained and unjust defense, be able to say that it was unknown to him, until the judgment was rendered, what sum he would have to pay. He is, in such a case, in fault. He has unjustly kept his creditor out of the use of his money, and should render an equivalent to him for the use of it, by paying him interest. The appellee's claim as to interest is not to be treated as one for damages, or as an unliquidated one upon a *quantum meruit*, where no agreement has been made between the parties as to interest, and where the duty of paying, at a certain time, whatever may be owing, has not in any way been imposed upon the debtor. The reason interest is not allowable in such cases *prima facie*, or as matter of law, is that it does not necessarily follow that the debtor has been put under a

duty to pay at a certain time. Its allowance or disallowance is therefore left to the discretion of the jury, or the court, if it be the trier of the facts, to be exercised according to the circumstances of the case, as, for instance, whether the debtor has been delinquent without cause. But where, by the contract between the parties, the debt is due at a certain time, and the debtor has therefrom impliedly promised to pay interest from that time, or has perhaps expressly so promised, upon whatever may be owing to his creditor, he cannot certainly defeat his right to it by a vain and unsuccessful dispute of the amount of the debt. Such a rule would not only be unjust, but unsustained by all modern precedent. Interest upon this claim was allowable, as a matter of law, because it was payable, by the contract between the parties, at a certain time; and the judgment is therefore affirmed.

COMMONWEALTH v. TATE *et al.*

(Court of Appeals of Kentucky. Feb. 27, 1890.)

STATE OFFICERS—SURETIES—EVIDENCE—APPEAL.

1. The failure of the auditor and secretary of state to make proper monthly and biennial settlements with the state treasurer, as required by law, whereby the latter was able to appropriate money of the commonwealth to his own use, and to conceal the fact, does not release sureties on the treasurer's bond, it being conditioned that the treasurer should "faithfully and diligently discharge all the duties appertaining to his office."

2. The bank pass-book of the treasurer, which, according to the proof, was regularly and accurately kept by him in connection with the discharge of his duties, was competent to go to the jury as a part of his official transactions, in the suit against his sureties.

3. A direction of a verdict for defendants will be set aside on appeal, where there is any evidence in support of plaintiff's side of the issue.

Appeal from circuit court, Franklin county.

"To be officially reported."

Action to recover of the sureties on the official bond of James W. Tate, treasurer of Kentucky, the amount of his alleged official defalcation. The court instructed the jury to find for the defendants, and the commonwealth appeals.

Thos. H. Hines and *P. W. Hardin*, Atty. Gen., for the Commonwealth. *A. Ducall*, *Wm. Lindsay*, *D. W. Lindsey*, *Frank Chinn*, *J. W. Rodman*, *P. B. Thompson, Sr.*, and *W. A. Sudduth*, for appellees.

BENNETT, J. James W. Tate, on the first Monday in August, 1867, was elected treasurer of the appellant for the term of two years, beginning on the first Monday in January, 1868. He was elected biennially thereafter until the first Monday in August, 1887, at which time he was again elected for the term of two years, and held the office until the 20th of March, 1888, at which time the governor and secretary of state suspended him from the duties of his office, and in a few days thereafter the legislature impeached him, and he was removed from office. The

appellant by this action seeks to recover of the appellees, the sureties of said Tate on his official bond for the term of 1882 and 1883, the sum of \$68,948.91, the alleged official defalcation of said Tate during said term. The appellees, as the sureties aforesaid, denied that Tate committed any act of defalcation during said term; alleged that he had committed defalcations for large amounts during his preceding terms, which, by means of false entries, was carried into the term of 1882 and 1883 as so much cash on hand, but, in fact, the sum apparently carried forward into said term as so much cash on hand was not cash, but represented said Tate's previous defalcations; and the appellees were not bound on said bond for the same. They also pleaded that Tate, as treasurer, could receive no public money, and did receive none, except by the written permit of the auditor; and could pay out no public money, and did not pay out any, except upon the warrant of the auditor. And as the auditor was required to settle with him once a month, and the auditor and secretary of state were required to make biennial settlements of his accounts, etc., it was impossible for him to make any defalcation, and not be detected in the fact by the auditor, or the auditor and secretary of state, unless these officers were derelict in their duty; that said duties of these officers entered into the contract with the appellees, as the sureties of said Tate, and became a part of it; and as the auditor had monthly settlements with Tate during the years 1882 and 1883, and the auditor and secretary of state made biennial settlement of his accounts, etc., for those years, on the 7th day of January, 1884, and reported his accounts with the appellant as all right, and the appellees in good faith, relying on the same as correct, and therefore taking no steps to indemnify themselves against the alleged defalcation, and, if there was such defalcation, the same could not have happened or remained undiscovered, except by the negligence of the auditor and secretary of state, and as a faithful discharge of their duties in this regard formed a part of the contract with the appellees, and as their neglect to perform them would cause a loss to fall on the appellees which would not have fallen upon them had these officials diligently and efficiently discharged these duties, they, the appellees, are released. They also allege that said auditor and secretary had, previously to 1882 and 1883, reported monthly and biennially that said Tate had kept faith with the state, and his official dealing with it as treasurer was correct; and as it was upon the faith of the truth of these statements that they signed said Tate's bond as sureties, and as it was upon the faith of these monthly and biennial statements, relative to the term of 1882 and 1883, that caused the appellees to rest under the belief that Tate was not in default, and to take no steps for their indemnity, the appellant is estopped to proceed against them.

The bond executed by Tate and the appel-

lees for the term of 1882 and 1883 is as follows: "Whereas, James W. Tate, of the county of Franklin, was at the general election held the first Monday in August, A. D. one thousand eight hundred and eighty-one, duly elected treasurer of the state of Kentucky: now we, James W. Tate, principal, and the other subscribers hereto as his sureties in this official bond of said Tate, do hereby bind ourselves jointly and severally to the commonwealth of Kentucky that the said James W. Tate, as treasurer aforesaid, shall faithfully and diligently discharge all the duties appertaining to said office. In witness whereof the same James W. Tate, and the other subscribers hereto as his sureties, have set their respective hands," etc.

The treasurer's duties are, among others, to "receive and safely keep in the treasury all money due or payable to the commonwealth from collectors of revenue, public officers, and others, when tendered, accompanied by the permit of the auditor of public accounts, stating the amount to be received, on what account, and from whom to be received. He shall immediately make out a receipt for the amount received, and for what and of whom received, and deliver it to the auditor, who shall in like manner give a receipt to the officer or person paying the same. The receipt, besides stating the amount paid, shall also, if it be all that is due from the officer or other person, so state." Section 9, art. 1, c. 108, Gen. St. "The treasurer shall not receive into nor pay out any money from the treasury, except upon the certificate or warrant of the auditor." Section 7, art. 1, c. 108, Gen. St. "If the treasurer willfully misapply any of the public money, or shall loan or use the same for his own purposes, or for the uses or purposes of another, he shall be guilty of felony." Section 10, art. 1, c. 108, Gen. St. According to these statutes, it was the duty of the treasurer to receive and safely keep in the treasury all public money tendered upon the permit of the auditor, and to pay the same out only upon the warrants of the auditor, specifying the amount to be paid, to whom, and for what. It was his duty to safely keep said money, unless paid out as aforesaid; and to appropriate the same to his own use, or that of another, etc., was a plain violation of his official duty,—a breach of official trust,—for which his sureties, by the express terms of the bond, were liable. There are no conditions or provisos in or attached to this bond whatever. The bond is a plain, unqualified, and unconditional undertaking on the part of the appellees, as the sureties of Tate, to be responsible for the faithful and diligent discharge of all the duties appertaining to the office of treasurer, and to answer in damages for any failure of his to discharge any of said duties; and, as we have seen, one of said duties was not to use or appropriate for his own benefit or that of another any of the public money intrusted to his safe-keeping, except to pay the same out upon the warrant of the auditor.

But did the failure of the auditor to do his duty, whereby the treasurer was able to appropriate the state's money to his own use and conceal the fact, and receive from the auditor monthly, and from the auditor and secretary of state biennial, statements that his official duties, in regard to the state's money, were honestly and correctly discharged, release the sureties from the obligation to pay to the state the amount of Tate's defalcation? In other words, did the auditor's and secretary's duty impliedly form a part of the contract with said sureties, or estop the state, so far as the sureties were concerned, from contradicting said settlements? It is contended that Tate could not have stolen from the treasury, and have escaped the detection of the auditor and the secretary of state, had the first named made proper and efficient monthly, and the two together the biennial, settlements with him. Rather, he could not have stolen from the treasury, except after the last monthly settlement, and before the next, without the theft, at said next settlement, being detected, if the auditor had performed his official duty in that regard; and the theft, however often committed, would be discovered (beyond a peradventure) at the next biennial settlement, if the auditor and secretary of state had performed their official duty. The treasurer could receive no money due the state, except by the permit of the auditor, stating the amount to be received, on what account, and from whom received. It is the treasurer's duty to immediately receipt the auditor for the same, stating the amount received, for what, and from whom received, and the auditor, in like manner, receipts the officer or person paying the same. Each transaction of this sort is entered, in detail, in the official books of each officer, and the permits and receipts are preserved by each. The treasurer can pay no money out of the treasury, except upon the warrant of the auditor, specifying the amount, to whom, and for what; which amount, to whom, and for what, he must enter in his books. His books must show, in full and in detail, the respective amounts paid into the treasury; when, by whom, and for what. They must also show to whom warrants have been issued, when, and for what amounts, and that same has been receipted for by the treasurer. Also the treasurer must report once per week to the auditor all payments at the treasury, and the warrants upon which the same were made, etc. Section 3, art. 2, c. 108, Gen. St. Also the "auditor and treasurer shall, once in each month, make a settlement of the receipts and disbursements of the money at the treasury, of every description, under appropriate heads, and file the same with the secretary of state, whose duty it shall be to report them to the general assembly within the first 10 days of each regular session; and the auditor shall, once in each month, ascertain whether the money on hand in the treasury agrees with the balance shown by the books

of the treasurer. The result of such investigation he shall immediately report to the governor." Section 4, art. 2, c. 6, Gen. St. "Upon the expiration of his term, or resignation of his office, or death, the secretary of state and auditor of public accounts shall examine his accounts, state the same, count the money in the treasury, take an inventory of the books and stationery and implements of the office," and take a receipt for same from his successor in office. Section 4, art. 1, c. 108, Gen. St.

It will be seen that it was the duty of the auditor to give permits for the receipt of all public money by the treasurer, and he could lawfully receive no public money without said permit; and, if he had received it without such permit, the auditor, whose duty it was to look after the payment of such money, would (if he did his duty) soon discover the fact. And it was the duty of the auditor to issue all warrants for the payment of the public money, and the treasurer could make no payment of the same without such warrants. Said warrants should state the amount to be paid, from whom, and on what account, and the auditor should make corresponding entries of these matters on his books. It was also the duty of the treasurer to make weekly reports to the auditor of all payments at the treasury, and the warrants upon which the same were made, etc. From these reports the auditor could and should see whether or not the payments were made in accordance with his warrants, an accurate account of which was in his office, and from which he could tell how much money ought to be on hand. Also it was the duty of the auditor to make monthly settlements with the treasurer of the receipts and disbursements of the money in the treasury of every description, etc. The auditor could and should ascertain from his own books how much money the treasurer had received during the month, and how much he had been authorized to pay out; and it was his duty to ascertain whether the money on hand in the treasury agreed with the books of the treasurer, etc. As before said, he could tell whether the books of the treasurer truly showed the amount of money that had been received, and the amount authorized to be paid out; and, by making a deduction of any outstanding checks that had been issued by the treasurer on his warrants, he could tell whether the money on hand agreed with the treasurer's books. Merely settling by comparing the balance sheets of the auditor's and treasurer's books, and thereby ascertaining the respective amounts of the receipts and expenditures, was not a compliance with the statute *supra*. Under such practice, the treasurer could steal for two years, which the statute *supra* was designed to prevent. Also in the biennial settlement of the treasurer's accounts, as required by section 4, art. 1, c. 108, Gen. St., the auditor's books, if correctly and truly kept, would show the amount of money, and by whom paid, that

went into the treasury during said term, and the amount of disbursements, and to whom, during said term; also he could, without involving an unreasonable task, count the money in the treasury, and ascertain whether the same was correct, or, if the same was in the banks used as depositories, personally apply to them for the correct amounts. If some of the public debtors had paid by checks drawn on some one of the banks of the state, and the same had not been collected, the auditor's books would show that permits had been granted for these amounts, and the exhibition of the checks themselves would show that they had not been collected; or, if they had been forwarded by any one of the three banks used by the treasurer as state depositories, and had or had not been collected, the same could be ascertained at such bank. Or, if the treasurer had exhibited a list of checks drawn in favor of any creditors of the state on any one of said banks, the auditor, by simply comparing them with the corresponding warrants and receipts, could tell whether they were authorized; and the actual amount of money in the treasury or banks would show how many of these checks had been paid to the creditors, and how much money had been received on the checks given by the state's debtors. The law requires these duties of said officers in making their monthly and biennial settlements of the treasurer's accounts, etc., in order to additionally secure the safety of the public money, and to speedily and certainly detect and expose any theft of it by the treasurer.

On the 7th of January, 1884, the biennial settlement of the treasurer's accounts was made as of the 31st of December next preceding. Between the 31st of December and the 7th of January the treasurer, upon the permits of the auditor, had received about \$75,000. It seems that the treasurer took a sufficiency of this sum to make his books correspond with the auditor's down to the 31st of December, and then entered the amounts making up the \$75,000 as of the proper dates in the month of January. Thereby the books down to December 31st were made to balance, and the January statement was made to appear all right. Why did not the auditor and secretary detect this fraud? The auditor says it was because he did not consult his books in reference to said matter, on the occasion of said settlement; that said settlement was made by the treasurer's books alone. This the auditor says was "not excusable, of course." He also states that the treasurer's accounts at the banks were not personally examined, but that the treasurer's entries, and evidences of the same, were relied on, in ascertaining the amount of the public money therein.

We have been thus particular to state the auditor's and secretary's duties, and their alleged omissions of duties, without meaning to cast any personal reflections on either of them. But the statements are made in view of the fact that the appellees rely upon these

supposed omissions as a breach of contract on the part of the state, or as an estoppel, whereby the appellees are released from liability on said bond; which propositions we will proceed to discuss.

The appellees went the sureties of Tate that he would faithfully and diligently discharge all the duties of his office. There were no conditions or provisos attached to this undertaking. If he could not have stolen except by the auditor's connivance—a fact not established—or negligence, and he was thus enabled to steal, it was nevertheless a breach of faith on his part, for which his sureties are liable. The law-makers attempted to hedge him in with safeguards, so that he could not steal without the theft being almost immediately discovered, and him deprived of his office, if the officer or officers, whose duty it was to look after him, did their duty; nevertheless he was required to give bond, with sureties, in a large sum that he would faithfully discharge his duties. Also the auditor was not the trusted supervisor of the treasurer; for he, too, was required to give bond for the faithful discharge of his duties. The fact that this officer might be negligent did not license Tate to steal. It nevertheless was his duty to be faithful and diligent, and the appellees covenanted that he would be. If it were true that the auditor's negligence made it imperative on Tate to steal, it might be, then, justly said that the appellees ought to be released. But the auditor's negligence did not have this effect. It was the duty of Tate not to steal, notwithstanding the auditor's and secretary's negligence, etc., and the appellees covenanted that they would be responsible if he did. It was not the auditor's and secretary's faithful discharge of duty that was to guaranty that Tate would faithfully and diligently discharge his; but the appellees covenanted that they would guaranty that fact, and be responsible for his failure. The commonwealth invested the auditor and secretary of state with the powers above mentioned, not as a guaranty to the sureties of Tate that he would faithfully discharge his duties. If such had been the purpose, there would have been no need of Tate's giving security for the faithful discharge of his duties, but the power was given to them as an additional guaranty to the people. Hence the law required Tate to give bond, with sufficient sureties, that he would faithfully and diligently discharge his duties; and, not being satisfied with this security alone, additional safeguards were thrown around his official conduct, in the way of preventing his stealing and speedily detecting the same, as additional security to the people; and, as still an additional security to the people, bond, with sufficient sureties, was required of the auditor that he would faithfully and diligently discharge his duties. We concede that these duties were mandatory upon the auditor. But it does not follow that Tate's sureties are not also responsible; for both bonds

were required as independent securities to the people. It was supposed that the auditor might be faithless, negligent, or *particeps criminis* with the treasurer; consequently he was required to give bond for the faithful discharge of his duties. Hence it cannot be said that he was the trusted agent of the state, any more than was Tate. Each gave bond for the faithful and diligent discharge of his duties. Each covenanted to be faithful and diligent, independently of the action of the other. The state required the covenant. The *particeps*, even if such were the case, or negligence of the auditor or the secretary, made Tate none the less a criminal, and his sureties none the less responsible for his defalcation. Tate was expressly informed by the statute that he must not obey the auditor in the exercise of unlawful authority, if he attempted it. Each bound himself, with sureties, that he would do his duty, independently of the conduct of the other. The law required this as independent and additional security to the people.

The following language in *Taylor v. Bank*, 2 J. J. Marsh. 570, is, as far as the principle is concerned, applicable here: "Suppose these several agents combine to defraud their principal, is the one excused by the fact that the other is *particeps*? Is the surety of one exonerated because the other has co-operated in the malfeasance? Or, suppose one connive at the fraud or improper conduct of the other, is the employer responsible because one of its agents knew of the delinquency, and might have prevented its recurrence? * * * If A. employ an agent to transact particular business, and exact from him surety for his fidelity, and constitute another agent, to perform other associate and supervisory functions, surely, if they both conspire to defraud their constituent, the security shall not be permitted to say that the act of the agent is that of the principal." It is clear from what has been said that the duties of the auditor and secretary did not form a part of the contract with Tate's sureties; nor did their conduct estop the state from proceeding against the sureties.

The pleadings concede that Tate was a defaulter prior to 1882, but it is denied that he committed any acts of defalcation in 1882 and 1883. It is alleged that he carried these prior defalcations over, and was charged with the amount of them in his biennial settlement of the first Monday in January, 1882, which went to make up the \$512,000, or the \$482,000, supposed to be on hand as cash at that time. It is also alleged that the appellees are not responsible for the same. It was the duty of Tate to safely keep the public money in the treasury, and not to apply the same to his own use, or to that of another, unless authorized by the warrant of the auditor; and any such application would be an unlawful conversion, for which the sureties on the bond for that term would be liable; and he could not thus carry an account with the state over to the next term, and

make his sureties of that term liable for it. The conversion occurred at the moment of the appropriation, and *eo instante* the sureties on his existing bond became liable for it; and to make his sureties on a subsequent bond liable for it would be to make them liable for money not on hand at the time they became bound as sureties, nor that came to hand during said term. After the appellant had concluded its evidence, the court instructed the jury to find for the appellees. This they did. The record states that it contains all the evidence introduced or offered by the appellant. This statement complies with the law. But the record shows that auditor's books, treasurer's books, the bank-books, Tate's reports to the legislature, his stubs and pass-books, were all considered as read to the jury. The pass-books, however, were rejected as evidence. These books, etc., are not before the court, and the appellees contend that we must presume that they contained evidence that authorized the court to give said peremptory instruction. As said, it was admitted that Tate had committed defalcations, and the only question was whether or not he had committed them during his term of 1882 and 1883. It is sufficient to say that the evidence tended to show that a part of the defalcations was committed during said term.

It has been held by this court, time and again, that if the plaintiff's evidence tends to make out his side of the issue, in whole or in part, it is the duty of the court, not to take the case from the jury, but to let them pass upon the issue, although the court might be of the opinion that, if there was a verdict for the plaintiff, it should be set aside. Also, in such case, the issue should be submitted to the jury, although, in the opinion of the court, the evidence on the other side was overwhelming. The jury have the exclusive right to weigh and pass upon the evidence; and for the court to take the case from them, because, in its opinion, the evidence on the one side overwhelms that on the other, would usurp the prerogative of the jury. We may presume that the books and other papers referred to would show all that is claimed; nevertheless the appellant had evidence before the jury that tended to support its side of the issue, and contradictory of the books, etc. And it was entitled to have the jury pass upon this conflict of evidence, although its evidence was weak and insignificant, as compared with that which the books showed for the appellees. Had the jury passed upon the issue, and the case were here for review upon a record that showed all the evidence used before the jury was not here, then we would presume that the absent evidence authorized the verdict. The same rule obtains in trials by the court. But this rule does not obtain where the court has withdrawn the issue from the jury. In such a case, the only question is, was there evidence enough to entitle the party offering it to go to the jury? *Easley v. Easley*, 18 B. Mon. 93. The

auditor's, treasurer's, and bank's books, including the pass-books, involving the treasurer's official transactions that showed his defalcations, are a great many; and for a jury to be required to investigate the books, item by item, in order to determine whether there was a defalcation, and when and to what extent, would devolve a duty upon them that they could not understand. Therefore it would suggest of itself, at first blush, that persons who were competent to investigate and understand the books, and had investigated them sufficiently to explain them to the jury in reference to the question at issue, should be allowed to do so. Of course, he should be able to tell what the books show in reference to these questions, and he should refer to the books themselves, if required to do so. The pass-book, according to the proof, was regularly and accurately kept by Tate in connection with the discharge of his duties, and it was competent to go to the jury as a part of his official transactions, in a contest with his sureties on his bond. The judgment is reversed, and the case is remanded, with directions to grant the appellant a new trial, and for further proceedings consistent with this opinion.

COMMONWEALTH v. TATE *et al.*

(Court of Appeals of Kentucky. Feb. 27, 1890.)

ACTIONS ON OFFICIAL BONDS—PARTIES—PLEADING—AMENDMENT.

1. Under Civil Code Ky. § 26, providing that sureties, severally liable on the same or separate instruments, may all or any of them be included in the same action, the state may bring one action on the official bonds of the state treasurer for several successive terms, against the treasurer and those of his sureties who are the same on all the bonds, and recover the whole amount of the treasurer's defalcations during the several terms; and it is not necessary to include in such action those of the sureties who are not on all the bonds.

2. In such action, though the sureties are the same, each bond should be set out in a separate paragraph, to show the contract by which they became severally bound.

3. Where each bond is thus set out in a separate paragraph, but the amount of defalcation for the term covered by each bond cannot be ascertained and is not set out, there may be an *addendum* or continuation of these two paragraphs, relating to both, and stating the total defalcation during the two terms; but it is error to make such statement by the addition of a third separate paragraph.

4. The addition of such third paragraph, where the three paragraphs state a cause of action, is merely an error in form, and may be cured by amendment.

Appeal from circuit court, Franklin county.

"To be officially reported."

Thos. H. Hines and *P. W. Hardin*, Atty. Gen., for the Commonwealth. *Wm. Lindsay*, *D. W. Lindsey*, *A. Duvall*, *F. Chinn*, *J. W. Rodman*, *W. A. Sudduth*, and *P. B. Thompson, Sr.*, for appellees.

BENNETT, J. The facts relating to the election of James W. Tate to the office of treasurer of this state, and his repeated elec-

tions to said office; his suspension from office; impeachment and removal,—are stated in the opinion in the case of James W. Tate and his sureties on his official bond for the term of 1882 and 1883, this day rendered, (ante, 113.) This action is against his sureties on his official bonds for the two terms,—one for 1886 and 1887, and one for 1888 and 1889,—to recover the amount of said Tate's defalcations for either or both of said terms. The appellant, in paragraphs 1 and 2, set out a cause of action on each bond, and filed a copy of the same with each paragraph, except the amount of defalcation occurring in each term was left blank. In the third paragraph it reiterates substantially all the allegations of the first and second paragraphs, together with the additional statement that the amount of defalcation occurring in said two terms was \$162,286.81; and that the appellant could not tell what part of said defalcation occurred during the term of 1886 and 1887, or what part occurred in the term of 1888, but it did occur during said terms; but the fact, as to the amount converted by Tate during each term, was peculiarly within his knowledge. The twenty-sixth section of the Civil Code provides: "Persons severally liable upon the same contract, and parties to bills of exchange, to promissory notes placed upon the footing of bills of exchange, or to common orders and checks, and sureties on the same or separate instruments, may, all or any of them, * * * be included in the same action, at the plaintiff's option." According to this provision of the Code, it seems that if the plaintiff holds two or more separate obligations for money, and the same sureties are to each obligation, all at the option of the plaintiff may be sued in the same action; or, if each obligation has a different set of sureties, they all may nevertheless be joined in the same action, at the plaintiff's option, provided the covenants are for the performance of substantially the same class of duties; for it is presumed that, if the codifiers had meant that the sureties should be the same to each obligation in order to entitle the plaintiff to join them in one action, they would have said so. It could have been done by simply using the expression, "if the sureties be the same on," preceding the word "separate." But they did not use this expression, nor any expression of similar import. But the language used, as before intimated, entitles the plaintiff, holding separate obligations, with different sureties to each, if these obligations are for the performance of substantially the same thing, to include them all in one action. Of course, in such case, there would have to be the same principal to each obligation; otherwise there would have to be separate actions. We have been speaking of the case of a totally different set of sureties, but with the same principal, to each instrument. But, where the sureties and principal are all the same to each instrument there can be no doubt of the plaintiff's right to include them in the same action; or

if the principal is the same, and the sureties are in part the same to each instrument, there, also, can be no doubt of the plaintiff's right to join them all in the same action; and, if possible, it is still clearer that he may include those that are the same to each instrument in the same action, for the Code expressly provides that he may sue any part of them at his option. While it is true that they all may be included in the same action, yet where there are two or more instruments, although the sureties sued are the same, each instrument should be set out in a separate paragraph, in order to show the contract by which they became severally bound. Here each bond is set out in a separate paragraph, and the same sureties on each bond are sued. The sureties that are on one bond, and not on the other, are not sued. The appellant, as said, had a right to include these in the same action. Whatever defalcation occurred during said two terms, all of the sureties sued, being the same on both bonds, are liable for the whole amount. They are equally liable to the appellant for said amount, whether all of the defalcation occurred during either term, or partly in both; and, as said, the only necessity of suing on each covenant is to show whereby they are become bound. But the respective obligations make them severally bound for the entire defalcation that occurred during said two terms; and the appellant has the perfect right to sue and collect this money off of all or any one of them. In suing and collecting its debt off of any one of them, it is not bound to so shape its suit as to preserve or facilitate appellees' remedies against their unsued co-sureties, or against each other that is sued. It is true that it cannot purposely do anything to destroy appellees' remedies against their co-sureties. But whatever the law authorizes it to do in the way of forcing the collection of its debt, although the pursuit of the remedy may cause inconvenience and hardship to the parties sued in reference to their remedies against their unsued co-sureties or in reference to each other, it has the perfect right to do; else the law would not have given it such remedy. It is its debt that it is trying to collect by such means as the law gives, and that law does not require it to pursue such a course as to preserve an easy remedy against the appellees' co-sureties. Their remedy against their co-sureties grows out of equities wholly independent of the appellant, and about which it has no concern whatever, except to do nothing that will impair that right, save what may incidentally grow out of the appellant's pursuit of its remedies.

Now, the petition shows on its face a cause of action against the appellees. The first and second paragraphs are defective only, in not stating the amount of defalcation during the term for which the bond was given. They both say that there was a conversion during each term, but the amount is left blank. The third paragraph says that during said two terms the said amount converted was up-

wards of \$162,000. The appellees are each bound to the appellant for this entire sum, the recovery of which the appellant is alone interested in looking after. With the equities of the appellees, in reference to contribution among each other, or in reference to contribution from the unsued co-sureties, the appellant is not one whit concerned. Its money is all it wants, and the appellees agreed to pay it.

Suppose that the appellant's petition, by being in three paragraphs, is informal or defective by reason thereof, but nevertheless, taken all and all, states a cause of action, (and it certainly does,) should the appellant be turned out of court on demurrer? Pom. Rem. § 549, says: "The true doctrine to be gathered from all the cases is that if the substantial facts which constitute a cause of action are stated in a complaint or petition, or can be inferred by reasonable intendment from the matters which are set forth, although the allegations of these facts are imperfect, incomplete, and defective, such insufficiency pertaining, however, to the form, rather than the substance, the proper mode of correction is not by demurrer, nor by excluding evidence at the trial, but by a motion before trial to make the averments more definite and certain by amendment." Here, as before said, the petition, in the three paragraphs, sets forth a cause of action against each one of the appellees for the full amount claimed. The first and second paragraphs were proper, as showing the respective obligations by which the appellees each became liable for the entire sum, and they are only liable for the entire sum by virtue of their being on each bond; otherwise the parties to each bond would only be liable for the defalcation that occurred during the term that such bond covered. Then, as the appellees were severally liable on each bond for the entire defalcation that occurred during the two terms, and as that liability required two paragraphs to set it forth, the only error consisted in having the third paragraph. Said paragraph should have been simply an *addendum* or continuation of the first and second paragraphs, and relating to both, and explaining why the respective amounts of Tate's conversion or defalcation in each was left blank. But it is said that the Code only authorizes a party to allege alternatively the existence of one or another fact, in case either constitutes the same cause of action. If we concede this interpretation of the Code to be correct, then the appellees are confronted with the fact that, as between the appellant and appellees, there is but one cause of action set out, although upon separate instruments; for each appellee is liable for the whole sum claimed. If the entire defalcation, if any, had occurred in either term, the appellees would have been liable for it; but the defalcation was scattered over two terms, and appellees are liable for it. In either case, as before said, it constitutes but one action under the Code. As to the question of contribution, the appellees will have

to look out for themselves. The appellant is, under the law, entitled to coerce the whole amount of its debt out of any one or all of them; and it is not bound to so shape its pleadings, or to so shape its allegations, as to make the appellees' right to contribution easy, or appear, as to the amount, of record. Upon the return of the cause, the appellant should be allowed to amend its petition in conformity with the foregoing views. The judgment is reversed, with directions for further proceedings consistent with this opinion.

BEST'S EX'R v. VANHOOK'S ADM'R.

VAUGHAN *et al.* v. BEST'S EX'R.

(Court of Appeals of Kentucky. Feb. 18, 1890.)

WILLS—SERVICE OF PROCESS—DECREE.

1. A testator devised land to several persons, and directed that the land should not be sold under any pretext, and provided that, if either of the devisees should die without issue, his portion should go to the survivors. One of the devisees was absent, and his residence unknown, and the will provided that, if he should never return to claim his portion, it should go to the other devisees. The absent devisee died subsequent to the death of the testator, and his portion was divided among the surviving devisees. Afterwards another of the devisees died, and one of his heirs filed a bill in equity against his other heirs, and had the share of the absent devisee which was allotted to her (plaintiff's) ancestor sold for partition. *Held*, that the heirs of the surviving devisees took a fee-simple title to the land devised to the one who was absent, and the decree for partition was binding on those who were made parties to that suit.

2. Where all the parties to an action were summoned to answer the original petition, but the record fails to show whether some of them were summoned to answer an amended petition, it will be presumed, after the lapse of 35 or 40 years, that all the parties were served with proper process.

3. Where land sold under a decree of court is situated in another county from that in which the action is brought, and the decree is procured at the instance of the owners who receive the benefit of it, they will not be allowed to vacate the decree, and recover the land, without any offer to restore the purchase money.

Appeals from circuit court, Garrard county.
"Not to be officially reported."

Anderson & Herndon, for Best's Ex'r.
M. H. Owsley and *W. O. Bradley*, for Vanhook's Adm'r and Vaughan.

HOLT, J. The will of Ebenezer Best, Sr., who died in 1839, provides: "I will and bequeath the tract of land upon which I now reside, estimated at about 1,200 acres, to the following persons, in the following manner, with the conditions annexed: I give to Alfred Best, who now lives with me, that portion of the aforesaid land commonly called the 'Woods Tract,' and estimated at 173½ acres, to him and his heirs, forever. To William Best, of Indiana, I give the Joe Wilson tract, estimated at 205 acres, to him and his heirs forever. To Humphrey Best, who also resides with me, I give the upper end of the 400 acres commonly known and designated as my father's 400-acre tract, that tract being equally divided by a direct line crossing

Paintlick creek. The upper portion, estimated at 200 acres, is to the said Humphrey and his heirs in like manner. To Oliver Best, now residing, if alive, in parts unknown, I give that part of the land which lies between the portion given to William and Humphrey Best, estimated at 200 acres to him and his heirs. I give in like manner, to Tyre Best, that part of my land called and known by the name of the 'Johnson Tract,' containing the quantity of about 200 acres. To the children of James Best, deceased, I will and bequeath the residue of the aforesaid tract of 1,200 acres known as the 'Montgomery Place.' The whole of the foregoing devises are made subject to the following conditions and trusts: I wish it most clearly understood my land is not to be sold. The legal title is to be held by Henry Miller and Oliver Terrell, who are hereby appointed trustees to hold the same for the use and benefit of the aforesaid legatees and their heirs. The land, I repeat, is not to be sold under any pretext, either by a court of chancery or by an act of the legislature. If either of the aforesaid legatees dies without issue, then the portion to which he or they was entitled is to go to the survivors equally, and to be held in like manner by the trustees for the use of the survivors. Should Oliver Best never return to claim his legacy, then the part of the land allotted to him is to go to the balance of the aforesaid mentioned legatees. In the mean time, until it is ascertained whether he is living or not, my will is that Humphrey and William Best have the use of the place devised to him, with instructions to cultivate the same carefully." Oliver Best died subsequent to the testator. This is averred in an amended reply filed in this suit August 26, 1877, and not denied. His death occurred probably about 1845. The portion of the land devised to him was allotted among the surviving devisees, the five children of James Best getting about 37 acres of it; their names being D. K. Best, Mary E. Holmes, Samuel Best, John Best, and Ebenezer Best. Samuel Best, who was the father of the appellants Ann E. Vaughan and Mary Burnam, died in 1851. Ebenezer and John Best died, respectively, in 1851 and 1868, leaving no issue. In 1847, Mary E. Holmes and her then husband brought a bill in equity in the Madison circuit court to partition, not only the lands devised to James Best's children by E. Best, Sr., but also the 37 acres derived by them from Oliver Best. The lands did not lie adjoining, but in the same vicinity, the greater portion being in Madison county, but the 37 acres in the adjoining county of Garrard. The other children of James Best were made defendants to the action, as well as the trustees under the will of E. Best, Sr. Some time after the bringing of this suit, an amended petition was filed in it, by which the parties elected to proceed only as to the 37 acres, and for a sale instead of a partition of it. A decree to this effect was entered, and it was sold in 1848, Tyre Best being the purchaser. A commissioner's deed was made to

him, and a commissioner also appointed to collect the purchase money, with orders to distribute it among the James Best children. There is nothing showing he did not do so, and this should be presumed after this lapse of time. Tyre Best went into possession of the land, and died intestate in 1849. His land was divided among his heirs, and of the 37 acres about 26 acres was allotted to his daughter, the wife, and now the widow, of E. Best, whose executors brought this action. In the settlement of his estate an arrangement was made by which his daughter Mrs. Best accepted money, and it was agreed that the 26 acres of land were to belong to her husband, and that she would make title to it whenever desired to his vendee, F. A. Vanhook, her husband having included it in a sale of about 125 acres of land by title-bond. The vendee went into possession, and this action was brought against his administrator by the executors of E. Best for a balance of purchase money. It is averred that his widow and heirs are ready and willing to make title in conformity with the bond of their ancestor. It thus appears that Tyre Best, and those claiming through him, have been in possession of the land in contest ever since 1848, by virtue of the purchase at the decretal sale then made. The defense to this action is that the title to the land purchased by Vanhook is defective as to the portion of the 37 acres included in it. The surviving James Best children were made parties, together with the heirs of such as are dead leaving issue. They claim the 37 acres of land, and it is unnecessary to say in what proportion, owing to our conclusion upon a question involving their claim to it. The lower court held that the appellees D. K. Best and Mary E. Holmes have an interest in the 37 acres. The executors of E. Best have appealed from this ruling, while Ann E. Vaughan and Mary Burnam, whose claim to an interest was denied, have also appealed. It is contended that the judgment of sale by the Madison circuit court, and which has never been vacated or reversed, was void *ab initio*.

All of the children of James Best were before the court upon the original petition. The record of the suit does not show that they were again summoned upon the amended petition. Some of them were then infants, however, and, after the amendment was filed, a guardian *ad litem* was appointed for them, and the record shows that the trustees under the will of E. Best, Sr., were summoned to answer the amended petition. But while the record does not show that the James Best children, who were defendants, were again summoned, yet it does not show that they were not, save so far as this is to be presumed from the absence of any summons showing it. After such a lapse of time, however, it must be presumed that the judgment of a court of general jurisdiction was rendered when all the proper parties, and who were made parties in the pleadings, were before it by proper service of process. If the record shows nothing to the

contrary, such a presumption, after such a lapse of time, should be indulged for the proper protection of innocent parties, and the stability of titles.

It is true the land sold under the decree was situated in another county from that in which the action was pending; but the judgment was procured at the instance of the owners of the land, and they received the benefit of it. They now, without any offer of restitution of the purchase money, ask a court of equity to give them the land. A court of equity should not hasten to do so, and, indeed, should not do it, unless the rules of law, which cannot, of course, be varied to suit every case of hardship, require it. Parties should not be allowed to question a judgment in their favor, obtained at their instance, and affording all the relief they desired.

The question then recurs, did the children of James Best have the fee-simple title to this land? If so, it passed by the decretal sale. It is contended, however, that under the will of E. Best, Sr., they did not have such title, but merely took the land for life. It must be borne in mind that this land, by the will, was given to Oliver Best, and that the children of James Best derived it from him, and not direct from their grandfather. They have treated it as their own absolutely, without question of their right. The very parties, in part, who procured the decree to sell it, and the heirs of the deceased parties to the suit in which the decree was obtained, are now asserting right to it. The parties and privies to that suit now claim it. Oliver Best, dying after his father, took under his will a life-estate, the remainder to his issue, and, in default of issue, to pass to the surviving devisees. It is evident, from all of its provisions, that the testator so intended. The devise was so conditioned that, in case of Oliver's death without issue, the surviving devisees took absolutely. If he had died leaving issue, the absolute right would have passed to them. As he died without issue, it vested in the surviving devisees. It is true the will provides that the land is not to be sold, but this provision should be regarded as for the benefit of the party to whom the right would pass in the event of the life-tenant dying without issue, or for the benefit of the remainder-man. This was, no doubt, the intention of the testator. It should not be regarded as an attempt to create a perpetuity. If so, it would be void by statute. It was merely a restriction upon the power of alienation by the life-tenant, to secure the remainder to the descendants of the testator. A particular estate was created with remainder to the issue of Oliver Best, or, in the event of his death without issue, with remainder to the survivors. In our opinion, the children of James Best, as survivor, acquired the absolute right to the land in contest, and the judgment is therefore reversed upon the appeal of E. Best's executors, with directions to render judgment in their favor for the

purchase money sued for, provided a title be tendered in conformity with the title-bond of E. Best; but, if this be not done, then the contract of sale between him and Vanhook will be rescinded upon equitable terms. The case is affirmed upon the appeal of Doc Vaughan, etc., and cause remanded for further proceedings consistent with this opinion.

COMMONWEALTH v. MASONIC TEMPLE CO.

(Court of Appeals of Kentucky. March 6, 1890.)

COLLECTION OF TAXES—INJUNCTION.

1. Gen. St. Ky. (Ed. 1878), c. 92, art. 8, §§ 3, 4, require the sheriff to give bond each year for collection of the revenue and dues, and the bond stipulates that he shall, during the year, by himself or deputies, collect, account for, and pay into the state treasury, or to the proper person, all taxes and public dues. On his failure to do so by a specified time, he and his sureties shall be liable therefor, and the commonwealth shall have a lien on his land which shall not be discharged until he has obtained a quietus. *Held*, that a sheriff was entitled to a quietus for taxes with which he had become chargeable during his term, but which he had been enjoined from collection by order of court.

2. Where the injunction against the collection of the taxes is not dissolved by the appellate court until after the expiration of the term of office of the sheriff who was chargeable therewith, his successor has authority, under the statute, to collect the same.

Appeal from Louisville law and equity court.

"To be officially reported."

Helm & Bruce, for appellant. *T. L. Burnett* and *Lane & Burnett*, for appellee.

LEWIS, C. J. In 1885 appellee brought an action against J. D. Barbour, sheriff of Jefferson county, to enjoin collection by him of certain taxes assessed on a lot of land in the city of Louisville, for the years 1862 to 1885, inclusive, and obtained judgment perpetuating that injunction. But upon appeal to this court the judgment was reversed, with directions for dissolution of the injunction and dismissal of the action.¹ In January, 1889, appellee brought the present action against William Clark, successor in office of Barbour, to enjoin collection by him of the identical taxes, and the judgment now appealed from is, in effect, the same as the other. It appears that Barbour's term of office expired, and he obtained from the auditor of public accounts a quietus for each of the years 1885, 1886, before the first injunction obtained was dissolved, or his right to collect the taxes in question was restored. The ground upon which the judgment appealed from was rendered is that Barbour only could be legally made chargeable with the taxes in question because assessed and listed during his term of office; that the auditor was not empowered to give him a quietus while they were outstanding; and, as Clark was not nor could be made liable on his bond for the collection of them, he had no authority to collect. Section 3, art. 8, c. 92, Gen. St. (Ed. 1873), requires

the sheriff, on or before the first Monday in January of each year, to enter into bond, with surety, for collection of the revenue and dues; and the bond contains a stipulation in substance, that he shall, by himself or deputies, during that year, "collect, account for, and pay into the treasury of the state, and to other persons entitled thereto according to law, all taxes and public dues; also all fines, amercements, and penalties directed or authorized by law to be collected or received by him in the year within the county," etc. By section 8 the sheriff is required to account for and pay all taxes for which he is bound into the state treasury by the 1st of April in each year, and upon his failure to do so he and his sureties shall be liable therefor, and shall be proceeded against at the first term of the Franklin circuit court. Moreover, by section 8 it is provided the commonwealth shall have a lien upon the real estate of the sheriff, which shall not be discharged until a quietus is obtained for all the revenue and public dues he was bound. Although the taxes in question were listed with Barbour in 1885, and he became chargeable with the collection of them, he was unquestionably entitled, in his annual settlement with the auditor, to a credit by the amount, and to the quietus given to him for each of the years 1885, 1886, notwithstanding no part of them had been collected; for it would be not only extremely oppressive, but contrary to a rational construction of the statutes, to make a collection of revenue liable to an action by the commonwealth, at the same time continuing the lien on his property indefinitely for a failure to collect taxes which he could not even attempt to collect without subjecting himself to penalties for disobeying an injunction. And, it seems to us, he, in the meaning of the statute, sufficiently accounted for said taxes, and therefore had the right to demand, and it was the duty of the auditor to give him, a quietus, as though he had actually collected and paid the amount into the treasury.

As, then, the quietus, for 1885, 1886, was regularly and legally given to Barbour, the effect of which was to release him from the covenant to collect the taxes from appellee, his authority to collect them ceased; for manifestly the duty and authority of a collector of revenue are to be always treated as correlative. And it thus follows if Clark, his successor in office, has no right or authority to collect, there is under the statutes, as now existing, no person by whom, or proceeding by which, they can be collected, and appellee becomes released altogether from payment of what it has been decided to justly owe the commonwealth; for clearly the chancellor has no right, as argued by counsel, to require appellee to pay the amount or any part of it into court, because the basis of the relief prayed for in its petition is the total lack of right or authority of Clark, sole defendant in

the action, to collect or receive the taxes. It is not to be assumed the legislature intended to remit altogether taxes, the collection of which may be stayed by a suit of the taxpayer, during the term of the sheriff originally made chargeable; nor is there a necessity for perverting the meaning or straining the construction of the statutes as they exist, in order to impose liability on and give to the present sheriff authority to collect the taxes from appellee. The power to collect revenue and dues is, in general terms, given to each sheriff who, in virtue of his office, is collector, and consequently must be regarded as existing in every state of case where it is not expressly provided otherwise. It is true the sheriff is required to give bond with security for the faithful performance of his duty, as collector, to which the commonwealth can look for redress in case of defalcation. But taxes are nevertheless due to it, and, where one sheriff has been during his term of office deprived of the power to collect by process of the court issued at the suit of a taxpayer, it would be absurd to say that the effect of a final judgment against him is to afford the identical relief thereby denied. Each sheriff covenants in his bond as collector that he shall, during the fiscal year in which it is given, collect, account for, and pay into the treasury of the state, or other persons entitled thereto according to law, not merely such as have been ascertained or assessed and listed with him for that year, but all taxes and public dues, without regard to the time when they first became subject to collection. That language, it seems to us, properly and fully applies to and comprehends taxes which, as in this case, were not collected by a former sheriff because he was enjoined from collecting, and cannot be so confined as to exclude them, without perverting its obvious meaning, and defeating the intention of the legislature. This court, it is true, has heretofore held that, where one sheriff has failed by his own negligence to collect certain taxes it was his duty to collect, he cannot compel his successor in office to collect them for him, because, having paid the amount into the treasury, the commonwealth has no longer any interest in them, but they have become individual demands of the sheriff himself; and for relief in such cases the legislature has by acts extended the period beyond the term of office in which such taxes may be collected by the officer entitled to them. Such was the ruling in the cases of *Middleton v. Caldwell*, 4 Bush, 392, and *Jones v. Gibson*, 82 Ky. 561, cited by counsel, but neither of them has application to the question before us. In our opinion, the taxes due from appellee were legally placed in the hands of Clark for collection, he became responsible for their collection, and the judgment in this case is therefore reversed, with directions to dissolve the injunction and dismiss the action.

ALLOWAY *et ux.* v. CITY OF NASHVILLE.

(Supreme Court of Tennessee. Feb. 11, 1890.)

EMINENT DOMAIN—PROCEDURE—EVIDENCE—INTEREST—PAYMENT INTO COURT.

1. In condemnation proceedings by a city to obtain a reservoir site, it is proper to reject evidence as to its particular value as a reservoir site, and to charge that the jury cannot single out and estimate the value for a special purpose, they being instructed to consider all the constituent elements that make up the market value, its availability, adaptability, and capacity for different uses and purposes.

2. In assessing incidental damages to the residue of the tract not condemned, as allowed by Mill. & V. Code Tenn. § 1562, it is to be assumed that land appropriated for a reservoir will be used in a skillful and proper manner, though reasonable apprehension of danger from inherent defects and unavoidable accidents may be considered.

3. Condemnation proceedings, under Mill. & V. Code Tenn. §§ 1549-1566, being begun by petition by the party seeking to appropriate land, on which a jury is impeached, trial, on appeal from whose verdict is *de novo*, the petitioner has the right to open and close, though the right to condemnation is conceded, and the land-owner appeals only on the question of damages.

4. Though the Code is silent as to interest in condemnation proceedings, and no instructions as to it were given or refused, the court should add interest to the verdict, on motion therefor; damages being assessed for the value of the land at the time it was taken.

5. Payment into court of the amount of a verdict, with interest and costs, will not prevent the recovery of interest on the full amount of a larger verdict recovered on appeal.

Appeal from circuit court, Davidson county; W. K. McALLISTER, Judge.

Demos & Malone, East & Fogg, and J. M. Anderson, for appellants. *Vertrees & Vertrees and Lytton Taylor*, for appellee.

CALDWELL, J. This proceeding was instituted by the city of Nashville, in August, 1887, to condemn and appropriate what is known as "Kirkpatrick's Hill," for reservoir purposes. The jury of view assessed the damages at \$9,686. Alloway and wife, the owners of the property, appealed from that report, and obtained a trial in the circuit court, when verdict and judgment were rendered for \$12,532. From that judgment Alloway and wife prosecuted an appeal in error to this court.

The assignment of errors presents several important and interesting questions of law and practice, which it is necessary to consider somewhat in detail in order to reach an intelligent decision of the case. It is objected, and assigned as error, that the owners of the land were not permitted to show its particular value as a reservoir site; and, again, that the trial judge, in his charge, instructed the jury that, in determining the value of the property taken, they could not single out from the elements of general value, its value for one special purpose. These two objections raise the same legal question, and will for that reason be considered together.

The "just compensation" required by our constitution (article 1, § 21) is the fair cash value of the land taken for public use, estimated as if the owner were willing to sell, and the corporation desired to buy, that par-

ticular quantity at that place and in that form. Woodfolk v. Railroad Co., 2 Swan, 437; Railroad Co. v. Love, 3 Head, 67; Railroad Co. v. Adams, Id. 600; City of Memphis v. Bolton, 9 Heisk. 509. This value means the market value. Lewis, Em. Dom. § 478; Boom Co. v. Patterson, 98 U. S. 408; Cooley, Const. Lim. (5th Ed.) 699. It includes every element of usefulness and advantage in the property. If it be useful for agriculture or for residence purposes; if it has adaptability for a reservoir site, or for the operation of machinery; if it contains a quarry of stone, or a mine of precious metals; if it possesses advantage of location, or availability for any useful purpose whatever; all these belong to the owner, and are to be considered in estimating its value. It matters not that the owner uses the property for the least valuable of all the ends to which it is adapted, or that he puts it to no profitable use at all. All its capabilities are his, and must be taken into the estimate. This does not mean that all the capabilities are to be priced separately, and the aggregate put down as the true value; for they do not exist independently of each other, and cannot all be realized at the same time. Nor will it do to restrict the estimate to any one of them, because in one view that would exclude the other elements altogether, and in the other view it would tend to make the degree of benefit to the party appropriating and condemning for a particular purpose the real measure of value, which is never allowable. The field of investigation, in the case before us, was a very broad one. The location and elevation of the property were given. Its surface, area, and present use were described. The existence and character of stone within its compass, and the fact that the best of the stone was used in the construction of the walls of the reservoir, were disclosed. The city's engineer said that the hill had some value for residence purposes, but was valuable "mostly for a reservoir site," and this view was confirmed by Mr. John Overton, who said that there was only "one or two more good places for a reservoir" in reach of the city. No witness was allowed to put a price upon any single element of usefulness or advantage, but all the foregoing facts and circumstances were stated in detail by one witness and another, and from them all the witnesses gave their opinions as to the market value of the property. The questions calling for such opinions were generally in this form: "Considering the property sought to be condemned in the form it was taken, and as it was taken, and having regard to the entire property, and the uses to which it was put, and also the uses to which it was adapted, and assuming that Mr. Alloway wanted to sell, but was not obliged to sell, this piece or parcel of land, and the city wanted to buy it, but was not obliged to have it, what was the cash market value of the same in August, 1887, and what would be just compensation to Mr. Alloway, and what damages should be allowed him?" Some

of the witnesses, especially those put upon the stand by the owners, answered that question as to their acquaintance with the property and its market value.

With respect to the mode of ascertaining the value of the land taken, the circuit judge instructed the jury in these words: "In estimating its value, all the capabilities of the property, and all the uses to which it may be applied, are to be considered, and not merely the condition it is in at the time, and the use to which it is then applied by the owner. It is not a question of the value of the property to the owner, nor can the value be advanced by his unwillingness to sell. On the other hand, the damages cannot be measured by the value of the property to the party condemning it, nor by its need of the particular property. The city is entitled to have the land at its fair, market, cash value, unaffected by the fact that it needs it, or desires it. If it were otherwise, the value of land would not be measured by what it is actually worth in the market, but by the extent to which it might be necessary for public use; and so, when an appropriation of land is made for a city reservoir, the question is not what the land is worth to the city for the special purpose, for that would be to measure the value by the immediate necessities of the public, rather than the actual worth of the land. In determining the market cash value, you cannot single out from the elements of general value the value for an especial purpose, but you are to consider all the constituent elements that make up the market value,—its availability, adaptability, and capacity for different uses and purposes. In determining the market cash value, everything which enhances or depreciates its worth should be taken into consideration. If the existence of a rock quarry under the surface of the hill augmented or entered into the market value of the land, that fact should be considered; but the jury could make no separate allowance for the rock, for that would necessitate an inquiry into the cost of excavating and raising it. The cash market value of the land with the rock in it would be the proper consideration." To a great extent, and entirely so, so far as the cases are alike, this charge is sustained by the opinion of this court in *Woodfolk v. Railroad Co.*, 2 Swan, 437; and in that and all other respects it is in accord with the doctrine laid down in *Lewis, Em. Dom.* §§ 478, 479, 486; 3 *Suth. Dam.* 441, 442; *Mills, Em. Dom.* (2d Ed.) § 168, *Moulton v. Water Co.*, 137 Mass. 163, *Searle v. Railroad Co.*, 83 Pa. St. 57; and in other cases not necessary to be cited. Thus, as we think, every legitimate question on this branch of the case was developed, and properly submitted for the consideration of the jury. The action of the trial judge was right, both in the rejection of evidence of the amount of value for a reservoir site, and in the instruction that the jury could not single out and estimate the value for a special purpose.

We fully agree with the learned counsel of Alloway and wife, that "the particular purpose for which a piece of property is most applicable" must be considered in estimating the value of such property. That was done in this case. It was distinctly proven that "Kirkpatrick's Hill" was applicable, "mostly, for a reservoir site," and the jury was told to consider that, and every other element of value. That they did so cannot be doubted for a moment, in the light of the whole proof, and the amount of the verdict returned. Our holding is that, while adaptability for a reservoir site must be considered, the value for such a purpose exclusively cannot be shown in proof, and made the sole basis of a recovery, especially when the property possesses other capabilities, as in this case.

There is a lack of harmony in the decisions on this subject, some of them permitting the inquiry as to the value of the property for one special use, and others holding, as we do, that the market value in view of all available uses is the measure of compensation. It is not desirable to review all the cases in this opinion, but some of them will be mentioned. The latest one in the former line is that of *San Diego Land Co. v. Neale*, decided by the supreme court of California in 1888, and published in 20 Pac. Rep. 372. In that case it was held, distinctly, that it was competent to prove the value of land for a reservoir site, and to make that value the measure of damages, independent of any other consideration or element of value; and that, too, when the land sought to be condemned was in fact not the real site of the reservoir, but only necessary to contain back water from the dam below. To reach that conclusion, two former decisions by the same court, holding a contrary rule, were overruled, and other authorities cited in the opinion, were followed. In a case of the other line, this language is used: "But, where a condemnation is sought for the purposes of a railroad, to single out from the elements of general value the value for the special purposes of such railroad is, in effect, to put to a jury the question, what is the land worth to the particular railroad company? rather than what is it worth in general? The practical result would be to make the company's necessity the landowner's opportunity to get more than the real value of his land." *Stinson v. Railroad Co.*, 27 Minn. 291, 6 N. W. Rep. 784. The case of *Boom Co. v. Patterson*, 98 U. S. 403, is cited by the California court, and is relied on as sound authority by counsel on both sides of this controversy. Patterson owned one island, and parts of two others, in the Mississippi river, which the boom company condemned. The value was first appraised by commissioners, and afterwards by a jury in the circuit court of the United States. When the case reached the supreme court, Mr. Justice FIELD, delivering the opinion of the court, said: "The jury found a general verdict assessing the value of the land at \$9,358.33, but accom-

panied it with a special verdict assessing its value, aside from any consideration of its value for boom purposes, at \$300, and, in view of its adaptability for those purposes, a further and additional value of \$9,058.33. * * * In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted? That is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities and conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated. So many and varied are the circumstances to be taken into the account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisalment in all cases. Exceptional circumstances will modify the most carefully guarded rule, but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future. The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the land. The boom company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands." 98 U. S. 405, 407, 408. This lengthy extract presents the rule for compensation, and its application to the facts of the case. Both, as we understand them, are in harmony with, and suggest, the views expressed in this opinion. There the adaptability of the islands for boom purposes was held to be an element of value to be considered by the jury; here it is decided that the adaptability of the hill for purposes of a reservoir is an element of value to be taken into the estimate. There it was treated as an element only, to be considered in connection with other elements of value; so it is here. In that case the contention of the condemning party was that the adaptability of the islands for boom purposes should not en-

ter into the estimate at all. The court said it should, in the words quoted. No comment is made in the opinion on the fact that the jury, in a general verdict, assessed the value for boom purposes separately. That method is neither approved nor disapproved, by intimation or otherwise. The general verdict, as reduced by the owner on suggestion of the lower court, was affirmed.

A late author, speaking on this subject, says: "The market value of property includes its value for any use to which it may be put. If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating the compensation. Some of the cases held that its value for a particular use may be proved; but the proper inquiry is, what is its market value, in view of any use to which it may be applied, and of all the uses to which it is adapted? * * * The conclusion from the authorities and reason of the matter seems to be that witnesses should not be allowed to give their opinions as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. The condition of the property, and all its surroundings may be shown and its availability for any particular use. If it has a peculiar adaptation for certain uses, this may be shown, and if such peculiar adaptation adds to its value the owner is entitled to the benefit of it. But, when all the facts and circumstances have been shown, the question at last is, what is it worth in the market?" Lewis, Em. Dom. § 479.

By statute, the owner is entitled to compensation for land actually appropriated, and, in addition, to incidental damages for injury, if any, to the residue of the tract. Mill. & V. Code, § 1562. Both were claimed in this case, but only the former was allowed by the jury. As ground for incidental damages, the use, amount, and relative position of the residue, and the capacity (50,000,000 of gallons) and dimensions of the reservoir, were shown. It was also proven that the walls of the reservoir were made of stone taken from the hill; that some of the stone was good for such purpose, and some of it was not; the yield, altogether, being largely more than was used in the wall. Upon these and some other circumstances the witnesses express various opinions on the question of depreciation or no depreciation in the market value of the residue.

The general charge with respect to incidental damages is not assailed, but error is assigned upon this paragraph: "Damages are to be assessed on the basis that the work will be constructed and operated in a skillful and proper manner. All damages resulting from the neglect in these respects, or from negligence in the use of the reservoir, may

be recovered, by appropriate suits, when such damages occur." The objection to this is "because a reasonable apprehension of danger would impair the whole of the property in the vicinity, and, when it had been shown that the walls were built from the stone taken from the site, and that most of the stone in the hill was of bad quality, this was ground to apprehend danger. And, besides, the present owner is entitled to the incidental damages." It seems to be well settled that damages to the residue are to be estimated on the assumption that the part actually appropriated will be used in a skillful and proper manner. *Mills, Em. Dom. § 220; Lewis, Em. Dom. § 482.* Clearly, this must be so when the damages are assessed before the construction and operation are commenced. If it were otherwise, no appraisalment could be made until after the work is completed, because it could not sooner be known how defective the work will be, nor the amount of depreciation caused thereby. The rule should be the same when the construction is in progress, and not completed. When the trial below occurred, the work on the reservoir had been going on a long while, and was approaching completion, but it could not be finished for several months to come. The city was under legal obligation to so construct its improvement as to do the least injury to the residue of the land; and the presumption that it would perform that duty faithfully should be indulged until the work was finished, and the presumption rebutted. Even though some defects should, through negligence, occur in the construction, it is fair to assume that it will be detected and cured before putting the reservoir to its ultimate use. In like manner, the law devolves upon the city the duty of operating the reservoir carefully and skillfully; and it would be unjust to assume in advance that it will not do so. A different rule would be impracticable, as well as unjust; for no one could tell the amount to be allowed for improper operation until the fact itself should be ascertained, and the consequences seen and weighed.

The owner is entitled to all his damages, those for the land taken, and those to the residue, so soon as the condemnation is made. Neither he nor the condemning party can await future developments to enhance or diminish the amount of damages. These must be estimated on the assumption that the land appropriated will be properly, and in a reasonable time put to the use for which it is condemned. We by no means intend to decide that incidental damages must be estimated upon the assumption that the construction and operation of the improvement will be absolutely safe, and that apprehension of danger therefrom may not be considered by the jury. Our meaning is that such damages cannot be enhanced by the suggestion that the corporation appropriating the land will act negligently. The presumption is that it will act carefully. If it act otherwise, and injury result from its negligence, that affords

an independent cause of action; and the liability so incurred forms no part of the incidental damages. There may be reasonable apprehensions of danger from inherent defects and unavoidable accidents, notwithstanding skillful construction and careful operation of the improvement. If so, such apprehension, so far as it depreciates the present market value of the land not taken, is an element of incidental damages, and should be considered by the jury in making up their verdict. Such apprehension was not excluded from the consideration of the jury in this case. Only that resulting from the neglect or negligence of the city was so excluded. At this point, it is well to note the fact that there was no proof that any of the inferior stone had been placed in the wall, or that any of the work had been unskillfully done.

Each side claimed the right to open and close the argument before the jury. The trial judge decided in favor of the city, and that action is assigned as error. This question has been decided in several of the states; some of them holding one way, and some the other. The majority of the cases seem to give the opening and conclusion to the land-owner. *Lewis, Em. Dom. § 426.* The conflict in the decisions is largely due, no doubt, to difference in local practice, or statutory provisions. In this state the proceeding is inaugurated by the party seeking to appropriate the land. It is done by a petition setting forth the land wanted, the object for which it is to be condemned, the name of the owner, and concluding with appropriate prayers. Notice is to be given the owner, after which a jury, to inquire and assess the damages, is summoned and sworn. Either party may appeal from the finding of this jury, and have a trial anew before a jury in the circuit court. *Mill. & V. Code, §§ 1549-1566, inclusive.* Not only is the corporation seeking the condemnation required to take the first steps, and bring the land-owner before the court, in the prescribed order, but it must, of necessity, show that it is entitled to exercise the right of eminent domain, and that the particular land is necessary for its corporate use. In all this the petitioner is plaintiff, with the affirmative of its claim and the burden of proof upon it. The question of the amount of damages is then considered, and generally one side seeks to make it as small, and the other as large, as possible. Starting out as plaintiff, with the *onus* upon it, the petitioner should be allowed to open and close the case, even though the burden of proof may be shifted to the other party on some question arising in the progress of the trial. Concession by the owner of petitioner's right to condemn, and to take the particular land, and contesting the question of damages only, cannot change the rule; nor can the fact that the owner alone appealed from the appraisalment by the jury of inquest, for on that appeal the trial is *de novo*, and the attitude of the parties is the same as before. Digitized by Google

The jury allowed no interest. No instructions on that subject were given or requested; but after the verdict was returned, and before judgment was entered, Alloway and wife moved the court to add interest. This the court refused to do; and his action in that regard, is now assigned as error. The statute authorizing the condemnation of private property for public use, and prescribing the mode of proceeding, is silent on this subject; and the general statute, (Id. § 2702,) which enumerates instruments that bear interest as a matter of law, does not embrace a case like that before us. Nevertheless, we have no hesitation in holding, upon general principles, that interest should have been allowed from the time of the appropriation of the property. From that time the original owner was deprived of the use and possession of the land taken. The liability of the city accrued at that date, though the amount thereof is not determined finally until long thereafter. Damages are properly assessed with reference to the value of the land taken, and the depreciation of the residue at the time of condemnation. The legal rights of both parties, so far as the damages are concerned, are fixed at that time. Subsequent enhancement or diminution of the value, though ever so great, cannot be considered by the jury in estimating damages. Witnesses are examined as to the amount of damages at the time of appropriation, and not at the time of the trial. That method was properly adopted in this case. The city, especially, asked her witnesses the value of the property "in August, 1887." In the case of *Railroad Co. v. Burnett's Ex's* 11 Lea, 526, the jury of inquest, though reporting several years after the land was appropriated, failed to allow interest. The petitioner did not appeal, and have a trial *de novo*, but excepted to the report because it did not include interest. The exception was overruled, and the petitioner prosecuted a writ of error. This court allowed the interest. Id. 527. A discussion of the subject is found in section 499, Lewis, Em. Dom. Refusal to allow interest was error. In the language of one of the counsel for appellants: "If the party in whose favor there is verdict is, as a matter of law, entitled to something additional, the court may allow it." Inasmuch as the error can be readily corrected here, that will be done, instead of reversing and remanding. This court will render the judgment that should have been rendered below. The land was taken about the 10th of August, 1887; hence judgment will be entered for the amount of the verdict, with interest from that date.

On September 22, 1888, the city paid into court, subject to the order of Alloway and wife, the sum of \$10,872.51, that being the amount of damages returned by the jury of view, with interest and costs added. Because of this tender, the city now insists that it can in no event be liable for interest on a larger sum than the difference between the verdict and the amount so paid into court.

This contention, though plausible at first view, is not sustained by sound reason. A tender of part of a debt, in satisfaction of the whole of it, is no tender at all in law. The sum paid into court in this case was more than \$2,000 less than the amount due Alloway and wife, as has since been demonstrated by the verdict of the jury; hence they were under no obligation to receive it, and cannot have their claim for interest abated on account of their refusal to do so.

The other grounds of error assigned so far as material, fall within principles already announced, and for that reason they will not be further mentioned. Let the judgment be modified by adding interest, and affirmed, with costs.

SNODDY v. AMERICAN NAT. BANK.

(*Supreme Court of Tennessee. Feb. 26, 1890.*)

GAMBLING CONTRACTS—DEALING IN FUTURES—NEGOTIABLE NOTES.

1. Act Tenn. March 30, 1883, §§ 1-3, provide that any contract for the sale of grain for future delivery, where either party is dealing simply on a margin, and there is no intention of actual delivery, is gaming; and the making of such contract is declared a misdemeanor. Code Tenn. 1884, § 2488, provides that all contracts founded in whole or in part on a gaming or wagering consideration are void to that extent. *Held*, that a promissory note given to cover losses sustained by the maker in dealing in futures is void.

2. Under Code Tenn. 1884, §§ 2444, 5708, making it a misdemeanor for the holder of a negotiable instrument, knowing it to be founded on a gaming or wagering consideration, to negotiate the same, such a note is void even in the hands of an innocent holder.

Error to circuit court, De Kalb county; M. D. SMALLMAN, Judge.

This was an action brought by the American National Bank against I. H. Snoddy on a promissory note given by the defendant in payment of losses sustained by him in dealing in futures in grain. There was judgment for plaintiff, and defendant took his writ.

Dan Williams, for plaintiff in error. *John M. Gaut* and *W. T. Hale*, for defendant in error.

SNODGRASS, J. The only question in this case is whether an innocent holder of a note founded on a gaming consideration can recover of the maker. The note sued on was void in the hands of the payee. It was given in a settlement of loss sustained by plaintiff in error while dealing in futures with Williams & Co. There was no intent to take or deliver grain pretended to be purchased on the one hand or sold on the other. The contract to do so was therefore gaming, and void by express statute. Act 1883, p. 331; *McGrew v. City Produce Exchange*, 1 Pickle, 572, 4 S. W. Rep. 38.

Nor does it matter that Williams & Co. pretended to be, or were, mere agents in the transaction. They knew of, and participated in, its illegality, and could maintain no ac-

tion on the note given them for the loss sustained by their alleged principal. *Beadles v. Ownby*, 16 Lea, 424. But they transferred the note taken by them in settlement of the loss sustained by plaintiff in error to the American National Bank, before due, for value; and the bank had no notice of the illegality of consideration. It is therefore insisted the bank may recover as an innocent holder, and the circuit judge so held. Our statute makes all wagering contracts void to the extent of the wagering consideration, and provides that no money or property won by any species or mode of gaming shall be recovered by action, and that any money or property so paid or delivered may be recovered back by the payor, his wife, children, next of kin, or creditors. Code, § 2438 et seq. The particular species of gaming now being considered is made a misdemeanor, and punished as such; the limitation as to the least punishment being more severe than that of ordinary gaming. Act 1883, § 3. Thus it appears that such contract is not only against public morals, and public policy, and public statute,—*malum in se*, and *malum prohibitum*,—and that it is declared void, but it is also made a crime, and punished as such. The general rule that, as between innocent holder and the maker, the consideration cannot be inquired into, is subject to the exception that it may be done if the consideration was gaming, or usurious. 3 Kent, Comm. (9th Ed.) 99. By the great weight of authority, notes given in consideration of a contract against morals, public policy, and public statute are void in any hands. 2 Amer. & Eng. Cyclop. Law, §68, and notes. Perhaps there are no exceptions where, in addition, the transaction is also criminal.

It is insisted, however, that the statutes referred to do not in express terms declare that negotiable notes so executed are void in the hands of innocent holders, and that, unless the statute so declares, they will be held good; and for this proposition *Chit. Bills*, 104, 105, *Daniel, Neg. Inst.* §§ 197, 198, and several cases, are cited. But these authorities (and to the same effect is section 192, *Story, Prom. Notes*, from which Mr. Daniel copies the greater part of sections cited) show that the statute need not expressly declare such notes void. If it does so by necessary implication, it is sufficient. We hold that the statutes referred to do by necessary implication make such notes void, in making the contract under which they are executed void and criminal. But the statute goes further. It affirmatively shows that such negotiable notes are not to be used, and makes the transfer of such a note to a party ignorant of its illegality a criminal offense. Code, §§ 2444, 5708. It results, therefore, that the bank cannot maintain an action on the note in controversy, and the judgment of the circuit judge must be reversed, and judgment entered here in favor of plaintiff in error. The costs of both courts will be paid by the bank.

SMITH v. NASHVILLE & K. R. Co.

(Supreme Court of Tennessee. March 7, 1890.)

EMINENT DOMAIN—COMPENSATION.

The right to damages for taking land under the power of eminent domain belongs to the owner of the land at the time it is taken, and does not pass to his grantee by quitclaim deed without an express conveyance.

Appeal from circuit court, Smith county; JOHN A. FITE, Judge.

H. M. Hale and W. V. Lee, for appellant.
J. J. Turner and B. F. C. Smith, for appellee.

LURTON, J. This is a bill to have a right of way through land now owned by complainant declared a cloud upon his title, and to recover damages for the right of way taken by the railroad company. Complainant claims title to a tract of land described in his bill, subject to a life-estate, in part thereof, in favor of one Mrs. Lawrence. Mrs. Lawrence, more than a year before complainant secured any interest whatever, executed a grant of right of way over 100 feet in width, and through the entire tract of land. This was not limited to her homestead tract, nor was it an easement for her life, but is the conveyance of an easement in fee absolute, and over the entire body of land. The railway company had taken actual possession of this easement, and were actually engaged in the construction of their railway, and were claiming and holding under the deed of Mrs. Lawrence, at the date of the purchase of this land. The deed of Mrs. Lawrence was only operative to convey her life-estate; and the possession by the railway company within her homestead would not in that case be adverse to complainant, or those under whom he claims, until the termination of her estate. But the possession under her deed, outside of her homestead, was adverse. In the first case, her conveyance, as to her estate for life, of a right of way, would not be a cloud. But, in so far as it was a color of title to an easement in the remainder of the tract, it would be a cloud, but for the fact that the deed of complainant is void and ineffective by reason of his purchase being champertous. This, however, only defeats his title in so far as the railway company were claiming an interest adverse. *Pickens v. Delozier*, 2 Humph. 400.

All other questions out of the way, this suit cannot be maintained as a suit to recover damages for the taking of this right of way through the interest now owned by complainant. He was not the owner of this land, or any interest therein, at the time the railway company entered upon, and begun the construction of, their road-way. The company had, in the exercise of the power conferred by statute, entered upon and appropriated this easement before complainant acquired the land, or any interest whatever. Damages for the taking of land under right of eminent domain belong to the owner at the time of the taking; and such claim for

damages does not pass to a grantee of the lands over which a right of way has been taken, unless expressly conveyed. Railroad Co. v. Stovall, 12 Heisk. 1; 2 Wood, Ry. Law, 864. The deed to complainant is a mere quitclaim, and the damages due to his grantor did not pass to him.

Reverse, and dismiss the bill, with costs.

HODGES *et al.* v. TAYLOR *et al.*

(Supreme Court of Arkansas. Feb. 15, 1890.)

LIMITATIONS—SUSPENSION—REVIVOR OF ACTIONS —MORTGAGE—FORECLOSURE.

1. The statutes of limitation were suspended by the war of the rebellion; and, in determining whether an action is barred by limitation, the time that elapsed during such war is not to be counted.

2. Under Mansf. Dig. Ark. § 5237, which provides that revivor of actions shall be by order of the court that the action be revived in the name of the representative or successor of the party who has died, and section 5239, which provides that notice of such revivor shall be given to the adverse party by service of the order in the manner as a summons, a failure so to notify the adverse party does not defeat the revivor, but merely postpones the duty of such party to show cause why such revivor should not take place.

3. Upon the death of a mortgagor it is not necessary to probate the claims against him in order to enable the mortgagee to foreclose the mortgage.

Appeal from circuit court, Washington county; E. S. McDANIEL, Special Judge.

In February, 1859, James C. Hodges borrowed \$1,000 from W. D. Reagan, giving W. B. Taylor and George E. White as security. In order to indemnify Taylor, Hodges executed to him a mortgage on real estate, conditioned that he would indemnify Taylor from all actions, charges, and demands that might at any time be prosecuted against him as a result of his becoming surety. Taylor, having been obliged to settle the debt, brought action on the mortgage in 1860, which, on demurrer to the complaint, was dismissed without prejudice. Taylor again commenced action, but on March 13, 1861, paid all costs, and dismissed his suit. On June 6, 1866, Taylor brought this action against Robert Hodges, heir of James C., and the widow and legal representatives of deceased. The cause was continued by consent, from term to term, until 1871, when Robert Hodges died. In February, 1872, the death of Robert Hodges being suggested, the court entered an order, on motion of plaintiff, making his widow and children parties defendant to the action. On July 24, 1872, summons was duly issued upon the order, and served on August 20th. A guardian *ad litem* was appointed for the minor defendants, and answered for all of them. The action was then continued from term to term till 1887, when plaintiff amended his complaint, making certain others parties defendant. All the minors, except one, having become of age, appeared and answered; and a new guardian *ad litem* being appointed for the remaining minor, he appeared and answered for him. Defendants pleaded the statute of limitations, and, judgment

having been rendered for plaintiff, they appealed.

Mansf. Dig. Ark. § 5237, provides that revivor of actions shall be by order of the court that the action be revived in the name of the representative or successor of the party who has died, and section 5239 provides that notice of such revivor shall be given to the adverse party by service of the order in the manner as a summons.

J. D. Walker, for appellants. *B. R. Davidson* and *L. Gregg*, for appellee.

PER CURIAM. If the time which elapsed during the late war is not counted, this action was commenced within less than three years after the right to bring it accrued. As the statutes of limitations were suspended during that time, it cannot be counted. The action was not barred. *Williamson v. McCrary*, 33 Ark. 470; *Ringo v. Woodruff*, 48 Ark. 469.

After the death of Robert Hodges, his death was suggested; and his heirs were made parties defendant, at the first term of the court held thereafter. This was substantially a revivor of the action against them, unless they thereafter showed cause why it should not be revived. The failure to notify them of the revivor by service of the copy of the order did not defeat the revivor. If it had any effect, it postponed their duty to show cause until they were properly served with notice. They were afterwards served with a copy of the order, and they showed no cause why the action should not be revived against them. The result was, it stood revived. Mansf. Dig. §§ 5237, 5244; *McNutt v. State*, 48 Ark. 30, 2 S. W. Rep. 254.

There is no evidence in the record showing that the same matters involved in this action were adjudicated in a former suit.

It was not necessary to probate the claims in controversy against the estate of the mortgagor to enable appellees to foreclose the mortgage sued on. *McClure v. Owens*, 32 Ark. 443. Judgment affirmed.

DAVIES v. NICHOLS.

(Supreme Court of Arkansas. Feb. 15, 1890.)

ADMINISTRATORS—ACTIONS—APPEAL—EXCEPTIONS —TIME OF FILING.

1. An administrator may take an appeal from a judgment of the probate court, and prosecute it to the same extent his intestate might have done.

2. Under Mansf. Dig. Ark. § 5157, providing that time to reduce exceptions to writing shall not be given beyond the succeeding term of court, an order fixing the time in which a bill of exceptions shall be signed and filed is final, and the court has no authority to shorten or extend the time at a subsequent term.

Appeal from circuit court, Garland county; J. B. WOOD, Judge.

Action by J. H. Nichols, Jr., as administrator of the estate of J. H. Nichols, against R. G. Davies, as administrator of the estate of J. H. Law. There was judgment for plaintiff, and defendant appealed. From the record it appeared that the case was tried at

the March term, 1887, of the circuit court, and that defendant filed his motion for new trial, April 22, 1887, which motion being overruled, he was given until the second day of the next term to file his bill of exceptions. At the September term the court granted 10 days further time, and subsequently again extended the time to January 16, 1888, on which day the bill was filed.

R. G. Davies and U. M. & G. B. Ross, for appellant. *L. Leatherman*, for appellee.

PER CURIAM. The administrator of Nichols had the right to take the appeal from the judgment of the probate court in this case, and prosecute it to the same extent his intestate might have done. *Ex parte Trapnall*, 29 Ark. 60. There is no bill of exceptions in the record. The paper purporting to be a bill of exceptions was not signed by the judge and filed within the time first given by the court. The order fixing the time in which the bill of exceptions might be signed by the judge and filed became final, and passed beyond the control of the court, when the term at which it was made expired, and the court had no authority to shorten or extend the time at a subsequent term. *Mansf. Dig. § 5157; Carroll v. Saunders*, 38 Ark. 216; *Railway Co. v. Rapp*, 39 Ark. 558; *Adler v. Conway Co.*, 42 Ark. 488; *Railway Co. v. Holman*, 45 Ark. 102; *Myrick v. Merritt*, 21 Fla. 799. Inasmuch as the bill of exceptions in this case cannot be regarded as any part of the record, the questions presented by appellant cannot be considered. Judgment affirmed.

RUSSELL et al. v. TATE et al.

(Supreme Court of Arkansas. Feb. 15, 1890.)

MUNICIPAL CORPORATIONS—APPROPRIATION FOR COUNTY BUILDINGS—INJUNCTION.

1. Under Const. Ark. 1874, art. 12, § 5, providing that no county, city, or town, or other municipal corporation, shall appropriate money or loan its credit to any corporation, institution, or individual, the common council of a town has no power to appropriate money to aid the building of a court-house in such town.

2. Under *Mansf. Dig. Ark. § 929*, which provides that any person owning property and paying taxes may enjoin the payment of any warrant issued by a city or town without authority of law, any tax-payer of the town may maintain injunction to restrain the payment of a warrant issued in accordance with such appropriation.

3. Where it appears that the warrant thus illegally issued has already been called in and canceled, it is within the powers of a court of equity to grant affirmative relief by an order restraining the future reissue of such warrant.

4. Defendants, who were members of the town council, with others, entered into a bond in a certain sum for the purpose of building a court-house in the town. Afterwards the town council, of which defendants were members, appropriated, \$1,000 of the town funds to aid in building the court-house, a portion of which sum was immediately paid over. *Held*, that the defendants were liable for the amount thus paid, in an action brought by the tax-payers for its recovery.

Appeal from circuit court, Pope county; **ROBERT TOOMER**, Judge.

This was a bill for injunction brought by R.

H. Tate, J. B. Evarts, J. W. Tucker, and J. A. Jamison, residents and tax-payers of the town of Russellville, Ark.; J. W. Russell, mayor, L. M. Smith, J. L. Shinn, W. J. White, J. M. Luker, and R. J. Wilson, councilmen, and W. M. Peeler, treasurer, of said town. It appeared that, in consideration that the people would vote to remove the county-seat of Pope county from Dover to Russellville, the defendants, except J. W. Russell, had executed an approved bond to the commissioners, for the use of the county, in the sum of \$50,000, to build a court-house at Russellville, and donate the house and ground to the county. In course of construction of said court-house, the same being built by private enterprise, the defendants, in their capacity as board of council of said town, on the 3d day of February, 1888, passed the following resolution: "Alderman Shinn moved, which was seconded by Alderman Smith, that the council appropriate \$1,000 to assist in the completion of the court-house, and that the mayor draw his warrant for the amount in favor of the chairman of the court-house building committee. The vote was ordered, which resulted as follows: Yeas, J. M. Luker, J. L. Shinn, L. M. Smith, W. J. White, and R. J. Wilson. The mayor announced the adoption of the resolution." The meeting was at night, the usual time of meeting. The treasurer had been invited to be present at said meeting, and report the amount of money of the town in his hands; and, reporting \$675, the appropriation was immediately drawn against by the mayor in two warrants, at the instance of the treasurer,—one for \$675, which was paid about 10 o'clock that night; the other for \$325, which was not paid for the want of funds. The money so received was applied to the payment of expenses for building said court-house, and the other warrant was outstanding in the hands of said Shinn. On the 17th day of February the plaintiffs filed their bill in chancery against defendants, alleging the foregoing facts; also alleging that they are citizens and tax-payers of said town. The prayer of their bill was: (1) For a temporary restraining order, restraining the collection and payment of the \$325 outstanding warrant. (2) That upon the final hearing the collection and payment of said warrant be perpetually enjoined and surrendered up and canceled. (3) That the resolution of said town council appropriating \$1,000 to the construction of said court-house be quashed and held for naught, and that defendants be perpetually enjoined from taking any further action under the same, or from diverting the revenues of said town for the objects and purposes of said appropriation. (4) For restitution into the town treasury of the \$675 already diverted and appropriated as aforesaid. (5) For general relief. After the defendants had made the aforesaid appropriations and taken the money, they proposed to submit their action to a mass meeting of the citizens of the town, but plaintiffs declined that meth-

od of arbitration. At the town election held April 3d, the defendants all became candidates for re-election, and undertook to force an arbitration of the matter, independent of the wishes of plaintiffs, by having printed on their tickets, "For appropriation." The plaintiffs also ignored that method of arbitration, by refusing to vote on the question. When suit was about to be brought by plaintiffs against defendants, the attorneys of defendants and J. M. Luker notified the attorney of plaintiffs that the town council would call in and destroy the \$325 warrant outstanding in the hands of J. L. Shinn. The first regular meeting of the council after suit was brought was March 1st. The council at that time took no steps to recall said warrant, but at a special meeting called at the instance of the city attorney, on the 27th day of March, five days before court convened, at which said cause was to be tried, the defendants, in their official capacity as town council, assembled and called in and destroyed the \$325 warrant, but never rescinded the resolution of February 3d, nor did they indicate the reason for destroying said warrant; nor did they prohibit the mayor from drawing another warrant in its stead against said appropriation of February 3d.

The defendants came into court and filed a motion to dismiss so much of plaintiffs' complaint as related to the \$325 warrant, on the ground that all injunctive relief had been extinguished by destruction of the warrant, which they alleged plaintiffs knew would be done before bringing suit, and which was done before the granting of any restraining order. The court overruled their motion. They filed a motion to strike out from appellees' complaint all that part which related to and sought to recover back \$675 already paid. The court overruled this motion also. The appellants then filed their answer, containing a demurrer, alleging: (1) That this suit was brought after appellees' attorney had been advised that the \$325 warrant would be recalled and canceled, and without giving opportunity to do the same, for the fraudulent purpose of giving the court jurisdiction of other matters alleged in the complaint. (2) There was no money in the treasury to pay said warrant, and that appellees knew it, and that there was no probable ground for believing that said warrant would be paid. (3) That the calling in and destruction of the warrant was virtually a rescinding of the resolution of February 3d, especially to the extent of the \$325 warrant. (4) They admitted that the \$675 of the town's revenues and funds were diverted from the lawful channels, as charged in the complaint, but that it was a legislative act, and courts cannot control matters lying in legislative discretion; and for that reason said act of appropriation is not wholly *ultra vires* and void, and denies the liability of the defendants for the \$675, notwithstanding they admit the funds were diverted from their lawful purpose. (5) They allege the revenues of the

town to be about \$1,600, and of that amount the four appellees pay \$74.80, and that they have no interest not held in common with other citizens and tax-payers of said town, and that they have no such interest as entitles them to sue in this behalf, and that the right to recover the \$675, already paid, is a separate and distinct right to the enjoining the collection of the \$325 outstanding warrant, and that same ought to be stricken from complaint. (6) That the people of Russellville were pledged to build and donate courthouse and grounds to the people of Pope county, and that the appropriation was made in furtherance of such pledge, and that appellees were citizens of Russellville, and bound by the action of the town council. (7) That after the appropriation had been made and the money diverted, the appellants submitted their action in that behalf to the qualified electors of said town, and they approved it by a large majority, and the appellants were all re-elected upon the record they had made, and that appellees were by said vote estopped from bringing this suit. The answer concludes with a demurrer: (1) For want of proper parties plaintiff. (2) Complaint does not state facts sufficient to constitute a cause of action. (3) Court no jurisdiction of the subject, in so far as it relates to the \$675 already paid. (4) Because there is no equity in the complaint as to the \$675 sought to be recovered. The court overruled the demurrer, and on final hearing rendered a decree for the appellees against the appellants for the \$675, for the use of the town, to be paid by them into the treasury of the town, and for costs, and in default of payment the same was to be collected on execution, and the sheriff was to pay the costs to appellees, and the \$675 was to be paid by the sheriff to the treasurer of said town, and by said treasurer to be held for the use of said town, and no other. And the defendants and servants and officers of said town were perpetually enjoined from using the funds of said town for the purposes mentioned in the resolution of February 3d, and from removing or attempting to remove the \$325 warrant set forth in the complaint, and alleged in the answer to be destroyed, and the resolution appropriating \$1,000 of the funds of the town to defray the expenses of building a courthouse was quashed and held for naught, and the defendants, officers and servants of said town, were perpetually restrained from making any further application of the funds of said town to the unlawful purposes of said resolution, either by their vote, taxation, or otherwise, either directly or indirectly. From this judgment defendants appealed.

Const. Ark. 1874, art. 12, § 5, provides that no county, city, or town, or other municipal corporation, shall appropriate money or loan its credit to any corporation, institution, or individual. Mansf. Dig. Ark. § 929, provides that any person owning property and paying taxes may enjoin the payment of any

warrant issued by a city or town without authority of law.

Wilson & Granger and G. W. Shinn, for appellants. *J. G. Wallace*, for appellees.

SANDELS, J. An analysis of the case shows six questions for decision: (1) Has equity jurisdiction as to the matters stated in the bill? (2) Are residents and tax-payers proper parties plaintiff? (3) May affirmative, as well as injunctive, relief be had in such a proceeding? (4) Was the appropriation of the \$1,000 by the council valid or void? (5) Are aldermen, as such, liable to an action for votes given upon measures before them? (6) What liability, if any, did the mayor, ordering, the treasurer making, and the council receiving, the payment, incur by reason of this transaction?

The so-called "appropriation" was a nullity. *Jacksonport v. Watson*, 33 Ark. 704; *Sykes v. Mayor*, 55 Miss. 115; section 5, art. 12, Const.; *Minot v. West Roxbury*, 112 Mass. 1. The officers of the city are trustees in the management and application of the funds and property of the people of the city. 2 Dill. Mun. Corp. § 915. The application of municipal funds to illegal purposes by them is a breach of trust. *Id.* § 919, and notes. Equity has jurisdiction to prevent the misapplication or waste of trust property. 2 Story, Eq. Jur. 1252, and note. The fact that, after the suit was brought, the city council recalled and canceled the unpaid warrant did not oust the jurisdiction of the court. That was but part of the purely equitable relief demanded. It was desired to prevent its reissue, and cancel the appropriation. Besides, under our chancery system, had the cancellation of the warrant been the only original ground of equity jurisdiction, it was not lost. *Price v. Bank*, 14 Ark. 50. Suits by tax-payers against towns and their officers, to prevent or remedy misapplication of town funds, are not only allowed by statute, but it is the prevailing doctrine in America that tax-payers may maintain them, in the absence of statute. Their relations to the municipality are analogous to those of stockholders to a private corporation. *Mansf. Dig.* § 929; *Jacksonport v. Watson*, 33 Ark. 704; *Crampton v. Zabriskie*, 101 U. S. 601; 2 Dill. Mun. Corp. §§ 914, 915; *Blaikie v. Staples*, 13 Grant. (U. C.) 67, cited in note on page 902, 2 Dill. Mun. Corp. There is no foundation in the authorities for the claim that the power of chancery is only injunctive. It would be a reproach to justice, if it were true. In the present case, the appropriation was made, the warrant was drawn, and the money paid by the treasurer before an attorney could have comprehended the situation, and have written the caption of a complaint. Chancery has ample power to prevent further wrong, and require reparation for that which has been done. 2 Story, Eq. Jur. 1252, and notes; *Frost v. Belmont*, 6 Allen, 152; *Association v. Lyon*, 29 N. J. Eq. 110; *Attorney General v. Poole*, 4 Mylne & C. 17; *People v. Fields*, 58 N. Y.

491; *Attorney General v. Boston*, 123 Mass. 460; *Attorney General v. Dublin*, 1 Bligh. (N. S.) 312; 2 Dill. Mun. Corp. §§ 909-912. As against the liability of these defendants, it is contended that, a city council, being in some sort a legislative body, its members are not liable for the erroneous exercise of their discretion in voting upon measures before them. This is true. *Jones v. Loving*, 55 Miss. 109; *Freeport v. Marks*, 59 Pa. St. 253. But where, after exercising their discretion in voting \$1,000 of the money of the town to pay an obligation which they and a few others had bound themselves to discharge, they or their building committee took the money, it was a conversion of trust funds, for which each of them, as also the mayor who ordered, and the treasurer who made, the payment, are liable. *Frost v. Belmont*, 6 Allen, 152; *Association v. Lyon*, 29 N. J. Eq. 110; *Attorney General v. Poole*, 4 Mylne & C. 17; *Attorney General v. Wilson*, 1 Craig & P. 1; *Blaikie v. Staples*, 13 Grant (U. C.) 67. The vote of confidence given appellants at the next ensuing city election does not affect their liability to repay the money which they took from the city treasury. Affirmed.

SCHOOL-DIST. NO. 42 v. BENNETT.

(Supreme Court of Arkansas. Feb. 15, 1890.)

SCHOOL-DISTRICTS — OFFICERS — ELECTION — POWERS.

1. *Mansf. Dig.* Ark. § 6206, relating to the election of directors of school-districts, as amended by Act Ark. April 4, 1887, provides that any person so elected shall within 10 days file his acceptance of the office with his predecessor, subscribe the oath of office, and file it with the county clerk, and enter at once upon the duties of the office. *Held*, that the provisions of the oath—requiring that the officers holding the election should make a return of the result to the county clerk 10 days before the meeting of the county court for the purpose of levying taxes, does not imply that the county court shall canvass the return, and certify to the result.

2. Under such act the term of office of the director so elected begins as soon as he has qualified as required by the terms of the act.

3. Under the provisions of the act it is necessary for a person elected to the office of school director to qualify within 10 days by subscribing the oath of office, and filing the same with the clerk, and, until he thus qualifies, his predecessor is entitled to exercise the powers of the office, under *Mansf. Dig.* Ark. § 6206, providing that school directors shall hold their office for three years, or until their successor is elected and qualified.

4. A contract made by two of three directors of a school-district at a meeting held at a time different from the time fixed for regular meetings, and of which the third director had no notice, is not binding on the district.

Appeal from circuit court, Clay county; *J. E. RIDDICK*, Judge.

This was an action, brought by *P. P. Bennett* against school-district No. 42, to recover for services rendered in teaching a school in said district. There was judgment for plaintiff, and defendant appealed.

E. F. Brown, for appellant. *J. C. Hawthorne*, for appellee.

HEMINGWAY, J. Baker Pollard, and McCleskey were directors of the appellant school-district when the annual district meeting convened, in May, 1887. Baker was the senior member of the board, and Rodery was elected by the meeting to succeed him. The vote was canvassed, and the result declared, when Rodery announced that he would accept the office. At some subsequent time, Rodery took some kind of a verbal oath before a justice of the peace; but he did not "subscribe to the oath prescribed for officers by the constitution of this state," "and file it in the office of the clerk of the county court," until the latter part of the following September. During the interval, Baker continued to act as a director. On the day that Rodery's oath was filed with the county clerk, the appellee made a contract with Baker and Pollard, as directors of the district, to teach a school in the district for three months at \$40 per month. The appellee taught the school. The directors refused to pay him. He brought this suit, recovered a judgment, and they have appealed. He was notified by Rodery and McCleskey, before he began to teach, that they disputed the validity of his contract, and would not pay him if he taught. It does not appear whether the contract was made at a meeting of the board, or by the two directors acting separately; but it was not made at a meeting held at the stated time for meetings in that district, and McCleskey had no notice of the meeting, if one was held. The court, in its instructions, charged that notice to him was not necessary.

Two directors can act for the board, if they proceed in conformity to law. *Manuf. Dig.* § 6366.

This settled, the appeal tenders two questions for our consideration: Was Baker a director when he signed the contract? If so, was it the contract of the board, unless made by a majority of the directors, at a meeting of the board, of which the director absent had notice?

Baker's term continued until his successor was elected and qualified. *Id.* § 6205. The statute provided that the term of office should begin on the 15th of October after the election, (*Manuf. Dig.* § 6206,) and that the party elected, within 10 days after the 15th of October, take and subscribe before a justice of the peace the oath prescribed for officers by the constitution, and file it with the county clerk. This was amended by the act of April 4, 1887, which provides that any person elected and accepting the office should, within 10 days after having been notified of his election, file his acceptance with his predecessor, subscribe the oath, and file it with the clerk, and enter at once upon the discharge of his duties. It is insisted that, under the law as amended, the term of the member elected does not begin until October; that the officers holding the election are required to return the result to the county clerk 10 days before the court meets for levying taxes; and

that it is thereby implied that this tribunal shall canvass the vote for directors, and certify the result to those elected, and that as it convenes in October, the term cannot begin sooner. When the justices of the peace sit with the county judge, the constitution directs the scope of their work, which is to assist in levying taxes, and making appropriations. *Const.* 1874, art. 7, § 30. There is nothing in the nature of this duty akin to that of canvassing and certifying the vote for officers; and, as the statute does not cast it upon them in express terms, or by necessary implication, we must assume that the return is made to the county court, at the time designated, to enable the court to levy the tax voted, and that it has no further duty in the premises. True, the return shows the number of votes cast in favor of each person voted for for director; but this, no doubt, is intended to furnish the court, and all other persons interested, a list of school directors. The law did not then prescribe how notice of his election should be given to the person chosen, but we think it was intended that the officers who held the election should give it. In most cases, as in this, the person is present, learns the result, and signifies his acquiescence. In such cases, no further notice was deemed necessary. Rodery was present when he was elected; and, having announced that he accepted the office, it was unnecessary to give him any formal notice of his election. The law required that he qualify within 10 days after his election, and enter at once upon the discharge of his duties. To qualify, the law required that he should subscribe the oath, and file it with the clerk. These provisions seem wise, and we think they are mandatory. If directors could neglect them, and meet their requirements by going before an officer, and orally taking some oath, the fiscal officers of the county could never know who composed the various boards of directors, and confusion and disorder would result. As Rodery did not qualify as the law directs, Baker's term continued. *State v. Johnson*, 26 Ark. 281. The new director should file his acceptance of the office with his predecessor, but we are not inclined to think that the statute in that regard is mandatory.

Is it necessary that a contract, to be binding on the district, should be executed at a board meeting, at which all the directors are present, or of which the one absent had notice? We appreciate the practical importance of this question, but entertain no doubt as to its proper solution, either on reason or authority. The different members of a board, scattered in the pursuit of their several avocations, are not the board. Duties are cast upon boards composed of a number of persons, in order that they may be discharged with efficiency and wisdom arising from a multitude of counsel. This purpose cannot be realized without conference between the members of the board, with reference to the matters intrusted to them, before they take action thereon. After conference the board

will often escape unwise measures to which each of the members, acting separately, would have committed themselves, either from haste, immature consideration, the demands of private engagement, or an unwillingness to shorten the allotted span of life under the entreaties of an importunate agent. The public select each member of the board of directors, and is entitled to his services. This it cannot enjoy if two members can bind it without receiving, or even suffering, the counsel of the other. Two could, if they differed with the third, overrule his judgment, and act without regarding it; but he might, by his knowledge and reason, change the bent of their minds, and the opportunity must be given him. We conclude that two directors may bind the district by a contract made at a meeting at which the third was present, or of which he had notice; but no contract can be made except at a meeting, and no meeting can be held unless all are present, or unless the absent member had notice.

No notice of a regular meeting is necessary where the board has fixed stated times for them. Our views find support in many adjudged cases. *Aikman v. School-Dist.*, 27 Kan. 129; *Hazen v. Lerche*, 47 Mich. 626, 11 N. W. Rep. 413; *School-Directors v. Jennings*, 10 Ill. App. 643; *Ballard v. Davis*, 31 Miss. 533; *Downing v. Rugar*, 21 Wend. 178.

We do not decide that the members of the board may not act separately, and without meeting, in a matter which involves no exercise of discretion. The instructions were erroneous; and the judgment will be reversed, and the cause remanded.

COCKRILL, C. J., did not sit in this case.

WELLINGTON v. STATE.

(*Supreme Court of Arkansas*. Feb. 22, 1890.)

CRIMINAL LAW—APPEAL—COSTS—CONSTITUTIONAL LAW.

1. Under the provisions of Mansf. Dig. Ark. § 2469, that, in criminal actions, upon affirmance of a judgment on appeal of defendant, \$20 shall be allowed as attorney fee for the prosecuting attorney, and taxed as costs, an allowance of such amount is proper.

2. Mansf. Dig. Ark. § 2471, providing that in criminal actions, where the execution of a judgment for a fine is suspended pending an appeal, and the judgment is affirmed, 10 per cent. damages shall be awarded against defendant, is constitutional.

3. The tax imposed by Mansf. Dig. Ark. § 5593, levying a tax of three dollars on each criminal conviction in a court of record, is a valid exaction, and properly taxed in the costs.

4. Under rule 23 of the supreme court of Arkansas, which provides that the cost of printing abstracts and briefs on appeal, not to exceed \$15 on each side, shall be taxed against the losing party, an allowance for that purpose is properly taxed against the losing party on appeal.

Motion to retax costs, and quash the execution.

For opinion in case on appeal, see 12 S. W. Rep. 562.

Mansf. Dig. Ark. § 2469, provides that, in

criminal actions, upon affirmance of a judgment on appeal of defendant, \$20 shall be allowed as attorney fee for the prosecuting attorney, and taxed as costs. Section 2471 provides that in criminal actions, where the execution of a judgment for a fine is suspended pending an appeal, and the judgment is affirmed, 10 per cent. damages shall be awarded against defendant. Section 5593 levies a tax of three dollars on each criminal conviction in a court of record. Rule 23 of the supreme court provides that the cost of printing abstracts and briefs on appeal, not to exceed \$15 on each side, shall be taxed against the losing party.

E. P. Watson, for appellant.

PER CURIAM. The fee of \$20 taxed against the appellant is authorized by section 2469, Mansf. Dig. This section was part of the Criminal Code approved July 22, 1868. The same legislature passed an act regulating fees for prosecuting attorneys, among other officers, which was approved July 23, 1868. Since that time the act regulating fees has been amended; but, as to the items of fees of prosecuting attorneys, the act of 1868 and the amendatory act of 1875 are identical, except as to the amount allowed for convictions in cases of homicide not capital. There is no repeal, express or implied; and the fee was properly taxed as part of the costs. *Chamberlain v. State*, 50 Ark. 132, 6 S. W. Rep. 524. The right of the legislature to impose 10 per cent. damages upon affirmance has long been conceded and affirmed by this court. The provision imposing it (section 2471) is not unconstitutional.

The tax of \$3 complained of is imposed by section 5593, Mansf. Dig., and has heretofore been held a valid exaction.

The amount of \$5.57, for printing the appellee's brief, is taxed under rule 23 of this court, which is based upon section 1307, Mansf. Dig. These charges are not part of the punishment of the accused. Costs are awarded in order that the state may prosecute the guilty at their own expense. *Fanning v. State*, 47 Ark. 442, 2 S. W. Rep. 70. Motion overruled.

BEAVER v. FRICK CO.

(*Supreme Court of Arkansas*. March 8, 1890.)

MORTGAGES—RECORDING.

1. Under Act Ark. March 12, 1883, dividing Carroll county into two districts, each district stands as a separate county; and a mortgage recorded in one district, on property situated in another, is not a lien against a subsequent mortgage recorded in the district in which the property is located.

2. Delivery of a deed in one district to the clerk or his deputy, without instructions, is *prima facie* delivery for record in the district where delivered.

Appeal from circuit court, Carroll county; *J. M. PITTMAN*, Judge.

Crump & Watkins, for appellant. *Marshall & Coffman*, for appellee.

PER CURIAM. The mortgagor resided in

the western district of Carroll county. The court found that the plaintiff's mortgage was never recorded or filed in that district. It was therefore not a lien on the property of the mortgagor, as against a subsequent mortgage filed and recorded in the district where the mortgagor resides. Under the act creating separate districts for the record of deeds and mortgages in Carroll county, (Act March 12, 1883,) the two districts stand in that respect as separate counties. Delivery of a deed in one district to the clerk or his deputy, without instructions, is *prima facie* delivery, to be filed in the district where delivered. Reverse and remand.

PRIDE v. STATE.

(Supreme Court of Arkansas. Feb. 15, 1890.)

SHERIFFS—ACTION FOR TAXES COLLECTED—LIMITATION.

1. Mansf. Dig. Ark. §§ 5882-5844, makes it the duty of the sheriff to settle for the taxes collected by him at each regular term of the county court, and to render his account for the same. On failure to account and settle, the county court is empowered to adjust the account according to the best information obtainable, and ascertain the balance due the county. Defendant, as sheriff, in 1864 collected the taxes of the county, but failed and neglected to render an account of them, or make any settlement. In 1887 the county court adjusted the account, and ascertained the balance due the county. *Held*, that the cause of action against the sheriff for taxes collected did not accrue until the adjusting of the account by the county court, within the meaning of Mansf. Dig. Ark. § 4481, requiring actions against sheriffs upon any liability incurred by them in the discharge of an official duty, or the omission of such duty, to be brought within two years after the cause of action accrued.

2. Defendant presented to the county court, for examination, county warrants to the amount of \$65,000; and, the court having ordered the cancellation of certain of the warrants, defendant appealed to the circuit court from the order. It appeared that these warrants had come into defendant's hands in payment of taxes collected by him while sheriff of the county. He had never rendered any account of the taxes collected by him, or made any settlement with the county court. The court thereupon adjusted the account, and found a balance due the county of \$118,000. From this judgment defendant also appealed. It appeared that defendant was insolvent, and that his official bond had been lost. *Held*, that an action in equity would lie to restrain the collection and reissue of a warrant, and to declare such warrants as were valid a set-off against the balance found to be due the county for taxes collected by the defendant.

Appeal from circuit court, Sevier county;
R. D. HEARN, Judge.

This was an action in equity brought by the state, for the use of Sevier county, against Henry C. Pride. It appears from the allegations of the bill that Pride was the collector of revenue for Sevier county in 1864; that he collected the revenue of that year, and failed to pay over to the treasurer, or to make any settlement with the county court, but fraudulently converted the same to his own use; that the county court, at July term, 1861, made an order appointing commissioners in each township to relieve the families of volunteers in the Confederate

and state armies, and that taxes were assessed and collected for that purpose; that in October, 1861, an order was made that all allowances made for the relief of such families should be drawn by the clerk of the court on the treasurer; that at the same term of the court, on November 1, 1861, it was ordered that all appropriations before that time made, and for which taxes had been assessed, including allowances for the support of the families of volunteers in the army, be collected and paid into the county treasury as ordinary county revenue, and that the several appropriations and allowances should be consolidated; that it was further ordered that all orders made at that term of the court directing the clerk to draw his warrants on the treasurer out of any particular fund be set aside, and that he draw all his warrants on the treasurer for all allowances made by the court, in the ordinary manner of drawing county warrants; that these orders were in full force in 1864 and 1865, including the assessment and collection of taxes to pay the orders of the court, in allowing claims against the county; that at the April term, 1864, of the court, it was ascertained that to pay the current expenses of the county for that year a tax of \$8,000 should be levied, to pay for the support and relief of the families of soldiers in the army a tax of \$82,000 should also be levied, and for these purposes 3 per cent. on all the taxable property in the county was assessed, extended upon the tax-book, and collected as a whole,—that is to say, that the taxes for both purposes were consolidated and made one, all allowances for the relief of the families of soldiers in the army, and all allowances for ordinary expenses, being made and entered of record on the same day, and frequently in the same order; that the clerk drew all warrants for the payment of such allowances on the treasurer, to be paid out of the taxes consolidated and collected as stated, and that all the orders of the court allowing claims against the county for the ordinary expenses were so mixed with the allowances made for and in aid of the war, and the warrants were so drawn, that they were all alike illegal and void, though the warrants have on their face a money value; that in the latter part of 1863, and all of 1864, all the able-bodied men of Sevier county, between 18 and 50 years of age, were in the regular service in the army, and their families were almost wholly dependent upon the relief given them under the orders of the county court; that large amounts of county warrants were issued, at every term of the court during the period of the war, for such purpose, by means of which large amounts of warrants were in the hands of the tax-payers of the county at the time of the collection of the taxes of 1864, and were collected and received by the collector of the county, and by him retained and converted to his own use, and who is now attempting to collect the face value of such warrants from the county as the *bona fide* owner thereof; that the bond of Pride as collector is

lost, and that he is wholly insolvent; that on April 6, 1887, the county court of Sevier county made an order calling in her outstanding warrants for examination, cancellation, and reissuance, and that, in obedience to this order, Pride, on July 25, 1887, appeared in court, and presented for examination and reissuance 501 warrants, amounting in the aggregate to \$65,071.33, which on examination were rejected, and Pride appealed to the circuit court, where the matter is now pending and undetermined; that in April, 1887, the county court made an order reciting that Pride had collected the taxes of the county for the year 1864, and requiring him to make a settlement thereof; that Pride appeared at the January term next following, and filed an answer, to which a demurrer was sustained, and, refusing to plead further, judgment was rendered against him for \$118,237.39 county taxes, and \$450 ferry license, from which he appealed to the circuit court, where the appeal is now pending and undetermined; that the warrants presented by Pride for examination and reissuance are regular on their face, and can only be defeated by intrinsic evidence that the county is not legally bound to pay them. The prayer of the bill is for general and special relief, and is substantially as follows: The plaintiff asks the court, by proper orders, judgments, and decrees, to grant to her such relief in the premises as to equity and good conscience may pertain, and that she may have all the benefit and advantage of all equitable set-off and limitation on the hearing of the cause; that the defendant, on the final hearing, be perpetually restrained from the collection of the warrants presented by him for reissuance; that, in the event such warrants should be found to be a part of the revenues collected by the defendant in 1864, that they be canceled; and that, if the defendant shall recover any part of the warrants, the plaintiff have her equitable set-off as may be proven; and that if, upon the hearing, it should appear that, by the orders of the county court mixing and collecting the revenues in aid of the war with other revenues, the whole system of revenue during the war was void, that the plaintiff may recover all her costs, and such other relief as to equity may pertain; the plaintiff in no case asking to recover of the defendant the revenues of the year 1864, more than a sufficient amount to set off and defeat the claim of defendant. On the overruling of the demurrer, and the refusal of the defendant to plead further, the court rendered a final decree on the merits, finding that the defendant had collected warrants of the county, in payment of the taxes of 1864, amounting in the aggregate to \$118,237.39, which he never accounted for to the county, but converted to his own use; that the 501 warrants presented by the defendant to be reissued, aggregating the sum of \$65,173.33, were each and all of them part and parcel of the warrants collected by him, and converted as aforesaid, and decreed their cancellation, and enjoined him from

ever prosecuting any action thereon. From this decree the defendant appealed.

G. W. Williams, for appellant. *Compton & Compton*, for appellee.

HEMINGWAY, J. Upon appeal from the county court, the circuit court acquires only such jurisdiction as the county court had, and may render such judgment only as the county court should have rendered. In the matter of the presentment of county warrants by the appellant for reissuance, it was authorized to examine them, and to reject such as, in its judgment, the county was not justly and legally bound to pay, and reissue those not rejected. *Mansf. Dig. § 1152*. In ascertaining what warrants the county was justly and legally bound to pay, it might summon and examine witnesses; but it had no equity powers, and could not direct any reference to a master to take proof, examine records and documents, and state an account. If, upon its examination, it found the warrants, or any of them, just and legal demands, it could only reissue them; and it could not decline to do so although it might believe that, upon the determination of a claim by the county against the person presenting them, he would be found indebted to it in a large sum. In this case, although the claim of the county had been established, and the amount due it ascertained, it is doubtful if the court would be authorized to cancel the warrants legally due, and refuse to reissue them. An appeal had been taken from the judgment fixing the appellant's liability, and it was entirely possible that it would not be determined until after the other cause. In which event, if the court found that any of the warrants were just and legal debts, they might be reissued and disposed of before his liability was fixed. In the proceedings of the county court to procure a settlement of the appellant's account, the court was authorized duly to adjust his account, ascertain the amount due by him, and to render a judgment against him in case he failed, at the next term of the court, to show cause to set aside the settlement. *Mansf. Dig. §§ 5844-5847*.

By the settlement appealed from, he was found to be indebted to the county in the sum of \$118,000. But he was insolvent, and his bond lost. If any warrants should be delivered to him, they could be easily placed beyond the reach of legal process. Equity is invoked to prevent this. But it is alleged, and the demurrer admits, that the warrants were received by appellant as a part of the revenue of the county, and by him retained and converted. If so, he held them for the county. He was a naked trustee, and the county the real owner. A court of equity only has the power to declare the trust, and compel the delivery of the trust property to the real owner. Even if a court of law could determine all the rights of the parties, its process could not enforce them. But a court of equity, in one cause, could ad-

Judge the rights of the parties as to all the matters involved in the pending controversies, as well as to those not involved in either of them, so as to do full and complete justice between them. In either case, whether the warrants were a part of the revenue converted by the appellant, or he was found indebted to the county upon a settlement of his account, and the warrants legally belonged to him, a court of equity could, but the county court could not, afford the proper relief. The causes pending were about the same matter set out in the complaint in this cause, but they did not seek the same object. This case, therefore, comes within the rule announced by this court in the case of *Garibaldi v. Wright*, 12 S. W. Rep. 875, (decided during the present term.) The courts do not favor a multiplicity of suits between the same parties, about the same matter, seeking the same object; and, when one is pending in a court of competent jurisdiction, they have declined to entertain another such, because it would be unreasonable and unnecessary, and therefore vexatious and oppressive. We do not so regard this suit; but it seems to us reasonable and necessary, and we think the complaint discloses a proper case for equitable cognizance. *Hatch v. Spofford*, 22 Conn. 485. The case of *Grand Chute v. Winegar*, 15 Wall. 373, relied upon by counsel for appellant to sustain the contrary, was not like this. There an action had been brought on certain claims which the defendant alleged were invalid. Their validity was the only matter in controversy between the parties, and the court held that, as this could be determined in the action at law, equity should not interfere.

Admitting the allegations of the bill, the defendant could not claim the benefit of the equitable principle which protects a party against stale demands. It is not a shield for fraud or concealment. The facts fail to disclose a bar by limitation, as no suit could have been brought against appellant until his account was settled, and a balance found due by him. *Davis v. Tarwater*, 15 Ark. 296; *Pom. Eq. Jur.* §§ 418, 419, 1080. We think the judgment was right, and it is affirmed.

CITY OF SILOAM SPRINGS v. McPHITRIDGE.
(*Supreme Court of Arkansas.* March 8, 1890.)

ARREST OF JUDGMENT.

Since a judgment becomes final at the end of the term at which it is rendered, the court cannot set it aside at a subsequent term, notwithstanding it has taken under advisement a motion for a new trial and in arrest of judgment, and has entered an order suspending execution until his decision is rendered.

Appeal from circuit court, Benton county; J. M. PITTMAN, Judge.

E. S. McDaniel, for appellant.

PER CURIAM. On August 17, 1887, the defendant, William G. McPhitridge, was tried before the mayor of the appellant for

violation of a city ordinance. He was convicted, fined, and appealed to the circuit court. On September 27, 1887, he was tried and convicted in the circuit court, and judgment rendered against him for the fine and costs. On October 17, 1887, at the same term of the court, he filed his motion for new trial and in arrest of judgment, and the record says: "Which motion is by the court taken under advisement, and hearing of said motion is continued; and it is ordered by the court that the execution of the judgment rendered in this cause be suspended until decision by the court upon said motion." At the next term of the court, on April 20, 1888, the court sustained said motion in arrest of judgment, set aside the judgment entered at the preceding term, and gave judgment against appellant for the whole cost of the prosecution. This was beyond the power of the court. Its judgment upon the verdict convicting McPhitridge became final at the end of the fall term, and the pendency of the motion for new trial and in arrest, and the order suspending execution of the judgment, did not prevent this result. Had the court desired to reserve the matter of the motion for consideration, it should have set aside the judgment at the fall term. The judgment of September 27, 1887, is still in full force, and the order setting it aside is quashed as upon *certiorari*.

BLYTHE v. JETT, Sheriff.

(*Supreme Court of Arkansas.* Feb. 23, 1890.)

EXECUTION—EXEMPTIONS—BURDEN OF PROOF.

Under the provisions of *Mansf. Dig. Ark. § 3006*, requiring a debtor who claims property to be exempt from execution to schedule the same, and file the schedule with the officer levying the writ, the burden is upon such debtor, or one claiming under him, to show affirmatively that the property levied on is exempt.

Appeal from circuit court, Johnson county; GEORGE S. CUNNINGHAM, Judge.

This was an action of replevin, brought by L. R. Blythe against W. S. Jett, as sheriff. There was judgment for defendant, and plaintiff appealed.

A. S. McKinnon, for appellant. W. S. Jett, pro ss.

HUGHES, J. Appellant purchased of Mrs. O. J. Harris, a married woman, doing business as a merchant in Clarksville, Johnson county, Ark., the property in controversy in the suit. Mrs. Harris being indebted and insolvent at the date of the sale, an execution was levied by the appellee, as sheriff of Johnson county, upon the property, to recover which, Mrs. Blythe, the appellant, brought an action of replevin before a justice of the peace, and recovered judgment, from which appellee appealed to the circuit court, where judgment was rendered in his favor, from which appellant appealed to this court. No instructions appear in the record. Appellant's motion for a new trial in the circuit court was upon the grounds that the verdict

was contrary to the law; that the verdict was contrary to the evidence. Appellee, in his answer to the complaint of appellant, states that the sale by Mrs. Harris to appellant was made for the purpose of hindering and delaying the creditors of the said Mrs. O. J. Harris. Appellant contends that the property was exempt from execution for Mrs. Harris' debts before the sale, and that, as the execution creditors could not have taken it while owned by her, it is exempt in the hands of her vendee; that the burden of proof was upon the execution creditors to show that the property was subject to execution before the sale. There was evidence tending to show that the property of Mrs. Harris, at the date of the sale, was near \$600 in value; and, upon the other side, the evidence tended to show that its value was less than \$500. It appeared that she owed \$221.66, and that she reserved from sale \$125 worth of her property; that the appellee purchased the property in controversy through J. N. Brown, acting under the employment and direction of her husband and general agent, E. D. W. Blythe, for \$273.66; that Brown, at the time of the purchase, knew of Mrs. Harris' embarrassed financial condition, and that E. D. W. Blythe knew that R. C. Redding had been employed to recover the goods for Mrs. Harris' creditors, from E. D. W. Blythe, who had levied an execution upon them. There was testimony upon which the jury might have found the sale by Mrs. Harris to be fraudulent. Notice to appellant's agent was notice to her. There was no evidence that Mrs. Harris was a resident of the state at the date of the sale. Therefore, under the proof in the case, had she not sold the property, the claim that it was exempt from execution could not have been maintained by Mrs. Harris herself, as only a resident of the state can claim the exemption. *Guise v. State*, 41 Ark. 249.

It is settled in the decisions of this court that, as to property exempt from execution, there are no creditors; that, as they cannot sell it under execution, they are not injured by a sale of it by the owner, and are not concerned with the motives which may prompt the sale. *Clark v. Anthony*, 31 Ark. 546; *Erb v. Cole*, Id. 557; *Stanley v. Snyder*, 48 Ark. 434; *Bogan v. Cleveland*, 12 S. W. Rep. 159, (Oct. 12, 1889.) When property seized under an execution is claimed as exempt, upon whom does the burden of proof rest? In *Erb v. Cole*, 31 Ark. 554, this court decided that it is incumbent on a party who attacks a sale on the ground that it was made to hinder, delay, or defraud creditors, "to show that if it had not been made the goods would have been subject to seizure and sale upon execution." But, after careful examination and consideration, we cannot approve this decision, and are constrained to overrule the same, as to the principle announced in the quotation made above. Under our statute, a debtor claiming property to be exempt from execution is required to make a schedule of all his or her property, including moneys, rights, credits, and choses

in action, specifying the particular property claimed as exempt under article 9 of the constitution of 1874, and file the same with the officer issuing the execution, after having given five days' notice, in writing, to the opposite party. *Mansf. Dig. § 8006*. "*Prima facie*, all the personal property of a judgment debtor is liable to levy and sale upon execution. If he would claim exemption for any of such property, he must bring himself and his property within the exceptions of some statute, by proper proof." *Dains v. Prosser*, 32 Barb. 290; *Van Sickler v. Jacobs*, 14 Johns. 434; *Bourne v. Merritt*, 22 Vt. 431; *Tuttle v. Buck*, 41 Barb. 417; *Perkins v. Wisner*, 9 Iowa, 320; *Briggs v. McCullough*, 36 Cal. 542; *Smyth, Homest. & Ex. § 585*; *Thomp. Homest. & Ex. § 879*; *Calhoun v. Knight*, 10 Cal. 394; *Twinam v. Swart*, 4 Ians. 264; *Smith v. Slade*, 57 Barb. 640; *Wolfenbarger v. Standifer*, 3 Sneed, 659; *Pollard v. Thomason*, 5 Humph. 56; *Prewitt v. Walker*, 7 J. J. Marsh. 332; *Brown v. Davis*, 9 Hun. 43.

It devolved upon the appellant, claiming that the property which she bought of Mrs. Harris was exempt from execution for Mrs. Harris' debts, before the sale, to affirmatively show this fact. To have shown this, it would have been necessary to prove, in addition to other matters, that Mrs. Harris, at the date of the sale, was a resident of the state, and this was not done. Article 9, § 1, Const. 1874; *Mansf. Dig. § 8006*; *Guise v. State*, 41 Ark. 249. The judgment of the Johnson circuit court is affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. HALL.

(*Supreme Court of Arkansas*, March 1, 1890.)
RAILROAD COMPANIES—EXEMPLARY DAMAGES—REMITTITUR OF DAMAGES.

1. In an action against a railroad company for personal injuries sustained while attempting to drive over a crossing, plaintiff's evidence showed that defendant's engine was standing on the crossing, partially obstructing it, and that, when plaintiff's team was just in front of the engine, steam spurted out under his mules, causing them to run away, and throwing him out of the wagon. Defendant's engineer testified that he noticed the approach of the team, but paid no particular attention to it; that, on receiving a signal from a brakeman to move the engine back a little, he did so, not to exceed a foot; and that he thought plaintiff's team had crossed. *Held* that, as there was no evidence to show that defendant's engineer was guilty of willful or conscious indifference of consequences, it was error to permit the jury to take into consideration the element of exemplary damages.

2. Where the jury, in addition to compensatory damages for plaintiff's expenses, suffering, etc., has been erroneously allowed to consider the element of exemplary damages, the supreme court has no right to permit a remittitur from a verdict in plaintiff's favor as a consideration for the affirmation of the judgment below, but will remand the case for a new trial.

BATTLE and HEMINGWAY, JJ., dissent.

Appeal from circuit court, Garland county; J. B. Wood, Judge.

Action by N. H. Hall against the St. Louis, Iron Mountain & Southern Railway Company for personal injuries while attempting to drive over a crossing on defendant's road.

J. L. Rouse, one of plaintiff's witnesses,

testified that plaintiff was working for him; and, on October 14, 1888, when plaintiff was hurt, he was driving a team for witness. Drove up just behind Frank Smith's wagon at the railroad crossing, one mile south of Benton. Defendant's engine and train were standing on side track south of crossing, and, though clear of crossing, the pilot was but a few feet from the planks forming the crossing. Witness understood Smith to ask the engineer "whether we could cross, and understood engineer to say we could. Smith drove forward, and we followed." The team plaintiff was driving belonged to witness. The mules were gentle, and could be driven right up to a train of cars without being frightened. They were four years old, and had been worked two years. The children of witness had worked them. "After Smith's wagon had crossed, and as our team was in front of the engine, saw steam spurt out of lower part of engine. This caused mules to become frightened, and they ran about twenty yards, dashing into a tree, and breaking loose from wagon." The shock threw witness and plaintiff out, and the latter was knocked insensible. He remained in this condition until after witness had gone to Benton, and returned with a conveyance, and carried him there, and helped put him to bed. Plaintiff was confined to his home, witness thinks, about three months. Plaintiff and another witness testified substantially to the same effect. As to the injuries he had sustained, plaintiff testified as follows: "When I came to my senses, I found that my right thigh-bone was broken near the head. While my right leg, before the accident, was one inch longer than the left, owing to inflammatory rheumatism I had when a child, it is now three inches shorter, owing to this accident. My hip is disfigured, as you see, and I can feel the head of the bone projecting upwards. I have no joint that I can use my hip on that side. I can use the leg a very little, but not without crutches, which I have to use all the time. I suffered intense pain for some time, and am not now entirely free from it. I was not allowed, at first, to turn over, but had to lie in one position. I laid on my back four weeks. It was six weeks before I got out of bed, and three months before I could get out doors, and go down town." Witness further stated that he learned and followed the saddling trade when a young man. Is 62 years old. For 25 or 30 years prior to accident, had not lost a day on account of sickness. Had always been a stout man. Besides his trade, had followed merchandising. Had also farmed, driven a wagon, cut wood, and did a little of everything of that kind. Came to Arkansas from Iowa about a year ago. "At my trade, a man could make from \$1.50 to \$2 per day." Cannot now follow that trade, because cannot cut out and do the rough work. Can sew the leather, but cannot sit a long time without pain. Reduced in flesh, and only weighs 140, as against 180 before accident. Suffered all the time, for six weeks,

as much as a man could suffer. After that the pain was greater at times than at others. On cross-examination he testified: "I do not know whether my hip was dislocated or not. Did not hear the doctor say anything about it being dislocated. At the time of the accident, I was working for Mr. Rouse at \$1 a day. Prior to that I had cut wood at 75c. a day, and before that had worked at about a dollar a day. Since the accident I have been employed by a saddler to do sewing, and get a dollar a day. I did not pay anything for being nursed. Don't know what my drug bill is. The doctors have never told me what their charge would be. At the time I started the team across, following Smith's team, I thought it was prudent and safe to do so. I got a bruise on the back of my head, just at the base of the skull, and my spine was sore and blue for some time after I was hurt. After I got up, and tried to walk on my crutches, I felt like I would pitch forward on my head. My hearing has been injured by the accident. I can hear a person speak in an ordinary tone, provided they will speak slowly, and articulate their words plainly. I am a man of family, having a wife and five children."

Dr. Harvey testified that he was sent for to attend to plaintiff, and found him in a very critical condition. Did not expect him to live until morning, and sent for another doctor. Found contusions on back of head from a severe blow, which had produced unconsciousness. There was a fracture of the upper portion of the thigh-bone of right leg. Spinal column did not appear to have been injured. "We did not pay so much attention to getting his leg back, so as to make a good appearance, as to save his life. We set the leg, and I think the bone knit together properly." Witness had first called in Dr. Hall, and afterwards Dr. Fisher. "We attended him regularly for about five weeks, during which time he was confined to his bed. He was confined to his house much longer. Have not examined him since five weeks after the accident. Then I thought the bone had properly knit, but the right leg was shorter than the left." The *femur* was curved in a manner witness says he could not account for, but says it was not the result of the accident, but seemed to be of long standing. The wounds and injuries were necessarily very painful, and plaintiff will be a cripple the rest of his life. Dr. Fisher and witness have made their joint bill \$100. Witness detected no signs of dislocation of the thigh, and does not think it was dislocated. Cannot account for the thigh-bone projecting upwards. Sometimes, in severe injuries like this, a fibrous formation grows in the socket, which may increase until it produces a dislocation, but cannot say that this is so in plaintiff's case.

For defendant E. E. Bell testified that he was the fireman in charge of the engine in question. When the train was stopped on side track, the nose of the cow-catcher was

four or five feet from the crossing. Saw the two teams approaching the crossing. The second was some distance behind the first. Does not remember what conversation occurred between any of the occupants of the wagons and himself. As the crossing was clear, witness paid no further attention to the teams, except that he noticed that one had already crossed before he moved the engine. The cause of his moving the engine was a signal to slack back a little. The engine was already on reverse motion. Only moved the engine a few inches, not exceeding a foot. The driving wheels did not move a whole revolution. Supposed both teams had crossed. Did not know that the team had run away until after the accident had occurred, when the engineer came to the engine, and reproved witness for moving the engine. Witness is 24 years old, and has been working on railroads several years.

The third instruction requested by plaintiff, and given by the court, over defendant's objection, was as follows: "If the jury find for the plaintiff, the court gives you the following instructions in regard to exemplary damages: A corporation may be subjected to exemplary or punitive damages for tortious acts of its agents, servants, or employees, done within the scope of their employment, in all cases where natural persons, acting for themselves, if guilty of like tortious acts, would be liable to such damages. And if the jury believe from the evidence that the agents, servants, or employees of defendant were guilty of gross, wanton, and willful negligence in opening the steam-valves or cylinder cocks of the said machinery, at the time and under the circumstances when the same was done, (if you find that it was done unnecessarily and negligently, as you have been instructed before,) then, in addition to the damages which will compensate the plaintiff for his injuries, you may find such additional sum as in your judgment should be imposed upon said defendant as a punishment for such gross, wanton, and willful negligence."

The jury returned a verdict of \$18,500 for plaintiff, and defendant appeals.

Dodge & Johnson, for appellant. *Sanders & Watkins*, for appellee.

SANDELS, J. Such absence of care by appellant's servants as was inferable from the proof well warranted a recovery by plaintiff. The cause appears to have been fairly tried upon instructions, so far as determining the fact of defendant's liability, and ascertaining plaintiff's compensation, were concerned; but we are of opinion that the court erred in giving the third prayer of plaintiff, respecting exemplary damages. The testimony does not present a case which demands more of the defendant than compensation. The element of willfulness or conscious indifference to consequences, from

which malice may be inferred, is lacking. The engineer of defendant appears to have occasioned the injury while in the performance of his duty. He is not shown to have acted otherwise than with a careless unconsciousness of plaintiff's possible danger. *Kelly v. McDonald*, 39 Ark. 387; *Railway v. Arms*, 91 U. S. 489; *Railway v. Quigley*, 21 How. 202; *Field, Dam.* § 34; 1 *Suth. Dam.* 724.

Having reached the foregoing conclusion, it was referred to counsel for argument whether the court had the right to permit a *remittitur*, in case the appellee saw fit to so proceed as a consideration to an affirmance. We have given the subject the consideration which its importance demands. The history of the practice seems to be the same in the various states. It was originally held that a *remittitur* could be entered only in actions *ex contractu*, or in cases of damage to property, where the value of the property furnished an exact measure of damages properly recoverable; and, further, that it was permissible only where the *remittitur* could cure the only error complained of. Such were the decisions in this state, and such the rule of this court. *Fowler v. Johnson*, 11 Ark. 280; *Hirsch v. Patterson*, 23 Ark. 112; *Ex parte Hardy's Ex'rs*, 26 Ark. 94; *Hamlett v. Tallman*, 30 Ark. 505; *Dodds v. Roane*, 36 Ark. 511; *Ferguson v. Fargason*, 38 Ark. 238. *Railway Co. v. Barker*, 39 Ark. 491, was the first departure from the previous limits, and established in this state the practice prevalent in most others, of allowing a *remittitur* in all cases where excessive damages were the only elements of error. In *Blunt v. Little*, 3 *Mason*, 102, Judge *STORY* says that a verdict for damages should not lightly be disturbed on the ground of excessiveness, and that in permitting a *remittitur*, where such excessiveness was the only error, he went to the limit of the law. And so we think. The case of *Railway Co. v. Barker*, is certainly "the limit of the law." In this cause the jury had properly before them the plaintiff's expenses, his loss of time, his diminished capacity for labor, and his pain, anguish, and suffering. The difficulties which would beset a court in determining the justness or excessiveness of a verdict based upon these premises alone would not be inconsiderable. But superadd the element of punitive damages, erroneously allowed, and the process by which the court is to dissect the verdict, eliminate the error, eliminate the excess of compensation, and settle upon the exact sum which plaintiff's case entitles him to have, "passeth all understanding." To attempt it, we think, would be a violation of the spirit of the constitution, which intends that every litigant shall have a trial of his cause before an impartial jury, upon proper declarations of the law. Reversed and remanded.

BATTLE and HEMINGWAY, JJ., dissent.

In re CAMPBELL.

(Court of Appeals of Texas. Feb. 19, 1890.)

HABEAS CORPUS—BAIL—EVIDENCE.

Under Code Crim. Proc. Tex. arts. 171, 174, 296, the court is required, in *habeas corpus* proceedings for admission to bail, to hear evidence of the nature of the offense, and the circumstances under which it was committed.

Habeas corpus on appeal from an order in chambers, issued by A. W. MOARSUND, judge of the thirty-third judicial district.

Finlay & Finlay and *Triplett & Lewis*, for relator. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. Appellant, being charged by indictment with murder, applied to and obtained from the district judge of the district in which the indictment is pending a writ of *habeas corpus*. Upon the hearing of the writ, the state admitted that applicant was entitled to bail. Applicant thereupon offered evidence to show the nature of the offense, and the circumstances under which it was committed. The judge refused to hear such evidence, and applicant excepted, reserving his bill of exception. After hearing evidence as to the pecuniary circumstances of applicant, the judge fixed the amount of bail at \$7,500, and applicant has appealed to this court, claiming that the judge erred in refusing to hear evidence as to the nature and circumstances of the homicide, and that the amount of bail required is excessive. We think the judge erred in refusing to hear the evidence offered by applicant. It was only after hearing such evidence, and evidence as to the pecuniary circumstances of applicant, that the proper amount of bail to require could be determined. It is a requirement of the law in such cases that such evidence should be heard. Code Crim. Proc. arts. 171, 174, 296. In the absence of such evidence on appeal, it cannot be determined by this court whether or not the bail required is excessive. The judgment requiring bail in the sum of \$7,500 is reversed, and the cause is remanded, with instructions that the judge hear evidence as to the nature and circumstances of the offense of which applicant stands charged, and fix the amount of bail in accordance with such evidence, considering the pecuniary circumstances of the applicant. Ordered accordingly.

MURPHY v. STATE.

(Court of Appeals of Texas. Feb. 1, 1890.)

HOMICIDE—MURDER—EVIDENCE.

On the trial of defendant for murdering his wife, a witness testified that he was standing in the door of defendant's house when the latter returned from work, where he had been for several days; that he spoke to witness, and went into the house, and kissed deceased; that, after they had all taken a drink, defendant asked deceased why she had not come out to where he was working, as she had promised, and, upon her making excuses, said, "You did not want to come;" that, after talking a while, deceased stooped to pick up a smoothing iron to give to a woman who at that

moment came for it; that witness, having turned his back, heard a blow, and looking around saw that defendant had cut deceased in the back; that defendant then threw her down, knelt on her breast, and raised the knife again, but was stopped by the witness; that he then dragged her out of doors, and cut her in the arms, neck, leg, and stomach, though the witness did not see the blows struck; and that she died the same day. The woman who had come after the iron corroborated the witness as to the cutting. *Held*, that defendant was guilty of murder in the first degree.

Appeal from district court, Burleson county; C. C. GARRETT, Judge.

The death penalty was assessed against the appellant upon his conviction in the first degree for the murder of his wife, Fannie Murphy. Cy. Johnson testified for the state, in substance, that he was present and witnessed the cutting of Fannie Murphy by the defendant, her husband. It occurred a few minutes after defendant's return from the Tew bottom, where he had been several days at work. Witness was standing at the door of the defendant's house when he arrived. His wife was in the house sewing. Defendant said "Howdy" to the witness as he passed into the room. He then stooped over his wife's chair, and kissed her. He then produced a bottle of whisky, took a drink, and gave a drink to witness and his wife. He then proceeded to tell about the work he had done since he left home, and finally asked his wife why she did not go to the Tew bottom to see him, as she promised to do. She replied that she had nothing to ride, and did not know the way. He remarked, "You did not want to come." Defendant then seized a smoothing iron, and proceeded to knock out both ends of a barrel that was standing by the door. Deceased said something to witness about the iron belonging to Sarah Montgomery, who arrived about that time, and asked for the iron. Deceased stooped to pick up the iron from the floor where defendant had thrown it. Witness then turned around for some purpose, and, while his back was to the parties, he heard a blow, and deceased exclaimed: "Oh, Mr. Johnson! help me!" Witness turned, and saw that defendant had cut his wife in the back. Defendant then threw deceased down, placed his knee on her breast, and raised his knife to strike again. Witness caught his hand, when he ordered witness to release him, threatening witness if he did not. Witness, being a cripple, obeyed. He then dragged his wife out of doors, and cut her in the arm, leg, and neck, and in the stomach, but witness did not see him strike either blow. Mrs. Murphy was placed on the bed, and died during the day. Sarah Montgomery testified for the state that she witnessed the cutting. She went to defendant's house, and asked deceased for her smoothing iron. Fannie stooped to pick it up from the floor, when defendant cut her in the back. Fannie started to run, but struck her foot against a table leg and fell. Defendant thereupon pulled up her clothes, and cut her across the stomach. Witness ran off, but soon afterwards returned, and

found that Fannie had been cut on both arms, legs, neck, and in the back, and across the stomach. She died during the day. Witness heard no quarreling.

Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. In September, 1889, in Burleson county, the defendant killed his wife, Fannie, by stabbing her several times with a knife, for which act he has been convicted of murder in the first degree, and the death penalty assessed against him. He has appealed from said conviction to this court, but there has been no appearance in his behalf on his appeal. We have given the record a careful examination, and find no error in the conviction. In all respects he appears to have had a fair and impartial trial, in strict accordance with the law. There are but few facts in the case, but they are uncontradicted, and establish conclusively a most unprovoked, inhuman, and deliberate murder. The judgment is affirmed.

BENNETT v. STATE.

(Court of Appeals of Texas. Jan. 23, 1890.)

THEFT—INSTRUCTIONS—EVIDENCE.

1. Pen. Code Tex. art. 738, provides that if property, taken under such circumstances as to constitute theft, be voluntarily returned within a reasonable time, and before prosecution is commenced, the punishment shall be by fine not exceeding \$1,000. *Held* that, if the evidence shows such a return of the stolen property to the owner, the failure of the court to give the provisions of said article in charge to the jury is reversible error.

2. Where the evidence shows that defendant sold cattle of the same mark and brand as the cow which he was accused of stealing; that the cattle were gathered from the range by the purchaser; the cow was among those gathered; and that defendant, on hearing that the real owner claimed her, returned her to him,—a conviction for larceny should be reversed.

Appeal from district court, San Saba county; *A. W. MOARSUND*, Judge.

Albert Bennett appeals from a conviction for theft.

L. Burleson, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. "If property, taken under such circumstances as to constitute theft, be voluntarily returned within a reasonable time, and before any prosecution is commenced therefor, the punishment shall be by fine not exceeding one thousand dollars." Pen. Code, art. 738. It appeared from the evidence that a few days after the defendant discovered that the cow in question was claimed by Sanderson, the owner, and before any prosecution had been commenced for the theft of said cow, he returned said cow into said Sanderson's possession. This being the evidence, the above-quoted provision of the Code was a part of the law of the case, and it was the imperative duty of the judge to give it in charge to the jury, whether requested or not by the defendant. *Anderson v. State*, 25 Tex. App. 593, 9 S. W. Rep. 43; *Guest v. State*, 24 Tex. App. 530, 7 S. W. Rep. 242; *Willson, Crim. St.* § 1287.

Such charge was not given, and the failure to give it vitiates the conviction.

We will say further that we could not permit this conviction to stand had such charge been given, because, in our judgment, it was not warranted by the evidence. There was no actual taking of the cow by defendant. He sold cattle in the same mark and brand of said cow, which cattle were gathered from the range by the person to whom he sold; and among those so gathered was the cow in question. Defendant did not see the cow, or know that she had been taken, until he learned that Sanderson claimed her; and, when he learned that it was Sanderson's cow, he returned her to him. It is apparent to our minds, from the evidence before us, that the cow was taken through mistake, and that defendant did not fraudulently take her, nor fraudulently cause her to be taken. A new trial should have been granted the defendant because the verdict was not supported by, but was contrary to, the evidence. The judgment is reversed, and the cause remanded.

HANLEY et al. v. STATE.

(Court of Appeals of Texas. Feb. 15, 1890.)

THEFT—EVIDENCE—INSTRUCTIONS.

On trial for theft, where evidence that other property was stolen in the same manner, if not at the same time, as that charged, is admitted, the jury should be instructed as to the only purposes for which such evidence can be considered, which are either (1) to establish identity in developing the *res gestæ*, (2) to prove defendant's guilt by circumstances, or (3) to show his intent with respect to the property for the theft of which he is accused.

Appeal from district court, Victoria county; *H. C. PLEASANTS*, Judge.

Hugh Hanley and *Pleas Chance* appeal from a conviction of theft.

A. B. Petticolas and *A. S. Thurmond*, for appellants. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. Appellants were tried and convicted for the theft of a cow, the property of Fagan. On the trial it was proved that eight other animals, belonging to other parties, were stolen in the same manner, if not at the same time. Defendant, by special instruction, asked the court to limit the purposes for which this evidence with regard to the theft of these other animals could and should only be considered by the jury, which instruction was refused, and the charge, as given, failed to apprise the jury of the only purposes of said proof. It was error to refuse the instruction. "In a trial for theft, it is not competent for the state to prove the theft of other property at the same time and place as the property in question, unless such proof conduces to establish identity in developing the *res gestæ*, or to prove the guilt of the accused by circumstances connected with the theft, or to show the intent with which the accused acted with respect to the property for the theft of which he is on trial; and

when such proof is admitted, for either of the legitimate purposes indicated, the charge of the court must apprise the jury of the purpose of the proof," (Kelley v. State, 18 Tex. App. 262;) and that they could not convict the defendant for the theft of any other property than that named in the indictment," (Carter's Case, 23 Tex. App. 508, 5 S. W. Rep. 128; Reno's Case, 25 Tex. App. 102, 7 S. W. Rep. 582; Gentry's Case, 25 Tex. App. 614, 8 S. W. Rep. 925; Willson, Crim. St. § 1906.) The judgment is reversed, and the cause remanded.

MIXON v. STATE.

(Court of Appeals of Texas. Feb. 1, 1890.)

THEFT—EVIDENCE—INSTRUCTIONS.

1. On indictment for theft of a cow, the evidence showed that the cow was killed by one R.; that defendant roped the cow at his request, and was present, as was also one P., when the cow was killed; that the brand had disappeared when the hide was found; that defendant stated that he cut the brand out to take it home, but threw it away, and also stated that the cow belonged to R., and asked why people did not come to himself and R. to inquire about it. Held, that evidence that a friend and two relatives of defendant, a week after the theft, defendant not being present, came to P., and asked him if he had been to town, and made complaint, and, receiving a reply that he had, remarked that there was then no use of "carrying him down yonder," was hearsay, and reversible error.

2. Where the first count of the indictment alleges ownership in P., and the second in some person unknown to the grand jury, to warrant conviction under the first count, the state must prove ownership in P., and, under the second count, that ownership was unknown to the grand jury, and that they used reasonable diligence to ascertain the fact of ownership; and a charge that the jury need not believe that the animal belonged to P., but must believe that the property was taken, as alleged, as the property of some person unknown to the grand jurors, is erroneous, as incorrect, and as failing to state separately the law as applicable to the two counts.

Appeal from district court, Burleson county; C. C. GARRETT, Judge.

Ben Mixon was convicted for the theft of a cow. State witnesses R. U. Jones and W. T. Newman testified, in substance, that on the morning of August 15, 1888, they found the freshly removed hide of a cow secreted in a thicket near the East Yegua, in the edge of Burleson county. It was the hide of a red cow, with white flanks. The ears had been cut off, and the brand cut out. They did not find the place where the cow had been killed. Jones further testified that a few days afterwards he saw a place in the edge of Lee county, about 300 yards distant from where he had seen the hide in Burleson county, where an animal of the cattle kind had been recently killed. The remains of a paunch were there. A few days afterwards he saw a cow's head at Malloy's. John Price testified, for the state, that he was present when the cow was killed, and helped butcher it. Defendant was present, and roped the cow at the request of W. E. Richardson, who killed the animal. That beef was delivered to Roe Malloy, a negro, who was to pay wit-

ness' mother some boards. Witness did not understand the nature of the transaction whereby Malloy was to get the beef, and his (witness') mother the boards. Richardson pointed out the cow, and defendant roped her at his request. Richardson then killed the animal with an axe, and Richardson, defendant, and witness skinned her. Witness then went and notified Malloy that the beef was ready for him. Malloy sent other negroes after the beef. They asked if they should take the hide. Richardson replied in the negative, and said that he was going to sell the hide for money to buy coffee. Richardson then took the hide on his horse, and he (witness) and defendant rode off. After crossing the Yegua, Richardson dropped behind, and when he next overtook witness and defendant he did not have the hide. The hide was not mutilated when witness last saw it. Witness knew that the brand on the animal killed was "M P." If there was a bar between the "M" and "P," making "M H P" connected, the witness did not observe it. Defendant and witness went with Richardson to kill the cow at Richardson's request. Defendant never claimed an interest in that cow, so far as the witness knew. Thomas Porter testified, for the state, that in 1887 he owned a red and white pied cow, branded "M H P," connected, that ranged near the Swope crossing of the Yegua, in Burleson and Lee counties. About September 13, 1888, James Moak bought the said cow from the witness. Prior to that time, witness had not consented for any person to take her. He had no cow branded "M P." Arch Skinner testified, for the state, that he saw the hide found in the thicket on the Yegua. The ears had been cut off, and the brand cut out. On the day after the hide was found, the defendant remarked to witness that the finding of the hide seemed to create something of a "stir," and asked: "Why don't the people come to me or Richardson about it?" He further said that it was Richardson's cow, and was branded "X D,"—Richardson's brand; that he and Richardson killed it; that he cut out the brand, intending to tack it up at home, but that, forgetting it, he left it in his saddle pockets until it got to stinking, when he threw it away. He advised witness to see Richardson about it. Witness did so, and Richardson said that the cow belonged to him. It was proved for the state that James Moak was a constant companion, and intimate friend, of defendant. The state closed. Mrs. Price testified, for the defense, that in August, 1888, Richardson owed her \$25. He told her that he would have Roe Malloy make and deliver to her some boards to go on the debt. If defendant had any interest in the boards, witness did not know it. Witness never got the boards. Richardson was witness' brother. She did not know his present whereabouts. L. R. Hilliard testified for the state, in rebuttal, that, about a week after the cow was killed, J. B. Moak, Ed. Ellis, the half-brother of defendant, and Claude

Shaffer, the husband of defendant's half-sister, passed the house of Clark Hilliard, where witness then was, on their way to John Price's house. Witness followed them to and into the house. After a time, Moak remarked: "Well, this is not business. Let's do what we came for. If we are going to talk to John Price, it is time we were at it." Price, Moak, Ellis, and Shaffer then went into the yard, where they talked for some time. Witness afterwards went into the yard, and heard Moak ask Price if he had been to town, and made complaint. Price replied that he had. Moak said to the parties with him: "If he has been to town, there is no use of our carrying him down yonder this morning." This is the evidence involved in the first ruling of this court.

W. K. Homan and E. G. Banks, for appellant. *W. L. Davidson*, Asst. Atty. Gen., for the State.

WILLSON, J. On the trial, over defendant's objections, the state was permitted to prove by the witness Hilliard a portion of a conversation between Price, Moak, Ellis, and Shaffer in relation to the theft of the animal involved in this case. Defendant was not present at said conversation, and the same occurred about one week after said theft. Exceptions to the admission of this testimony appear in the statement of facts, and are, we think, sufficiently full and specific to demand consideration. In our opinion, said testimony was inadmissible. It was hearsay; and while, considered by itself, it does not appear to be material, or in any manner prejudicial to the defendant, yet, when viewed with reference to the other evidence in the case, it seems to us to be material, and calculated to injuriously affect the rights of the defendant. We hold, therefore, that in the admission of said testimony material error was committed.

There are two counts in the indictment. The first charges that the animal stolen was the property of Thomas Porter, and the second that it was the property of a person to the grand jurors unknown. By the fourth paragraph of the charge, the jury are instructed as follows: "There are two counts in the indictment, in one of which it is alleged that the animal was the property of Thomas Porter, and in the other it is alleged to be the property of some person to the grand jurors unknown. You are charged that, if you should believe from the evidence that the animal was stolen, as charged, it will not be necessary for you to believe that the animal was the property of Thomas Porter, but you must believe that the animal was fraudulently taken, and taken in every other respect as alleged, as the property of some person unknown to the grand jurors, with the fraudulent intent on the part of the defendant to deprive the owner of the animal, and to appropriate it to the use and benefit of some other person than the owner." To warrant a conviction under the first count in the indictment, it was certainly necessary that the

evidence should prove beyond a reasonable doubt that the animal was the property of Thomas Porter, as alleged in said count. To warrant a conviction under the second count, it was essential that the state should prove that the ownership of the animal was unknown to the grand jury, and that they used reasonable diligence to ascertain the fact of ownership. Willson, Crim. St. § 1297. We think the paragraph of the charge above quoted is erroneous in that it does not state the law applicable to the two counts separately, and does not state the law correctly. No exceptions were reserved to the charge, nor was any error therein complained of in the motion for a new trial, and the error above noticed is for the first time presented on appeal. It is unnecessary that we should determine whether or not, under these circumstances, said error in the charge would of itself demand a reversal of the conviction. We have called attention to the error in view of another trial of the cause. Because of the error of admitting in evidence the testimony of the witness Hilliard, the judgment is reversed, and the cause is remanded.

WAMPLER v. STATE.

(Court of Appeals of Texas. Feb. 1, 1890.)

THEFT—INDICTMENT—DESCRIPTION OF PERSON—EVIDENCE—INSTRUCTIONS.

1. Where an indictment for theft alleges defendant's name correctly in the first instance, but, in charging the intent, incorrectly alleges either his Christian name or surname, the variance does not render the indictment invalid.

2. Where the record contains no bill of exception to the court's action in overruling an application for a continuance, the matter cannot be considered on appeal.

3. Where, on indictment for theft, a witness, though he be an accomplice, testifies directly that defendant confessed the theft to him, a charge on circumstantial evidence is not required.

4. Where it is proven that defendant stole the horse in question, and took it to the house of P., who borrowed it and rode into another county, defendant accompanying him, such act of P. is the act of defendant, whether the former knew the horse was stolen or not.

Appeal from district court, Erath county; *C. K. Bell*, Judge.

T. B. King and M. F. Martin, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. The charging part of the indictment is as follows: "That Charles Wampler and T. A. Parker, on the 15th day of August, in the year of our Lord one thousand eight hundred and eighty-nine, in the county of Erath, and state of Texas, then and there one certain horse, not their own, nor the property of either of them, but the same then and there being the corporeal, personal property of D. D. Anderson, from the possession of the said owner, without the consent of the said owner, with the intent to deprive the said owner of the value of the same, and with the intent to appropriate it to the use and benefit of them, the said Charles Wam-

plene and J. A. Parker, did then and there fraudulently take, steal, and carry away." A motion in arrest of judgment based upon the supposed insufficiency of the indictment was overruled. It will be observed that the names of the defendants, as first stated in the indictment, are differently stated in charging the intent; that is, as first stated, the Christian name of Parker is "T. A.," while in charging the intent it is alleged to be "J. A.," and the surname of Wampler is alleged to be "Wamplene." This variance in the names was made the specific ground of the motion in arrest of judgment, and is insisted upon by counsel for defendants as a fatal defect in the indictment.

While the indictment appears to have been carelessly and awkwardly drawn, still, we think, it must be held substantially sufficient. The defendants' names were alleged correctly in the first instance. In repeating them they are referred to as "them, the said J. A. Parker and Charles Wamplene." In *Musquez v. State*, 41 Tex. 226, it was held that where the name of a defendant had been first stated correctly, but afterwards stated incorrectly as to his Christian name, the incorrect statement of his Christian name might be rejected without affecting the indictment. And it has been held that the same rule applies to the surname of a defendant. *Cotton v. State*, 4 Tex. 260. In this indictment, therefore, under the authority of the cases above cited, the names of the defendants having been first correctly alleged, the incorrect statement of the Christian name of Parker, and of the surname of Wampler, may be rejected without affecting the validity of the indictment. See, also, 1 Bish. Crim. Proc. § 689a.

There being no bill of exception in the record to the action of the court overruling the defendant's application for a continuance, that matter cannot be considered. *Willson's Crim. St.* § 2187.

This is not a case which required a charge on circumstantial evidence. State's witness Parker testified directly that the defendant told him that he had stolen the horse in Palo Pinto county from D. D. Anderson, the owner. Although the witness Parker was an accomplice in the theft, this fact did not make the case one dependent wholly upon circumstantial evidence, so as to demand a charge upon that character of evidence. *Id.* § 2342.

We find no error in the charge of the court. It is proved by the testimony in the case that the defendant stole the horse in Palo Pinto county; that he took said horse to Parker's house in Parker county; that Parker there borrowed the horse of defendant to ride into Erath county, and defendant went with Parker into Erath county, Parker riding said horse. Upon this state of facts, we think the court charged the law fully, pertinently, and correctly, to the effect that the act of Parker in carrying the horse into Erath county was the act of the defendant Wampler; and whether or not at the time of such act

Parker knew that the horse had been stolen by defendant would not, in our opinion, affect the question of defendant's guilt. We are of opinion that there is no error in the conviction, and the judgment is affirmed.

In re HUNT.

(Court of Appeals of Texas. Feb. 1, 1890.)

CUMULATIVE SENTENCES — DISCHARGE — *EX POST FACTO* LAWS.

1. Under Code Crim. Proc. Tex. art. 800, providing for cumulative sentences, where there are two or more convictions of the same person at the same term, the judgment in the second or subsequent convictions must be so rendered as to provide that the punishment shall begin when the judgment and sentence in the preceding convictions shall have ceased to operate; otherwise the judgments as to the term of imprisonment will be concurrent, and will be treated as one judgment, and will cease to have any further effect when the first term of imprisonment has been served out.

2. Where a person has been sentenced to the county jail for 10 days, and to pay a fine and costs amounting to \$107.50, and after the expiration of the 10 days has made and filed in the county court affidavits of his inability to pay the fines and costs, and after that has served a term of 46 days, he has more than satisfied the judgment; Code Crim. Proc. Tex. art. 816, providing that in such case he may discharge the amount of his fine and costs, by rating his imprisonment at three dollars per day for each day he remains in jail.

3. Act Tex. March 7, 1890, amending Rev. St. Tex. art. 3597, and reducing from one dollar to fifty cents the rate per day allowed a county convict as credit on his fine and costs when working the same out by manual labor, does not apply to a judgment which was rendered, and in process of execution, prior to the passage of the act; since under Const. Tex. art. 1, § 16, every law which changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed, is *ex post facto*.

Appeal from Milam county court; E. Y. TERRAL, Judge.

E. L. Antony, for relator. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. On October 3, 1888, Hunt was convicted, under two prosecutions in the county court, for keeping and exhibiting a gaming bank; the judgment in each case being a pecuniary fine of \$10, and 10 days' imprisonment in the county jail as additional punishment. The fine and costs in the two cases aggregated \$107.50. In the judgment rendered in the second case there was no notice taken of the first or previous judgment, so as to make the punishment in the second cumulative after the expiration of the punishment assessed in the first, as is provided may be done by article 800, Code Crim. Proc., which prescribes that, where there are two or more convictions of the same defendant at the same term, "the judgment in the second and subsequent convictions shall be that the punishment shall begin when the judgment and sentence in the preceding convictions have ceased to operate." Unless the judgment in the second or subsequent conviction is so rendered, there can be no cumulation of the imprisonment part of the punishment assessed in the first judgment. In such event, the judgments as to the term

of imprisonment will be concurrent, and will be treated as but one judgment, and cease to have any further operative effect when the first term of imprisonment has been served out. *Prince v. State*, 44 Tex. App. 480; *Hannahan v. State*, 7 Tex. App. 664; *Baker v. State*, 11 Tex. App. 262. It is only by virtue of this statute, and compliance with its terms, that cumulative imprisonment can be assessed and enforced in our state under the decisions referred to.

This being the law applicable, the defendant, in the two cases of the judgments in the county court, could only legally be imprisoned or held under the imprisonment parts of the judgments for the 10 days specified in the first judgment. He was confined in jail on the 3d of October, and his imprisonment expired on the 14th October. From October 14th he could be confined further, until the two fines and costs assessed against him, aggregating \$107.50, as above stated, had also been paid off or discharged by subsequent manual labor or further imprisonment. The county authorities did not hire him out or put him to work, though it seems they had a farm upon which they worked their county convicts. On October 16th defendant made and filed in the county court affidavits of his inability to pay the fines and costs adjudged against him in the two cases. He remained in custody in the county jail until December 1st, which would be 46 days, counting from October 16th. Under the provisions of article 816 of the Code of Criminal Procedure, he could discharge the amount of his fine and costs, under the facts stated, by rating his imprisonment at three dollars per day for each day he remained in jail after making the affidavit of inability to pay. At this rate, he paid for the 46 days \$138, when he was only due and owing \$107.50. It is clear that the county court judgments had been fully paid off, discharged, and satisfied on December 1st.

But it appears that during this imprisonment the defendant was tried and convicted in the district court of aggravated assault on an indictment for assault with intent to murder, and his fine and costs in that case amounted to \$233.44. This conviction became final on December 1, 1888. On December 3d he was hired or put to labor by the county authorities on the county convict farm, and he remained continuously at work upon said farm from December 3, 1888, to August 9, 1889, eight months and six days,—say about 240 days,—when the county commissioners' court ordered his discharge, upon his agreement to pay them five dollars per month for the balance they claimed he was due and owing the county on the three judgments,—the two in the county court, and the one in the district court. As we have seen, he owed them nothing on the county court judgments. Did he owe any balance on the judgment of the district court? At the time he was hired out as a county convict he was entitled to receive a credit

against his fine and costs of one dollar per day for each day he labored. Rev. St. art. 3597; *Dampier's Case*, 24 Tex. App. 561, 7 S. W. Rep. 330. As stated above, the relator was kept and labored upon said farm about 240 days, which, at \$1 per day, would be \$240, as against \$233.44, the amount of his fine and costs. It is clear that, on this calculation, he had more than overpaid the district court judgment also. But by act approved March 7, 1889, and which took effect from and after its passage, article 3597 of the Revised Statutes was amended, and the rate allowed a county convict as credit upon his fine and costs, when working the same out by manual labor, was reduced from one dollar to fifty cents per day; and it was claimed by the county authorities that, from the passage and adoption of said amendment, a county convict was only entitled to a credit of fifty cents per day. Acts 21st Leg., Laws 1889, p. 14. If this position was correct, then the defendant, upon the calculation of 50 cents per day after the 7th day of March, would, on the 9th day of August, 1889, when he was discharged as aforesaid, have been indebted to the county somewhere in the neighborhood of \$60. But did or could the amendment of March 7, 1889, reducing the rate of the convict's credit for labor, operate and apply to a judgment rendered, and which was in process of execution, prior to the adoption of said act? We are of opinion that it could not. We think the law in force at the time the judgment was rendered was, in this particular case, the law which regulated the mode and manner of its satisfaction; and that the subsequent act did not affect it, and should not do so, especially in view of the fact that it is more onerous upon the defendant, by increasing the term or duration of his punishment. "Laws which change the punishment, and inflict a greater punishment than the law annexed to the crime when committed," are *ex post facto*, and within the inhibition of the constitution. Const. Tex. art. 1, § 16; *Murray v. State*, 1 Tex. App. 417; *Maul v. State*, 25 Tex. 166; 7 Amer. & Eng. Cyclop. Law, 527.

We are of opinion that under the law in force when the defendant was convicted, and under which he was hired out, he was entitled to a credit of one dollar per day for each day he labored as a convict, and that at such rate of credit he owed nothing on the district court judgment when he was, on the 9th of August, discharged by order of the commissioners' court, upon his agreement to pay five dollars per month on the balance they claimed was due the county. He failed and refused to pay said balance. A *capias pro fine* was sued out by the county authorities, under which he was arrested again, and placed in custody. He sued out this writ of *habeas corpus* before the county judge, who, upon the hearing thereof, refused to discharge, but remanded him to custody. From that judgment he has prosecuted this appeal. For the reasons discussed the

judgment is reversed, and appellant is fully discharged from custody, and from any further liability upon the judgments, or either of them, involved in this controversy. Ordered accordingly.

CARTER v. STATE.

(Court of Appeals of Texas. Feb. 1, 1890.)

ASSAULT WITH INTENT TO KILL.

1. On a trial for assault with intent to murder, where there is evidence from which the jury may infer that the assault was committed with intent to inflict great bodily injury, it is error to instruct that, to reduce the offense to aggravated assault, the evidence must fail to show, not only that defendant had a specific intent to kill, but also that the act would have been murder, had death resulted. One who commits an assault with intent to do great bodily injury is not guilty of an assault with intent to murder, since the specific intent to kill is the essential element of the offense; but death resulting from an assault with intent to inflict serious bodily injury may constitute murder.

2. Where defendant testifies that he called the prosecuting witness to account for improper language to his mother, and that the prosecuting witness shot at him before the assault was committed, it is error to instruct that, if defendant brought on the conflict, he cannot avail himself of the law of self-defense, though in the conflict his life or person was endangered. If defendant provoked the contest without any intention to kill or inflict serious bodily injury, he would still have an imperfect right of self-defense, which, though not sufficient to justify, might reduce the grade of, the offense.

Appeal from district court, Hamilton county; C. K. BELL, Judge.

Indictment of Dolly Carter for an assault with intent to murder John Mouchett. Defendant was found guilty, and sentenced to two years' imprisonment. He appeals. The prosecuting witness, John Mouchett, testified, in substance, that he was in the employ of H. J. Carter, the father of the defendant, at the time of the alleged assault. He and Northcutt, another hired hand, occupied a room in the old house in an orchard, which was separated from the new house by a partition fence. Mr. H. J. Carter and his family, consisting of his wife and his sons, the defendant, George and Bank Carter, and Nancy Connell, the sister-in-law of George Carter, occupied the new house. After supper on the night of May 6, 1889, the defendant came to the witness' room door, and, in a pleasant manner, told the witness to go with him to the barn, to help him catch chickens, and put them in a coop. Witness replied that he was suffering with a severe headache, and would like to be excused. Defendant left, and witness pulled off his shirt, and proceeded to apply an ointment to his person, to relieve the itch, with which he was afflicted. A few minutes later, while witness was engaged in anointing himself, the defendant returned, pushed open the witness' door, and, in a furiously angry voice, ordered witness to go with him to catch chickens. He said to witness: "Come on, God damn you! You have got to go, you God damned son of a bitch!" Witness replied that as soon

as he could get on his shirt he would go to defendant's father, and ask if he was expected to submit to such abuse from defendant. Defendant replied that he would go with witness, and stepped into the hall. The witness then closed the door, propped it with a wood-bottomed chair, and put on his shirt. Defendant meanwhile stood in the hall, cursing the witness. After getting his clothes on, the witness secured his pistol, and put it into the right-hand pocket of his pants. About that time, defendant pushed open the door, seized the chair, raised it above the witness' head in a striking attitude, and ordered witness to go on. Witness, followed by the defendant, with the chair in a striking attitude, went to the new house, and inquired for H. J. Carter, whom he was told was at the barn. The witness, still followed by defendant, started to the barn. *En route* they met H. J. Carter, and witness said to him: "Mr. Carter, please make Dolly let me alone." Defendant said something about the witness insulting his mother, whereupon H. J. Carter said to the defendant: "Go for him!" Accordingly the defendant "went" for the witness, striking him over the head continuously with the chair. Witness, with his right hand in his pocket on his pistol, and using his left arm in an effort to ward off the blows, retreated until he had gained and passed the corner of the new house, and crossed the path leading from the new to the old house, when, believing he saw death at the hands of defendant staring him in the face, he pulled his pistol, and fired in the direction of defendant, without, however, any intention of shooting defendant. With the chair, the defendant knocked the pistol out of the witness' hand. The scuffle for the pistol resulted in the defendant getting possession of it, and witness fled into the orchard, jumping the fence, and tearing off a paling, which he took with him. Defendant, with the pistol, old man Carter, and George Carter, who meanwhile had joined the party, pursued the witness, cursing him. When they had nearly overtaken witness, George Carter threw a stone, which struck witness on the jaw, and broke it in two places. Witness fled a few steps further, and then stopped, turned, and retraced his steps until he met defendant and George Carter, when he and they stopped. Witness told them that he could strike them with the paling, but that he would not do so if they let him alone. They made no further effort to strike witness, but old man Carter, who came up about that time, sprang on the witness, bore him to the ground, and with one hand choked him almost to suffocation. After a few minutes, witness was released, and taken back to the house. Later in the night he left the house, and went to the town of Hamilton.

The defendant testified, in his own behalf, in substance, that at the supper table, on the night preceding the alleged assault, Mouchett being present, H. J. Carter said that he wanted the boys (meaning witness, Mouchett,

and the others) to catch and coop chickens after supper, to keep them off the crops. All of the boys except Mouchett obeyed the direction. The same direction was given by H. J. Carter on the next night, Mouchett being present. Mouchett finished his supper, and went to his room. When witness got through with his supper, he went to Mouchett's room, and asked him to go to the barn, and help catch and coop chickens. Mouchett replied that he had a headache. Witness told him that the exercise would cure it, and left. About 20 minutes later, witness returned to the hall of the old house, which was used as the dining-room, for a drink of water. He found his mother and Nannie Connell washing the dishes. His mother then told him that after he and the others went to the barn she went to the door of Mouchett's room, and asked him why he did not go; that Mouchett replied, sullenly, that he was not asked to catch chickens; that she replied to him, "Yes, John, Mr. Carter asked you the same as he did the other boys;" that Mouchett replied, in an angry manner: "It is no such a thing. I was not asked." Witness asked his mother: "Did he talk to you like that?" She replied that he did. Witness at once stepped to Mouchett's door, and pushed it open. He was met by Mouchett, with a pistol presented in a shooting attitude. Witness said to him: "No gentleman will talk to a woman as you have done. You can sauce me, but you must not sauce my mother." Mouchett then put his pistol into the right-hand pocket of his pants, and said that he would go and see witness' father. Witness replied that he would go with him. They went to the new house, but failed to find old man Carter, and then started to the barn. When they reached the porch, Mouchett said that he would go no further, put his right hand into his pants pocket, and with his other pushed witness backwards. Witness seized a convenient, light, cane-bottomed chair, raised it up, and told him that he must go. They again started to the barn in quest of old man Carter. At the yard gate, they met George Carter, who passed into the yard. About that time, old man Carter came up, and asked what was the matter. Witness told him what Mouchett had said to his mother; and old man Carter asked him: "Why didn't you knock him down?" Witness and Mouchett then passed around the corner of the house to the path leading from the new to the old house, when the witness put the chair down. Mouchett grabbed at the chair, but witness secured it. Mouchett at once presented his pistol at witness' head, and fired; the ball passing within a few inches of witness' ear. Immediately the witness struck him on the head with the chair, and knocked him down. As he got up, George caught him from behind; and witness struck again, nearly knocking both George and Mouchett down. About that time, old man Carter came up, and asked who fired the shot. Mouchett re-

plied that he did not. Witness replied: "You know that you did." Mouchett then admitted that the shot was fired by him, but claimed that it was an accident. Old man Carter then said that he would allow no man to carry a pistol on his place, and that he would take Mouchett to Hamilton, and turn him over to the authorities for carrying the pistol. Mouchett then fled, jumped the fence into the orchard, tearing off a paling, which he kept in his hands. Old man Carter then told witness and George to pursue and capture Mouchett, as he intended to take him to Hamilton on the charge of carrying concealed weapons. When witness overtook Mouchett, he rushed upon witness to strike him with the paling; but the paling caught in a peach tree, when witness knocked him down with his fist. Mouchett got up, and attempted to strike with the paling, but was again knocked down by witness. He got up just as George arrived, and proposed to quit, if witness and George would. About that time, old man Carter arrived. He seized Mouchett, and ordered him to surrender the pistol. Mouchett replied that he had lost it. Mouchett was then taken back to his room, where his wounds were washed and dressed by Northcutt and George Carter. The pistol was found on the ground where witness struck Mouchett with the chair. Bank Carter afterwards came to the room, and asked for a private conversation with Mouchett. Everybody retired from the room except Bank and Mouchett, and witness did not see Mouchett again until he saw him in the town of Hamilton.

J. A. Edilson, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. Several objections are urged by counsel for defendant to the charge of the court, some of which, in our opinion, are well founded. In the main, however, the charge is an exhaustive and able presentation of the law of the case. The second and third errors assigned are as follows: "(2) The court erred in the following paragraph of its charge, to-wit: 'If you believe from the evidence that the defendant, in the county and state, and at or about the time alleged in the indictment, made an assault and battery upon John Mouchett, and that he was not justifiable in so doing under any of the instructions which will be hereinafter given you; and if the evidence fails to show that such assault was made with the specific intention on the part of the defendant of taking the life of the said John Mouchett thereby, and that, if the death of the said John Mouchett had resulted therefrom, the defendant would have been guilty of murder; and if you further believe from the evidence that by such assault and battery a serious bodily injury was inflicted upon the said John Mouchett,—you will find the defendant guilty of aggravated assault and battery, and assess his punishment as herein directed for that offense,'—because said paragraph requires

that the evidence fail to show both the specific intent to kill, and that, if death had ensued from such assault and battery, it would have been murder, before such offense would have been reduced to aggravated assault, whereas the failure to show either would have been sufficient. (3) The court erred in the following paragraph of its charge, to-wit: 'Again, if you believe from the evidence that in the county and state, and at or about the time alleged in the indictment, some person or persons other than defendant made an assault and battery upon John Mouchett; and if the evidence fails to show that such assault and battery was made with the intention on the part of such person or persons of taking the life of the said John Mouchett thereby, and that, if the death of the said John Mouchett had resulted therefrom, such person or persons would have been guilty of murder, as that offense has been hereinbefore explained to you,' etc.,—because said paragraph requires that the evidence fail to show both a specific intent to kill, and that the act would be murder if death had ensued, before the offense would be reduced to aggravated assault, whereas the failure to show either would be sufficient." For the reason stated in the assignments, we think said paragraphs of the charge are erroneous, and materially so, because calculated to prejudice the rights of the defendant. Under the facts of the case, the jury might have believed that the assault, if it had resulted in death, would have been murder, and yet may have believed that the evidence did not show a specific intent to kill the assaulted party, but, although so believing, they could not convict under the charge of an aggravated assault. Murder may be committed although a specific intent to kill the deceased does not exist in the mind of the slayer. If the intent be to inflict upon the person killed serious bodily injury, which may cause his death, the homicide may be murder, although a specific intent to kill may not be shown. Willson, Crim. St. §§ 1039, 1041. But to constitute the offense of an assault with intent to murder there must be a specific intent to kill. An intent to do serious bodily harm is not sufficient; and, if the jury believed, in this case, that the evidence did not show a specific intent to kill, whatever else they might believe, they could not convict the defendant of that offense, but might have convicted him of a lower grade of assault, and should have been, by the charge, given the discretion of doing so. Id. § 857.

The fifth assignment of error is as follows: "The court erred in giving the following charge to the jury, to-wit, 'If the defendant sought and brought on a conflict with John Mouchett, then he cannot avail himself of the law of self-defense, although, in such conflict, his life or person was endangered,' without also instructing them as to the law of partial or imperfect self-defense, and without also instructing the jury as to what offense the defendant would be guilty of in the

event it appeared from the evidence that the defendant had sought and brought on a conflict with the said Mouchett merely for the purpose of committing a battery upon him, and not with the intention of killing him." This assignment must also be held well founded. If the defendant provoked the contest, but without any intention to kill or inflict serious bodily injury, he would not be wholly deprived of the right of self-defense. He might still have an imperfect right of self-defense, which, although not sufficient to justify his act, might reduce the grade of it. Id. § 981. We think the evidence required that the instruction given by the court as to defendant's provoking the difficulty should have been qualified as above indicated, and that the failure to qualify it was material error. In other respects than those we have mentioned, we think the charge of the court is unobjectionable, and that there was no error in refusing the special requested instructions. Because of the errors in the charge which we have discussed, the judgment is reversed, and the cause is remanded.

GRAVES v. STATE.

(Court of Appeals of Texas. Feb. 1, 1890.)

THEFT—EVIDENCE.

Rev. St. Tex. art. 2257, provides that an instrument of writing required by law to be recorded may be read in evidence without proof of its execution, provided it has been filed among the papers of the cause at least three days before trial. *Held* that, on a trial for the theft of an animal, the execution by defendant of an attested bill of sale for the animal, which has not been filed in the case, cannot be proved by secondary evidence, without accounting for the non-production of the subscribing witness; a bill of sale being required by law to be recorded. *Morrow's Case*, 3 B. W. Rep. 624, followed.

Appeal from district court, Bandera county; T. M. PASCHAL, Judge.

Indictment of J. T. Graves for the theft of an animal. From a conviction defendant appeals. Rev. St. Tex. art. 2257, provides: "Every instrument which is permitted or required by law to be recorded * * * shall be admitted as evidence without the necessity of proving its execution, provided that the party who wishes to give it in evidence shall file the same among the papers of the suit in which he proposes to use it at least three days before the commencement of the trial of such suit, and give notice of such filing to the opposite party or his attorney of record."

Storms & Powell, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. On the trial in the court below the prosecution offered in evidence a bill of sale for the alleged stolen animal, which bill of sale the prosecution also proposed to prove by the witness Bostic had been executed to him, said witness, by the defendant; Bostic having testified that he had purchased the animal of defendant. The introduction and proof of this bill of sale was objected to by

the defendant upon the ground that the same appeared to have been attested by one Henry Stucke as a witness, and that secondary proof of its execution was not admissible without accounting for that of the subscribing witness. The objection was overruled, and Bostic, the grantee in the bill of sale, was permitted to prove its execution; defendant promptly reserving an exception to the ruling. The same question here presented came up in *Morrow's Case*, 22 Tex. App. 239, 2 S. W. Rep. 624, and it was held that "a bill of sale is an instrument of writing which is permitted and required by law to be recorded in the office of the county clerk. * * * It is such an instrument, therefore, as comes within the provision of article 2257, Rev. St., and may be read in evidence without proof of its execution, provided it has been filed among the papers of the cause at least three days before the commencement of the trial, and notice of such filing given to the opposite party or his attorney." Having failed to so file the bill of sale involved in this case, and to give due notice, the state was not entitled to introduce the same in evidence without proof of its execution. And, said bill of sale having been attested by one M. as a subscribing witness, it was held that secondary evidence of its execution by one who was present and saw it signed by the vendor was not admissible until the non-production of the subscribing witness, M., was accounted for or explained by the state. See *Morrow's Case*, supra, and authorities cited; and also *Willson*, Crim. St. §§ 2483, 2497, 2507. Other questions raised and elaborated in the brief of counsel for appellant will not be discussed, as they may not arise on another trial. For the error above discussed the judgment is reversed and cause remanded.

BROWN v. STATE.

(Court of Appeals of Texas. Feb. 19, 1890.)

THEFT—INDICTMENT—DESCRIPTION OF PERSONS.

An indictment for theft, where defendant and the owner of the stolen property were of the same name, alleged that "M. B., on or about * * * did * * * take from the possession of M. B. five head of cattle, the same being the property of the said M. B., without the consent of the said M. B., and with the intent to deprive the said M. B. of the value of the same, and to appropriate them to the use and benefit of him, the said M. B.," etc. Held, that the words "him, the said M. B.," in the appropriation clause, refer to defendant, and not to the alleged owner of the cattle.

On petition for rehearing.

R. A. Pleasants, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. At a former day of this term we affirmed the judgment in this case.¹ Appellant now makes a motion for rehearing, and claims that the indictment is fatally defective. As set out in the indictment, the charge is "that Mack Brown, on or about

May 30, 1888, and anterior to the presentment of this indictment, in the county and state aforesaid, did then and there unlawfully and fraudulently take from the possession of Mack Brown five head of cattle, the same being the corporeal, personal property of the said Mack Brown, without the consent of the said Mack Brown, and with the intent to deprive the said Mack Brown of the value of the same, and to appropriate them to the use and benefit of him, the said Mack Brown, contrary," etc.

It will be seen that the accused and the alleged owner of the stolen property bore the same name,—Mack Brown. The offense is admitted to be clearly and properly charged down to the allegation of appropriation. The preceding allegations next before the appropriation clause manifestly and unquestionable refer to the owner, his name being mentioned four times immediately theretofore, as the party the defendant intended to defraud, and deprive of his property. The language then is: "And to appropriate them to the use and benefit of him, the said Mack Brown." To whom do these words, "him, the said Mack Brown," refer? Appellant's counsel insists that by every rule of construction they must be held to refer to the Mack Brown whose name has been just immediately theretofore mentioned, the word "said" being always held, construed, and interpreted to relate to the before-mentioned, next preceding substantive, and that, giving them this construction, the indictment is fatally defective, because it fails to charge the accused, Mack Brown, the taker, with the intent to appropriate the stolen property to his use and benefit. *Willson*, Crim. St. § 1255; *Willis' Case*, 24 Tex. App. 584, 6 S. W. Rep. 856. *Bouvier*, in his *Law Dictionary*, defines the word "said" to mean "before mentioned," and he says: "In contracts and pleadings, it is usual and proper, when it is desired to speak of a person or thing before mentioned, to designate them by the term 'said' or 'aforesaid,' or by some similar term. * * * The reference of the word 'said' is to be determined, in any given case, by the sense. The relative 'same' refers to the next antecedent in the interpretation of a written instrument. The word 'said' does so only when the plain meaning requires it. 2 Kent, Comm. 555." In *Wilkinson v. State*, 10 Ind. 872, it was held that the word "said," in an indictment, will be referred to the next antecedent only when the plain meaning requires it. Mr. Bishop says: "Chitty goes on: 'The word "aforesaid," in general, refers to the last antecedent, but not so invariably as the word "same," which is more explicit.' * * * This is a sort of criticism little indulged in by modern courts. It may be useful, in rare cases; but at this day, and perhaps always, the various words of reference, of which the relative and 'there' and 'said' are specimens, will be referred to any antecedent plainly required by the sense, whether the writer, in expressing it, framed his sentences according to the

¹ There was an oral opinion on the original hearing.

rules of grammar or not." 1 Bish. Crim. Proc. (3d Ed.) § 512.

Adopting these rules of construction, the word "said," or the words "him, the said Mack Brown," used in connection with the allegation of appropriation in the indictment, refers to the before-mentioned Mack Brown who was charged with the fraudulent taking of the animals, and not to the Mack Brown who was alleged to be the owner. Plain sense and meaning would exclude the idea that a thief stole property of another with the intent of appropriating it to the use and benefit of such other, who was the owner. The indictment is sufficient, and the motion for rehearing is overruled.

MARTIN v. STATE.

(Court of Appeals of Texas. Feb. 5, 1890.)

CHattel Mortgages—Sale of Property—INDICTMENT.

1. On a trial for the fraudulent disposition of mortgaged property, evidence that defendant had previously sold property other than that charged in the indictment, but covered by the mortgage, is admissible on the question of defendant's motive in subsequently disposing of the property, for which he was being tried.

2. Where the indictment describes the mortgaged property as being grown on the "McLame Farm," evidence that the farm was known both as the "McLame Farm" and the "McNamee Farm" does not constitute a fatal variance between allegation and proof.

Appeal from district court, Red River county; E. D. McCLELLAN, Judge. On motion for rehearing.

The indictment charged as follows: "R. M. Martin, on or about October 20, 1888, in the county of Red River, state of Texas, did then and there, unlawfully, with intent to defraud A. J. Wright, dispose of certain personal and movable property, by trading the same to A. T. Aydelotte, to-wit, one wagon, worth \$30, and about 40 bushels of corn, of the value of \$20, all of the aggregate value of \$60; said corn being a part of a crop of corn raised by said Martin on the McLame plantation in the year 1888, and being a part of the growing crop mentioned in the hereinafter named mortgage; and the said wagon being the same wagon mentioned in the hereinafter named mortgage; the said R. M. Martin having theretofore, to-wit, on the 26th day of May, 1888, executed and delivered to said A. J. Wright a valid mortgage, in writing, upon the said above-described property, and which said mortgage was, at the time of said trading, and disposition of said property, a valid, subsisting, unsatisfied mortgage upon said property, and was then owned and held by the said A. J. Wright; contrary," etc. The proof shows, in substance, that defendant mortgaged his certain crop, growing on the McLame plantation, in the year 1888, his wagon and two yoke of oxen, to A. J. Wright; that he subsequently traded the corn and wagon mentioned in the mortgage and indictment to Aydelotte, and left the country without first

discharging the mortgage. It was also proved that prior to the trade to Aydelotte he sold the oxen to Stephens. Certain witnesses testified that they knew the place on which the defendant raised the crop. According to some of those witnesses, the place was known as the "McLame Farm," and, according to others, as the "McNamee Farm." The court charged as follows: "If you should find that defendant disposed of the corn described in the indictment, but you have a reasonable doubt as to the corn being raised on the McLame farm, then you cannot find defendant guilty of the fraudulent disposition of the corn. But, in this connection, I instruct you that, if the evidence shows you, beyond a reasonable doubt, that the farm on which the corn was raised was known as the 'McLame Farm,' as well as the 'McNamee Farm,' that would be sufficient proof to sustain the allegation in the indictment as to the name of the farm, though the proofs show that the farm was also known as the 'McNamee Farm.'" There was a conviction, and defendant appeals.

Sims & Wright, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. This conviction is for the fraudulent disposition, by sale, of certain corn and a wagon, upon which defendant had executed a mortgage. We think the exceptions to the indictment were properly overruled. All of the necessary constituents of the offense are alleged in the indictment, and the mortgaged property is described therein substantially as it was described in the mortgage.

In addition to the property named in the indictment, the same mortgage included a yoke of oxen, but defendant is not charged in said indictment with the fraudulent disposition of the oxen. On the trial, however, the state, over the objections of the defendant, was permitted to prove by one Stephens that, about one month prior to the time that defendant sold the corn and wagon, he (witness) purchased from defendant the oxen mentioned in the mortgage. Defendant objected to this evidence upon the ground that it was irrelevant. It was admitted as relevant upon the issue of the intent of the defendant in selling the corn and wagon, and the jury was specifically instructed that it was admitted for that purpose only, and could not be considered for any other. We are of opinion that the court did not err in its ruling. While a general rule of evidence is that irrelevant testimony should not be admitted, an exception to this rule obtains when it becomes necessary to prove motive, intent, or knowledge on the part of the defendant. In such cases greater latitude is allowed in the admission of testimony; and it is competent for the prosecution to prove such acts, conduct, or declarations of the accused as tend to establish motive, intent, or knowledge, although such proof may show that the defendant has committed a distinct

crime from that for which he is being tried. *Francis v. State*, 7 Tex. App. 501; *Heard v. State*, 9 Tex. App. 1; *Cameron v. State*, Id. 332. In this case, the sale of the oxen by the defendant prior to the time he sold the corn and wagon was a fact which tended to show a fraudulent intent on his part in selling the corn and wagon. It was a fact which bore, if not directly, at least relevantly, upon that issue; and the state was entitled to have it considered by the jury. Having disposed of the oxen, a portion of the mortgaged property, thereby diminishing the security of the mortgagee, the subsequent disposition of the remainder of the mortgaged property would certainly have more the appearance of a fraudulent disposition than if he had not previously disposed of the oxen. Our view upon this question is not in conflict with that line of decisions which excludes testimony of collateral crimes unless such crimes are contemporary with the crime for which the defendant is being prosecuted. That line of decisions is peculiarly applicable in prosecutions for theft, and is not applicable to the question presented in this case.

With respect to the supposed variance between the name of the farm on which the corn was raised, and the name as set forth in the indictment and mortgage, we think the charge of the court is correct, and that it was not error to refuse the special charge upon that point requested by defendant. There was evidence that the farm was known by the name as stated in the indictment and mortgage; and, besides, it was conclusively shown that the corn in question was raised on that farm.

MOORE v. STATE.

(Court of Appeals of Texas. Feb. 19, 1890.)

THEFT—INSTRUCTIONS—EVIDENCE.

1. A charge that, if the jury believe that defendant did not commit the theft as charged, they must find him not guilty, is error, since it bases his right to acquittal on the jury's belief in his innocence, instead of his guilt.

2. On indictment for theft of a horse, the defense being that defendant, believing the horse to belong to one T., received it from him, and at his request took it into another state, and the evidence tending to support such defense, it is error to refuse to charge that, if T. delivered the horse to defendant, who did not participate in the theft of the same as principal, the latter should not be convicted of the theft of the horse, though T. had in fact stolen it, and defendant knew the fact when he received it.

3. It is no error, in such case, to admit testimony as to the contemporaneous theft of a saddle and other articles, in the same neighborhood, where the court charges the jury that such evidence cannot be considered as tending to show the theft of the horse, but only as tending to show the intent of defendant in whatever action they may find from the evidence was done by him.

Appeal from district court, De Witt county; H. C. PLEASANTS, Judge.

Indictment for the theft of a horse. On trial the court admitted evidence of the contemporaneous theft of a saddle and slicker, and charged the jury: "Defendant is on trial for theft of E. A. Gresham's horse, and

you will give no attention to the testimony about the slicker and saddle as evidence to show the theft of the horse. The said testimony can only be considered by you, if at all, for what you may deem it worth as tending to show the intent of defendant in whatever action you may find from the evidence was done by him, if any."

Poindexter & Padelford, for appellant.
Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. An exception was reserved by defendant to the sixth paragraph of the charge, which paragraph is as follows: "If you believe that defendant did not, either alone or as principal, as above explained, fraudulently take, as explained in the second paragraph of this charge, the animal described in the indictment, then you will find him not guilty." We think the exception is well taken. Said paragraph of the charge required the jury, before they could find defendant not guilty, to believe that he was innocent; whereas, they should have been instructed that they should not find him guilty unless they believed from the evidence that, as a principal, he did fraudulently take the animal. *Smith v. State*, 9 Tex. App. 150; *Robertson v. State*, Id. 209; *Blocker v. State*, Id. 279; *Wallace v. State*, Id. 299.

Defendant's defense was that one Talbot delivered the horse to him, said Talbot claiming the same as his property, and requested defendant to take said horse with him to Arkansas, where defendant was going, and keep the same for him (Talbot) until he called for him; and that he (defendant) received said horse from said Talbot in good faith, believing the same to be Talbot's property, and carried the same to Arkansas. This defense was supported by evidence, and demanded a plain, direct, and affirmative instruction from the court that if Talbot delivered the horse to defendant, and defendant did not participate in the theft of the same as a principal, he should not be convicted of the theft of said horse, although Talbot had stolen the same, and although defendant, at the time he received the same, may have known that Talbot had stolen it. It was, we think, the intention of the trial judge to instruct the jury upon this vital issue; but we do not think the charge contains such instructions as the defendant was entitled to, under the evidence. Defendant reserved exceptions to the charge given upon said issue, and requested special instructions which would have cured the errors complained of; but the court refused to give them, and defendant reserved exceptions. We think the court erred in refusing to give the special instructions requested by defendant.

We think the testimony as to the theft of a saddle and slicker, which theft occurred about the same time, and in the same neighborhood, of the theft of the horse, was admissible, and that the charge of the court limiting the purpose of such testimony was sufficient. *Willson*, Crim. St. §§ 1295, 2496.

Because of the specified errors in the charge of the court the judgment is reversed, and the cause remanded.

MADDOX et al. v. FENNER et al.

(Supreme Court of Texas. Jan. 31, 1890.)

BOUNDARIES.

Under Const. Tex. art. 14, § 2, providing that all land certificates shall be located "only upon vacant and unappropriated public domain, and not upon any land titled," land held under a patent cannot be located upon, where the beginning is well known, and the first two calls for distances are found to be correct, though the lines are unmarked on a prairie, the third is excessive if carried to the point called for, and if followed will give 2,719 acres, instead of 800, as called for in the patent; it not being shown that the other distances and lines are not correct, and it being necessary to disregard calls for distance in order to make the survey include only 800 acres.

Appeal from district court, Bee county; H. CLAY PLEASANTS, Judge.

West & McGown, for appellants. *Glass, Callender & Proctor* and *Stockdale & Proctor*, for appellees.

HENRY, J. Appellants brought this suit, praying for the issuance of a writ of *mandamus* to compel the surveyor of Bee county to survey, by virtue of a land certificate, a portion of certain land described in the patent issued by the state therefor, as follows: "Beginning at the S. W. corner of a survey made for the heirs of Wm. Ryan; thence due east, with the Ryan survey, 1,262 *varas*, to the Francis Deitrich north-west corner, a post bearing from a live oak marked X, N., 10° E., 106 *vs.*; thence south, with that survey, 1,350 *varas*, to A. P. Baker's corner, a post and mound; thence, with that survey, S., 60° W., 1,900 *varas*, to Gilford Deen assignee's (Hassell's) corner, a mound; thence N., 30° W., with said survey, 1,500 *vs.*, to corner, a post and mound; thence N., 60° E., 850 *vs.*, to J. Sharp's corner, a mound; thence N., 80° W., with said survey, 2,400 *vs.*, a post and mound; thence S., 70° E., 2,000 *vs.*, to J. Skidmore's south-east corner, a post and mound; thence south, 950 *vs.*, to place of beginning." The petition charges that the portion of the said land upon which they desire to locate their certificate is vacant, unappropriated, and unreserved public domain, and as such is subject to location under their scrip. Defendants deny that the land is part of the public domain, and say that it was patented to Washington Stevens in 1846. Plaintiffs contend that if the Stevens survey be surveyed on the ground from its beginning corner (which is well known and recognized) according to course and distance, instead of the calls for surrounding surveys, it will have its full complement of land; while if, on the other hand, it is surveyed according to the calls for surrounding surveys, it will contain 2,719 acres, instead of the 800 acres for which the patent calls. The lines of other surveys called for in the Stevens patent are unmarked lines in

the open prairie. The field-notes of the adjacent surveys are not shown by the record. Plaintiffs proposed to locate all of the land included in the boundaries mentioned in the patent in excess of 800 acres. The third call, (from Baker's corner to Hassell's,) which is 1,900 *varas* in the patent, measures upon the ground, if prolonged to Hassell's, 3,275 *varas*, which causes the excess in the quantity of land. The maps exhibited in evidence show that the Stevens and the surrounding surveys were made near the same date, and, in the absence of evidence to the contrary, it is presumed that the lines of all were actually run by the surveyor. It is contended by plaintiffs that the lines of surrounding surveys, called for by the Stevens survey, being unmarked lines, in a prairie, must yield to course and distance. Acting upon that contention, they propose to adopt the first two calls of the Stevens, as to course and distance, and follow the course of the third call 1,900 *varas*, and stop at that point, without reaching the Hassell survey, and then to so run the remaining lines, paying some regard to course, but none to distance, that by entirely omitting the last call the place of beginning will be reached with a survey containing 800 acres.

The provision of the constitution¹ reading, "All genuine land certificates heretofore or hereafter issued shall be located, surveyed, or patented only upon vacant and unappropriated public domain, and not upon any land titled," etc., it is contended has no application to this case, because the land claimed by plaintiffs is not patented under a proper construction of the patent. If by a proper construction of the patent it should be held that it does not include the land sought to be appropriated by plaintiffs, we think they are correct in their assertion that its location is not prohibited. But when the land may be included in the terms of the patent, and when its being so included has been long recognized by the land department of the state government, that construction ought not to be departed from in favor of a subsequent locator, except upon clear and convincing proof to the contrary. Plaintiffs fail to make out their case on their own or any other theory. They do not establish their right by disregarding unmarked lines in an open country, in favor of calls for course and distance, as being the best evidence, under the circumstances, of the actual boundaries of the survey; but, on the contrary, they adopt three calls of the patent for distance, two of which are found to be correct on the ground, and entirely disregard the length of every remaining call for distance. With the exception of the third call, it is not shown that any of the calls for course or distance do not correspond on the ground with the calls in the patent. The case made by plaintiffs, while casting doubt upon the correctness of the patent on account of the excessive quantity

¹ Article 14, § 2.

of land that it seems to convey, furnishes no criterion for determining the true boundaries of the survey, except quantity. Their proposition is to begin the survey at a known and properly described corner, and then to follow the calls of the patent, as far as they may be followed, so as to return to the beginning, disregarding distance and course in so much only as is consistent with limiting the survey to contain 800 acres. We think the judgment ought to be affirmed.

MASTERTON v. LITTLE.

(Supreme Court of Texas. Jan. 28, 1890.)

STATUTE OF FRAUDS—DEED—JUDGMENT—ESTOPPEL—VENDOR AND VENDEE—SERVICE OF PROCESS.

1. L., who owned land certificates, entered into an oral agreement with defendant, whereby he promised to convey to him one-third of the land covered by the certificates, in consideration of defendant's representing him as an attorney in securing patents for the land, and perfecting the title thereto. Defendant performed the agreement, perfected the title, and sued for partition of the land, obtaining a decree setting off to him his share. Before the partition suit was instituted, L. conveyed the land in question to plaintiff, but the deed was not recorded until the suit had been brought, and plaintiff was not a party to such suit. Afterwards plaintiff sued for the land. *Held*, that the privity of title between plaintiff and L. gave plaintiff the right to object to the contract between L. and defendant, on the ground that, not being in writing, it was void under the statute of frauds.

2. Under Rev. St. Tex. art. 543, providing that no estate of inheritance or freehold shall be conveyed from one to another unless the conveyance be in writing, subscribed and delivered by the party disposing of the same, an oral contract by one who owns land certificates, and who has located the land, intending to apply for patents, whereby he agrees to convey a part of such land to another in consideration of his rendering services as an attorney in respect to the land, and a decree of partition obtained by the latter setting off the land to him, cannot be pleaded as a defense by the attorney in a suit against him by one who received a deed of the land from the owner before the suit for partition was begun.

3. Letters written by L. to defendant in reply to letters inclosing a written contract containing the terms of their oral agreement, and asking him to sign it, which acknowledge the receipt of the written contract, giving an excuse for not signing it at that time, though not disputing the correctness of it, and assuring defendant that there will be no trouble about his getting his share of the land, are not such memoranda in writing as will take the oral contract out of the statute of frauds.

4. Oral promises of a person in interest, who is not joined as a party to a suit for land, that, if he is not so joined, he will hold himself bound by the judgment, as if he had been made a party, cannot estop him to afterwards set up that he was not a party, and that the judgment did not bind him, where it appears that, if he had been made a party, he had a good defense, since in such case failure to make him a party did not prejudice the party relying on his promises.

5. The deed from L. to plaintiff took effect when it was delivered, and not when recorded, and, having been delivered before the partition suit was instituted, judgment in such suit could not affect the title of plaintiff.

6. Fraud in the conveyance of land cannot be set up as a defense in a suit by the vendee, unless the vendor is made a party.

7. In a suit by the vendee to recover the land conveyed to him, which is in possession of another, in which suit plaintiff asks that, in case judg-

ment is for defendant, he may have judgment over against his vendor on his covenants of warranty, it appearing that the vendor is a non-resident and has no property in the state, the court does not acquire jurisdiction of him, by the service upon him of plaintiff's petition and exhibits, in the state in which he resides, by the sheriff of his county.

8. Plaintiff, after bringing suit, agreed with defendant that, if his right to the land should be established as against L., he would abide by the judgment of partition. *Held* that, as L. was not a party to the suit by plaintiff, the rights, as between him and defendant, were not tried or established, and the agreement could not take effect.

Appeal from district court, Calhoun county.

A. B. Petcolas and Branch T. Masterson, for appellant. Stockdale & Proctor and Glass, Callender & Proctor, for appellee.

HENRY, J. The following statement of the pleadings is taken from the brief of appellant's counsel:

On the 23d day of February, 1884, John Little sued appellant and Edwin and A. C. Hawes in the district court of Calhoun county, alleging that he was the owner of certain lands on Matagorda island, in said county, describing them, and alleging an ouster by the defendants. Little says that he was seised and possessed of said land by deed from William Little, dated November 24, 1883, and recorded in said county on December 1, 1883, and that defendants set up a claim thereto, by reason of a pretended contract of Masterson with William Little, and a pretended judgment of partition rendered in the district court of Galveston county in the suit of Masterson v. William Little; that petitioner was not a party to said suit, and purchased said lands on the day of the date of his deeds, and paid therefor a full and valuable consideration anterior to said suit and decree of said partition, and without any knowledge or notice, actual or constructive, of any contract of the said Masterson with the said William Little, whereby any title or interest in said land was vested in or accrued to said Masterson, and long before any interest or right thereto was claimed or asserted or sought to be enforced by the said Masterson.

Masterson answered with a general denial, and the plea of "not guilty," and, further answering, alleged, in substance: That one William Little had contracts with the owners of the land certificates by virtue of which the lands in controversy had then been located under which he claimed. That in consideration of his services in perfecting said location, having surveys made and returned to the general land-office, and obtaining patents from the state, he would become entitled to one-half interest in said lands, the title to which might be so obtained or acquired under his said contract; and he claimed that one-half of all expenses incurred by him should be paid by said owners of said certificates under his locative contracts aforesaid. That said William Little had had charge of said locations for a long period, to-wit, about 30 years, and had failed to obtain patents on said surveys, and the ownership of said certificates was in said parties who as owners

thereof contracted for the location thereof as aforesaid, and the legal title to said land was then in the state. That said William Little had been sued by the various owners of said certificates for the purpose of recovering from him said certificates, or their value, on account of his failure to comply with his said contracts. That said William Little employed this defendant to examine into all of said matters, and to aid him in acquiring title to said land, and represent him in said suits, and to obtain title for said William Little under said locative contracts by perfecting said locations into patents, and thus acquire title to one-half of said land, and to establish and enforce a lien on the other half for one-half of the money expended by said Little; and said Little agreed to convey to this defendant one-third of all lands so located on said three islands, the titles to which should be obtained or established or acquired under said locative contracts aforesaid, and all titles so acquired should be for the joint benefit of said William Little and this defendant, two-thirds to said William Little, and one-third to this defendant, and that defendant should also receive one-third of the money that might be recovered or obtained from the owners of said land certificates. That defendant performed his part of said contract, bestowing upon the work much time and labor. That defendant succeeded in recovering a decree in said cause, establishing said William Little's right to one-half of said lands under said locative contracts, and establishing a lien on the shares of the different owners for their respective *pro rata* portion of the expenses incurred by said Little, amounting, in the aggregate, to the sum of \$3,577.92, and a decree establishing and foreclosing a lien on the shares or portions owned by said defendants, respectively, for the respective amounts so adjudged to be due by them, which said equitable lien accrued and was created in the carrying out of said locating contracts in the course of acquiring the title from the state for the lands so located. That under said decree a large part of said lands adjudged to the owners of said certificates and locations was sold by the master in chancery in said suit, to satisfy the amount due by them as aforesaid, and this defendant bought said lands at said sale made by said master in chancery in said suit to satisfy the amount due by them as aforesaid, and this defendant bought said lands at said sale made by said master in chancery in the name of said William Little, for the joint use and benefit of said Little and this defendant, two-thirds for said William Little, and one-third for this defendant, and paid therefor by crediting the amount of his bids on said decree, and said sale was duly confirmed, and a deed ordered to be executed by said master in chancery conveying said land to said Little, which deed was so executed and delivered to this defendant. That this defendant, in the further carrying out of this contract, made several trips to Austin, Tex.,

at the repeated and earnest request of said William Little, to acquire title to said lands by obtaining patents on the unpatented parts of said islands, which said William Little had been unable to obtain; and by diligent effort in the proper preparation and presentation of said claim, and the question of law connected therewith, this defendant succeeded in obtaining a favorable ruling, and the issuance of 45 patents for lands on said islands, thereby acquiring title to said land from the state of Texas for the joint benefit of defendant and said Little, in the proportion of two-thirds to said Little and one-third for defendant, and said patents were delivered by the state for this defendant. That this defendant held, and still holds, the title-deeds and patents aforesaid, and the same have never been delivered to said William Little otherwise than through the delivery to this defendant, which delivery was for and inured to the joint benefit of said William Little and this defendant in the joint acquisition of said lands as aforesaid. That said fee was wholly contingent, and was a reasonable compensation for the services rendered by this defendant as aforesaid.

This defendant further alleges that in 1882 he prepared and sent to the said William Little, at Austin, Tex., a contract in writing, to be signed by him, (a copy, in substance, of said contract is hereto attached, and marked "Exhibit B," and made a part hereof,) which contract was in conformity with the terms agreed on, and said William Little acknowledged receipt of said contract, and wrote to defendant that there would be no trouble with defendant concerning his fee, or the interest to which defendant was entitled, and said Little did not in any manner dispute or question the correctness of said contract, but on the contrary, at various times thereafter, urged this defendant to proceed with his work, and acquire and obtain complete titles to said lands as aforesaid, and this defendant continued to render services in good faith under his said contract. That in the spring of 1888, the said William Little not having returned to Texas, defendant wrote to him at Newark, N. J., requesting him to sign, acknowledge, and return said contract for his contingent fee of one-third interest in said lands, and in reply to said letter said William Little, on April 13, 1888, wrote a letter to this defendant, wherein he promised and agreed to attend to it on his return to Texas, giving as his reason for not then doing so that he had left said contract with his papers in Austin, Tex., and in said letter in no manner questioned or disputed the correctness of said contract, or his obligations thereunder. That this defendant continued to render services under said contract until the work was completed, and titles acquired and obtained, as aforesaid. That this defendant demanded of the said William Little a deed for his one-third of said land, and a partition thereof, and, said Little failing to execute said deed, this defendant, on the 7th day of January, A.

D. 1884, filed a suit against said William Little for partition of said land, which suit was filed in the district court of Galveston county, (No. 11,762;) and said William Little being duly cited in said cause, and the same coming on to be heard, a decree was rendered therein for partition, and commissioners duly appointed thereunder, and said commissioners made partition of said land in conformity with said decree, awarding two-thirds thereof to said William Little, and one-third to this defendant, the parts awarded to this defendant being lots No. 1 on Matagorda, No. 1 on St. Joseph, and No. 1 on Mustang islands, as shown in said Exhibit A.

This defendant further represents that said lot No. 1, on Matagorda island, includes the land plaintiff is wrongfully claiming in this suit. That said decree is a final decree, and in full force, and has never been appealed from, or in any manner disputed, by said William Little, nor by plaintiff, until the filing of this suit. That in said suit No. 11,762 the prayer of the petition was that plaintiff should have his one-third of said lands set off to him in severalty, but that if, by reason of the failure of said defendant to execute the contract for fees or from any cause, said defendant could not obtain said partition, then he should have judgment for the reasonable value of his services, whereby it became and was necessary for said court to determine whether said contract was a good and valid contract or not, and by its decrees aforesaid said court adjudged that said contract was not within the statute of frauds, but was in all respects valid and binding. This defendant further says that said John Little was a purchaser of a portion of the land sold under the decree of the United States circuit court aforesaid, and was in the office of this defendant, and consulted him about said lands, and had full knowledge of the fact of this defendant's employment by said William Little as far back as 1882, and knew of the services rendered by defendant to William Little, and that this defendant had not received his compensation therefor; and in 1883, prior to said pretended purchases by plaintiff, he (the plaintiff) was fully informed of the fact that this defendant claimed one-third of said land as his interest therein for his said services rendered, and that he held possession of said patents, deeds, and title-papers, and that said patents and deed from the master in chancery had never been delivered to said William Little, and that this defendant refused to deliver the same until he should receive a deed for his one-third of said land acquired on joint account as aforesaid. Defendant further says that said John Little obtained from said William Little deeds for the whole of said lands on all three islands, including defendant's one-third interest, and that said deeds recite payment of only a part of the purchase money. That nearly two-thirds of the purchase money remain unpaid. That said John Little contracted to pay therefor. That said pretended

deeds were executed by said William Little for the purpose of defrauding this defendant out of his one-third of said land, and said land constituted all of the property of said Little in the state of Texas, as far as known to defendant, and that said John Little, who is a nephew of said William Little, accepted said deeds with full knowledge of said intention. That said John Little, after said pretended purchase, came to defendant as representing his uncle, William Little, as agent, to make a settlement, and made no claim to said property in his own right, but said that his uncle ought in good faith to carry out his said contract with this defendant, and that he had so advised him; and after the institution of said suit by this defendant against the said William Little for partition, and to have defendant's share of said land set apart to him, the said John Little represented to this defendant that he did not want to be a party to said suit, or any litigation concerning said lands, and that when this defendant established his claim in said suit against William Little that he, the said John Little, would not dispute it. The said John Little was in Galveston, and was fully advised of the pendency of said partition suit before said partition was made, and made no objection to said partition, and in no manner disputed this defendant's rights thereunder, but assured this defendant that whatever right defendant established against said William Little would not be in any manner disputed or contested by him. That this defendant, acting and relying on said representation, did not make said John Little a party to said proceeding or suit, and said John Little recognized said decree as binding upon him, and applied to this defendant, after said partition, to purchase his (defendant's) interest on Matagorda island, and, he and this defendant not agreeing upon terms of sale, this defendant sold all of those tracts on Matagorda island set off to him in said partition suit to his co-defendant, E. Hawes.

This defendant further says that at the time said partition suit was instituted, to-wit, on the 7th day of January, 1884, he (this defendant) had no actual notice or information that said William Little had executed said deeds, or any of them. That John Little concealed the facts from defendant until after said suit was filed. That said deeds are all dated and executed on the 24th day of November, 1883, and thereafter, on the 27th day of November, 1883, he came to see this defendant as agent for his uncle, William Little, to make a settlement with defendant concerning said lands, and made no claim to any of said land in his own right, and did not disclose that he held deeds from his said uncle therefor, or for any part thereof. That the only deed recorded by said John Little prior to the filing of defendant's partition suit was the deed for lands on Matagorda island. That in said decree in said partition suit No. 11,762 there was partitioned and set off to this defendant lands in addition to those sued for by

plaintiff herein, some situated on Matagorda island, some on Mustang island, and some on St. Joseph island. That at the same time said decree set off to William Little his two-thirds of the lands on said islands. That at the same time, and as one transaction, said William Little executed three deeds,—one for the lands on Matagorda island, one for the lands on Mustang island, and one for the lands on St. Joseph island,—purporting to convey to the said John Little all of the lands situated on all three of said islands, including all of said lands set off in partition to this defendant as aforesaid, (for a full description of said lands on all of said islands, reference is made to Exhibit A, hereto attached.) That the said John Little paid but little more than one-third of the aggregate amount that he (said John Little) undertook upon certain conditions to pay to the said William Little therefor. That for the excess over said cash payment John Little did not give any consideration, or, if any, nothing more than a non-negotiable obligation, which he has not paid, and which he cannot in law be required to pay, and the superior title to said property was in said William Little at the time said suit was filed and said decree was rendered, and the said decree in said cause was binding upon said superior title, and all right that said William Little had or held in said land; and, this defendant having established in said decree his right as against William Little, he (this defendant) is subrogated to all of the rights of said William Little in and to said land, to the extent sufficient to satisfy said one-third thereof so set off to this defendant, and to protect him therein. That said deeds for lands on Mustang and St. Joseph islands were not recorded until after said partition suit was filed, and this defendant had no notice, knowledge, or information of the execution of any of said deeds at the time said suit was filed by him against said William Little, and this defendant did not know, believe, or have any reason to believe, from the acts of any of the parties or otherwise, that said deeds had been executed, or that John Little claimed any interest in said land; and this defendant says that said deeds, as to him, had no force or validity until the dates of their record, subsequent to the filing of the said partition suit, and said decree therein is *res adjudicata*, both as to said William Little and said John Little, and the matters therein adjudged cannot again be contested by them, or either of them.

This defendant further says that all of said deeds from said William Little to said John Little being executed with intent on the part of said William Little to defraud this defendant out of his interest in said lands, and said John Little having accepted said deeds with full knowledge and notice of said intent, and that the necessary consequence of said conveyance, if valid, as against this defendant, would be to defraud him of his said interests in said lands, said deeds are and were void as

to this defendant. That the said John Little has, by virtue of said pretended deeds from William Little, taken possession of all the lands on Mustang and St. Joseph islands that in said partition suit No. 11,762 were awarded to this defendant, and also of all the lands on Matagorda island awarded this defendant, except that part sold by defendant to E. Hawes, and has ousted defendant therefrom contrary to law. That said deeds from William Little to John Little constitute a cloud over this defendant's title to the lands awarded him on all of said islands. That all of said lands on all of said islands being partitioned in one decree by virtue of one right, and all of John Little's right adverse to this defendant being acquired at one time, and as parts of one transaction, between him and said William Little, it is necessary, in order to do complete justice herein, that the court shall inquire into and determine the rights of all parties to the suit to all of said lands so partitioned in said decree in said suit No. 11,762. Defendant says that said partition is and was fair and just to all parties, and the enforcement thereof herein will not wrong or injure in any manner any person in his legal or equitable rights, and will avoid a multiplicity of suits concerning the same subject-matter, between the same parties. That plaintiff, John Little, has a perfect defense against the unpaid purchase money due by him to William Little, in the event that the interests of this defendant in said lands, as awarded to him in the district court of Galveston county, in said suit No. 11,762, are recognized and enforced, and, being by law only protected as an innocent purchaser to the extent of the purchase money by him paid, he is not and cannot be injured by the enforcement of the rights of this defendant. This defendant further says that after the filing of this suit, and while the same was in progress, and all the defendants had answered therein, this defendant and plaintiff, John Little, and defendants E. Hawes and A. C. Hawes, signed and executed a contract and agreement concerning lands in litigation in this cause, a substantial copy of which agreement and contract is hereto attached, and made a part hereof, marked "Exhibit C." That on the same day this defendant and the plaintiff, John Little, made and entered into a contract and agreement concerning lands in litigation in this suit, a substantial copy of which is hereto attached and made a part hereof, marked "Exhibit D." That said agreement marked "C," among other things, provides that said William Little shall be made a party herein. That said John Little shall have and receive title to certain lands therein specified, whether the title of said defendants shall be defeated or maintained, and defendant Masterson, or his vendee, E. Hawes, is to have and receive titles to certain lands as in said agreement specified, whether said title of said defendant is maintained or defeated. This defendant further says that, in and by said contract marked

"Exhibit D," it is agreed by and between the parties thereto that, in the event that said William Little shall fail to defeat said Masterson's title to the land on Mustang island, in said exhibit described, said defendant is to convey the same to said John Little at the price specified in said exhibit, and said John Little binds himself to purchase the same from this defendant, as set out in said exhibit, and is given the right therein to take possession of the land at once, with consent of said Masterson, and to hold the same subject to the decision of this cause as between William Little and this defendant. That by these two agreements it was provided that in this suit Masterson's right to all of the land awarded to him in the decree of partition in said cause No. 11,762 should be brought into the suit, that William Little should be made a party by the plaintiff, and that Masterson's title should be recognized by said John Little, unless said William Little should defeat said Masterson's right, and that thereby said John Little is now estopped from contesting the right of said Masterson to the lands awarded to said Masterson.

Attached to the answer were two agreements, made during the pendency of the suit, one of them signed by all of the parties, by which, among other things, it was stipulated: "That the pleadings in said cause shall be so amended as to set up the claim of defendant Masterson to all land awarded to him in the decree of partition between Branch T. Masterson and Wm. Little, rendered in the district court of Galveston county in cause No. ———, Branch T. Masterson vs. Wm. Little. That said Wm. Little, who conveyed to John Little, shall be made a party to this suit. That in the event that on the final decision in said cause the title of Branch T. Masterson and Edwin Hawes or A. C. Hawes shall be maintained, then said John Little agrees to pay said Masterson one dollar and seventy-five cents per acre, and interest thereon at eight per cent. per annum, from the date of said Masterson's conveyance to Edwin Hawes to the date of purchase, for all the following surveys," etc.

The other one, which was signed by John Little and the defendant Masterson only, reads as follows: "State of Texas, county of Victoria. This agreement, made and entered into by and between John Little and Branch T. Masterson, witnesseth, that whereas, Branch T. Masterson recovered in the district court of Galveston county, in the case of Branch T. Masterson vs. Wm. Little, a decree for three thousand two hundred acres of land on Mustang island, for a description of which reference is made to said decree, being in cause No. 11,762, and John Little holds a deed from Wm. Little for all the land on Mustang island described in said decree, including the part therein decreed to Masterson, for which deed John Little paid part cash and gave Wm. Little notes that are not negotiable for the balance; and whereas, a suit is now pending in Calhoun county,

wherein John Little is plaintiff, and Branch T. Masterson and others defendants, and in that suit the plaintiff is to make Wm. Little a party: now, it is agreed that if Wm. Little shall fail in said suit to defeat Masterson's title to said land on Mustang island, awarded to Masterson in said decree, then John Little agrees to pay to said Masterson one dollar per acre, and eight per cent. per annum from this date, for all of said land awarded to Masterson situated on Mustang island; it being understood that, if any part of said land has been washed off by the Gulf, the part so washed away is not to be paid for; the payment to be made in Galveston, Texas. And Masterson agrees to sell to said John Little said land at said price, and it is agreed that said John Little has the right to take possession of said land at once, with consent of Masterson, which consent is hereby given, and he shall hold the same subject to the future decision of the cause now pending between the parties hereto, and the perfect performance of this agreement. Indianola, November 10th, 1885. [Signed] JOHN LITTLE. [Signed] BRANCH T. MASTERSON."

After defendant Masterson had filed his answer the plaintiff filed a supplemental petition, in which he alleged that he had purchased the lands in controversy from William Little, who had bound himself to warrant the titles thereto. Plaintiff charged that said William Little was a resident citizen of the state of New Jersey, and prayed that he be cited to appear and defend, and, in the event of Masterson's recovering the lands in controversy, that the plaintiff have judgment over against said William Little on his covenants of warranty. By his second supplemental petition, John Little set up the following exceptions to the answer of the defendant Masterson: "And specially excepting to said answer, this plaintiff excepts to all that portion of said answer wherein he alleges employment by, and services rendered to, Wm. Little as attorney in certain suits in the United States court, and the district court at Galveston, and an indebtedness to the said defendant Masterson by the said Wm. Little for these and other services alleged to have been performed by him for and at the special instance and request of the said Wm. Little, and the knowledge of plaintiff of the rendition of said services, and of an indebtedness of the said Wm. Little to said Masterson, and says that the same, taken separately or together, presents no legal defense to plaintiff's action. (2) And this plaintiff specially excepts to that portion of said defendant's answer wherein he avers that by reason of said service he held, and still holds, the title-deeds and patents to said lands, because this plaintiff says that the possession thereof created no charge or lien in defendant's favor upon the land for the recovery of which this suit is brought. (3) This plaintiff specially excepts to that portion of defendant's answer wherein he claims and sets up that his fee for professional services rendered was a contin-

gent fee, to be paid in a portion of the land recovered in said named litigation, and the agreement of the said Wm. Little to convey the same to him, because it appears from the answers of the defendant Masterson in this regard that said alleged agreement, and no memorandum thereof, was in writing, signed by the said Wm. Little; and the same not being binding in law upon the said Wm. Little, or legally enforceable against him, the alleged knowledge thereof by this plaintiff presents no bar to the recovery of the plaintiff in this action. (4) This plaintiff further excepts to all that portion of defendant's answer setting up a suit and judgment in the district court of Galveston county, and the decree of partition thereunder, because, as appears from said answer, the said suit was instituted, and the proceedings had thereunder, long after the date of this plaintiff's purchase of the land; and, further, because this plaintiff was not a party thereto, and cannot be affected thereby. (5) And this plaintiff further excepts to the said answer, and for exception says that the same, neither in whole nor in its separate averments, presents a legal defense to plaintiff's action."

There was service on William Little of a copy of plaintiff's supplemental petition, with all the exhibits attached, in Newark, N. J., on the 18th day of April, 1888, by Cyrus Benedict, under-sheriff of Essex county, N. J., sworn to as required by law. The case coming on to be heard upon the exceptions, they were sustained, except the general demurrer, thus leaving the defendant Masterson with no answer except the general denial. The court then held that William Little had not been properly served to give the court jurisdiction, refused a continuance requested by the plaintiff to get service upon him, and the plaintiff thereupon dismissed the suit as to him. The final judgment is in accordance with the prayers of the plaintiff and of the defendants Ed. and A. C. Hawes, in so far as the enforcement of the agreements was concerned.

Appellant complains that error was committed in sustaining the exceptions, for the following reasons: "(1) Because under the allegations of defendant's answer John Little had no right to plead, as an affirmative ground of attack upon defendant, the statute of frauds, and apply said plea to a contract alleged to exist between defendant and William Little; that the plea, as applied to a contract between defendant and William Little, can only be urged by him, and, as to him, it had already been adjudicated; that the statute renders no contract void, but only voidable. (2) Because the answer, in so much as it states the substance of the contents of Wm. Little's letters to defendant, taken in connection with the contract for fees sent him by defendant, and all the surrounding circumstances, showed a memorandum in writing signed by said William Little sufficient to satisfy the requirements of the statute of frauds. (3) Because Masterson's contract

with William Little was not a contract for the sale of lands, within the meaning of the statute of frauds, but was a contract for the joint acquisition of lands, which is not affected by the statute of frauds. (4) Because John Little's promises to Masterson, and his agreement to abide by and respect the judgment that might be rendered, and which was afterwards rendered, against William Little, preclude and estop him from denying the binding force and effect of said judgment against him. (5) Because the judgment in the case of Masterson vs. William Little was *res adjudicata* as to William Little, who, at said date, had the superior legal title to the Mustang and St. Joseph island lands, for which John Little had not paid, and because at the date of the institution of said suit John Little had not caused his deeds for said lands to be recorded, and defendant had no notice of them. (6) Because plaintiff came before the court invoking its equitable jurisdiction as an innocent purchaser for a valuable consideration without notice, and cannot complain of the relief asked by defendant; the answer showing that he could not be injured by it. (7) Because the answer charges that the deeds from William Little to John Little were executed with intent to defraud Masterson, a creditor of William Little, of which intent John Little had notice."

Appellant cites numerous authorities to the effect that, under the statute of frauds, a parol contract is voidable, and not void; that it is the personal privilege of a party, his privies or representatives, to abide by or repudiate his contract, within the statute; and that a mere stranger cannot interfere to prevent the performance. Our Revised Statutes provide that "no estate of inheritance or freehold * * * shall be conveyed from one to another, unless the conveyance be declared by an instrument in writing, subscribed and delivered by the party disposing of the same, or by his agent thereunto authorized by writing." Article 548. While we believe that the privity of estate existing between William and John Little gave to John Little the right to interpose, under the statute of frauds, the objection that the contract was not in writing, we also think that, independently of that statute, the one quoted above is applicable, and gave validity to the defense. We think the answer sufficiently shows that the contract between the defendant and William Little was an oral one. No question as to that is raised. The certificates had been located upon the land when the contract was made, and patents for the lands so located were subsequently issued to William Little.

The allegations contained in the answer, with regard to the contents of letters written by William Little to defendant, do not show such a memorandum in writing as will satisfy the requirements of the statute of frauds. In the case of Sprague v. Haines, 68 Tex. 217, 4 S. W. Rep. 371, this court said: "The words, 'any contract for the sale of real estate,' as used in the statute, include every

agreement by which one promises to alienate an existing interest in land, upon a consideration either good or valuable. It is accordingly held, in a number of cases, that a contract to convey land in consideration of labor or services to be rendered is within the statute." In the case of *Reed v. Howard*, 71 Tex. 205, 9 S. W. Rep. 109, it is said: "That a contract for the purpose of jointly acquiring title to vacant lands, and for sharing them when acquired, is neither within the statute of frauds, nor against public policy, has been held in the many cases enforcing parol contracts made by owners of land certificates with land locators, where a locative interest is stipulated to be taken by the locators." Appellant contends that he comes within the protection of the last-cited case, but we think the allegations of his answer place him clearly within the principle of the first one, and subject him to the requirements of the statutes on the subject.

We cannot agree with appellant in his contention that the allegations of his answer to the effect that, after defendant had sued William Little for partition, John Little represented to him that he did not want to be a party to the suit, and that he would not dispute or contest any right established in that suit against William Little, and that acting on such representations defendant failed to make him a party to the suit, etc., are sufficient to hold John Little bound by that judgment, as if he had been made a party to it, and prevent his now asserting his title to the land. On general principles, we do not think that mere oral promises of a person in interest, who is not joined as a party to a suit for land, that if he is not so joined he will hold himself bound by the judgment, as if he had been made a party, should be held to make the judgment rendered binding on him by estoppel or otherwise. In the case of *Scoby v. Sweatt*, 28 Tex. 731, it is said: "No such estoppel can arise without proof of wrong on one side, and injury suffered or apprehended on the other, nor unless the injury be so clearly connected with the wrong that it might and ought to have been foreseen by the guilty party. * * * When no injury results from a misrepresentation, its decision belongs to the forum of morals, and not to the judicial tribunals." If defendant had made John Little a party defendant to his suit against William Little, we must indulge the presumption that he would have asserted his proper defenses, and, had he done so, it is evident that no judgment against him for the land could have been rendered. It is not shown to us in what respect the defendant could more successfully have contended with him in that case than he can in this, and hence we are unable to see that he suffered any prejudice from believing or acting on the promises, if they could be held in any other respect to amount to an estoppel.

William Little's deeds to John Little took effect when they were delivered, and not when they were recorded, and having been

delivered, if not recorded, before Masterson sued William Little to recover and partition the lands, it necessarily results that the suit against William Little, who had no title when sued, did not adjudicate the title to John Little, the then owner of the lands. John Little in his petition in this suit sets up a legal title to the lands in controversy. His right to recover cannot be affected or delayed by equities, if there be such, between the defendant and William Little, to which he is not shown to be subject. As the holder of the legal title, by purchase from William Little, one-third of the land purchased by him cannot be set apart to defendant, on account of equities between defendant and William Little alone. The answer fails to show that any title to the lands, either legal or equitable, capable of enforcement in a court of justice, by defendant against William Little, existed when William Little sold and conveyed the lands to John Little. If no other sufficient objection had existed, still the question of fraud in the conveyances from William Little to John Little could not have been adjudicated in this suit without making William Little a party. That not having been done, there was no error in sustaining exceptions to so much of the answer as set up that defense.

After the exceptions to the answer had been sustained, defendant proposed, under his plea of "not guilty," to prove the matters alleged in the answer. He contends that the court erred in refusing the evidence. It is simply the same question in another form. It was proper to sustain exceptions to the answer, because, if proved, it was no defense. There was no error in quashing the service on William Little. He was a non-resident of the state, and was not found within its limits. The judgment sought against him, on his covenants of warranty, was a personal action, and, if maintainable in this suit in any aspect, it is well settled that the court had not acquired jurisdiction over him.

It is insisted that the court erred in the following particulars: "In sustaining said exceptions, and striking out said answer, because, by the agreement between the parties, dated November 7 and 10, 1885, set up in said answer, all matters in issue between John Little and this defendant were arranged, and said agreements were to be carried out according to their terms, unless Masterson's rights should be defeated by Wm. Little. Unless that contingency happened, John Little bound himself to abide by the Galveston judgment in the case of Masterson against Wm. Little, and thereby he was concluded from contesting after that agreement this defendant's claims. In the judgment rendered herein, in not rendering judgment for Masterson upon the agreement dated November 10, 1884, between John Little and Masterson, in accordance with its terms,—Wm. Little not having defeated Masterson in this suit; and in the decree rendered upon the agreement of parties. Under this agreement, John Little recognizes Masterson's rights to be as

fixed by the partition decree in Galveston, unless Wm. Little should defeat Masterson in this suit. Wm. Little did not defeat Masterson, and Masterson was entitled to the judgment provided for in the agreement." We think that the court would have been entirely unwarranted in giving the agreements the construction here contended for. It is evident that what the parties had in contemplation was that William Little should be brought into the case so that he could contest with Masterson his right to the land claimed by him on the merits, and to accept the result of such contest upon the title, and, that question being settled, to make some further disposition of other matters between the parties. As William Little was not made a party defendant, and the contested issues were never tried between him and defendant, they remained to be tried between the plaintiff and defendant, unaffected by the agreements in that respect. It must be concluded that the agreements were made with the knowledge that, under the circumstances, the court had no power to acquire compulsory jurisdiction over William Little, and that no more could be done by plaintiff than to make him a party to his pleadings, and have him served with such process as the law provided. Having done that, the party, though not bound, might have voluntarily submitted to the jurisdiction. The plaintiff having done everything in his power to execute the agreement, and the non-resident having failed to submit himself to the jurisdiction, the court properly declined to exercise it over him. The plaintiff still offered to delay the cause to obtain jurisdiction. Nothing seems to have been suggested tending to show that the desired result would be accomplished by allowing further time, and we see no reason why the defendant may not have properly opposed its being granted, but certainly not with the effect of treating an issue on the merits as having been tried and lost by plaintiff, as is now contended for. The only assignment not disposed of is raised by a bill of exceptions taken to the action of the court in overruling the exceptions to the answer. The court properly declined to sign it, because the action of the court appears otherwise, and such a practice is not warranted or necessary. We find no error in the proceedings, and the judgment is affirmed.

LARGEN et al. v. STATE ex rel. ABNEY.

(Supreme Court of Texas. Jan. 31, 1890.)

MUNICIPAL CORPORATIONS—DISSOLUTION—JURISDICTION OF DISTRICT COURT.

1. In a proceeding by *quo warranto* against the mayor and officers of a city, who are alleged to unlawfully hold office, the district court will be presumed to have jurisdiction, in the absence of objection below, where, from the pleadings, it appears that the area, population, and property rights of the city are such that the taxes must annually amount to over \$500.

2. Rev. St. Tex. art. 340, authorizing cities of a certain population to accept the provisions of that act in lieu of any existing charter, by a two-thirds vote of the council, and on compliance with cer-

v.13s.w.no.3—11

tain requirements, being the only law relating to the dissolution of municipal corporations by its own action, an attempted dissolution by vote of the mayor and aldermen, and subsequent incorporation under laws relating to unincorporated towns and cities, are void.

3. An attempted dissolution of a municipal corporation being void, dissolution cannot be presumed from acquiescence and lapse of time.

Appeal from district court, Lampasas county; W. A. BLACKBURN, Judge.

W. E. Adkins and J. J. Hill, for appellants. W. H. Browning and W. B. Abney, for appellees.

STATON, C. J. The nature of this proceeding as well as the defenses are thus stated in brief for appellants: "This is a suit in the nature of a proceeding in *quo warranto*, instituted in the district court of Lampasas county, on the 4th day of November, 1889, in the name of the state of Texas, by information of the district attorney for said county, upon the relation of W. B. Abney, against the appellants, T. J. Largen et al., to oust them from their respective offices as mayor, aldermen, etc., of the city of Lampasas, on the ground that they had usurped, intruded into, and unlawfully held and were exercising said offices. The information charges that the city of Lampasas, as organized at present, has no legal existence; that in 1873 the city of Lampasas was incorporated by act of the legislature, and organized as a municipal corporation under said act; that said corporation continued its organization until 1876, when all of its officers resigned; that since 1876 there has been no corporate organization of the said city of Lampasas, but that said corporation had not been dissolved; that in 1883 the city of Lampasas was incorporated, or pretended to be incorporated, under the statutes providing for the incorporation of towns and cities of over 1,000 and less than 10,000 inhabitants, without any reference to said corporation of 1873; that the said pretended corporation of 1883 embraced the territory of that of 1873, and additional territory; that the defendants were in the exercise of corporate functions under the said pretended corporation of 1883." The defendant answered by special and general exceptions, by general denial, and specially pleaded their defenses. "No action seems to have been taken on the demurrers, nor was there any question made as to the jurisdiction of the district court to hear and determine the cause. The answer alleged that the corporation created and organized under the act of the legislature incorporating the city of Lampasas had long since been dissolved; "that it was dissolved March 20, 1876; and set forth in full the facts whereby, as they claimed, it had ceased to exist. They alleged, in substance, that the corporation of the old city of Lampasas had, up to and before the 20th of March, 1876, served all the purposes for which it was created, and that the people and qualified voters residing in the said city wished to abolish it, and in effect a majority of them

voted for its abolition, and in effect did abolish it. They further alleged, in substance, that the action whereby the said corporation was abolished, or attempted to be abolished, was at the time acquiesced in by all the inhabitants and qualified voters of the said old city of Lampasas, and has, for more than 13 years, been accepted and acquiesced in. That for more than 13 years the said old corporation has exercised no corporate functions. That the act creating said corporation provided no means for its dissolution. They further alleged, in substance, that the present city of Lampasas was regularly incorporated in 1888, and that for more than six years it has been a regular, acting, existing *de facto* corporation, exercising all the functions of a municipal government. That it had constructed many costly and important works, etc., and contracted large indebtedness, and issued bonds, which are now outstanding and unpaid, in the sum of \$50,000.00. That said corporation owns much valuable property."

The substance of the averment as to the dissolution of the corporation organized under the act of 1873 was that, at the election held in the spring of 1876, the qualified voters of the city elected a city council, known to be in favor of dissolution, which in March of that year, at a regular meeting, made a full, complete, and permanent settlement of all corporate business, with a view to its dissolution, when they resigned, after having unanimously passed an ordinance declaring the several municipal offices forever thereafter vacant. Incorporation in 1888 was attempted through an election, ordered by the county judge on application of 50 persons resident within the territory desired to be embraced within the limits of the proposed corporation, as is provided may be done in case of incorporation of a city or town not before incorporated. Special exceptions questioning the sufficiency of the facts pleaded in the answer to operate a dissolution of the corporation created by the act of 1873, as well as the sufficiency of the facts transpiring in 1888 to give valid incorporation, were sustained; but a trial was had on the general averments of the information and answer, which resulted in a judgment in favor of the state.

A question is raised in this court for the first time whether the district court had jurisdiction to hear and determine the cause. This proceeding is by the state, representing the interest of every inhabitant who may be injuriously affected by the acts of those who assume the right to exercise powers such as valid incorporation would give to the city council and ministerial offices. Looking to the averments of the pleadings as to the area and population of the city, its property rights, and to the powers of taxation which respondents must claim the right to exercise, claiming, as they do, valid incorporation under the general laws of this state regulating the incorporation of cities and towns, it must

be held, if jurisdiction is to be determined by the amount in controversy, that this is sufficient; and especially so when no question of jurisdiction was made in the trial court. A controversy between the people and respondents is, in effect, involved, as to whether the latter shall compel, without lawful authority, all persons resident within the limits of the alleged corporation, or owning property therein, to pay taxes, which, under the averments of the pleadings, ought to be presumed to amount annually to more than \$500, in the absence of an issue on that question made and tried in the district court.

The cause having been tried on its merits, in the absence of a statement of facts, it must be presumed that the averments of the information were proved. We have a case, then, in which it is shown that the city of Lampasas was duly incorporated by an act of the legislature passed in 1873; that an organization existed under that act which was represented by a mayor and four aldermen, as provided by the charter, who, on March 20, 1876, assumed the power to declare that the corporation should be dissolved. "The state creates such corporations for public ends, and they will and must continue until the legislature annuls or destroys them, or authorizes it to be done." 1 Dill. Mun. Corp. § 167; *State v. Dunson*, 71 Tex. 65, 9 S. W. Rep. 103. At the time the dissolution of the corporation was attempted, the only law in force by which a repeal of the existing charter could have been accomplished, by the act of the representatives of the inhabitants, was the act of March 15, 1875, the first section of which provided that "any city within the limits of this state, containing one thousand inhabitants or over, may accept the provisions of this title in lieu of any existing charter, by a two-thirds vote of the city council of such city, which action by the city council shall be held at a regular meeting thereof, and entered upon the journals of their proceedings; and a copy of the same, signed by the mayor, and attested by the city clerk or secretary, under the corporate seal, filed and recorded in the office of the clerk of the county court of the county in which such city is situated; and the provisions of this title shall be in force, and all acts theretofore passed incorporating such city, which may be in force by virtue of any existing charter, shall be repealed, from and after the filing of the said copy of their proceedings as aforesaid." Rev. St. art. 340. That this course was not pursued is, in effect, alleged in the pleadings of both parties, which show that instead of incorporating under the general law, as might have been done, the attempt was, by the act of the city council, to dissolve the existing corporation. That this could not be done in the manner attempted is too evident, and it must be held that the corporation created by the act of 1873 still exists, with powers, duties, and limits prescribed by that act. The act of March 15, 1875, did not provide for the incorporation

of cities or towns having over 1,000 inhabitants, by the voluntary act of the qualified voters, as did it for the incorporation of towns and villages having 200 and less than 1,000 inhabitants, (Id. arts. 340, 341, 506-514;) but the act of March 26, 1881, amendatory of article 340, Id., did empower cities and towns, not already incorporated, to incorporate by complying with the requirements of the law applicable to towns and villages. This was again provided for by the act of April 6, 1881, but throughout all the legislation bearing on the question there is nothing to intimate an intention to permit existing corporations to incorporate under the general laws, and thus dissolve the existing corporation, in any other manner than that provided by the act of March 15, 1875, (Id. art. 340;) and the amendment to that article approved March 27, 1885, (Sayles' Civil St. 340b.)

This case differs in no essential manner from the cases of *State v. Dunson*, 71 Tex. 65, 9 S. W. Rep. 103, and *Buford v. State*, 72 Tex. 182, 10 S. W. Rep. 401; and, in view of the discussion of the questions found in the opinions in those cases, we deem it unnecessary to now restate the many objections to the validity of the claims set up by respondents, but may say, in view of the claim that dissolution of the corporation created by the act of 1873 ought to be presumed from the period of time which has elapsed since that charter was acted upon, that presumptions cannot be indulged in opposition to facts which show that the fact sought to be established by presumption can have no existence.

The municipal corporation known as the city of Lampasas, incorporated under the act of April 18, 1873, still exists, and the law furnishes a means by which the municipal offices, if all vacant, may be filled; but respondents are not entitled to hold such offices, or to exercise the powers pertaining to them, and the judgment of the court below will be affirmed.

BURKE *et al.* v. HANCE.

(Supreme Court of Texas. Feb. 11, 1890.)

GARNISHMENT—EXEMPTIONS.

1. Plaintiff obtained judgment against defendant, from which defendant appealed, and, pending the appeal, C., who had recovered judgments against plaintiff in another court, garnished defendant on the judgment which plaintiff had obtained against him. Defendant answered the writ of garnishment, setting up his appeal, and denying that he was indebted to plaintiff; but judgment on the garnishment was entered against him from which he failed to appeal, and afterwards plaintiff obtained final judgment against him on his appeal. *Held*, that though the judgment on the garnishment was erroneous, yet defendant, having failed to prosecute his remedies for relief against it, cannot enjoin the collection of plaintiff's judgment by pleading the judgment in the garnishment proceeding, nor can the plaintiff in the garnishment suit intervene and prevent plaintiff from collecting his judgment.

2. A final judgment for conversion is subject to garnishment in a suit in a different court, where it appears that all of the property converted was not exempt from forced sale, as there is noth-

ing to show how much of the judgment proceeded from exempt property.

Appeal from district court, Galveston county.

W. B. Denson, for appellants. *Wharton Branch*, for appellee.

HENRY, J. About the year 1886, James G. Burke brought suit in the district court of Galveston county against W. B. Hance, to recover damages for personal property wrongfully taken and converted by said Hance. On the 18th day of February, 1888, Burke recovered judgment for the sum of \$604.16. This judgment was afterwards affirmed by this court. The record before us and the report of the former case show that it was brought here by appeal. 73 Tex. 62, 11 S. W. Rep. 135. One A. Chimene had recovered against Burke two judgments in a justice's court in Harris county. On the 8d day of March, 1888, Chimene sued out, against Hance, writs of garnishment, which were served upon him in Galveston county, where he resided. On the 23d day of March, 1888, Hance answered the writs, denying, in general terms, that he was indebted to Burke, and stating, specially, the fact and the date of the recovery of the judgment against him in the district court of Galveston county, adding: "But respondent says said judgment is utterly unjust, and will be immediately removed by writ of error from said district court to the supreme court of the state, and that respondent is legally advised and firmly believes that said judgment will be duly reversed by said supreme court, and the case on which it was rendered be remanded for another trial, at which trial respondent is legally advised and firmly believes he will wholly defeat the unjust and iniquitous claim upon which said Burke recovered judgment. Further, respondent says: That he now has pending in the district court of Galveston county a suit against said James G. Burke for damages in the sum of five thousand dollars, for which amount he expects to recover judgment against said Burke at the ensuing April term of said district court. Wherefore respondent says said Burke is indebted to respondent in excess of any indebtedness respondent may possibly be under to said Burke, in case the judgment referred to in favor of said Burke shall be affirmed by the supreme court." On April 30, 1888, judgments were rendered in the justice's court in favor of Chimene, and against Hance, in both of the cases. Hance failed to appeal, or take any other steps to relieve himself from these judgments. Execution having been issued upon the judgment in favor of Burke, and levied upon the property of one of the sureties of Hance upon his appeal-bond, this suit was brought by Hance to enjoin further proceedings under said execution; and, among other things, setting up the rendition of said judgments against him as garnishee as a cause why said execution, and the judgment on which it issued, should not be collected.

The petition charges that said judgments are unpaid, and amount to the sum of \$486.12. It is further charged that executions on said justice's judgments have been issued, and are in the hands of the sheriff of Galveston county for collection. The petition complains that said justice's judgments ought to be credited on said Burke's judgment, and that plaintiff ought to be protected from a double payment, and prays that defendant Burke be cited to appear and show cause why the amount of said justice's judgments should not be paid to Chimene. W. B. Denson intervened, and alleged and proved that, in the year 1886, Burke transferred to him one-half of his claim against Hance. He also alleged an additional interest in it, and another intervenor, Halsey, alleged an interest in the whole of the claim that was in excess of the amount claimed by Denson. Chimene also intervened, and adopted the allegations and prayers of plaintiff's petition. The court rendered judgment in favor of Denson for one-half of the amount of the judgment recovered by Burke against Hance, and in favor of Chimene for the balance of it, less \$25.20 appropriated to the payment of costs. The sureties of Hance had paid the money into court. Burke and the intervenors Denson and Halsey prosecute this appeal. The only question that is presented to us for decision relates to the judgment in favor of Chimene.

It is said that "a negligent garnishee is no more entitled to protection than any other negligent party, and he is as much bound to look after the proceedings against him, and protect himself from an improper judgment, as a defendant in an ordinary suit is. If, by his failure in this respect, the plaintiff gain an advantage over him, he is without relief." Drake, Attchm. § 658e. In the case of Miller v. Taylor, 14 Tex. 538, Miller had a judgment in a justice's court against Hall. Subsequently there was a proceeding by arbitration between Leaverton and Hall, in which a judgment for money was rendered in the district court against Leaverton, and in favor of Hall, which was subsequently transferred by Hall to Taylor. During the pendency of the arbitration proceeding, Miller sued out a writ of garnishment against Leaverton. Leaverton answered as garnishee, after judgment against him had been rendered in the district court in favor of Hall, and on his answer another judgment against him in favor of Miller was rendered in garnishment suit. Miller and Taylor were both proceeding to enforce their judgments, and Leaverton brought suit for an injunction, and to compel them to interplead, he bringing the amount of the debt into court. WHEELER, J., said: "The first and principal question to be determined is whether the garnishee could be held liable, under the circumstances of this case, upon the process issued from the justice's court; and the better opinion, upon authority, seems to be that he could not, by reason of the proceeding pending, * * *

in another court not of concurrent but of a different jurisdiction, at the time of suing out the process against the garnishee. * * * It has been made a question whether a judgment debtor can be charged as garnishee of the judgment creditor, and on this point there has been a conflict of opinions and decisions; but the better opinion upon authority and reason seems to be that he can. * * * The court did not err in holding it [on the award] valid and obligatory, notwithstanding the judgment rendered by the justice in the matter of the garnishment. However that judgment might embarrass the garnishee, it could not impair the force of the judgment of the district court rendered upon the award. If the garnishee in his answer disclosed the proceedings in the district court, it was error in the justice to give judgment against him; and if the plaintiff in the garnishment had sought to avail himself of the erroneous judgment to oppress the garnishee, the latter might have been driven to a proceeding by *certiorari* to reverse the judgment of the justice." This court held that the money was rightly awarded to the assignee of the plaintiff in the district court judgment. In the case of McRee v. Brown, 45 Tex. 503, it appears that McRee, as surviving partner of A. B. James & Co., sued Brown for debt in the United States circuit court. Ireland had a judgment against McRee in the county court of Guadalupe county. Ireland sued a writ of garnishment out of the county court, and caused it to be served on Brown, who answered, admitting an indebtedness to McRee, on which answer Ireland took judgment against Brown as garnishee, and Brown paid the judgment. Judgment was also rendered in the circuit court in favor of McRee against Brown, and he paid that too. Afterwards he sued McRee to recover back from him the money paid on his judgment. In the opinion rendered by this court it is said: "But though Brown, as he alleges, has paid the same debt twice, it may be questioned whether he has taken the proper course, or applied to the proper tribunal for relief. From the statement of facts incorporated into and forming a part of the judgment, it seems that his debt to James & Co. was one for which he was jointly liable with Mayfield and Cotton. If it was a partnership debt, it is held in many courts that he could not be forced to pay it on a separate writ of garnishment; and if he has done so without a proper effort to protect himself he is not entitled to relief. * * * It is not shown whether the writ of garnishment by Ireland was served before or after the bringing of the suit in the United States court. If it was afterwards, it seems to be held by the supreme court of the United States (Wallace v. McConnell, 13 Pet. 136) that the garnishment cannot arrest the suit, or preclude the plaintiff from recovering judgment in that court; nor can the garnishee protect himself by pleading the garnishment *puis darrein continuance*. * * * And if Brown was entitled to relief against the

last judgment, it may also be well questioned whether he should not have gone to the court rendering the judgment to obtain it."

We think these cases sufficiently announce the doctrine that during the pendency of a suit against a debtor by his creditor in one court the debtor cannot be compelled to defend, as garnishee, a suit in a different court by one seeking a judgment against him for the same debt. There are, at least, some defenses which the garnishee is required to assert in all cases when they exist, and still others that he is required to make known when they are known to him. We think the rule is a just one that relieves him from asserting his defenses against the same debt in different courts at the same time, and when a suit is pending in the name of his creditor for the debt it ought to be held a complete defense for him to answer the pendency of such suit in any other court where he may be cited to answer for it as garnishee. The rule is a useful one, too, to prevent confusion in jurisdictions and multiplicity of suits, and to preserve the substance, instead of the shadow and form only, of litigation to the court that first acquired jurisdiction. In the matter before us, the defense which was proper and necessary for his protection was pleaded by Hance, the garnishee. The defense was disregarded by the justice of the peace. It was the duty, as well as the right, of Hance to pursue such remedies, by appeal or otherwise, as the law furnished him with to relieve himself from the erroneous judgment. That he did not do so furnishes no reason for his being relieved in the manner now sought by him. If he had properly defended the garnishment suit no judgment against him could have been maintained. If defended properly the law would not have permitted the plaintiff in the garnishment suit to prevent or interfere with the collection of his debt by Burke in his prior suit. Hance and not Burke must be charged with the consequences of the negligence of the former. Whatever legal rights Chimene acquired by his judgments against Hance as garnishee must be pursued by appropriate process against Hance. He has shown no right to intervene or recover in this cause, and for the error in allowing him to recover any sum the judgment must be reversed.

It is insisted that, as the property converted by Hance, and for which the judgment in favor of Burke was rendered, was exempt from forced sale, the judgment recovered by Burke is protected also. If the evidence showed that the judgment was rendered for the seizure of exempt property we think the proposition contended for would be correct; and if that fact was known to the garnishee it would be his duty to plead it. The evidence shows that all of the property, on account of which Burke sued Hance, was not exempt from forced sale, and as there is nothing to show how much of the judgment proceeded from exempt property that principle cannot be applied in this case. It is not

our purpose to decide that a judgment, final in the courts of this state when all proceedings in the suit in which it was rendered, whether original or appellate, are at an end, is not subject to garnishment in other suits pending in the courts of this state, without regard to any question of inferiority of the courts. While authorities conflict on the question we are of the opinion that they are subject to garnishment in such cases by writs sued out after the termination of all proceedings. Such other questions as may arise in the trial of this cause, if any such there be, are not before us in a way that we can pass upon them. The judgment is reversed and the cause is remanded.

SMITH v. SABINE & E. T. RY. CO.

(Supreme Court of Texas. Feb. 7, 1890.)

APPEAL—WEIGHT OF EVIDENCE—EXPERTS.

1. In an action for the destruction of plaintiff's house owing to defendant's alleged negligent construction of an embankment four feet high, it appeared that plaintiff's house fronted on a body of water, and that the embankment was about a mile west thereof. During a violent storm from the east, the water from the pass was blown over the house, and plaintiff alleged that the embankment prevented the water from flowing over the level country west of it; that the height of the flood was thereby increased, and the house thereby destroyed. Held that, as it was clear that the injury had been occasioned by the combined action of the wind and water, and as it was questionable whether the increased depth of the water, if any, caused by the embankment, contributed in any manner to the destruction of the house, a finding that the house would have been destroyed even though the embankment had not been there would not be disturbed.

2. Expert evidence, by one who has been a sailor nearly all his life, and who is acquainted with the locality, as to the size of the waves that would be caused in the immediate vicinity of the destroyed premises by a wind blowing 60 miles an hour, is admissible, though other persons were present when the house was destroyed.

Appeal from district court, Jefferson county.

Tom J. Russell, for appellant. O'Brien & O'Brien, for appellee.

GAINES, J. During the storm and flood which occurred at Sabine Pass on the 14th day of June, 1886, a house belonging to Charles F. Ilfrey was washed away, and destroyed. He brought this suit to recover of appellee damages for the destruction of the property, alleging that it was caused by the negligent construction of the embankment upon which the railroad track was laid. The house was situated in the town of Sabine Pass, fronting on, and very near to, the body of water of the same name. The company's track lay west of the town, and was built upon an embankment about four feet in height. At the time of storm the waters were driven up from the gulf, and overflowed the town. There was a strong wind blowing from the east. The country west of the town is level for many miles in extent, and has no natural obstacle to prevent an uninterrupted flow of water over it. Appellant claims that

the water which was driven by the storm over the town was retained by the railroad embankment, and prevented from flowing over the level country west of it, as it would otherwise have done, and that in consequence the height of the flood was increased, and the house thereby destroyed. Ilfrey having died, his wife, who married again, joined by her second husband, made herself a party to the suit in her own right, and as guardian of Ilfrey's minor children. The case was tried without a jury, and resulted in a judgment for defendant. The contention of the defendant in the court below was that the house was destroyed by reason of the wind and waves, and that the embankment did not contribute to the injury.

During the progress of the trial, one Louis King, a witness for defendant, after having testified that the wind, on the morning of June 14th, was blowing at the rate of 60 miles per hour, was asked the question: "With a wind like that, what would have been the size of the waves in that immediate vicinity?" The question was objected to on the grounds that the witness had not shown that he was an expert, and that expert testimony could not be resorted to to prove the size of the waves, when it appeared that other witnesses were present at the scene of the disaster at and about the time the house was destroyed. The court overruled the objection, and the witness answered the question. In this ruling there was no error. The witness had testified that he went to sea when he was 14 years of age, and had continued a sailor for 11 years; that subsequently he had run a steam-boat at Sabine Pass, and at the time of the storm was living two miles distant. He was 65 years of age; and, according to his own testimony, the occupation of a sailor, with short intervals, had been the business of his life. His knowledge of the immediate locality, and of the force of the wind, and his experience upon the water, qualified him to give an opinion. The fact that other witnesses were enabled to testify, from their own knowledge, as to the height of the waves, did not render his opinion incompetent. *Lawson, Exp. Ev. 26, 27, citing Thornton v. Assurance Co., Peake, 37.*

The other assignments of error relate to the conclusions of the court. The court's findings of fact are as follows: "(1) That overflows from freshets and high tides had happened at Sabine Pass many times since 1871, but no storm or cyclone, with wind blowing at the rate of 60 miles per hour, had occurred there until the storm and cyclone which occurred there on the 14th of June, 1886, almost destroying the town; (2) the court concludes, from the preponderance of evidence, that defendant's railroad embankment was not the proximate and immediate cause of the injury complained of; (3) The court concludes, from the preponderance of evidence, that plaintiff's house would have been washed away had not the railroad track been located where it was; (4) the court concludes, from a

preponderance of evidence, that the storm and cyclone of the 14th of June, 1886, was one of unusual violence, amounting to an act of God, against which no reasonable amount of diligence and skill could have provided." We quote the findings at large because each paragraph is made the subject of a separate assignment of error. It is evident, however, that if either the second or third conclusion of fact is sustained by the evidence it is wholly immaterial whether the others were warranted or not. The real issue in the case was determined, by the third finding, adversely to the plaintiffs; and if this be sustained by the evidence it is decisive of the case. If the house would have been washed away in the absence of the railroad embankment, then the embankment was not the proximate cause of the loss, and plaintiffs were not entitled to recover. Upon this, the vital issue, it is doubtful if it can be said that the testimony was conflicting. It may be that the testimony of different witnesses tended to different results. The house was doubtless carried away by the combined action of the wind and water. That it would not have been destroyed even if the height of the water had been less, it is impossible to say from the testimony. It follows that if the evidence did show that the company's embankment did dam the water, and cause it to rise higher than it would have arisen but for the construction, it would still be a question whether the increased depth of water contributed in any manner to the destruction of the house. We think the court was warranted by the evidence in concluding that it was not proved, by a preponderance of evidence, that the embankment caused the loss of the property. The findings of the court are entitled to the same respect as the verdict of a jury, and cannot be aside when there is evidence to support them. If the loss would have occurred although the embankment had never been constructed, the plaintiffs were not entitled to recover. The judgment is therefore affirmed.

MORRISON *et al.* v. ADOUE *et al.*

(Supreme Court of Texas. Feb. 18, 1890.)

SALE — RESCISSION — FALSE REPRESENTATIONS — BONA FIDE PURCHASERS.

Where one has been induced to sell goods on credit to a firm, on the faith of a false statement as to its assets and liabilities, made by a partner having full opportunity to know that it was false, the seller may avoid the sale, and recover the goods from persons to whom they have been transferred in settlement of pre-existing debts, they not being *bona fide* purchasers, though they were ignorant of the buyer's false representations; and, if they have disposed of the goods, the seller can recover their value.

Appeal from district court, Galveston county.

Action by Morrison, Herriman & Co. against Adoue & Lobit and others. There was judgment for defendants, and plaintiffs appeal.

William B. Lockhart, for appellants. *G. E. Mann*, for appellees.

STAYTON, J. On August 23, 1887, appellants, merchants doing business in the city of New York, sold goods to C. W. Nordholtz & Co., a firm doing business in this city, who about September 1st placed the goods bought on credit among their general stock, from which they sold in ordinary course of trade until about September 19th, when they sold their entire stock to the many defendants, in settlement of debts for the most part due when the goods were bought from appellants. After the sale was made by Nordholtz & Co., appellants demanded the goods sold by them, before appellees had disposed of them, claiming the right to avoid the sale on the ground that Nordholtz & Co. had induced them to sell the goods by fraudulent statements as to the assets and liabilities of that firm. Appellees refused to deliver the goods, and this action was brought against them to recover as for the conversion, the petition setting out the goods on which appellants claimed the right to avoid the sale. The statement on account of which the sale was made and credit given was as follows:

"N. Y., 8—23rd, 1887.

"The following statement is made by me to Morrison, Herriman & Co., as a basis of credit on this and all future purchases by—

"Name, G. W. Nordholtz & Co.

"Residence, Galveston, Texas.

ASSETS.

Aug. 5th, '87.

Stock at value.....	\$38,987 43
Outstanding accounts, good.....	4,972 45
Cash in hand, and in bank.....	885 00
Total.....	\$44,844 87

LIABILITIES.

Owe for Mdse. on open account }	
Owe for Mdse. settled by note }	\$ 4,750 26
Borrowed money.....	10,180 00
Other debts, bank.....	8,000 00
	\$17,930 26

Surplus..... \$26,414 61

"Indebtedness, past due, none.

"Indebtedness extended, part of Claflin's acct., say \$1,500.

"Insured for \$30,000.

"Sales for cash, }

"Sales on credit, } \$5,500.

"Rent, \$2,400.

"Other expenses, reduced considerably from last year, ab't.

"Buying altogether 5/6000.

[Signature] "G. W. NORDHOLTZ & Co."

It is shown that goods sold from the entire stock of Nordholtz & Co., from the time of the purchase in question until the transfer to appellees, amounted to about \$5,000. After the transfer was made an inventory was taken by appellees, or under their direction, in the taking of which neither member of the firm of Nordholtz & Co. was permitted to be present or to participate. That inventory showed stock on hand not exceed-

ing \$32,000 in value. But three witnesses testified, and only two of them knew anything about the value of the stock when statement was made by Nordholtz & Co., or when transferred to appellees. G. W. Nordholtz stated: "When I left Galveston for New York, in 1887, the stock of G. W. Nordholtz & Co. was worth about as much as was shown by statement, viz., \$38,987.42, and the other items given in the statement were approximately correct at the time as given." He, however, admitted an indebtedness of \$21,000 existing before he went to New York, and at the time he made the statement, and it was conceded by defendants that a further indebtedness, which he denied, amounting to \$2,550.46, then existed. The other member of the firm of Nordholtz & Co. testified as follows: "I was the partner of G. W. Nordholtz in the firm of G. W. Nordholtz & Co., and am executor without bond of the estate of Ferdinand Emme, deceased. Nordholtz did the buying for the firm, and for that purpose went on to New York in 1887, while I remained in the store. No account of stock was taken before Nordholtz's departure for New York, in August, 1887, and none had been taken since January 1st of that year. When Nordholtz left for New York, in August, 1887, the stock on hand was not worth more than twenty-two or three thousand dollars. Very few goods had been bought by the firm for a year prior to August, 1887, as business had not been good, and I had done all I could to restrain Nordholtz from incurring new obligations for the firm. I had told him that we must stop buying, except as should be absolutely necessary; and that when we did buy it should only be from home people, and in small quantities at a time. Previous to and while Nordholtz was in New York, in August, 1887, the sales were very light. The year had been a very bad one, and sales light, particularly in July, August, and September, which are always dull months. At the time Nordholtz went to New York, in August, 1887, the firm was indebted to Albert Sundt \$2,600 of the \$3,005.40 owing to him at the date of the transfer to defendants, viz., September 19, 1888; to Mrs. Ernestine Schulte, \$1,500; to Texas Banking & Insurance Company, \$500; to Ball, Hutchings & Co., \$600,—which was, as was also the debt to the Texas Banking & Insurance Company, a renewal of a pre-existing debt; to H. Miller, \$1,700; to L. & H. Blum, at least \$600; to P. J. Willis & Bro., at least \$778; to Adoue & Lobit, at least \$3,000; to the estate of Ferd. Emme, \$12,000, including principal and interest; to Charnock & Co., \$800; and to Mrs. Wright, \$5,000. While gone, in 1887, Nordholtz bought between eight and nine thousand dollars' worth of goods, which were received in stock by Nordholtz & Co., on about September 1, 1887. The statement made by Nordholtz, August 23, 1887, which is attached to the deposition of E. M. Post in this case, is greatly exaggerated. The value of

the stock, as stated therein, is greatly above what its true value was. The indebtedness of the firm is underestimated, and of the outstanding accounts, stated to be \$4,900, all of which was asserted in the statement to have been good, not more than 50 cents on the dollar could have been collected. I assisted in taking the inventory of stock after the transfer for three days, when objection was made by the defendants to my being present, and I was excluded from the store. The inventory was taken at invoice prices, while I was there; and when I saw it, two or three days after its completion, footed up thirty-one or two thousand dollars." Cross-examined, the witness said: "The debt of the firm to the Emme estate amounted to \$12,000 at the time Nordholtz went to New York. My statements as to amounts of our indebtedness, amount of stock, and other figures are my recollection and belief. I was familiar with the stock and indebtedness of the firm, and had entire charge of the business while Nordholtz was gone."

From the evidence, it will be seen that the indebtedness of the firm, at the time statement was made, was largely in excess of sum stated; and, while Nordholtz did not state all the indebtedness, he did not question the accuracy of his partner's statement, which showed an indebtedness exceeding \$28,000. If the statement of the other partner is correct, the statement of assets made to appellants was largely in excess of all owned by the firm, and the inventory made by appellees, or under their direction, tends to corroborate the testimony of that witness. As Nordholtz and partner were not permitted to be present and to participate in making inventory of stock, at time appellees bought, the latter cannot well question its accuracy. When we take into consideration the fact that Nordholtz bought eight or nine thousand dollars worth of goods while in New York, at the time he bought from appellants, and that those goods went into the stock bought by appellees, it is evident that the statement of stock on hand August 23d was excessive. If we add to the amount then stated \$8,000, we have \$46,987.42, from which, if we deduct \$5,000 on account of sales, there ought to have been on hand, when appellees bought, \$41,987.42, when in fact, from inventory taken when appellees bought, there was not more than \$32,000 in stock on hand. These facts show that the statement as to assets and liabilities was incorrect, and both so in the direction to obtain credit.

In making a statement for such a purpose, the partner making it ought not to be heard to say that he was ignorant as to the condition of the firm business; for it was his duty to know, and to make no statement not substantially correct, when he knew that the seller was to be influenced by it. The evidence shows that early in 1887 appellants had refused to fill an order made by Nordholtz & Co. because the business up to that time had not been satisfactory, but that the firm after-

wards paid sum due, when appellants determined not to reopen an account, but were induced to do so by the favorable statement made August 23, 1887. The cause was tried without a jury, and we have not the benefit of the judge's conclusions of fact and law. Appellees answered by demurrers and by general denial, and did not plead that they were innocent purchasers, though in their brief it is suggested that under the facts proved such is their character. It is well settled that a seller, who is induced to sell by a false statement of material fact or facts made by the buyer, is entitled to avoid the sale in all cases in which the false statement is made with knowledge of its falsity by the person making it. A false statement made by a buyer, who has full opportunity to know whether it is true or not, in reference to a material fact, although it may not be actually known by him to be false, also furnishes ground for avoidance of the sale, if it be made when he has no reason to believe it to be true. In the case before us, it is shown that the person who made the representations which induced appellants to sell was an active partner in the purchasing firm, and that by the use of the means within his reach he could and ought to have known that his statements were not substantially true. A person so situated ought not to be heard to say that he does not know what his firm owns and owes. He must be held to have made a statement as to the assets and liabilities of his firm known by him to be untrue, or to have made the statement recklessly, without making that inquiry which good faith required he should make before making a statement intended to influence, and which he knew would influence, the sellers. In either case, appellants were entitled to avoid the sale so long as the goods sold were in the hands of any person not a *bona fide* purchaser. Appellees, having purchased solely in payment of existing debts, cannot claim to be such purchasers, although they may have known nothing of the untrue statements which induced appellants to sell to Nordholtz & Co. Appellees having refused to deliver the goods sold by appellants to Nordholtz & Co., although demanded before they had disposed of any of them, it is the right of the latter to recover their value; but as the case is presented this court cannot, with certainty of doing justice, render a judgment. Appellees are liable only for the value of such goods sold by appellants as were received by them, and in the absence of evidence showing what part of the goods they did receive, or that this cannot now be accurately ascertained, resort should not be had to presumptions which may be drawn from facts proved. What goods appellants sold to Nordholtz & Co. is shown, and their value may, no doubt, be established with reasonable accuracy. It is, however, rendered probable that some of the goods may have been sold, in ordinary course of business, before the sale to appellees. If so, appellees have or ought to have it in their power

to show what was so sold, by showing what they received; for they received all that had not been sold before their purchase. At time appellees were notified of appellants' election to avoid the sale, they still held the goods, and their refusal to deliver them made them wrong-doers, against whom, in the absence of direct evidence, much ought to be presumed. When demand was made, they became aware of the right of appellants, and then had it in their power to ascertain with accuracy, so far as the record shows, what goods belonging to appellants they held. It seems to us that it then became their duty to ascertain that fact, and if they failed to do so, and sold the goods to other persons, thereby depriving appellants of the power to show what goods came into their hands, then they ought to be held liable for the value of all the goods sold by appellants to Nordholtz & Co. The burden of proof ought to rest on appellees to show what goods they received; and, as the case now appears from the record, if they fail to do this judgment ought to be rendered against them for the full value of the goods sold to their vendors by appellants. *Preston v. Leighton*, 6 Md. 97; *Whart. Ev.* §§ 1265, 1266; 1 Greenl. Ev. § 37. The judgment will be reversed, and the cause remanded, that both parties may have opportunity so to present the case that justice between them may be done. It is so ordered.

WESTERN UNION TEL. CO. v. SMITH.

(Supreme Court of Texas. Feb. 18, 1890.)

TELEGRAPH COMPANIES — NEGLIGENCE — REMOTE AND CONJECTURAL DAMAGES.

Plaintiff delivered to a telegraph company for transmission a message as follows: "R., [addressed.] Meet me in C. Saturday night. S.;" which was not delivered to R., and plaintiff brought an action against the company, alleging that by its negligence he was put to expense in hiring a conveyance to go from C. to R.'s home, and back again; that by loss of time he failed to meet important engagements; and that, by reason of exposure, his health was greatly impaired,—to his damage a named sum. *Held*, that the petition was bad on demurrer, the damages being too remote, conjectural, and not in contemplation of the parties, in case of a breach of the contract.

Appeal from district court, Colorado county.

Action by Frank M. Smith against the Western Union Telegraph Company for failure to deliver a message. Defendant filed a general demurrer to the petition, on the ground that the damages were too remote and conjectural, and were not in the contemplation of the parties in case of a breach of the contract. The court overruled the demurrer, there was a judgment for plaintiff, and defendant appeals.

Stemmons & Field, for appellant. *McLean & Munson*, for appellee.

HENRY, J. Appellee delivered to appellant the following message, to be transported over its wires: "Merkel, Tex. 10, 21, 1886. To J. C. Ratcliff, Columbus, Texas, Care of Simpson & Crebbs: Meet me in Co-

lumbus, Saturday night. [Signed] FRANK M. SMITH." Plaintiff in his amended petition charges that he is a merchant, a banker, and the treasurer of Jones county, Tex.; that on the 21st day of October, 1886, he was at Merkel, and having important business with said Ratcliff, who resided in Coleman county, and being then on his way to said county to have a personal interview with him, and being pressed for time because he had other important engagements to meet, and the nature of his business at home demanding his speedy return, he sent the above dispatch, and paid 50 cents for transmitting it; that when he delivered the message "he informed defendant's agent that the message was important, and of the circumstances making necessary its speedy transmission and delivery;" that plaintiff proceeded on his journey, and on his arrival at Columbus he failed to find said Ratcliff, and, on inquiry, he found that the message had not been delivered to Simpson & Crebbs, although they had an office in said city which was well known to defendant's agent there; that at the date of said message Simpson & Crebbs were transacting said Ratcliff's business, and, if the message had been delivered to them, it would have been forwarded to Ratcliff in ample time for him to have met plaintiff, and he would have done so, saving plaintiff from further delay; that on account of the non-delivery of the message, he was compelled to incur great expense in procuring a conveyance to the home of Ratcliff, which was about 25 miles distant from Columbus; that on reaching the home of Ratcliff he found him absent, and plaintiff had to go a distance of 25 miles further to find him; that by reason of the delay in finding Ratcliff he reached Columbus on his return too late for the train, and in order to recover as much time as possible, and obviate the delay of one day, he employed a livery man to drive him to the town of Sealey, to another railroad, a distance of about 30 miles; that by reason of the failure to deliver the message he is damaged the amount paid therefor; that he failed to meet "important engagements previously made with parties; that he suffered great loss of time, and was greatly damaged in his business at home; that he incurred heavy expenses of travel, horse hire, board," etc.; that he was subjected to great hardship of travel and exposed to cold, wet, and disagreeable weather, resulting in impairment of health, and great physical and mental suffering, and that he incurred great expense for medical attention, to his further actual damage \$2,000; that the non-delivery of the message was caused by the gross and willful negligence of defendant's agents; that defendant has ratified the negligent acts of its agents, and has been guilty of negligence in the selection of its servants, whose gross and willful negligence led to the non-delivery of the message, wherefore he prays for \$1,000 as exemplary damages. The defendant filed a general demurrer to the petition. We think the court

erred in not sustaining the demurrer. As appellee requests us to finally dispose of the case, the judgment is reversed, and the cause is dismissed.

HUBBARD v. COX.

(Supreme Court of Texas. Feb. 18, 1890.)

DEEDS—GIFTS INTER VIVOS—DELIVERY.

1. In an action to quiet title it appeared that plaintiff's grantor, having frequently expressed the desire that plaintiff should have her land, brought a notary to her house that she might execute and acknowledge a deed therefor to plaintiff, which she did, saying that it was for past services rendered her, stating the items, and requiring the notary to cast them up, and to put the result into the deed as its consideration. The notary then, in the grantor's presence, handed the deed to plaintiff, who locked it up in a box containing papers belonging to him, and put the box in a wardrobe, which he also locked, though the grantor kept its key, with others, she and plaintiff living in the same house. *Held*, that there was a sufficient delivery and acceptance of the deed.

2. In an action to recover money alleged to have been given to plaintiff by defendant's testator, two witnesses testified that when one of them paid testator certain money she expressed the intention of giving it to plaintiff; that the testator was expecting to die, and said she had already given all her property to plaintiff; but at the witness' suggestion she made a will to that effect. Plaintiff testified that before she died she gave the money to him, and he put it in a box with papers belonging to him. *Held*, that the evidence was not sufficient to show delivery of the money; plaintiff's testimony as to a transaction with a decedent being inadmissible.

Commissioners' decision. Appeal from district court, Fayette county.

James B. Cox sued Evander Hubbard, alleging that he was the owner and in possession of 40 acres of land, described in his petition, to which defendant was asserting a claim which clouded plaintiff's title to the land, and obstructed his free use and enjoyment of the same and the sale thereof. He also sued to recover a deed to said land, made to him by a Mrs. P. W. Davis on the 27th day of June, 1888, and of which defendant, he alleged, had wrongfully deprived him. Finally he sued to recover of defendant the sum of \$1,000, which he alleged defendant had forcibly and unlawfully taken from his possession. Defendant answered that he made no claim to the land except as executor of the will of Mrs. Davis, and that the money was bequeathed to him by the residuary clause of such will. There was judgment for plaintiff, and defendant appeals.

Hums & Kleberg, for appellant. *Phelps & Lane*, for appellee.

COLLARD, J. Both the questions involved in this case are mixed questions of law and fact. Was the deed of Mrs. Davis to Cox delivered by her, and accepted by him? and was the money so delivered and accepted? When these questions are answered in the affirmative or negative, no other points need be considered. If she had absolutely conveyed the land and the money to Cox, she could not afterwards dispose of the same by gift or will. If she had not parted with the

title to the land, the will must have effect; and if she had not given and delivered him the \$1,000, but only intended at one time to do so, then her undisputed gift and delivery of it to the defendant, Hubbard, must be held to be final and conclusive. Delivery by the grantor and acceptance by the grantee of a deed are both required to pass title to land; both facts may be established by circumstances, as well as direct proof. *Dikes v. Miller*, 24 Tex. 425; *Tuttle v. Turner*, 28 Tex. 773; *Van Hook v. Walton*, Id. 59; *McLaughlin v. McManigle*, 63 Tex. 553. Actual manual delivery is not necessary, nor is it material that the delivery be by the grantor in person, to constitute a good delivery. The form and manner of doing the act is not important, so it is the manifest intention of grantor to deliver. *Devl. Deeds*, §§ 261, 262, 269. The facts and circumstances of this case show that it was the intention of Mrs. Davis to convey and deliver the title to the land to Cox. She had frequently expressed the desire that he should have the property, and that her relatives should not. The notary was brought to her house, so that she might execute the deed, and acknowledge it. When the parties were all present for this purpose, she again stated that it was her desire to deed Cox the property for past services he had rendered her, stated the items, and had the notary to cast them up, the result of which was put in the deed as its consideration. He had been living with her for many years, attending to her affairs, and an illicit intimacy had grown up between them. Under these circumstances, the deed was written at her request, signed and duly acknowledged by her, after which, in her presence, it was handed to Cox by the notary. These acts and declarations, in our opinion, tend to evidence a complete delivery. When her property was mentioned afterwards, she stated that she had deeded it to Cox. It has been said that "the doctrine seems to be settled * * * that where a party executes and acknowledges a deed, and afterwards, either by acts or words, expresses his will that the same is for the use of the grantee, especially where the assent of the grantee appears to the transaction, it shall be sufficient to convey the estate, although the deed remains in the hands of the grantor." *Devl. Deeds*, § 262. The foregoing extract might not be the law of all cases. Every case must depend upon the facts and circumstances attending it, and the relations of the parties. We think there must be an intention to deliver, and there must be acts tending to show an execution of that intention. There was evidence supporting the court's finding that Cox accepted the deed. He in fact received it from the hands of the notary, immediately after its execution and acknowledgment, in response to the delivery and intent to deliver by the grantor, and this in her presence. He put the deed away in a box with other papers belonging to him, containing old wills of Mrs. Davis. He claimed the box, locked it, put it away

in a wardrobe on the place, which he also locked. The key, it was true, was kept by Mrs. Davis with other keys, tied together, under her pillow; but the parties lived together in the same house, and the court might well have concluded that, under such circumstances, the fact that she carried the keys was not significant, or at least ought not to outweigh other direct proof of delivery and acceptance. His declining to record the deed, and his expressions to that effect before the execution of the deed or afterwards, on the ground, as he stated, that he did not want his children to bother her about the property if he should die first, would not necessarily imply that he did not accept the conveyance of the fee. It most probably meant that he intended she should use and enjoy the property as long as she lived, which would not be inconsistent with his ownership of the title, and acceptance of it in good faith.

The next question is, was Mrs. Davis' intention to give the \$1,000 to Cox finally executed and carried into effect? The testimony upon this subject, besides that of Cox himself, is that of Baker, the notary, and J. C. Brown. Baker says he was over at Mrs. Davis' house two days after the execution of the deed, when J. C. Brown paid her \$1,200 on land he had purchased from her. He says: "When Brown paid her the money, she said she intended to take this money, and use it for what she needed, and whatever was left of it she intended to give to Cox." She was very sick at the time, and did not expect to live. She and Brown then had some conversation about a will, and she remarked: "I do not see the necessity of making a will, as I have already given everything to Cox." Brown told her it would be better, and she finally executed the will. Brown testified that when he went over to pay her for the land, and give his note for the balance, she told him she was going to give the \$1,200 to Cox. At this time she said she had already made a deed to Cox for the land. Brown advised her to make a will to that effect, as at her death her relatives might attack the deed. She then made a will leaving to Cox all her property, real and personal. Cox's evidence shows that she gave and delivered to him the \$1,000, as alleged, but the evidence, being objected to by defendant, was allowed to go in, the trial being before the judge; but the judge who made up the statement of facts, the parties failing to agree, in his certificate thereto says he did not consider Cox's testimony relating to transactions and conversations with Mrs. Davis. Cox also testified that when she gave him the money he put it in the box with the deed, and locked it in the wardrobe. This testimony was also objected to. We are in doubt as to whether the court considered this a transaction with Mrs. Davis. We think no part of it was admissible. The court may have inferred from the fact that Mrs. Davis had expressed her intention to give Cox the money, and the fact, as stated by him, that

he had possession of it, that she had actually given and delivered it to him. We cannot tell exactly what evidence of Cox the court did consider. At all events, leaving out such of the evidence of Cox as should have been excluded, we are not satisfied with the conclusion of the learned trial judge as to the delivery of the money to him. All that the evidence shows was that she intended to give it to him. This intention is shown by her expressions, and the will in his favor was not to take effect until after her death. In the mean time, before she died, she gave the money to defendant, Hubbard. This final disposition of it revoked her intention to give it to Cox, and must have effect.

We conclude the judgment of the lower court should be affirmed in so far as it adjudged the land to plaintiff, and reversed in so far as it adjudged a recovery of the money by him, and that judgment be rendered in favor of defendant, Hubbard, for the \$1,000 sued for, so that plaintiff take nothing by his suit for the money.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment affirmed in part, and reversed and rendered in part, as per opinion.

PEGUES *et al.* v. HADEN.

(Supreme Court of Texas. Jan. 21, 1890.)

CONTRACTS—BETWEEN HEIRS—COMMUNITY PROPERTY.

1. An agreement between heirs to divide the estate according to law, which is based on a misconstruction of the law of inheritance, whereby one renounces a part of her legal share on the erroneous supposition that the others are entitled to it, and without receiving any consideration therefor, does not bind her to that construction.

2. The fact that the personality is divided in accordance with the parties' supposition of what the agreement requires does not estop such heir to claim that she is not bound to divide the realty.

3. Under Rev. St. Tex. art. 1653, providing that, on death of husband or wife, leaving children, the surviving spouse shall take one-half of the community property, and the children the other half, a surviving child inherits all of a deceased parent's half of the community estate, to the exclusion of grandchildren.

Commissioners' decision. Appeal from district court, Houston county.

Action by M. E. Haden, a daughter of Philip and Eliza Alston, deceased, against Dock Pegues and others, grandchildren of decedents. Plaintiff claimed four-sixths of the entire estate of decedents, consisting of all of Eliza Alston's half of the community property, and one-sixth of the estate of Philip Alston, under his will. Eliza Alston died in 1877, and Philip Alston in 1879. Defendants claimed that plaintiff should have but one-fourth of Eliza Alston's half of the community property, as there were four children, or their descendants, of decedents. The parties had entered into an agreement, referred to in the opinion, to divide the property. Rev. St. Tex. art. 1653, provides that, on death of husband or wife, leaving chil-

dren, the surviving spouse shall take one-half of the community property, and the children shall take the other half. Judgment for plaintiff and defendants appeal.

Nunn & Denny, for appellants Angus Alston, J. M. Forrest and wife, and B. F. Cabiness and wife. *Eastham Bros.* and *Earle Adams*, for Dock Pegues and wife. *S. A. Miller*, for William A. and Bernice Alston. *Abercrombie & Randolph*, for appellees.

COLLARD, J. Appellants' first assignment of error is as follows: "The agreement among the heirs to divide the estate into four parts, and to distribute it among the original heirs, and their descendants, and the part execution of such agreement, was binding upon all such heirs; and the court erred in not so holding." The court below came to the conclusion that the distribution of the estate of Eliza Alston was not made under the verbal agreement referred to in the assignment of error, and we concur in that conclusion. After the "general verbal agreement," as it is called, was made, there was a written agreement among the parties to divide Mrs. Alston's community half of the cattle among the grandchildren and plaintiff, under the statutes of inheritance; and the statement of facts shows that "defendants read in evidence a written agreement, of date September 24, 1879, seven days subsequent to the agreement to divide the cattle, wherein they agree to a division of the community estate of Mrs. Alston under the laws of inheritance." It is true that the division of the cattle and the mules, as shown by the writing of September 24, 1879, all the partition that was ever made, was upon the basis of one-fourth to each set of heirs or grandchildren, and one-fourth to Mrs. Haden. This was doubtless owing to the construction given by the parties at the time of the statute regulating the descent of Mrs. Alston's community estate. The division that was made was adopted by the parties by a written instrument to that effect. It is evident that the written instruments made subsequent to the parol agreement were made in lieu of it; that it was merged into the writings. 2 Whart. Ev. § 1014; 1 Greenl. Ev. § 275; Hunt v. White, 24 Tex. 643.

The division that was actually made of the personal property was held by the lower court to be binding upon Mrs. Haden, and there is no controversy upon that subject. The parties making the division supposed they were complying with the contract in allowing Mrs. Haden only one-fourth of the property. The law was generally so construed and acted on until the decision in the case of *Burgess v. Hargrove*, 64 Tex. 110, in 1885, when the supreme court, for the first time, construed the statute. Pasch. Dig. art. 4642. By that decision the surviving child or children was made to inherit all a deceased parent's half of the community estate to the exclusion of grandchildren. The division made shows that the parties construed

the stipulation in their contracts, that Mrs. Haden was to take under the law of descents, to mean that she was to take one-fourth, and each set of grandchildren one-fourth, of Mrs. Alston's community estate. They supposed they were making such an agreement. It is also true, however, that it was not understood by the parties that Mrs. Haden was to surrender any part of her inheritance to the grandchildren. She was to take according to law. Upon the supposition that the grandchildren were entitled to share with her the estate under the law, an agreement was made to divide the estate according to law. The fact that the parties misconstrued the law, and the terms of their contract, would not bind Mrs. Haden to that construction; no consideration having been paid to her for such renunciation. If the parol contract had not been merged into the written agreements, it would not be binding upon Mrs. Haden, because it was without consideration. It would have been nothing more than an agreement to divide her own property with others, without consideration, upon the erroneous and mistaken assumption that such other persons were entitled to and owned an interest in it. Such an agreement cannot be enforced. *Davis v. Agnew*, 67 Tex. 213, 2 S. W. Rep. 48, 376. When a right is doubtful, is controverted, or where the object is to avoid or settle litigation, a compromise duly executed will not be set aside by the courts, if the parties act in good faith, and there is no fraud or misrepresentation. *Camoron v. Thurmond*, 56 Tex. 33-35. In this case there was nothing to compromise, and no compromise was made; nor does it appear that there was any controversy between the parties. It simply appears that, in the partition made, Mrs. Haden, by a misconception of the law, allowed the grandchildren three-fourths of her mother's community, when in fact, under the law, they were not entitled to any of it; the written contracts between them stipulating for her full legal inheritance. The court below at least went so far in favor of the grandchildren as the law would permit in sustaining the partition made. Appellants claim that Mrs. Haden is estopped. We see nothing in the nature of estoppel in the case. The reasoning of appellants would be that, because at one time Mrs. Haden donated to them three-fourths of her inheritance of personal property, she must now donate them three-fourths of the land. She is not bound to do so, by contract or estoppel.

Appellants claim that in 1879, when descent of Mrs. Alston's community estate was cast, Mrs. Haden could only take one-fourth under the law. This point has been twice decided by the supreme court adversely to appellants. *Burgess v. Hargrove*, 64 Tex. 110; *Cartwright v. Moore*, 66 Tex. 55, 1 S. W. Rep. 263; Act 1848, (Pasch. Dig. art. 4642; Rev. St. art. 1653.) We see no reason why those decisions should be overruled. The statute was amended in 1887, by act of

the legislature, so as to allow descendants of children to inherit the shares of their deceased parents. Gen. Laws 1887, p. 76. Finding no error in the judgment of the court below, we conclude it ought to be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment affirmed.

LIVINGSTON v. WILLIAMS et al.

(*Supreme Court of Texas. Jan. 24, 1890.*)

SLAVE MARRIAGES.

Const. Tex. 1869, art. 12, § 27, legitimizing the children of slaves, who prior to emancipation lived together as husband and wife, and continued so to do until the death of one of them, and validating the marriages of such persons as were living together at the time of its adoption, and legitimizing their children, whether born before or after that time, did not make persons husband and wife who were at the time cohabiting, and who had previously cohabited while slaves, when the relation of husband and wife was not recognized between them while they were slaves, and when the man at that time was cohabiting with another woman, formerly a slave, who was recognized as his wife, both before and after emancipation.

Appeal from district court, Washington county.

Eddino & Ewing, for appellant. *Bassett, Muse & Muse*, for appellees.

STAYTON, C. J. This action was brought by appellant to recover land which belonged to Moses Livingston, who died before it was brought. The court below found that "Moses Livingston was a slave, and owned by one Philip G. Smith, for a long time prior to and up to his emancipation, June 19, 1865. After the manner of slaves, and with the consent of his master, he married one Fannie, also a slave belonging to said Smith, and they lived together as husband and wife, after the manner of slaves, upon the plantation of said Smith, continuously from about 1850 until they were emancipated, and thereafter, until the latter part of 1865, late in the fall." Appellees are the children of Moses and Fannie, born before emancipation. "For a long time prior to his emancipation, but beginning some time subsequent to his marriage with Fannie, Moses began to cohabit also with one Malinda, also a slave belonging to said Smith, and she bore him several children, the youngest of whom, George Livingston, the plaintiff, is the only one now living; * * * but this cohabitation was disapproved of by the master, and was clandestine. The relation, however, of husband and wife continued to exist between Moses and Fannie, and they occupied the same house, and lived together as man and wife, until late in the fall of 1865." The court further found that after the time last named Moses and Malinda cohabited as husband and wife until her death, which occurred in 1876, but that during that period he also cohabited with Fannie at intervals, until her death, which occurred in 1872. On this state of facts the court be-

low found that the relation of husband and wife did not exist between Moses and Malinda, and that appellant did not inherit from Moses.

In this ruling there was no error. Section 27, art. 12, of constitution of 1869, legitimated the children of slaves who prior to emancipation lived together as husband and wife, and continued so to do until the death of one of them. That section of the constitution also validated the marriages of such persons as were living together as husband and wife at the time of its adoption, and legitimated the children of such persons, whether born before or after that time. The purpose of this provision evidently was to give effect to the moral obligation arising from the consent and act of those who while slaves entered into the only marital relation possible under their condition, in all cases in which such persons, after emancipation, continued to recognize and live in the relation of husband and wife until the constitution was adopted. It, however, can have no application to cases in which, after emancipation, persons formerly slaves had unlawfully cohabited; nor to cases in which, during bondage, slaves had cohabited without intent to become husband and wife, according to the usages of persons in that condition. They must have lived together as husband and wife during bondage, and so have continued to live until the adoption of the constitution, to come within its provisions. Not being capable of making matrimonial contracts while slaves, if on emancipation such persons theretofore living as husband and wife elected no longer to do so we do not see that any lawful power would exist to make them man and wife against their consent; but their consent, evidenced by continued cohabitation after emancipation, that the relation of husband and wife recognized to exist during bondage should continue, might be given effect, as was done by the section of the constitution referred to. The relation of husband and wife was never recognized between the mother of appellant and Moses Livingston while they were slaves, and the provisions of the constitution did not have the effect to make them husband and wife simply because they were cohabiting at the time the constitution was adopted. After emancipation, they might have made a valid matrimonial contract, but the existence of such a contract cannot be inferred from the fact of cohabitation, when it is shown that he also cohabited with the mother of appellees, who, during the time they were slaves and subsequently, was recognized as his wife. It may be true, under the facts in proof, that the relation of husband and wife continued between the mother of appellees and Moses Livingston until the adoption of the constitution of 1869. If so, they became husband and wife, and appellees his legitimate children. Unless the provision of the constitution on which it is claimed the *status* of the parties depends, forbids such a ruling, it seems to us, as stated

by an elementary writer: "If the parties, having been married while slaves in the form usual among this class of persons, live together as husband and wife after they are emancipated, this, their subsequent mutual acknowledgment, should be held to complete the act of matrimony, so as to make them lawfully and fully married from the time at which such subsequent living together commenced." 1 Bish. Mar. & Div. § 162. If this be the true rule, then, without reference to the constitutional provision, under the findings of the court the mother of appellees became the lawful wife of Moses Livingston; for he lived with her as husband, and recognized her as his wife, after their emancipation, although he may not have continued to do so until the constitution of 1869 was adopted. If the mother became his wife, laws in forcemade appellees, though born in bondage and without wedlock, his legitimate children. It is not necessary, however, to determine whether appellees are the legitimate children, and therefore entitled by inheritance to the property in controversy; for, as defendants, they were entitled to a judgment, unless appellant was shown to be the heir. There is no error in the judgment, and it will be affirmed.

MEYER *et al.* v. OPPERMAN.

(Supreme Court of Texas. Jan. 28, 1890.)

TRUST-DEEDS — PURCHASE BY BENEFICIARY — ADVERTISEMENT — COMMUNITY PROPERTY — PARTIES.

1. Where the answer in trespass to try title alleges that plaintiff fraudulently, and at an inadequate price, bought the land at a sale under a deed of trust given by defendants, in which he was beneficiary, evidence that there were other liens besides his on the land is admissible, and it is not necessary that plaintiff shall have specially replied to defendants' allegation; Rev. St. Tex. art. 1197, providing that "it shall not be necessary for the plaintiff to deny any special matter of defense pleaded by the defendant, but the same shall be regarded as denied, unless expressly admitted."

2. In Texas, a deed of trust executed by a man after the death of his wife, on land which was the property of their marriage, and occupied by them, in which deed the children of such marriage do not join, conveys only an undivided one half interest in the land.

3. Where there is evidence that the paper in which the sale under a deed of trust was advertised had only a limited circulation, not as large as other papers published in the same city, — and that the general public did not take and read it, but that it was the official organ of the city, and that legal notices were generally published in it, whether or not such paper was a newspaper is a question for the jury.

4. The holder of a junior lien, for whose account a sale of the incumbered property is made, has the right, for his own protection, to give notice, at the time of the sale, of other liens on the property, and of the estate, which will be bought.

5. In such action, where the original defendant has died, and his heirs have been made parties, and filed their answer, and plaintiff afterwards files an amended petition, alleging that he has purchased the interest of some of the heirs, which allegation is not controverted, such heirs are no longer necessary parties, and the suit may be prosecuted without them.

Commissioners' decision. Appeal from district court, Galveston county.

C. L. Cleveland, for appellants. *Wheeler & Rhodes*, for appellee.

HOBBY, J. This suit is an ordinary action of trespass to try title, brought on February 28, 1877, by Gustave Opperman, originally, against John Berlocker. By amendment filed in February, 1885, the death of said Berlocker was alleged, and his administrator, G. A. Meyer, was made a party. It was also alleged that Louisa Jones, John and Charles Berlocker, were the heirs at law of the deceased John Berlocker, and his first wife, Anna, also deceased, and that the second wife of said John Berlocker, Louisa J., and her minor children, Bertha, Sextus, Leo, and Robert, survived said John Berlocker, and were made parties. The adult heirs pleaded not guilty, and limitation. On November 5, 1885, an amended petition was filed, alleging the purchase, since the institution of the suit, by petitioner, of the interest of Louisa, John, and Charles Berlocker, the issue of the first marriage, between John Berlocker and his wife Anna. The second wife, Louisa J., and her minor children, were alleged to be in possession of the property sued for. The suit was prosecuted against G. A. Meyer, the administrator of John Berlocker's estate, and the second wife, Louisa J., who survived Berlocker, and who were alleged to be in possession. On December 10, 1886, Louisa Berlocker and the said minors, by their guardian, filed their answer, containing general demurrer, and pleaded specially that the plaintiff derails his title to the property in question through a deed made by Robert Ruff, as trustee, of date September 11, 1876, under power contained in trust-deed made by John Berlocker and his second wife, dated January 1, 1874, and a fraudulent sale thereunder, and a pretended purchase by appellee, who was the beneficiary in said trust-deed; that said sale was in violation of the terms and conditions of said trust-deed, and for a grossly inadequate price; that, by the terms and conditions of the trust-deed, it was made the duty of the trustee, before any sale should be made, to first advertise in some newspaper printed in Galveston for 20 days; that the trustee abused the discretion invested in him in this respect, and unfairly, and in violation of the spirit and intent of the said provision, selected a printed sheet called "The Civilian," in which he pretended to give the notice required; that the sheet called "The Civilian" was an obscure paper, not generally read, or generally circulated, printing only a few hundred sheets, not read or sought by the general public, and the advertisement therein did not give reasonable, fair, and proper notice of the sale; that there were other newspapers printed in the city which would have given, by advertisement therein, such fair notice and notoriety, notably the Galveston News; that the sale thereunder

was for a price grossly inadequate and shocking, to the beneficiary, of \$500 for lot 5, and improvements, and \$500 for lot 2, embraced in same sale; that Opperman paid no part of the purchase money, but indorsed a credit of the amount bid on the note which said trust-deed was given to secure; that there was on said lot 5 a large three-story brick building, then worth \$12,000, and the ground, worth \$5,000. There was prayer to set aside the sale, and annul the deed. Plaintiff made no reply to the answer of the defendant. The cause was tried by a jury, resulting in a verdict for the plaintiff. Judgment was rendered against Meyer, the administrator of Berlocker, and Louisa Berlocker, and the minor defendants.

The error first assigned in the brief of appellants is the court's action in overruling the objections of the defendants to the proof offered by plaintiff, and admitted by the court, with respect to liens claimed by the plaintiff as subsisting upon the property in his favor prior to the 11th day of September, 1876, and asserted when the lot was sold by Robert Ruff, trustee, and at which sale Opperman was the purchaser. On the trial, the witness Opperman was asked, in connection with the purchase of this property by him, what was the condition of this property with respect to other liens. He answered that there were liens upon it amounting to \$8,000. This was objected to by the defendants because there was no allegation in the pleadings of such liens, and, the plaintiff having made no replication, by way of plea or supplemental petition to the defendants' answer, such evidence was inadmissible. The authorities cited by appellants in support of this assignment are the early cases of *Paul v. Perez*, 7 Tex. 345, and *Rivers v. Foote*, 11 Tex. 671, where the well-known rule was laid down that, if the defendant in this action pleaded not guilty, and a special plea setting up title in himself, and introduced evidence of such title, and the plaintiff wished to introduce rebutting evidence, he should make his allegations, as in other cases, to correspond with such testimony. In the cases cited the defendant pleaded specially, setting up title in himself; and it was held in the first case that the plaintiff could not prove a forfeiture of the title so pleaded without proper allegations as a predicate for the proof. So, in the second case, where the defendant set up title in himself, it was held that the plaintiff could not show an abandonment of the country by Stafford, under whom the defendant claimed, for the purpose of defeating his title, without having alleged it. It seems to us that the want of analogy between the cases cited and the present is manifest. There is no special plea by the defendants setting up title in them of any kind. Consequently, the evidence complained of is not in rebuttal of, nor does it attack, any title of the defendants. It is clearly relevant to the main issue made by the pleadings. The fairness of the sale, and the sufficiency of the price paid by the

appellee for the land, was the decisive issue in the case made by the defendants' plea; and no further plea was necessary, on the part of plaintiff, for that purpose. Article 1197 of the Revised Statutes provides that "it shall not be necessary for the plaintiff to deny any special matter of defense pleaded by the defendant, but the same shall be regarded as denied unless expressly admitted."

Under the operation of this statute, the special matter alleged by the defendant, that the property was purchased by plaintiff at a grossly inadequate price, was as effectually denied by the plaintiff, in the absence of an express admission of its truth, as if he had filed a special denial thereof. Evidence in support of defendant's plea, and in rebuttal of the same, was necessarily admissible. It will be noticed that the evidence referred to was in response to that brought out on cross-examination by the defendants. The witness Opperman had testified on cross-examination that "he paid \$500 for the whole thing." On re-examination by the plaintiff, he was, in explanation of the price thus paid, asked as to the liens on the property. Under the familiar rules of evidence, we think it was competent for the witness to show the condition of the property, and the incumbrances then upon it, so that the jury could determine from all the facts whether the price paid, \$500, was or not, under the circumstances, a grossly inadequate sum, as claimed by the defendants.

It is next assigned as error that the defendant's demurrer was overruled by the court, because the plaintiff, having brought suit originally against John Berlocker, his heirs were necessary parties upon his death, and, having been so made, and having answered, the plaintiff could not thereafter be permitted to prosecute the suit without them, or to discontinue as to a part of them. The trial was had upon the second amended petition, which was in lieu of all prior pleas filed by plaintiff. The heirs of the first marriage had been, by a prior petition, filed in February, 1885, made parties defendant. They were Louisa Jones, John and Charles Berlocker. The amended petition on which the trial was had November, 1885, alleged that plaintiff had purchased their interest. This was not controverted, and there was nothing to litigate as to these heirs. They were no longer parties to the suit, and its prosecution without them could not have affected the interest of the appellants.

The remaining assignments relate to the charge of the court. The defense relied upon in this case was that the title of the plaintiff was deraigned through a deed by Robert Ruff, trustee, on September 11, 1876, under a power contained in a trust-deed executed by John Berlocker and his second wife on January 1, 1874, to secure a note for about \$6,201.72 due plaintiff from said Berlocker, and a sale thereunder, at which appellee became the purchaser; that, by a violation of the terms of the trust-deed with respect to the notice to

be given of the sale, the plaintiff obtained the property, worth about \$17,000, at a grossly inadequate sum, to-wit, \$500; there was evidence that the Galveston News and Post were newspapers having at that time a much larger circulation than the Civilian, the paper in which the notice of the sale was published; that it was an obscure newspaper, and had a limited circulation, and was not read by the public much. There was also evidence that it was the official organ for the city of Galveston; had a circulation of several hundred; that citations and legal notices were generally published in it. Appellee became the purchaser of lot 5 in block 563, and improvements, for \$500, which amount he bid, and was credited on the note, less \$53.75, expenses of the sale. Berlocker was present at the sale. There was testimony showing that the property in 1876 may have been worth about \$15,000 or \$17,000. The plaintiff's agent and attorney, Burroughs, at the sale, gave notice of the liens on the property claimed by appellee, and that the property would be sold subject thereto. There was a trust-deed, in favor of Mrs. Stephens, of June 14, 1870, to secure \$6,000; five other trust-deeds, in favor of plaintiff, Opperman, of different dates, aggregating over \$2,000. Other property was included in these trust-deeds. Appellee became the assignee of the Stephens note. It is manifest from the evidence that Berlocker owed Opperman, on this property, in excess of its value, as shown by the evidence, on the day of the sale under the trust-deed, under which appellee claims, and which sale appellants alleged to be fraudulent. Under these facts, the charge was, substantially, that the appellee was entitled to recover unless, in the circumstances of the advertisement for the sale or the sale itself, a fraud was committed to appellant's prejudice. The duty of the trustee to select a newspaper for the insertion of notice was defined, as also the term "newspaper;" and whether the Civilian was, at the time of the publication of the notice, a newspaper, was a question of fact, submitted to the jury. The jury were then told that they would be authorized to find the sale invalid, and for defendant, if the Civilian was not a newspaper giving, by publication, full notoriety to the sale, and this resulted in sacrificing the property. But its limited circulation, and that its issue was not so great as other Galveston newspapers, nor the fact that citizens did not take and read it, they were told, would not invalidate the sale. The jury were also told that it should clearly appear that the trustee, Ruff, abused his discretion in giving notice of the sale; that inadequacy of price was a circumstance proper to be considered, with other circumstances, in determining whether the sale was fair or not, but alone could not vitiate it. They were instructed that the holder of liens, for whose account a sale was being made of the incumbered property under a junior lien, had the right to give notice at the sale of such liens, and advise

the public of the estate in the property which would be bought, and for his own protection, but not to discourage bidders, and stifle competition, and purchase for himself at a sacrifice to the owners. The appellant requested the court to charge the jury "that sales under powers in deed of trust are a harsh mode of foreclosing the rights of the mortgagor. They are scrutinized by courts with great care, and will not be sustained unless conducted with all fairness, regularity, and scrupulous integrity. Upon very slight proof of fraud or unfair conduct, or of any departure from the terms of the power or abuse of the trust in making a sale, it should be set aside. If proper advertisement of the sale be not given, or if the proceedings, manner, and mode of conducting the sale by the trustee, or on the part of the beneficiary, he being the purchaser, are in any way contrary to justice and equity, the sale will not be allowed to stand. The directions of the power must be complied with in selling the property, the provisions in the power limiting and regulating the sale for the benefit of the debtor. If the trustee or creditor acts in bad faith, or exceeds his power, or if the trustee abuses the discretion vested in him in the selection of the medium through which publication and notoriety should be given to the proposed sale, as if the advertisement of the sale were inserted in an obscure newspaper, which would not give fair, full, and reasonable notice to the public thereof, by means whereof the property was sold for a grossly inadequate price, equity would set aside the sale; and, in such event, if the evidence should satisfy you of the unfairness of the sale, or abuse of the power conferred in the trust-deed, you should find for the defendants." And, also, "that if the jury believe from the evidence that the conduct of the trustee, Robert Ruff, or Gustave Opperman, the beneficiary, or their agents or attorney, at the time of the making of the sale, on September 11, 1876, was unfair, and calculated to prevent competition, or to deter bidding at said sale, whereby the property was sold for a grossly inadequate price, then, and in that case, Opperman, being the purchaser, would take no title, and you will find for the defendants." These charges were refused, and the refusal to give them is assigned as error. The charge, we think, is a correct and fair presentation of the material issues made by the evidence in the case, and there was no occasion for the special instructions requested by the appellants. The charge, in the present case, in respect to the duty of the trustee to give notice of the sale of the property, and its submission to the jury of the question whether the Galveston Civilian was a "newspaper," as defined, appears to be in harmony with the views expressed by the supreme court in the case of *Hurt v. Cooper*, 63 Tex. 367; a case in which it seems the sufficiency of a notice of a similar sale in the same newspaper was attacked and upheld.

That portion of the charge which was to

the effect that at the trust sale of September 11, 1876, only the undivided half interest of John Berlocker was sold, the other half being the property of the children of the first marriage of said Berlocker, and his wife Anna, was authorized by the evidence. There was no controversy as to the fact that this was the property of the first marriage of John Berlocker with his wife Anna. She died in June, 1870. The deed of trust was executed after her death, on the 1st of January, 1874, by John Berlocker, and the children, Louisa, John, and Charles Berlocker, the issue of the first marriage, did not join in the trust-deed. They, with John Berlocker, occupied the property before the second marriage of said John Berlocker. It was their interest plaintiff purchased pending this suit. Under these facts, there was no error in charging the jury that only the interest owned by John Berlocker passed by the trust sale. It could not, we think, have affected the issue of the adequacy of price paid at the trust sale by the appellee, because, whether the entire property, or only one-half, was sold at that sale, the evidence shows that the property was incumbered by liens beyond its value.

The court, it is claimed, erred in refusing the following charge: "(1) That the judgment of the district court of Galveston county, rendered on March 3, 1876, in cause No. 7686, entitled *Gustave Opperman v. John Berlocker, et al.*, was conclusive and binding upon Gustave Opperman, the plaintiff therein, and all other parties in that suit, in respect to all matters therein litigated, or that were necessary and proper therein to be litigated, and which might have been litigated, and especially as to all liens theretofore subsisting, or claimed to be subsisting in, or belonging to, or claimed to belong to, Gustave Opperman, or to any of the defendants, and that the said Gustave Opperman was thereby precluded and estopped from thereafter asserting, setting up, or claiming any lien, actual, or pretended, theretofore existing in his favor, or in his right, either as original holder in and upon the property known as 'Lots Nos. 5 and 2,' and improvements thereon, in block No. 563, in the city of Galveston, and which are involved in this suit." There was no error in refusing this instruction, because the judgment rendered in the cause No. 7686, referred to, by its own terms, provided that "this judgment should in no wise impair or prejudice or delay the liens and junior mortgages executed after March 14, 1870, as to such part of the premises as may not be sold to satisfy this judgment." The lien in the present case was one of the excepted junior mortgages, having been executed in January, 1874; and the evidence was that plaintiff had directed that the "premises," lot No. 5, involved in this suit, "be not sold to satisfy the judgment in cause No. 7686." This lien being specially excepted, by the terms of the judgment, from its operation, the appellee was not estopped by it. We are of opinion that, under the facts of this case,

no other result could have been fairly arrived at than was reached by the verdict and judgment, and that the judgment should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment affirmed.

PEREZ v. RAYBAUD.

(*Supreme Court of Texas. Feb. 4, 1890.*)

DANGEROUS PREMISES—LIABILITY OF LANDLORD.

A landlord, who does not covenant to repair, is not liable to a servant of the lessee injured by the falling of a cistern caused by decayed and insufficient supports, though he knew of the defect, and had promised to repair, as such promise was without consideration.

Commissioners' decision. Error from district court, Galveston county; WILLIAM M. STEWART, Judge.

L. E. Trezevant, for plaintiff in error.

COLLARD, J. Suit by plaintiff in error, servant of a tenant, against defendant in error, the owner of the rented premises, for damages resulting from the falling of a cistern. The petition alleged that defendant, the owner of the premises, leased them to A. Watts to use as a restaurant; that he was employed by Watts; that there was a cistern upon the premises of the capacity of 8,000 gallons, which, because of its defective supports, (the same being decayed and insufficient,) and because of the weight of water it contained, fell upon plaintiff while he was in the discharge of his duties, without his fault, causing serious and permanent physical injuries; that the defect in the cistern existed at and before the lease to Watts; that defendant knew of the defect in the cistern and its supports before the injury, and, at the request of Watts, had promised to have the same repaired before it fell, but had failed and neglected so to do; that plaintiff was at the time of the injury ignorant of the unsafe condition of the cistern; that its bad condition was not the result of temporary and unusual use and wear, but of age and natural decay. The court below sustained a general demurrer to the petition, and the case is here on writ of error, with a general assignment by plaintiff that the court erred in sustaining the demurrer. There is no brief on file for defendant.

It is well settled that the owner of leased premises is liable to the public or to third persons for injuries resulting from a defective structure on the premises, when the defect existed at the time the lease was made, or when he had covenanted to repair, and keep in repair. *Thomp. Neg.* 817; *Marshall v. Heard*, 59 Tex. 267; *Owings v. Jones*, 9 Md. 108; *Grady v. Wolsner*, 46 Ala. 381; *Helwig v. Jordon*, 53 Ind. 21. The case at bar is not an action by a stranger, but by the servant of a tenant against the owner; and in such case the rule seems to be that the

landlord is liable only when he had contracted or is under obligation to keep the tenement in repair, or has been guilty of fraud or deceit which would release the tenant from his implied obligation to repair. "It is a general rule," says Mr. Thompson in his work on Negligence, (volume 1, p. 323, § 3,) "that, in the absence of fraud or deceit, there is no implied covenant that the demised premises are fit for occupation, or for the particular use which the tenant intends to make of them. * * * Therefore the tenant has no remedy against the landlord for suffering the premises to get out of repair, * * * and this rule extends to servants and others entering under the tenant's title." In *Jaffe v. Harteau*, 56 N. Y. 401, the court states the doctrine as announced in the foregoing quotation, and say: "The question must be regarded as settled by authority." The action in that case was against the landlord for an injury of the wife of the sublessee, and, referring to the case of *Godley v. Hagerty*, 20 Pa. St. 387, which held a contrary doctrine, say that, in that case, "some importance was attached to the fact that the building was erected by the defendant. This may have been regarded as proper in that case, as tending to show him guilty of fraud;" and the court proceeds to show that cases where one erects a nuisance on his premises, and afterwards parts with the possession, have no application to the case under consideration; and then concludes, that "there is no reason for holding the lessor, in the absence of any agreement or fraud, liable to the tenant for the present or future condition of the premises, that would not be equally applicable to a similar liability sought to be imposed by a grantee in fee upon his grantor." The following cases, besides those cited in the foregoing case, assert the same doctrine, that there must be an express covenant or agreement by the lessor to keep in repair, in order to make him liable to the tenant. *Scott v. Simons*, 54 N. H. 431; *Brewster v. De Fremery*, 33 Cal. 341; *O'Brien v. Capwell*, 59 Barb. 497. The last case cited is, in principle, like the one before us. The action was by a washerwoman in the employ of the tenant, against the landlord, and the court held that where there is no fraud, false representations, or deceit; and, in the absence of an express warranty or covenant to repair, there is no implied covenant" in favor of the tenant; and, as the plaintiff stood in his place, there was no liability on the part of the landlord to her.

The authorities are abundant sustaining the doctrine that the owner cannot create a nuisance on his premises, and relieve himself of liability to a third person injured thereby, by leasing. It is also the law that he would be liable to a stranger where the defective structure causing the injury is on the premises when they are leased; but such liability would not exist in favor of the tenant, where there is no contract by the landlord to repair and no fraud, because he does not owe

the tenant the duty of repairing, as he does the public and strangers. The cases cited by plaintiff, holding the landlord liable, are cases where the injury was to third persons lawfully upon the rented premises, or where the landlord owed a duty to the public to repair. The cases cited are *Albert v. State*, 7 Atl. Rep. 697; *Rankin v. Ingwersen*, 10 Atl. Rep. 545; *Joyce v. Martin*, Id. 620; *Dalay v. Rice*, 12 N. E. Rep. 841. The first case was a suit by a minor for damages for death of parents who were drowned in consequence of the negligence of the owner of a wharf leased. The next case was a suit by a tenant of one part of a building for damages resulting from the bursting of water-pipes in another part of the building, occupied by another tenant, who had covenanted to repair, where it was held that the landlord of the tenant on whose premises the pipes were defective was liable. The next case was where the owner of a defective wharf leased it in a defective condition. It was held that he was liable to one lawfully using it for the purposes for which it was intended. The court held both lessor and lessee liable. *Dalay v. Rice*, the next case cited, was an action for damages by a person who, while lawfully using a way abutting leased premises, fell into a coal-hole upon the way. In none of these cases was the suit by the tenant, or the servant of the tenant, of the premises having the defective structure upon them, and none of them is authority for the proposition that the landlord would be liable to such tenant or servant, where he was under no obligation or contract to repair. The mere fact that there was a nuisance on the premises at the time the property was rented would ordinarily render the lessor accountable for damages to a stranger lawfully passing thereon, whether he contracted to repair or not; and, in case he had not so contracted, both the lessor and lessee would be liable.

It is alleged, however, in plaintiff's petition, that he did not know of the defects in the supports of the cistern, but that defendant did know the fact at and before the injury, and that at the request of her tenant, Watts, she had promised to make the necessary repairs, but had failed and refused to do so. This allegation may have been set up to show that defendant was liable, because she had so promised and contracted. The promise was merely gratuitous, not made at the time of the lease, and was no part of the original contract. It was without consideration, and could not be enforced. There is a case similar to this, where the suit was brought by the tenant. He had requested the landlord to repair a privy attached to the tenement, and the landlord agreed to do so. He, with some common laborers, attempted to make the repairs. Reported to the tenant's wife that the privy was safe. She went into it the same evening, when the floor fell through, and she was precipitated into the vault, and injured. The court, discussing the case, say: "In the ordinary contract be-

tween landlord and tenant, there is no implied warranty on the part of the former that the demised premises are in tenantable condition. He is under no obligation to make repairs, unless such a stipulation makes a part of the original contract; and any promise to do so, founded merely on the relation of the parties, and not one of the conditions of the lease, would be without consideration, and for that reason would create no liability. But, although a gratuitous executory contract of that kind would not be binding upon him, he would place himself in a very different position if he should see fit to treat it as binding, and actually enter upon its fulfillment. He is at liberty to repudiate it, or to perform it at his option; but, if his choice should be to perform it, he comes under some degree of liability as to the manner of its performance." *Gill v. Middleton*, 105 Mass. 478, 479, and authorities cited. We have quoted freely from this case, because it is the law of the point under consideration in the case before us, and is decisive of it. The reasoning is sound and well presented, and saves us the trouble of further discussion. We think the plaintiff's petition was bad on general demurrer, and that there was no error in the ruling of the court so holding, and that the judgment should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment affirmed.

COOPER v. LANGWAY.

(Supreme Court of Texas. Feb. 4, 1890.)

MALICIOUS PROSECUTION—PLEADING—EVIDENCE

1. A petition, in malicious prosecution, showing that the prosecution was for cutting and carrying away trees on a highway laid out over defendant's land under permit from the overseer of roads, is not demurrable, since, though the fee remained in defendant, plaintiff, acting under authority of the overseer, was not guilty of knowingly cutting timber on the land of another, without the owner's consent, under Pen. Code Tex. art. 697.

2. An assignment of error in overruling special exceptions to the petition, on the ground that the exhibits attached thereto show probable cause for the prosecution, and show that there is no cause of action by showing contradictory statements as to the cause of action, is too general; there being six exhibits, and no particular statements being specified.

3. Under a petition alleging that defendant made affidavit charging plaintiff with cutting and carrying away trees from his land, and caused it to be filed in the county court, and a *capias* to be issued, on which plaintiff was arrested and imprisoned until he gave bond, the *capias* and bond are admissible, though stating the charge to be theft.

4. Where plaintiff shows that the highway had been legally established over defendant's land, testimony of defendant that he cut out the road at his own expense is irrelevant, though offered to contradict an allegation in the petition as to the building of the road.

5. Under a petition alleging injury in the sum of five thousand dollars, and praying judgment "for the sum of two thousand as actual, and three thousand as exemplary, damages," a charge stating that plaintiff sues for two thousand dollars actual damages, and three thousand dollars exemplary

damages, is not misleading from the use of the word "dollars."

Commissioners' decision. Appeal from district court, Houston county; F. A. WILLIAMS, Judge.

Cooper & Moore, for appellant. *Munn & Denny*, for appellee.

ACKER, J. Sam Langway sued L. W. Cooper to recover damages for malicious prosecution. The damages were laid at "five thousand dollars,—two thousand actual, and three thousand exemplary." The defendant answered by general and special exceptions, specially denied malice, and specially pleaded the facts relied on to show probable cause for the prosecution of plaintiff. The exceptions were overruled, and the trial by jury resulted in verdict and judgment for plaintiff for \$50 actual, and \$50 exemplary, damages. It was proved that a first-class public road was laid out and opened by proper authority on defendant's land, and at his request; that in opening the road six or eight trees were left standing in the roadway, around which vehicles could pass; that these trees became dead, were in the way of the traveling public, and the limbs falling therefrom obstructed the roadway, and made it dangerous for persons passing; that the overseer of the road told plaintiff that if he would cut the trees, and remove them from the road, he might have the wood, and, under the authority of the overseer, plaintiff was cutting the trees when defendant came to him, and claimed them; that plaintiff told defendant that he was cutting the trees by authority of the road overseer, and defendant demanded of plaintiff eight or ten dollars in payment for the timber he had cut, which plaintiff refused to pay, and at once quit cutting the trees; that defendant went before a justice of the peace, and made affidavit charging plaintiff with cutting and carrying away timber of the value of five dollars from land of affiant, without his consent, knowing the land was not his; that this affidavit was filed in the county court, on which process was issued for the arrest of plaintiff, in which it was stated that the offense in the affidavit charged was theft; that plaintiff was arrested and confined in jail for about half of an hour, when he executed bond reciting that he had been arrested on a *capias* issued on an indictment returned by the grand jury on a charge of theft; that plaintiff was tried in the county court, and acquitted, on an information filed on defendant's affidavit. All of these facts were substantially set out in the petition, except the offense charged in the *capias* and bond was not stated, though it was averred that the *capias* issued on the affidavit made by defendant.

The first assignment of error presented is: "The court erred in overruling the defendant's general exception to plaintiff's petition, because there was no cause of action set up in said petition; the said petition showing said timber cut and appropriated to be on de-

fendant's land." Under this assignment it is contended that by laying out and opening the road the public acquired only an easement in the land,—that is, the right to use it for purposes of a public road; but, subject to this right, the land, and the timber growing upon the road-way, remained the property of defendant. The correctness of this proposition might be conceded, and yet the plaintiff may not have been guilty of the offense charged in the defendant's affidavit against him. Something more than cutting timber on the land of another without the consent of the owner is necessary to constitute the offense denounced by article 697 of the Penal Code, for which plaintiff was prosecuted. Such cutting must be knowingly done; that is, done with knowledge and understanding of facts that the land belonged to another, and that he had no right or authority to cut the timber. If the party accused in good faith believed he had the right to cut the timber, he would not be guilty of the offense. *Lackey v. State*, 14 Tex. App. 164. If the timber standing upon the road-way obstructed or impaired the use of the road by the public, it was the duty of the overseer of the road to have it removed, and the overseer's authority was sufficient to protect the plaintiff against all criminal liability. We believe the authorities sustain the doctrine contended for by appellant, and have no doubt he might recover, in a civil action, the value of timber cut and converted from the land on which the road-way was situated, unless such cutting was done, by authority of the overseer of the road, for the purpose of opening or improving the road. *Phifer v. Cox*, 21 Ohio St. 248; *Cole v. Drew*, 44 Vt. 49; *Barclay v. Howell's Lessee*, 6 Pet. 498; *Robert v. Sadler*, 104 N. Y. 229, 10 N. E. Rep. 428; *Millington Co. v. Bennett*, 18 S. C. 254. We do not think the court erred in overruling the general exception to the petition.

The second assignment of error is: "The court erred in overruling defendant's special exceptions to plaintiff's petition, because the exhibits attached to the petition show that there was no cause of action, by showing contradictory statements as to said cause of action, and said exhibits show that there was probable cause for making the affidavit upon which this suit is predicated." Upon careful examination of the exhibits attached to the petition, we do not discover any contradictory statements relating to the cause of action; nor are we able to discover that they show that there was probable cause for making the affidavit. There are six exhibits attached to the petition. The assignment does not point out any particular contradictory statements they contain, nor does it call our attention to the particular matter or matters that show the existence of probable cause. We think it clear that this assignment is too general to require consideration.

The third assignment of error is: "The court erred in admitting in evidence, over defendant's objections, the *capias* and bond,

because they did not correspond with the allegations of the petition; the petition and affidavit showing that plaintiff was arrested for cutting and carrying away timber from land not his own, by said affidavit. Said *capias* showed that defendant was arrested for theft; and said bond showed that he was arrested for theft on a *capias* issued on a bill of indictment returned into the county court by the grand jury." The petition alleged that the defendant voluntarily made an affidavit charging plaintiff with cutting and carrying away from the land of affiant six trees, of the value of five dollars, without the consent of the owner, and caused the affidavit to be filed in the county court, and caused the issuance of a *capias* for plaintiff, on which he was arrested, and placed in jail until he gave bond for his appearance. It was not alleged in the petition what offense was charged in the *capias*, or stated in the bond. The affidavit, *capias*, and bond were made exhibits to the petition; and the offense with which the plaintiff was charged was stated in the *capias* and bond to be theft. We do not think this constitutes a variance between the allegations and proof. Under article 702 of the Penal Code, the cutting and taking of timber may be prosecuted as theft. It is clearly alleged that the prosecution of plaintiff was instituted by the affidavit voluntarily made by defendant, and that all other steps in the prosecution were predicated upon the affidavit. The consequences were the same to plaintiff whether the offense named in the *capias* and bond was theft, or knowingly cutting and carrying away timber from land not his own. It appears from both the petition and exhibits, which were made part of it, that the defendant was solely responsible for the prosecution of plaintiff; and we think he should not be permitted to escape responsibility for his acts upon the circumstance that the officer who issued the *capias* on his affidavit called the offense charged against plaintiff "theft." We think the third assignment of error is not well taken.

The fourth assignment of error is: "The court erred in excluding the evidence of L. W. Cooper, because said evidence was in accordance with allegations in defendant's pleadings, and the pleadings were not excepted to." It appears from the bill of exceptions that defendant offered to testify that the road overseer did not cut out any part of the road on which the trees were cut, but that he cut the entire road, at the expense of \$40, as alleged in his answer, "to show that the allegations of plaintiff's petition that had been read to the jury were not true in point of fact." The evidence was objected to on the ground that it was irrelevant, and the objection sustained. It was alleged in the petition, and clearly proven, and not controverted by the defendant, that the road was a first-class public road, legally established, and we think it utterly immaterial, and wholly irrelevant to

any issue in this case, who actually "cut out" the road; and the court did not err in so ruling.

The fifth assignment of error is: "The court erred in his charge on first page, where he charges, in substance, that plaintiff sues for two thousand dollars actual damages, and three thousand dollars exemplary damages, when the petition does not use the word 'dollars' as to either kind of damages; and this was misleading to the jury." The language of the petition is: "Whereby he has sustained damage and injury in the sum of five thousand dollars; wherefore he sues and prays for judgment for the sum of two thousand as actual damages, and three thousand as exemplary damages." We think this objection to the charge too hypercritical to entitle it to the dignity of discussion. We do not think it possible that an average Texas jury could have been misled by the charge here complained of.

The seventh assignment is the next one presented, under which it is contended that the court erred in charging the jury to the effect that, if the plaintiff cut the trees under and by authority of the overseer of the road, he would not be guilty of the offense charged against him in the affidavit of the defendant. What we have said in discussing the first assignment of error disposes of this one.

The remaining assignments of error presented, question the sufficiency of the evidence to support the verdict. Whether the defendant instituted the prosecution against plaintiff with malice, and without probable cause, were questions for the jury, under proper instructions from the court. The charge of the court was a clear, full, and fair exposition of the law applicable to the case made by the pleadings and the evidence. We think there was evidence to support the verdict, and are of opinion that the judgment of the court below should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment affirmed.

HART et al. v. BLUM.

(Supreme Court of Texas. Feb. 4, 1890.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—SALE OF PARTNERSHIP ASSETS—WRONGFUL ATTACHMENT.

1. An instrument conveying a stock of goods to plaintiff, "first to pay himself" a certain debt, and all necessary expenses incurred in converting the stock into cash, the surplus to be divided *pro rata* among other named creditors, is not a mortgage, but a valid assignment.

2. There is no variance between such instrument and an allegation that "the property had been assigned, transferred, and conveyed, and delivered to plaintiff, * * * in trust to sell and dispose of the same."

3. A statement in a finding that the debtor "sold" the property to the assignee will not make the finding erroneous, where the instrument of assignment is set out in full therein.

4. Partnership property, having been bought by one member of the firm, and afterwards as-

signed in trust for creditors by a valid assignment, cannot be attached by firm creditors.

5. An agreement, by a partner purchasing the partnership effects, to pay the firm debts, does not charge the goods with a trust, so that an assignment by him will carry only his interest remaining after payment of the firm debts.

6. Goods assigned for the benefit of creditors having been attached and purchased by the assignee at the sale, he is not estopped to sue for their value by having given notice at the sale that he owned the goods, and would hold the sheriff and attaching creditors liable.

7. That the assignee purchased the goods at the sale cannot affect the measure of damages he is entitled to recover for their wrongful attachment.

Commissioners' decision. Appeal from district court, Galveston county; WILLIAM H. STEWART, Judge.

Wm. B. Lockhart, for appellants. Labatt & Noble, for appellee.

HOBBY, J. It appears from the record in this case that on the 10th day of October, 1887, W. L. Austin, of the firm of Austin & Fisher, executed to the appellee, A. Blum, an instrument in writing conveying to said Blum a stock of goods, wares, and merchandise, which constituted the drug and medicine store of said Austin, in the city of Galveston. The consideration recited in this instrument was an indebtedness due Blum of about \$1,650. It conveyed the property to appellee, first to pay himself the said sum of \$1,650, and all necessary expenses, etc., incurred in converting the stock, etc., into cash; the surplus, after the payments, to be divided *pro rata* between several named creditors, among them the appellants; "to whom," the conveyance also recited, "I am indebted in various sums of money upon their several indebtedness against the late firm of Austin & Fisher, of which I was a copartner, and for which indebtedness I am liable, and assumed the payment thereof." Appellants, to whom the firm of Austin & Fisher were indebted for goods sold in the sum of \$1,146.54, sued out a writ of attachment from the district court of Galveston county, caused the same to be levied on the property so conveyed to Blum, which was by order of the court sold. The appellee, Blum, became the purchaser for the sum of \$790. This suit, after said seizure and sale, was brought by the appellee, Blum, against Hart & Co. and the sheriff and his sureties, for the value of the goods so seized and sold. The cause was tried by the court without the intervention of a jury on November 22, 1888, and judgment was rendered in favor of the appellee, Blum, for the sum of \$1,523.19, the value of the goods so attached, against the appellants, said sheriff and his sureties.

There are several assignments of error discussed at length in appellants' brief, but the view we take of the case will dispense with the necessity for considering each error assigned; and we will confine ourselves to the questions we believe to be decisive of the rights of the parties. These involve—First, the construction of the instrument under

which the appellee, Blum, claims title to the property conveyed to him by Austin; and, *second*, whether, under the facts of this case, he can recover from the appellants the value of the goods attached by them. It is claimed, under the assignment first presented, that the court erred in admitting in evidence the instrument of October 10, 1887, conveying the property to appellee; because, if offered as a mortgage, it was not properly recorded, and, if offered as an absolute sale, it was at variance with the allegations of petition. It appears from the certificate of record attached to the instrument that it was recorded at length in the records of deeds, Book 65, p. 284, in Galveston county. In so far as the objections were predicated upon the claim that the instrument is a chattel mortgage, and should therefore not have been recorded at length, and that its record in a book for the registry of deeds is not such evidence of a deposit and filing as required by the statute with respect to chattel mortgages, it is only necessary to say that the instrument under consideration is not, in our opinion, a chattel mortgage. Discussing a conveyance, which in its essential features was identical with the present instrument, and which it was earnestly contended was a mortgage, our supreme court construed it to be an assignment. Not, however, within the scope of the statute, but an assignment, the validity of which must be tested by the principles of the common law. *Johnson v. Robinson*, 68 Tex. 399, 4 S. W. Rep. 625. The instrument before us, as in the case cited, was not intended as a security for debt, providing simply a lien on the property, and leaving an equity of redemption in Austin, the mortgagor, which are the characteristics of a mortgage with us. By its terms Austin could have no power to cancel or defeat this instrument by a payment or discharge of the debts therein mentioned, which he would have in the case of a mortgage. All the interest and title owned by Austin in the property are by the terms of the conveyance vested in the assignee, Blum, and such disposition is directed to be made of the property as is not merely inconsistent with the exercise of any further control over it by Austin, but it is placed entirely beyond his control by an absolute transfer to appellee to be sold, and the proceeds to be appropriated to the payment of the creditors therein named. We do not think the court erred in admitting the instrument in evidence. Nor do we think there is any variance between it and the allegations descriptive of it. These are that "the property had been assigned, transferred, and conveyed and delivered to this plaintiff by one W. L. Austin, then the owner on the 10th day of October, 1887, in trust to sell and dispose of the same," etc. The instrument objected to corresponded with these averments.

The third assignment is that "the court erred in the fifth paragraph of its conclusions of fact, in finding, under the pleadings and evidence, that the assignment from Austin to

Blum was an actual sale, and not a conveyance in trust." The finding referred to is that "Austin on the 10th day of October, 1887, sold to Blum the drug-store," etc. It is only necessary to say, in reply to this, that, if the use of the term "sold" was incorrect as applied to the conveyance from Austin to Blum, the instrument itself was set out in full, and made a part of the finding.

The fourth error assigned is to the effect that the seventh and ninth paragraphs of the conclusions of fact found that Austin put Blum in actual possession of the property, and that he remained in possession until dispossessed by the seizure under the attachment of appellants. The testimony of Austin and Blum fully authorized this conclusion of fact found by the court.

The eleventh assignment is that the court erred in not finding as conclusion of law that the assignment of said W. L. Austin to said A. Blum, of date October 10, 1887, interposed no obstacle to defendants' (E. J. Hart & Co.'s) attachment, because the evidence showed that the property assigned, as to defendants, E. J. Hart & Co., was partnership property of the firm of Austin & Fisher, who were debtors of said Hart & Co. The property was not partnership property at the time of the assignment by Austin to Blum, but belonged to the former, who purchased the interest of Fisher with the \$1,500 advanced and loaned to him by Blum. The assignment being a conveyance in trust to Blum for certain purposes,—that is, the payment of creditors therein named,—and the grantee being in possession under its terms, as the court found from the evidence, the trust or purpose for which it was executed could not be defeated by Hart & Co., through a seizure of the entire trust fund in satisfaction of their debt. As said in *Schooler v. Hutchins*, 66 Tex. 331, 1 S. W. Rep. 266: "The vestiture of title in the assignee, through the trust-deed, and his possession under it, would give him the right to maintain this action against any person seeking illegally to divert the fund, or any part of it, from the purpose contemplated by the law and the deed of assignment. The fact that the illegal conversion was in the interest of or instigated by one or more creditors of the assignees, and that it may have been consummated through the illegal use of the process of a court, cannot change the rule." If any facts existed which authorized the appellants to seize and appropriate the entire property in the assignee's possession to the satisfaction of their claim, they should have alleged, and established them by proof. *Barber v. Hutchins*, 66 Tex. 323, 1 S. W. Rep. 275. The assignment being a valid assignment, no creditor could by process of attachment seize the assigned property, or any part of it, and take it out of the assignee's hands, and apply it to his debt. *Moody v. Carroll*, 71 Tex. 148, 8 S. W. Rep. 510. It is claimed that there was error in not finding that the conveyance was fraudulently made, and that Blum had

notice of that fact. Upon this issue the testimony was conflicting. There is evidence in support of the finding of the court, and we cannot say that the conclusion complained of was error.

The appellants insisted that the court erred in not finding that Blum was estopped from maintaining this suit, by reason of his fraudulent conduct at the sale. The court found, in substance, that at the opening of the sale appellee, through his attorney, claimed to own the goods, and in consequence of this notice one E. J. Biering, who had come prepared to bid \$1,200 for the property, did not bid. There was evidence to the effect that appellee gave notice that he would hold the sheriff and his sureties, and the parties who had attached the property, liable at law. If appellants were liable to appellee for the seizure,—and it seems from the evidence and the finding of the court in this cause that they were,—then appellee certainly had the right to give the notice referred to. He is not shown to have done anything at the sale not authorized by law. There is no evidence that anything was said by him which he had no legal right to say, that stifled competition among bidders. If Blum can recover from appellants the value of the goods, he had the right to give the notice at the sale that the goods belonged to him, and that he would sue for their value.

The tenth assignment is that the court erred in not finding, as a conclusion of law, that plaintiff, Blum, cannot maintain this suit, because the evidence showed that by his assignment, under which he claimed the goods, he took only the interest of W. L. Austin in the property, and that interest was only what might remain after the payment of the debts of the firm of Austin & Fisher, of which firm Hart & Co. were creditors. The evidence does not show that, by the assignment from Austin to appellee, the latter took the interest only of Austin, after the payment of the firm debts of Austin & Fisher. On the contrary, it appears from the terms of the conveyance to appellee that it conveyed Austin's entire interest, unincumbered by any lien in favor of firm creditors, and that the title to the property had been in Austin since the sale to him by Fisher, in August, 1887. The assignment shows upon its face that Austin assumed to pay, first, the debt of \$1,500 due appellee. There were no reservations in the sale made by Fisher to Austin, alleged by the appellants or shown by the evidence. It was not alleged in any of the special pleas set up by the defendants that there was any agreement, contract, or understanding between Fisher and Austin, at the time of the sale of the interest of Fisher in the partnership property of Austin, that the latter was to hold the property in trust for the payment of the firm debts. A mere agreement, generally, to pay the firm debts, will not ingraft a trust of this character upon the conveyance.

It is contended by appellants that, "if Blum

was in possession of the goods with full title before attachment levy by appellants, the court erred in giving judgment for plaintiff for more than he paid for the goods at the sale, because the evidence showed that plaintiff bought at the sale, and the goods were delivered to him, and no other damage was shown than the wrongful taking of said goods." In the case of *Schooler v. Hutchins*, supra, it was said: "That the assignee may have bought a part of the property which the defendants caused to be seized and sold by the sheriff under the order of the court cannot affect either his right to recover or the measure of damages. His rights in these respects were fixed when the property was taken from his possession, and the defendants cannot be heard to assert that their liability or its measure can be made to depend on what subsequently occurred." We think the judgment should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment affirmed.

TRADERS' NAT. BANK v. CLARE *et al.*

(Supreme Court of Texas. Feb. 7, 1890.)

FRAUDULENT CONVEYANCES—EVIDENCE—PAROL AGREEMENT.

1. In consideration of the transfer of lands, the vendee agreed to pay certain liens thereon, and also certain other debts of the vendor, executing his notes for the amount of these debts to the vendor, who, under the conditions of the sale, at the same time indorsed them to the creditors whose claims the vendee was to pay. The vendee was surety for all these debts. *Held* that, the price being adequate, the transfer would not be set aside in favor of the vendor's creditors, though the vendee knew of the vendor's insolvency.

2. The fact that the agreement to assume and pay the vendor's debts was by parol does not invalidate the transaction.

3. Though the notes were executed to the vendor, and this is shown by the deed, it is competent to show that, in pursuance of an agreement made or existing at their execution, they were at the same time indorsed to the creditors, as this does not contradict the fact of their execution to the vendor.

4. Where several persons execute a joint note for borrowed money, which is divided among them, it is a sufficient consideration for a transfer of land by one of them to the others that they assume and agree to pay his share of the note, and his creditors cannot attack the transfer for the reason that he is not relieved of his liability as surety for the others.

Appeal from district court, Bee county; H. CLAY PLEASANTS, Judge.

H. B. Drought and W. S. Dugat, for appellant. L. H. Browne and John C. Beasley, for appellees.

STAYTON, C. J. Appellant was a judgment creditor of J. I. Clare, whose execution had been returned *nulla bona*; and it brought this suit to cancel two conveyances made by its debtor to H. F. Clare, one to P. S. and W. A. Clare, and another to P. S. Clare, and

also to cancel a trust-deed made by the debtor to H. T. Clare. Cancellation was sought on the ground that J. I. Clare was insolvent at the time the several conveyances were made; and it was alleged that they were made to hinder, delay, and defraud plaintiff in the collection of the debt due to it when the conveyances were made. No question was made as to the joinder of several causes of action. Defendants denied the insolvency of J. I. Clare, and alleged that the conveyances were made and received in good faith, on adequate consideration, without notice of insolvency of J. I. Clare, or any intent on his part to defraud his creditors, if such intent or insolvency existed. They also pleaded specially their defenses, which are thus stated in brief of counsel with substantial accuracy:

"The defendant H. T. Clare, answering specially, admitted the execution of the deed of trust to secure his debt, as charged by plaintiff, but denied that the debt was pretended, and averred, when said deed of trust was executed, said J. I. Clare was justly indebted to him in the sum of \$4,800.83, with interest thereon at 10 per cent. per annum from December 31, 1888, and that said trust-deed was executed for the sole purpose of securing said debt.

"The defendant H. F. Clare, answering specially, admitted that he purchased of J. I. Clare, on the 25th of February, 1889, the property in Beeville, as charged by plaintiff, and, he alleged, when he made said purchase said J. I. Clare was justly indebted to William M. Smith in the sum of \$3,652, and to Kohler & Helenfels the sum of \$600, with interest thereon at 12 per cent. per annum from the 10th of June, 1888; that said debts were secured by a lien on the property he purchased; that, in consideration of the sale and conveyance of the property to him, he assumed the payment of both said debts; that the consideration for said conveyance, being the amount assumed, was the fair value of said property; that he had acknowledged his liability to said Smith and Kohler & Helenfels, and had paid a part of the debt to Smith; that he owed no part of the consideration to said J. I. Clare, but that he owed it all, except the payment mentioned, to the said creditors of J. I. Clare; and that the sale was made to him in order to have said creditors paid." "H. F. Clare, still specially answering, admitted that he purchased of J. I. Clare, on the 4th of February, 1889, 991 acres of land, as charged by plaintiff, and he alleged that the consideration for the same was \$3,964, which was the fair value of the land; that, at the time said purchase was made, J. I. Clare was justly indebted to P. Dodridge & Co. in the sum of \$1,562.50, with interest thereon from December 16, 1887, at the rate of 10 per cent. per annum, and that at said time he was also indebted to one John M. Judah in a sum exceeding \$5,000, which was secured by a lien on the said 991 acres of land, and other lands; that he himself owed no part of either of said debts, but was

liable for both as security for J. I. Clare; that at the time he was negotiating with J. I. Clare for the purchase of said land, and at the time said sale was consummated, it was agreed and understood by and between him and J. I. Clare that the purchase money for said land was to be paid as follows: '\$2,328.85 thereof was to be paid to John M. Judah on said debt from J. I. Clare to him, and \$1,635.15 thereof, being the balance of the purchase money, was to be paid on said debt of J. I. Clare to P. Dodridge & Co.;' that he did assume the payment to said Judah of said sum of \$2,328.85, and executed a promissory note for the sum \$1,635.15, payable to said J. I. Clare or his order, which said note, as soon as executed, was, at his direction, and in pursuance of the terms of the contract of sale, indorsed by J. I. Clare to said P. Dodridge & Co., and then delivered to P. Dodridge & Co.; that said P. Dodridge & Co. was informed of the terms of the sale, and was satisfied therewith, and accepted said note, and are the owners and holders of the same; that the entire consideration for said land was paid to the said creditors of J. I. Clare, as stated, and that J. I. Clare was not to receive, and did not receive, any part thereof.

"The defendant P. S. Clare answered specially, admitting that he purchased of J. I. Clare, on the 4th of February, 1889, 4,162 acres of land, as charged by plaintiff, and he alleged that the consideration for the same was \$14,587.81, which was the fair value of the land; that at the time said purchase was made J. I. Clare was justly indebted to John M. Judah in a sum of money exceeding \$14,000, with interest thereon from the 26th day of December, 1888, and that he was also justly indebted at that time to Isham Railey in the sum of \$5,117.69; that at the time he was negotiating with J. I. Clare for the purchase of said land, and at the time said sale was made, it was agreed and understood by him and J. I. Clare that the purchase money for said land was to be paid by him to said Judah and said Railey on their said debts; that the sum of \$9,801.57 was to be paid to said Judah, and the balance of the purchase money, to-wit, \$4,786.30, was to be paid to said Railey; that when said conveyance was made he did assume the payment of said sum of \$9,801.57 to said Judah, on the debt of J. I. Clare to him, and that he executed two promissory notes, each for the sum of \$2,393.15, payable to the order of J. I. Clare, and the same were at the time of their execution, and under his direction, and in pursuance of said agreement, indorsed by J. I. Clare to said Railey, and were delivered to him, and he is now the owner and holder of the same; that said Railey was apprised of the terms of said sale, and accepted said notes, and was satisfied with the security thereby obtained for his said debt; that the said debt to Judah was secured by a lien on the land purchased by him, and on other lands; that he owed no part of either of said

debts, but was liable for their payment as a surety of J. I. Clare.

"The defendants P. S. Clare and W. A. Clare answered specially, admitting that they purchased of J. I. Clare, on the 4th of February, 1889, 4,058 acres of land, as charged by plaintiff, and they allege that the consideration for the same was \$18,861.57, which was the fair value of the land; that at the time said purchase was made J. I. Clare was justly indebted to John Gifford in a sum exceeding \$9,961.69, with interest thereon from the 26th day of December, 1888, and he was also then indebted to A. C. Jones in the sum of \$3,849.14; that they owed no part of said debts, but were liable for their payment as sureties of J. I. Clare; that the said debt to said Gifford was secured by a lien on said land purchased by them, and on other lands of J. I. Clare; that at the time they were negotiating with J. I. Clare for the purchase of said land, and at the time said sale was made, it was agreed and understood by them and J. I. Clare that the purchase money was to be paid to said Gifford and said Jones on their said debts; that the sum of \$9,961.69 thereof was to be paid to said Gifford, and the balance, to-wit, the sum of \$3,409.88, was to be paid to said Jones; that at the time the conveyance was made they did assume the payment to Gifford of said sum of \$9,961.69 on the debt of J. I. Clare to him, and they at said time executed their promissory note for the said sum of \$3,409.88, payable to said Clare or his order, and the same was, at the time of its execution, under their direction, and in pursuance of said agreement, indorsed by J. I. Clare to said Jones, who is now the owner and holder thereof; that said Jones was, before the execution of said conveyance, apprised of the terms of the same, and was satisfied therewith; that they are bound to pay the entire purchase money to said Gifford and said Jones; and that J. I. Clare was not to receive any portion thereof, and did not receive any portion thereof."

These several answers present good defenses, and this is not questioned on this appeal, except in reference to one matter, which is thus presented in an assignment of error. "The court erred in overruling the exceptions by plaintiff to defendants' answer in this: that the court should have stricken from said answer all allegations setting up a parol agreement between all the parties to the several conveyances that the negotiable promissory notes payable to the order of J. I. Clare were to be applied to the payment of his, the said J. I. Clare's, debts." It will be seen from the answers that each of the persons who purchased lands from J. I. Clare purchased such as were already covered with liens, which the purchasers undertook to discharge, or that the purchasers were sureties for J. I. Clare for the identical debts which they assumed, and in most instances the land was already under lien, and the purchasers also bound as sureties. Sureties so situated had the same right to purchase property at a

fair price from J. I. Clare as would they have had had they been creditors, and so without reference to his insolvency or intent. They had the right to protect themselves. Those who purchased property, for a fair price, that was already covered by lien to its full value, with agreement to pay the debt thus secured by lien, could not practice a fraud on any person.

That the agreement was in parol through which the several purchasers assumed the payment of the debts for which they or the property was already liable, or provided for the doing of this, did not invalidate such agreements. Such contracts are not forbidden by any statute of which we have any knowledge. The agreement was simply that they would execute notes to J. I. Clare, who, in order that his creditors should become the owners of them, would, as he did, by indorsement, pass title to them. The agreement was as binding, between the parties, as though it had been in writing. Appellant alleged that appellees knew of the insolvency of J. I. Clare when the conveyances were made; and on the trial many witnesses, who were shown to have had ample opportunity to know what his financial standing and reputation was, were permitted to state that he was regarded as solvent at that time. We think there was no error in this.

It is urged that "the court erred in overruling plaintiff's objection to the testimony of the Clare brothers, and in permitting said Clare brothers to testify as to the contemporaneous parol agreement between said J. I. Clare and his said brothers, whereby it was understood and agreed that the negotiable promissory notes mentioned in the several deeds, and executed by the said brothers to J. I. Clare or his order, were to be appropriated to the payment of the debts of said J. I. Clare, as shown in plaintiff's bill of exception." This has already been considered in noticing the objection to pleadings, and we see no reasonable ground on which objection can stand to appellees' showing that such steps were taken as would secure to creditors of J. I. Clare the entire sum they were to pay for the lands. In the absence of given facts, the existence of which appellant was controverting, such evidence was vital to the defense, and appellees were entitled to bring it forward. It seems to be contended that such evidence contradicted the deeds or notes or both, and that for this reason it should have been excluded. The deeds but declare the notes were executed, and the evidence confirms, but does not contradict, that fact. The notes show that they were payable to J. I. Clare. The evidence declares the same fact, but goes further, and shows that, in pursuance of an agreement made or existing at their execution, they were at the same time indorsed to creditors.

It is urged that the court erred in refusing to charge the jury "that, if they believed from the evidence that J. I. Clare conveyed to his co-defendants, P. S. and W. A. and

H. F. and H. T. Clare, the lands described in plaintiff's petition, and admitted to be conveyed in defendants' answers, and that the purchasers in said conveyances executed and delivered their negotiable promissory notes for part of the purchase money for said lands payable to the order of J. I. Clare, and at the time of such conveyances said J. I. Clare was insolvent, or in failing circumstances, and this fact was known, or by ordinary diligence or inquiry could have been known, to defendants, and said conveyances operated hindrance or delay to plaintiff in the collection of its debt, or interposed obstructions in the way of plaintiff's enforcing its debt, demand, and judgment against J. I. Clare, then you will find for plaintiff." This charge was not applicable to the only case the evidence tended to establish, and to have given it would have withdrawn the mind of the jury from the real issues in the case; for, without disregarding all the evidence, the jury could not have found that the negotiable promissory notes were left subject to the control of J. I. Clare. J. I. Clare may have been insolvent, and this fact known to appellees, yet if they paid a fair price for the property, and secured the proceeds to the creditors of their vendor, no fraud was committed against appellant. It would have been but one method whereby the debtor gave preferences not invalid, if vendees had not been entitled to protect themselves as sureties for their vendor, or the lands already covered by liens. The case of *Elser v. Graber*, 6 S. W. Rep. 560, differs from the present in this: Here the purchasers saw that the notes executed by them inured to the benefit of creditors, while in that the vendee only had the promise of the vendor that the negotiable note executed should be applied to the payment of his debts. The other points of difference, the facts suggest.

It was claimed that the conveyances to appellees were made with specific intent to defraud appellant, and evidence tending to show that J. I. Clare had offered to convey to it property at such prices as appellees bound themselves to pay tended to rebut this claim. The evidence had but very slight bearing on any issue really involved in the case, but, on the question of fraud, it cannot be said that it was wholly irrelevant. The court instructed the jury, in effect, if the several conveyances were made under the circumstances and for the purposes alleged by appellees, then they would not be fraudulent, and in this left out of consideration, as was proper, the questions of solvency and intent of J. I. Clare, but in other parts of the charge instructed the jury, upon the question of intent of the vendor, and knowledge on the part of the vendees of any fraudulent intent he may have had. The parts of the charge last referred to were applicable to the case, in the event the jury found that the conveyances were not made under the circumstances and for the purposes alleged by appellees, and are not subject to the con-

struction that, if notice of the insolvency or intent of J. I. Clare became important, this might not be shown by proof that appellees were in possession of facts which put them upon inquiry as to his solvency and intent in making the conveyances. The controlling questions in the case seem to have been fairly submitted in the charge of the court, and there is no assignment of error which questions the sufficiency of the evidence to require a finding that the facts were as specially pleaded by appellees.

Appellant assigns as error the refusal of the court to give the following charges: "If the jury believe from the evidence that, at the time the defendant J. I. Clare conveyed his property by deed to H. F. Clare, P. S. Clare and W. A. Clare, and P. S. Clare, J. I. Clare was either in failing circumstances or insolvent, then you will return a verdict for plaintiff. (2) If the jury believe from the evidence that J. I. Clare was insolvent at the time of making his deeds to H. F. Clare, P. S. and W. A. Clare, and P. S. Clare, they will return a verdict for plaintiff. (3) If the jury believe from the evidence that the conveyances from J. I. Clare to H. F. Clare, P. S. and W. A. Clare, and P. S. Clare hindered or delayed plaintiff in the collection of its debt, you will return a verdict for plaintiff. (4) If you believe from the evidence that the defendants knew of J. I. Clare's failing circumstances, or by the use of reasonable diligence might have known, or were cognizant of circumstances which would have put a reasonably prudent man on inquiry, and failed to make such inquiry, then you will return a verdict for plaintiff. (5) There need be no fraudulent intent on the part of the defendants P. S. Clare and W. A. Clare and H. F. Clare in the acquiring of the lands in controversy; and still, if the conveyances hindered or delayed plaintiff in the collection of its debt, they are void, and you will return a verdict for plaintiff." Having stated the issues made, and there being no claim that the evidence does not sustain the special pleas, the impropriety into which the court would have fallen, had these charges been given, is patent. If, however, the case had stood stripped of the facts that appellees were sureties, and the property incumbered with debts which they assumed, there was not more than one of the requests which could with any show of propriety have been given. The first would have entitled appellant to a verdict if the vendor was in failing circumstances or insolvent, whether this was known, or ought to have been known, to appellees. So with the second. The third would have entitled appellant to a judgment if in fact the conveyances hindered or delayed appellant in collection of its debt, without reference to whether, within the meaning of the law, the conveyances were fraudulent. The effect of the fifth would have been the same. The fourth would have entirely excluded the defenses specially pleaded, if appellees knew, or ought to have known, that their vendor was in fail-

ing circumstances. These charges were not asked as parts of a proper charge, but as separate and entire propositions.

It is claimed that the court further erred in refusing to give the following charge: "If the jury believe from the evidence that the consideration for the conveyances from J. I. Clare to H. F. Clare, P. S. Clare and W. A. Clare, and P. S. Clare, was, or a great portion of it was, the assumption of a debt secured by a mortgage on the land conveyed, and P. S. and W. A. Clare and P. S. and H. F. Clare were not bound to protect J. I. Clare from all claim by reason of the mortgage notes or mortgage on said land, then, under the testimony, these conveyances are void; and it will not aid them that it is recited in the same conveyances that the purchasers assume the mortgage." It appears from the evidence that J. I. Clare, and the others named in the above request, borrowed a sum of money from Judah, to secure which they each executed mortgage on his own property, and joined in one note, but the money was unequally divided between them, J. I. Clare receiving the sum stated in special pleas. While all were bound to the lender, as between themselves, each was primarily bound for the money by him received, and, from that standpoint, had the right to protect himself. The assumption of the sum for which J. I. Clare, as between themselves, was liable, was, in effect, the assumption of debt for which they were securities for him. The consideration was sufficient, and the fact that J. I. Clare may not have been relieved from personal liability for the sum due to the lender from the others was one in which appellant had no interest. The transaction placed no incumbrance on any property owned by J. I. Clare to secure the payment of the sum due from the others, but left the property which he conveyed to them incumbered as it was before. His debt, however, was assumed by them, and was to be paid as the consideration for the incumbered property. We do not understand that a creditor has any legal interest in having a debtor released from a mere personal obligation for the debt of another. The continuance of such an obligation removes none of the debtor's property from the creditor's reach. If the conveyances had been made on consideration that appellees would pay only what, as between themselves, was due by them to the lender a very different question would arise. The effect of the whole transaction, looking to their obligation then existing, was to bind them to pay the entire sum due the lender. For this they became personally bound to J. I. Clare, as were they before to the lender; and all the property remained bound, as was it before, for the entire debt.

The eighth special charge was correct, as an abstract proposition; but to have given it, in this case, would have been more likely to mislead the jury than otherwise.

The tenth and eleventh charges were based on states of fact not shown to exist, and

were properly refused for this reason, and, besides, were erroneous. The first contained the proposition that a transfer by a debtor of all his property to relatives was a badge of fraud, without reference to the purpose or consideration for which the conveyance was made. The latter has no application to facts proved in the case, but upon an assumed state of facts, whose relations it is difficult to perceive, as the charge is drawn, declared, as matter of law, that a fraudulent transaction would exist.

The remaining assignment is that "the court erred in overruling plaintiff's motion for new trial," which was based on 18 different grounds. Such assignments cannot be considered.

The debt on which appellant's judgment was rendered was secured by a deed of trust on cattle, under which a sale was made, on account of which J. I. Clare sought to establish a credit for \$10,000, which appellant resisted, but this matter the court below declined to submit to the jury; and, without appeal, or even an assignment of error, J. I. Clare now seeks a revision of the action of the court in this respect. That this he cannot have, as the case is presented, is clear. We find no error in the judgment, and it will be affirmed.

DODD v. TEMPLEMAN.

(*Supreme Court of Texas. Feb. 7, 1890.*)

ADMINISTRATOR'S SALE—COLLATERAL ATTACK.

1. A report of sale by an administrator, showing that land belonging to his decedent's estate had been sold to a designated person, is not conclusive as to who the purchaser was, but the real purchaser may be shown by parol, though the decree of confirmation directed that conveyance be made to "the purchaser."

2. An administrator's sale cannot be collaterally attacked on the ground that the administrator himself was indirectly the purchaser of the land; the remedy being direct and timely proceedings by the persons interested in the estate. *Ruth v. Stamford*, 60 Tex. 447, followed.

Appeal from district court, Grimes county. NORMAN G. KITTRELL, Judge.

Hutcheson, Carrington & Sears, for appellant. *H. H. Boone*, for appellee.

STAYTON, C. J. Appellee brought this action to recover a part of a league of land granted to Nancy Anderson, who died intestate, leaving five children. It seems to be considered that the part of the league in controversy, by some voluntary partition between the heirs, became the property of Walter and Wyatt Anderson, two of the children. There is no question raised on this appeal as to the right of appellee to so much of the land as formerly belonged to Walter Anderson, but that he was shown to be the owner of the interest inherited by Wyatt Anderson is denied. It is shown that Wyatt Anderson conveyed his interest in the land to W. Ransom House as early as 1861, but that the deed through which this was done was lost. House having died, and the deed from Anderson having

been lost, on October 8, 1886, Anderson executed a deed to the heirs of House, which recited that it was made as a substitute for the lost deed. Appellee claims the interest conveyed to House through a sale made by the administrator of his estate, and, further, by a conveyance made to him by four of the five heirs of House. Appellant claims through a conveyance which passed to him the interest of one of the heirs of House, but those conveyances from the heirs were all made after the sale, which it is claimed was made by the administrator of the estate through which appellee claims. From this statement it will be seen that appellee was entitled to recover, if the sale made by the administrator was valid, provided he has shown that he acquired the title which thus passed from the estate of House. If title did not thus pass from the estate of House, and by subsequent conveyance to appellee, then he is not entitled to recover more than four-fifths of the land conveyed by Wyatt Anderson to House. It appears that at August term, 1867, the probate court, in which the estate of W. Ransom House was in course of administration, ordered the sale of the interest of the estate in the land in controversy. A report by the administrator was made to the January term of that court for 1868, which showed that the land had been sold to J. C. Kendrick at 25 cents per acre. This sale was confirmed. On the trial a deed from the administrator, dated May 14, 1886, conveying the land to W. C. Kendrick, was offered in evidence. This deed recited the orders in probate, and that it was made in the place of a deed executed by the administrator to Kendrick in January, 1868, which had been lost or mislaid. The administrator testified as follows: "I never knew any one by the name of J. C. Kendrick, as administrator of W. R. House. I sold the 1,280 acres of land out of the Nancy Anderson league, situated in Grimes county, to W. C. Kendrick, Plantersville, Grimes county, Tex. I sold the land mentioned to W. C. Kendrick, of Grimes county, Tex., and not to J. C. Kendrick. I had an order of court authorizing the sale, and made a report of sale to the court which ordered the sale. The name of the person to whom said sale was made is correctly stated, except as to the first initial letter, which in the report appears as 'J.,' and ought to be 'W.,' which would make the report read as W. C. Kendrick, instead of J. C. Kendrick. This is a clerical error, and I presume occurred by the report of sale having been written up by my attorney, and having escaped my notice in signing same. The name 'J. C. Kendrick' appears in the report as purchaser, but the sale and deeds were made to W. C. Kendrick." Upon cross-examination, he testified as follows: "I did not visit the house of William Roberts at any time in company with any one by the name of J. C. Kendrick, but did, perhaps, visit there frequently with a James Kindred. I say the report was true, except as to the first initial letter of the name of the purchaser of the land

in question, which ought to have been 'W.' instead of 'J.,' as explained in answer to the seventh interrogatory. I do say that the name of the party to whom the land was sold was W. C. Kendrick, and I further say that said sale was made to W. C. Kendrick in accordance with his authority and acceptance, and that, by an agreement with him, I paid for him the purchase money for the land, and made full settlement with the estate therefor." So far as the record shows, no objection was made to this evidence. Appellee offered in evidence a deed from W. C. Kendrick, conveying to him the land sold by the administrator; and further showed that the latter had charged himself, in his accounts with the probate court, with the sum for which the report showed the land had been sold. There is nothing tending to show that he did not pay out all moneys with which he charged himself. W. C. Kendrick testified that he never purchased, paid for, or had deed made to him, or paid taxes on or claimed the land, although the record discloses the sale of this land to J. C. Kendrick in 1867. He testified to having a dim recollection that Beauchamp, administrator, once asked him to let him use his name in bidding the land in; that that conversation he had forgotten, until a letter from Beauchamp refreshed his recollection; that he has never heard of it since, and asserted no claim to the lands. He further stated: "All I know about the matter is Beauchamp [the administrator] told me he was going to buy a piece of land, take a deed in my name, and I could keep or deed same back to him. Beauchamp never asked me for any money due on the land; never authorized Beauchamp to pay any money for me on the land." In the deed which W. C. Kendrick executed to appellee he recited the several orders made in the probate court; the execution of a deed to himself by the administrator; stated that four of the heirs of House had conveyed to appellee; and that the instrument then by him executed was for the purpose of removing the cloud thereby placed on appellee's title. He further stated, in the face of that, that the deed from the administrator to himself was made without his knowledge or consent, and that he had never paid anything for the land. Subsequently he made another deed to appellee, which did not contain the recitals and statements contained in the deed before mentioned, and the consideration for these conveyances was \$150 paid by appellee.

The first assignment of error is that "the court erred in holding that the title of W. Ransom House to the land in controversy ever passed to W. C. Kendrick, and this error is based on two grounds: *First*, it is not competent to prove by parol that J. C. Kendrick, to whom the land was recorded as sold, in whose favor confirmed, and deed ordered made, meant W. C. Kendrick, in plain contradiction of the record; *second*, if competent, the evidence was wholly insufficient to have sustained the finding, because W. C.

Kendrick, the pretended purchaser, showed that he never bought, paid for, had deed made, or asserted any claim to the same." There was no objection made to the admission of the evidence by which it was shown that the real purchaser was W. C. Kendrick, and that in the report of sale the name of J. C. Kendrick was inserted by mistake; and we understand the objection now to be that the court erred in giving any effect to it, on the theory that the report of sales was conclusive as to who the purchaser was. The decree of confirmation directed "that conveyances be made to the purchasers," and, if the word "competent" is used in the sense of "suitable" or "sufficient," we do not see that the evidence was wanting in competency to establish the fact that W. C. Kendrick was the purchaser at the sale. If it be meant that the report of sale was conclusive as to who the purchaser was, and that for this reason, notwithstanding the evidence admitted, the court should have found that W. C. Kendrick was not the purchaser, then we think the proposition cannot be sustained. The purpose of a decree of confirmation is not so much to determine what particular person is entitled to complete title to the thing bought, as to determine that the sale was made in such manner and for such price as justifies the court's sanction to the completion of the purchase. If the sale had in fact been made to J. C. Kendrick, and under his direction the deed made to W. C. Kendrick, the transaction would have been valid, even if the decree of confirmation had expressly recognized J. C. Kendrick as the purchaser. In case of *Davis v. Touchstone*, 45 Tex. 490, it seems that an order had been made substituting another for the purchaser, and it was said: "The order allowing the substitution of the name of J. A. Davis as the real purchaser, after a confirmation of the sale to H. W. Davis, we do not regard as beyond the power of the court, if, as must be presumed, it was made with the assent of H. W. Davis. Even without such an order, it would have been competent for H. W. Davis, his bid having been paid, to have the deed made to such person as he might direct." *Ewing v. Higby*, 7 Ohio, pt. 1, p. 198, is to same effect. In a case involving a similar question, the supreme court of the United States said: "This is a matter entirely between such person [the purchaser named] and those to whom the deed was made. To Cutter [the person whose property was sold] it is immaterial to whom the conveyance was made. His right was extinguished by the sale and confirmation. It is equally immaterial to those who claim under Cutter who received the deed,—Stanley, the purchaser, or Foster, the plaintiff. It was a matter between themselves, which can have no effect on the validity of the sale, were it unexplained." *Voorhees v. Bank*, 10 Pet. 479. Evidence to show the mistake in the name of purchaser in report of sales was properly received, but, had there been no evidence on that question, it was not

for appellant, on that account, to question the right of W. C. Kendrick to the deed.

There is evidence tending strongly to show that the purchase was made in the name of W. C. Kendrick for the administrator, and, if this was true, those interested in the estate, by timely and proper procedure, could have had the sale set aside; but that could not be done in this case. *Rutherford v. Stamper*, 60 Tex. 447; *Fisher v. Wood*, 65 Tex. 200. Neither the necessary parties nor pleadings are before the court to authorize such action. The court found that the sale was in fact made to W. C. Kendrick, and there was evidence which justified that finding, though it tended strongly to show that the purchase was for the benefit of the administrator. The facts found vested title in Kendrick, through whom appellee claims. The finding of the court, taken as a whole, was that appellee bought from four of the heirs of House their interest in the land, and that appellee had bought the interest of the other heir, though there was one finding, in effect, that appellee had purchased from all the heirs; but these findings become immaterial, in view of the fact that the sale by the administrator divested the heirs of interest. The only other assignments present in a different form the same question already considered. There is no error in the judgment, and it will be affirmed.

SNOWDEN *et al.* v. RUSH *et al.*

(*Supreme Court of Texas*. Feb. 11, 1890.)

TAX-TITLES—LIMITATION OF ACTIONS—RECORD ON APPEAL.

1. While "possession and payment of taxes" must concur, under Rev. St. Tex. art. 8193, which provides that every suit to recover land, as against any person having peaceable and adverse possession thereof, and paying taxes thereon, and claiming under a deed or deeds duly registered, shall be instituted five years next after the cause of action accrued, yet the taxes need not be actually paid during the continuance of possession. It is sufficient if the taxes are paid for the five years during which possession is held, though the payment is not made until after possession has ceased.

2. In the absence of a statement of facts, the correctness of conclusions of fact filed by the trial court cannot be questioned, except in so far as the conclusions may contain contradictions.

Commissioners' decision. Appeal from district court, De Witt county.

Trespass to try title by Stella Snowden and T. W. Snowden, her husband, against O. T. Rush and J. A. Rush, his wife. On November 23, 1875, Davidson and Atkinson purchased the land in controversy, and put O. T. Rush into immediate possession, as their tenant under a deed duly registered. Davidson and Atkinson sold their interest in the land to Sorrell and Eastland, who on February 11, 1881, partitioned the land between themselves, and Sorrell conveyed his share to defendant Rush. The taxes for the five years from 1875 to 1880, inclusive, were paid by Davidson and Atkinson, but the taxes for 1880 were not paid until March 29, 1881. For further facts, see 6 S. W. Rep. 767. The court

found in favor of defendants, and plaintiffs appeal.

Rev. St. Tex. art. 3193, provides: "Every suit to be instituted to recover real estate, as against any person having peaceable and adverse possession thereof, cultivating, using, or enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after the cause of action accrued, and not afterwards."

R. A. Pleasants and S. F. Grimes, for appellants. *Fly & Davidson*, for appellees.

ACKER, J. Appellants sued in trespass to try title. Appellees pleaded the five-years statute of limitation. The trial was without a jury. It was proved that appellees held possession of the land, under duly-registered deed, from November 23, 1875, until February 10, 1881, and paid all taxes assessed against the land for the years 1876 to 1880, inclusive, but did not pay the taxes for the year 1880 until the 29th of March, 1881. Appellants contend that the facts do not sustain the plea, because the payment of the taxes for the year 1880 was not made until after possession had been abandoned, and was not, therefore, concurrent with the possession. It is well settled that the payment of taxes and possession must concur, but we do not understand by this that the taxes must be actually paid during the continuance of the possession. By the use of the phrase, "possession and payment of taxes must concur," in the decisions construing this statute, we understand it is meant that the time for which taxes are paid and possession held must concur; that is, if the possession is held for the years 1876 to 1880, inclusive, it must be shown that taxes were paid for these years. Under the laws in force and governing the collection of taxes for the year 1880, the taxes might have been paid at any time after the 1st day of October of that year, and up to the 1st day of March, 1881, without costs or damages, and after that time by payment of the penalties imposed by law for neglect to pay prior to March 1st. Now, suppose appellees had gone into possession of the land under duly-registered deed on the 25th day of September, 1875, and continued their possession until the 26th day of September, 1880, and abandoned the possession on that day,—one day after the expiration of the five-years possession, and four days before the taxes could have been paid for 1880,—under the doctrine contended for by appellants they would thereby have forfeited the right to claim the benefit of the statute, though they may have paid the taxes for 1880 on the first day it was possible for them to do so. We do not think such construction consistent with the evident spirit and purpose of the statute. We think the proof sustained the plea, and that the court did not err in so holding.

It was urged that there was no evidence that the taxes for 1880 were paid for the ben-

efit of appellees. The court filed conclusions of fact, but there is no statement of facts. It appears from the findings of fact that Davidson and Atkinson paid the taxes for the entire five years, and that they sold the last of their interest in the land in 1880. Having owned the land on the 1st day of January, 1880, Davidson and Atkinson were liable for the taxes for that year. In the absence of a statement of facts, the correctness of the conclusions of fact cannot be questioned, except in so far as the conclusions may contain contradictions. We are of opinion that the judgment of the court below is correct, and should be affirmed.

STAYTON, C. J. Report of commission of appeals examined; their opinion adopted; judgment affirmed.

HUNTER v. SOUTHERN PAC. RY. CO.

(*Supreme Court of Texas. Feb. 11, 1890.*)

CARRIERS OF GOODS.

1. A railroad company is not liable as a common carrier beyond its own line, unless it assumes such liability.

2. The mere fact that a railroad company receives goods marked for a place beyond its own line does not import an agreement to transport the goods to the destination named as a common carrier.

Commissioners' decision. Appeal from district court, De Witt county.

R. A. Pleasants and Rudolph Kleberg, for appellant. *Stockdale & Proctor*, for appellee.

HOBBS, J. There is no error, we think, in the judgment rendered in the court below. The allegations of the petition showed that the plaintiff's cause of action grew out of a contract by the terms of which the appellee undertook and contracted to deliver the stock at the city of Chicago, Ill., to the consignees named. But the proof in support of this was a live-stock shipping contract in writing, introduced by plaintiff, which contained the stipulation releasing defendant from liability beyond the termination of its own line of road, and which the testimony showed was New Orleans, La. These facts did not establish a cause of action against the defendant, because a common carrier is not liable beyond the terminus of its own line, unless it has assumed such liability. *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 31 Fed. Rep. 247; *Ortt v. Railway Co.*, 36 Minn. 396, 31 N. W. Rep. 519.

And the fact alone that it received goods marked for a place beyond its own terminus does not import an agreement to transport to the destination named as a common carrier. *Lawson, Carr.* § 240. Those cases which hold that such fact alone is to be regarded as showing that the railroad had contracted for the delivery of the freight at the point of destination, and as showing that it had made arrangements with connecting lines, concede that this is not so, where it expressly limits

its liability. *Railroad Co. v. Mt. Vernon Co.*, 84 Ala. 173, 4 South. Rep. 356; *Falvey v. Railway Co.*, 76 Ga. 597. The reason a railroad is not liable beyond its own line as a common carrier, in the absence of an express contract, is because it is not a common carrier beyond its own line. The law attaches to it no liability as a common carrier beyond the terminus of its own line, and does not compel it to act as a common carrier over other lines not within its control. *Railway Co. v. Baird*, 12 S. W. Rep. 530. Hence when this liability does attach it must be by virtue of some contract assuming it. In the case under consideration, the stipulation excepted to expressly releases it from such liability. It was lawful for the defendant in the contract of shipment to so provide. *Railway Co. v. Baird*, supra. The appellant's exceptions thereto were properly overruled; and, as the evidence failed to show that plaintiff had any such cause of action against the appellee as was alleged in the petition, there was no error in rendering judgment for the defendant. We think the judgment should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment affirmed.

GULF, C. & S. F. RY. CO. v. LEVI.

(Supreme Court of Texas. Feb. 14, 1890.)

CARRIERS OF GOODS—MOBS.

Under Rev. St. Tex. art. 277, which declares that the duties and liabilities of carriers in Texas shall be the same as at common law, except where otherwise provided, a common carrier is not liable for depreciation in the value of goods, resulting solely from inevitable delay in their transportation, caused by a mob of rioters. Overruling 13 S. W. Rep. 677.

On rehearing. For former opinion, see 12 S. W. Rep. 677.

Action by Will Levi against the Gulf, Colorado & Santa Fe Railway Company for the value of a car-load of lemons shipped by plaintiff over defendant's railroad and its connections. Rev. St. Tex. art. 277, declares that "the duties and liabilities of carriers in this state shall be the same as are prescribed by the common law," except when otherwise provided. From the judgment for plaintiff defendant appealed, and on its affirmance now moves for a rehearing.

Shepard & Miller, for appellant. *B. P. Ayres*, for appellee.

STAYTON, C. J. A further consideration of this case induces us to believe that the former disposition made of it was erroneous, and the motion for rehearing is sustained. Appellee brought this action to recover damages resulting from delay in transporting a car-load of lemons, received by appellant from another railway company at Rosenberg Junction, to be transported to Fort Worth. He alleged, if the lemons had

been transported within a reasonable time, they would have reached Fort Worth on September 27th, at which time they were then worth in the market \$12 per box, but that they were not delivered at Fort Worth until October 2d, when they were worth in the market only \$4 per box, and that by reason of this delay he was damaged \$2,000, there being 250 boxes. He further alleged that the lemons were shipped from New Orleans in a ventilated car, as was necessary for their preservation, but that while *en route* they were transferred from that to a close car, whereby they were caused to heat and rot, and that from this cause 50 boxes were lost, for which he asked \$600 as damages. He further alleged that he was compelled to assort the lemons after they were received at Fort Worth, which cost him 50 cents per box, and this he also sought to recover. The petition then proceeds as follows: "Wherefore plaintiff avers and charges that, by reason of said unreasonable delay in the transportation and delivery of said lemons as aforesaid, and the depreciation of the price thereof as aforesaid, and the transferring said lemons from said ventilated car to said close car as aforesaid, he has been damaged in the sum of two thousand seven hundred and twenty-five dollars," for which he prays judgment. Defendant answered by a general denial, and further specially pleaded as follows: "And for further and special answer the defendant says that, if it ever received the fruit described in plaintiff's petition, the same was received by it at Rosenberg Junction from the G., H. & S. A. Ry. Company, and was immediately forwarded from said station in said car in which the same had been delivered to defendant, without opening the same. That the said car-load of fruit was carried with speed and safety to the city of Temple, in Bell county, through which it had to pass to be delivered to plaintiff at Fort Worth. That said car, on its arrival at Temple, was taken from the train, and side-tracked by a mob of persons, who, at the time, were engaged in a riot in the said city of Temple, and in the removal and destruction of defendant's property, including its road-bed, rolling stock, freight, etc., at said place. That said rioters were in great force and number, and that it was impossible for defendant, with its agents and employes, to resist them, or dispossess them of defendant's property. That when the plaintiff's fruit arrived at Temple in the said car the said rioters immediately stopped the train and car bearing the said fruit, and took possession thereof and out of the control of defendant with overpowering force and arms, and against its protest, and notwithstanding its strenuous and exhausting efforts to prevent the same. The said rioters uncoupled the cars, and forced said car of fruit upon a side track, where, by overwhelming force and arms and violence, for the space of, to-wit, five days, they held possession of the same, refusing to permit the defendant to remove

the same; and using force and violence to prevent defendant, and its agents and employes, from moving said car, as it then offered and wished; and was ready to do. Defendant says that it had remaining in its employ at and during said time a sufficient number of competent employes, who would have moved its trains and carried said car of fruit and other freight, had it not been prevented by the force and violence herein charged. Defendant made every possible effort to resume control of its property, and to move its said trains, and ship the car bearing plaintiff's fruit, and through its manager and agents appealed to city, county, and state authorities and officers for assistance and force to control said riot, and the prevailing unlawful force, and to assist defendant to repossess itself of its property, and to pursue its lawful business. But defendant says that neither the city, county, nor state officers and authorities were able to furnish sufficient force to subdue said riot, and dispossess said rioters, and drive them from the occupation of defendant's property. That this state of affairs existed for the space of, to-wit, five days, during which the plaintiff's fruit was in the control and in the possession of said rioters, and could not be handled or transported by defendant. That immediately after the cessation of said riot, and the dispersion of said rioters, which occurred at the end of, to-wit, five days, the defendant immediately recovered its property and freight, and took possession of said car, and, as soon as it was possible, transported the same to its destination, namely, the city of Fort Worth, in Tarrant county, where it delivered the same at once to plaintiff. Wherefore defendant says that it has not been guilty of any negligence in and about said transportation of said car, and said delay was not due to the negligence of its duties by defendant, but solely and wholly and entirely to the act of the said rioters and unlawful persons, and to the inability of the peace-officers of the city of Temple and county of Bell and state of Texas to disperse the said rioters, and restrain them from acts of violence, and permit the defendant to pursue its ordinary and peaceful avocation. And all this the defendant is ready to verify, and prays judgment." The plaintiff filed a general demurrer to this plea as setting up no lawful defense, which was sustained by the court. There was a judgment for the plaintiff, from which this appeal is prosecuted.

From the statement it will be seen that plaintiff based his claim for damages mainly on the ground that there was an unreasonable delay in the transportation of the lemons. If a defense to a claim for damages resulting from such a cause, other than inevitable accident or the act of God, can prevail, there can be no doubt that the answer sets up such a defense; and, if a good defense to any part of plaintiff's claim was set up in the answer, it was error to sustain a demurrer to it. Under the statutes of this state the liability of

the common carrier is that imposed by the rules of the common law. "He is liable not only for losses occasioned by secret theft or embezzlement, but for those inflicted by highway robbery, by the spoliations and outrages of mobs, rioters, and insurgents. The most restless and destructive conflagration, if occasioned by human agency, without any negligence whatever on the part of the carrier, will furnish no valid ground of exemption." *Chevallier v. Straham*, 2 Tex. 122. For failure to carry and deliver, the carrier cannot excuse himself by reason of the fact that, through human agency, not under his control, this was prevented without fault on his part; but if the property be wholly lost or partially decayed through some inherent quality, without fault on the part of the carrier, this will excuse the failure safely to carry and deliver, for the operation of the laws of nature, working destruction or loss, furnish the same excuse as do tempest, lightning, or other cause termed the "act of God." The reasons on which the common-law rule is based are thus stated by the English judges, whose knowledge of the ground-work of that system has never been questioned: In *Forward v. Pittard*, 1 Term B. 27, the reasons are thus stated by Lord Mansfield: "But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unraveled, the law presumes against the carrier, unless he shows that it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests. If an armed force came to rob the carrier of the goods, he is liable; and a reason is given in the books, which is a bad one, viz., that he ought to have a sufficient force to repel it; but that would be impossible in some cases, as, for instance, in the riots in the year 1780. The true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil." The reasons are thus stated by Best, C. J., in *Riley v. Horne*, 5 Bing. 220: "When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to their place of destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has added to that responsibility of a carrier, which immediately rises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer. From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country when they happen that no person would be so rash as to attempt to prove that they had happened

when they had not, namely, the act of God and the king's enemies."

The same reasons do not apply when the thing is actually transported and delivered, although when delivered it may be greatly diminished in value by a fall in the market price, or its value partially or entirely destroyed by reason of its inherent perishable nature, which has worked its partial or entire destruction while in transit. The rule is thus stated by a recent text-writer, in accordance with the view expressed by many others: "But the reasons upon which the extraordinary responsibility of the common carrier for the safety of the goods is founded do not require that the same responsibility should be extended to the time occupied in their transportation. The danger of loss by robbery or embezzlement, or theft by collusion and fraud on his part, has no application when the mere time of the carriage is concerned. 'His first duty,' it is said, 'is to carry the goods safely, and the second to deliver them; and it would be very hard to oblige a carrier, in case of any obstruction, to risk the safety of the goods in order to prevent delay. His duty is to deliver the goods within a reasonable time, which is a term implied by the law in the contract to deliver; as *TINDAL, C. J.*, puts it, when he says: 'The duty to deliver within a reasonable time being merely a term ingrafted by legal implication upon the promise or duty to deliver generally.'" In this respect, therefore, the common carrier stands upon the same ground with other bailees, and may excuse delay in delivery of the goods by accident or misfortune, although not inevitable or produced by the act of God. All that can be required of him in such an emergency is that he shall exercise due care and diligence to guard against the delay, and that, if it occur without his fault or negligence, he shall omit no reasonable efforts to secure the safety of the goods." *Hutch. Carr. § 330*. See, also, sections 292, 331, 335. Many cases are cited in the notes illustrative of the application of this rule, and we will briefly refer to some more recent. In *Haas v. Railroad Co.*, 35 *Amer. & Eng. Ry. Cas.* 572, 7 *S. E. Rep.* 629, it was held that the company was not liable for loss resulting from "delay in delivering freight, caused by a strike of its employees, accompanied by intimidation and violence which could not be prevented or suppressed by either the company or the civil authorities." The loss in that case resulted from a fall in the market price between the time the freight would ordinarily have been delivered, but for the obstruction, and the time when it was delivered. In the case of *Geisner v. Railway Co.*, 102 *N. Y.* 568, 7 *N. E. Rep.* 828, the same ruling was made, and the case distinguished from *Weed v. Railway Co.*, 17 *N. Y.* 862, and *Blackstock v. Railroad Co.*, 20 *N. Y.* 48. Case last cited, while affirming the rule quoted from *Hutchison on Carriers*, held that the simple fact that employees refused to work did not relieve the carrier from liability for

failure to transport freight within the usual time. *Railroad Co. v. Hollowell*, 65 *Ind.* 189, was a case in which a carrier was sought to be held liable for failure to receive and transport freight within the usual time, and the company set up a defense similar to that urged in the case before us. After stating the rule as to the liability of carriers for failure to deliver at place of destination, the court said: "But the strict rule contended for by the appellee is applicable to common carriers only after they have received the goods for transportation, and fail to deliver them at their destination, or when they are lost. In cases like the present, for delay in receiving and carrying the goods, the carrier is not an insurer, and is bound only by the general rule of liability for a breach of his contract, or of his public duty as a carrier; and may be excused for delay in receiving the goods, or in transporting them after they have been received, whenever the delay is necessarily caused by unforeseen disaster which human prudence cannot provide against, or by accident not caused by the negligence of the carrier, or by thieves and robbers, or an uncontrollable mob." In *Railway Co. v. Hazen*, 84 *Ill.* 36, it was held competent for the carrier to show, in a suit for damages resulting from delay in the transit of freight, that the delay was caused solely by irresistible violence of men who were not in the employment of the company; and that when employees suddenly refused to work and were discharged, and others employed who were prevented by lawless violence of those discharged from doing duty, the company was not liable for delay thus caused. The case of *Railroad Co. v. Bennett*, 6 *Amer. & Eng. Ry. Cas.* 402, decided by the supreme court of Indiana, affirms the rule asserted in *Railroad Co. v. Hollowell*, though the case was one under contract. Many cases might be cited in which carriers have been held not liable for injury resulting solely from delay, when this was shown to have been caused by misfortune or accident, not such as would relieve the carrier for loss of freight or failure to deliver it. We are of opinion that the answer excluded, presented a good defense to so much of the action as sought to recover damages for decline in market price of lemons during time of transit.

It may be true that the answer does not present a defense arising from the fact that the lemons may have become less valuable while in transit by reason of material decay without fault on part of carrier; for there is no averment in the pleadings of either party that there was any diminution in value on that account. Plaintiff does allege that they heated, and on that account rotted to a given extent, but that was attributed to the wrongful act of defendant in putting them in an improper car. To the extent the fruit may have deteriorated, on account of its perishable nature, while in transit, the facts pleaded would furnish a defense, if defendant bestowed upon it proper care; for in such case

such a loss would be attributed solely to the delay which the answer excuses. For the error of the court in sustaining the demurrer the judgment will be reversed, and the cause remanded.

MISSOURI PAC. RY. CO. v. LAMOTHE et al.

(Supreme Court of Texas. Feb. 14, 1890.)

MASTER AND SERVANT—DEFECTIVE APPLIANCES—ARGUMENTS OF COUNSEL—EVIDENCE.

1. In an action against a railroad company for negligently causing the death of an employe, the action of the court in permitting plaintiff's counsel, in the presence of the jury, to read authorities to the court showing a verdict for \$15,000, and another for \$10,000, against railroad companies, does not show such an abuse of judicial discretion as to warrant a reversal.

2. Evidence of a rule of the company which was printed on its applications for employment, and was required to be signed by every applicant who obtained a position, and was supposed to be known to him, is inadmissible, in the absence of an offer to produce the writing itself, or to account for its absence, or to show that decedent had signed it, or that he knew of the existence of the writing or rule.

3. Inasmuch as such evidence was excluded, it was proper to refuse to instruct that plaintiffs could not recover if such a rule existed, and was known to decedent, and if the failure to comply therewith contributed to his injury.

4. Refusal to exclude evidence on motion, made after it has been admitted, will not be disturbed, on appeal, where it does not appear why it was not objected to when offered, and that the court abused its discretion by refusing on the ground that the objection comes too late.

5. Where it appears that the train which decedent was attempting to couple was not moved by a switch-engine, but by a powerful road freight-engine, evidence that the former is more suitable for such work, and more easily handled, than the latter, is pertinent to the issues, and admissible.

6. Where the petition fails to allege that the accident was due to the failure or inability of the engineer to see the signals, the admission of evidence that engineers are controlled entirely by signals when switching, though improper, does not affect the result of the action, as it does not suggest that the injury was caused by the omission to give them.

7. It is presumed that the trial court enforced rule 40, that "side-bar remarks, and remarks by counsel of one side, not addressed to the court, while the counsel of the other is examining a witness, or arguing any question to the court, or addressing the jury, will be rigidly repressed by the court;" and, where the court refuses to allow the question, by plaintiffs' counsel, why decedent left the company's employ, a remark by counsel, that he might have been discharged for incompetency, was evidently addressed to the court, and does not warrant a reversal.

8. Evidence that decedent was killed by the Miller draw-head, passing the central draw-head, and crushing him, there not being more than four or five inches of space between the cars after the passing of the draw-heads where he was standing, is not objectionable as suppositional and hearsay.

9. An instruction that, if the proximate cause of the accident was the darkness of the night, or the stormy weather, plaintiff cannot recover, is properly refused, where there is no evidence that such were the proximate causes of the accident, and as such causes, if they increased decedent's peril, would be additional grounds for recovery.

Appeal from district court, Galveston county.

White, Mott & Ballinger, for appellant.
Wheeler & Rhodes, for appellees.

HENRY, J. The appellee Theresa Lamothe, as widow of Alto Lamothe, deceased, in her own behalf, as well as in the behalf of Marie Lamothe, the mother of Alto Lamothe, prosecutes this suit against the Missouri Pacific Railroad Company for damages for negligently causing the death of said Alto Lamothe, who was, at the time he met his death, a switchman in the service of, and employed in the yards of, the Missouri Pacific Railroad Company at Galveston. The accident occurred at night, on October 12, 1886. Appellee alleges that her husband, while in the discharge of his duties as switchman, was required by the railroad company to make a coupling of two railroad cars in the service and under the control of appellant, and a part of its railway equipment; the night being dark, and the said Lamothe being wholly unacquainted with the defective draw-heads of the two cars which he was required to couple, and, further, that the draw-head of one of the said cars, which Lamothe was required to couple, was at the time out of order, and in a dangerous condition, and had been in such condition for months anterior to the fatal accident, and which was known to appellant, or might have been known by the exercise of reasonable diligence, but was wholly unknown to Lamothe. The petition charges that the appellant, in disregard of the safety of its employes, was at the time employing, in the making up of its trains, instead of a switch-engine, a large and powerful road freight-engine, which was being handled and controlled by an unskillful and incompetent youth, named Charles Marshal, acting as engineer; that said youth had neither the physical strength nor skill requisite for the proper discharge of the duties of an engineer; that said Marshal, for the want of the requisite skill and strength, could not properly handle and control the engine, which was known to appellant, but unknown to Lamothe; that while Lamothe was in between the two cars which he was required to couple, for the purpose of making said coupling, Marshal, being unable to control the engine, backed the engine, with one of the cars to be coupled, with such unnecessary force and violence as to jam the two cars closely together, the defective condition of the draw-heads of the two cars readily admitting of the passage of one draw-head by the other, thereby bringing the bodies of the said two cars so closely together as to smash and crush the said Alto Lamothe to death before he could extricate himself from the position of peril in which he had been placed by the wrong and negligence of appellant, and without fault on his part. The petition further charges that the two cars which Lamothe was required to couple were unfitted to be coupled together, the draw-heads thereof being so constructed as to admit of the passage of one by the other when in good condition, and which danger had been greatly increased by the negligence of appellant in allowing one of the draw-heads of the two cars to get out of order, and

remain out of order for months anterior to the killing of Lamothe. The petition charges that Lamothe had entered the service of appellant the day he was killed; that he was wholly unacquainted with the dangerous condition of the draw-heads of the two cars which he was required to couple, and ignorant of the fact that one of the draw-heads was out of repair; that Lamothe was also unacquainted with the incapacity and want of skill of the engineer, Marshal; that at the time of his death Lamothe was 25 years of age, strong and able-bodied, and the sole support of his family; that he was earning at the time he was killed \$60 per month wages. The appellant answered—*First*, by general denial; and, *second*, that the injuries from which Alto Lamothe died, if caused by the negligence of any one other than himself, were caused by the fellow-servants and co-employees of Lamothe, for which defendant was not liable, and that Lamothe, by his own carelessness and negligence, contributed to the injuries from which he died, and that but for his carelessness and negligence such injuries would not have been received by him. There was a trial of the cause, and a verdict and judgment for the appellee Theresa Lamothe for the sum of \$6,000.

The counsel for plaintiffs, in his opening argument, upon questions of law addressed to the court in the presence of the jury, read from Wisconsin and Texas cases,—one showing a verdict for \$15,000, and the other one for \$10,000, against railroads. The defendant objected at the time to their being read, on the ground that it tended to prejudice the jury. The objection was overruled, and the ruling is assigned as error. We think it must be largely left for the trial judges to determine for themselves what authorities, and how much of each, they will permit to be read to them. If, in any case, it is apparent that the purpose is to influence the jury, rather than to inform the judge, the attempt should be promptly rebuked when it occurs. We can see no good reason why the amounts of verdicts in other cases should have been read to the judge at that stage of the trial. We think, however, that, before any case should be reversed for that reason, a clear instance of an abuse of the rule ought to be presented, as well as strong ground to believe that the verdict may have been improperly influenced by the course pursued. We do not think that the record before us presents a case of that character.

The defendant offered to prove "that it was a rule of the company, at the time of this accident, that each switchman, brakeman, and train hand should carry and use an instrument known as a 'coupling stick' or 'knife,' and that this rule was printed upon what is known as 'Application Form No. 189,' and that this form had to be signed by every applicant for employment who obtained a position with the company in February, 1886, and that every employe was supposed to know this rule." The court properly excluded the

evidence. No offer was made to produce the writing itself, or to show that the deceased had signed it, or that he even had actual knowledge of the existence, either of the writing or the rule. The argumentative mode of proving the fact could not properly be resorted to until the absence of better and more direct evidence was accounted for. A charge was requested, on the same subject, to the effect that, if such a rule existed, and was known to the deceased, and if his failure to use such a knife contributed to his injury, plaintiffs could not recover. The evidence having been excluded, the charge would have been improper. As the issues were developed on the trial, we think the rule, if proved, would have been immaterial, and proof of it could not properly have exercised any influence on the decision of the cause.

Plaintiffs introduced evidence to show that switch-engines were different from road-engines in their construction. It was proved that signals can be better seen from switch-engines, and there was some evidence that they are more readily handled. After such evidence had been admitted, defendant moved the court to exclude it all. The refusal of the court to do so is assigned as error. Objections not made to the introduction of evidence when it is offered, but afterwards, in the form of a motion to exclude it generally, deserve a less favorable consideration than when made at the time. Usually, some reason for the delay in urging the objection ought to be made to appear, and the decision upon such objections ought to be left more to the discretion of the trial courts than when the objections are interposed at the proper time. No reason is shown for not making the objections when the evidence was offered, and it does not appear that it was not a proper exercise of the discretion of the court to refuse the motion because it came too late. The evidence in regard to a switch-engine being more suitable to the work in question, and with regard to its being more easily handled than a road-engine, was, we think, pertinent to the issues made by the pleadings, and was admissible, even if the objection to it had been made when it was offered.

A witness for plaintiffs testified: "We go altogether, in switching, by signals. I never move my engine to couple cars without a signal from one of the yardmen. The whole work depends upon signals. We move no engines without signals." This evidence was objected to, when it was offered, on the ground that the petition did not allege that the accident occurred through the failure or inability of the engineer to see the signals. As we find no such allegations in the pleadings, we think the objection was well taken, and the evidence ought to have been excluded. The evidence was, however, immaterial, and, we think, could not have influenced the result. While it established the usefulness of signals, it did not suggest that the injury to the deceased was caused by the omission to give them. The only evidence

on that issue was that the proper signal was given, and there is no evidence in the record that it was not seen by the engineer. It is evident that the result was controlled by other issues.

A motion was made, after the evidence had been admitted without objection, to exclude "all evidence tending to show that it was not a general custom to couple a Miller to an ordinary draw-head." What we have said with regard to the motion to exclude the evidence relating to the engines applies with equal force to the manner and the substance of this objection.

Plaintiffs' attorney, upon cross-examination, asked a witness: "Do you know what (the Marshal) left the employ of the company for?" "This was objected to by the defendant as incompetent, and as hearsay evidence," and the objection was sustained by the court, whereupon the attorney remarked, in the hearing of the jury: "He may have been discharged for incompetency. I don't know." Defendant took a bill of exceptions to the remark, and now urges it for a ground for a reversal of the judgment. It is insisted that rule 40 was violated, which reads: "Side-bar remarks, and remarks by counsel of one side, not addressed to the court, while the counsel of the other is examining a witness, or arguing any question to the court, or addressing the jury, will be rigidly repressed by the court." The remark complained of seems to have been addressed to the court. As an illustration of the propriety of the question asked, it is not evident that it was not pertinent and proper. At any rate, it is to be presumed that the court will exercise the authority that it undoubtedly possesses, not only to prevent prejudice to litigants by remarks addressed to itself, but, in the language of the rule, "will rigidly repress" all others that are prohibited by it, or that are calculated to defeat the ends of justice. The practical enforcement of such rules must be left mainly to the trial courts, and there must be strong reasons to believe that the proper administration of the law had been defeated by their non-observance before this court will be disposed to set aside a judgment on that account. We do not think it should be done in this case.

The plaintiffs read in evidence the following answer of a witness: "His death was caused by the Miller draw-head passing the central draw-head, and crushing him; there not being more than the space of four or five inches between the cars after the passing of the draw-heads where he was standing." The defendant objected to this evidence because it was "a supposition and surmise on the part of the witness, and hearsay." The court overruled the objections. We think that the evidence was not subject to the objection.

Defendant requested the court to charge the jury "that if they believed from the evidence that the proximate cause of the accident was the darkness of the night, or the

stormy condition of the weather, the plaintiffs would not be entitled to recover." The court did not err in refusing to give the charge. There was no evidence tending to show that such were the proximate causes of injury to the deceased. If such causes increased his peril from the defective machinery of defendant, or the inefficiency of its servant, they still could not prevent, but would rather be added causes for, a recovery. The judgment is affirmed.

GULF, C. & S. F. RY. CO. *v.* ANDERSON.

(*Supreme Court of Texas.* Feb. 18, 1890.)

RAILROAD COMPANIES—INJURIES AT CROSSINGS—
CONTRIBUTORY NEGLIGENCE.

1. In an action for injuries received at a railroad crossing, it is a question for the jury whether plaintiff's failure to look for approaching trains was negligence, and hence it is proper to refuse to instruct that if plaintiff, by using his senses of sight and hearing, could have discovered the train in time to avoid the accident, he cannot recover.

2. Under Rev. St. Tex. art. 1831, requiring the special verdict to find "the facts as established by the evidence," so that nothing shall remain for the court "but to draw from such facts the conclusions of law," it is proper to refuse to submit as a special issue the question whether plaintiff by looking westward could have seen the train in time to avoid the accident, as, upon an affirmative finding, it would still be a question for the jury whether his failure to look in that direction was negligence.

3. Though the petition alleges that the accident occurred on a street crossing, proof that it occurred on a trestle, some distance from the crossing, will not defeat plaintiff's recovery, where the answer alleges that it occurred at the latter place.

4. Though the petition does not allege that plaintiff's view was obstructed by smoke and steam, evidence that it was so obstructed is admissible in response to a plea of contributory negligence.

5. Rev. St. Tex. art. 4232, as amended by Act March 21, 1883, provides that "the whistle shall be blown or the bell rung at the distance of at least 80 rods from the place where the railroad shall cross any public road or street, and such bell shall be kept ringing until it shall have crossed such public road or stopped." The court charged that it was the duty of the railroad company to "keep ringing or blowing" until the street was crossed. *Held*, that the charge was not prejudicial to defendant.

Appeal from district court, Galveston county.

J. W. Terry, for appellant. *John Lovejoy* and *Wheeler & Rhodes*, for appellee.

HENRY, J. The petition charges that heretofore, to-wit, on the 29th day of August, A. D. 1888, and prior and subsequent thereto, defendant, as a common carrier of freight and passengers, was engaged in running and operating coaches, passenger and freight trains, drawn by locomotives, operated and propelled by steam, on and along avenue A, in the city and county of Galveston, and across Twenty-Seventh street, in said city, and at and upon the said Twenty-Seventh street, on said Avenue A, and the intersection of said streets in said city; the said Avenue A and Twenty-Seventh streets, and the crossing and intersection thereof, being a public street and thoroughfare, in constant and daily use by the public, and one of the most generally

used streets in said city, the same being within the corporate limits thereof. That on the day and date last aforesaid, while plaintiff was engaged in the lawful pursuit of his business, and while in so doing he was walking along the said public street and said highway, to-wit, Twenty-Seventh and across said avenue A, and the crossing thereof, and while upon the crossing at intersection of said public streets, he was run down or run into and struck with great force by one of the locomotives of said defendant, drawing a train of cars at great speed on said avenue A, and across said Twenty-Seventh street, greatly wounding and bruising him, and injuring plaintiff, and so crippling him as to render him sick and weak for the remainder of his life. That the front of said engine struck plaintiff on the back and right side, and on the back of his head and neck, and so bruising his head and body, and so injuring his spine, and so shocking his nervous system, and so bruising his back and whole body, as to seriously affect his back, his spine, right side, head, and neck as not only to weaken his whole body and destroy his physical health, but also to greatly affect and impair his mind, and cause him great distress, physical and mental anguish, and to such an extent as to prevent his doing any work or pursuing his avocation, that of a cotton screwman and stevedore, or to attend to any business whatever. That plaintiff, at the time of said injury, was about 44 years of age, a strong and able-bodied man, and had been so for years thereto, and for many years had been steadily employed and earning the sum of \$100 per month, by which he was enabled to support himself and family, consisting of a wife and five children. That since the said injury plaintiff has been incapable of earning anything or doing any work whatever, and is a cripple for life, and will be a sufferer the balance of his life. That the ordinances of the city of Galveston, and especially and particularly section 3, art. 3, of the Revised Ordinances of the City of Galveston, provide that it shall be unlawful to run a steam-engine or any railroad within its city limits at a greater speed than four miles per hour. Plaintiff avers that on the day and date last aforesaid persons approaching or crossing the said avenue A or Twenty-Seventh street were prevented from seeing whether locomotives or trains were approaching from the west by reason of the fact that a long line of freight-cars were kept standing on a side track, and parallel with, and within a few feet of, the main track, and the one upon which plaintiff was struck. Plaintiff avers that notwithstanding the premises aforesaid, and notwithstanding the law of the state of Texas in reference to a warning bell or whistle, and notwithstanding the ordinances of the city of Galveston, on the said day and date the said defendant, without warning or notice, by bell or whistle, or any other mode or manner, with great force and violence, and at great speed, to-wit, the rate

of twenty miles per hour or more, without having a competent flagman to give notice of approaching trains as required by law, and as was the custom of defendants, ran into and upon and ran down plaintiff, no opportunity having been given him of escaping, injuring him as aforesaid; all of which occurred without fault or negligence on the part of the plaintiff, but through the negligence, carelessness, and unlawful and improper conduct of said defendant, its servants and its agents. The defendant answered by a general denial, and alleged specially that the plaintiff, had he looked or listened for the approaching train, which he could have done, would have discovered the same in time to have avoided the accident; and, further, that the plaintiff was not struck on the crossing at the intersection of avenue A and Twenty-Seventh street, but that he was struck some distance east of Twenty-Seventh street crossing, while carelessly and negligently walking on the trestle-work or bridge, upon which the railroad track was constructed, and which was not intended to be used for the purposes of foot travel, and that he failed to exercise any care to learn of the approaching train. The case was tried before a jury, and there was a verdict and judgment in favor of plaintiff for \$6,000.

It is complained that the court erred in the following particulars: (1) In refusing to submit to the jury the first and second special issues requested by the defendant, which were as follows: "*First*, could the plaintiff, by looking westward before he went upon the railroad track, have seen the approaching train in time to have avoided his injury? *Second*, if, immediately before he stepped on the railroad track upon which he was struck by the engine, the plaintiff had looked to the westward, would he have seen the approaching train in time to have remained off the track, and avoided the accident?" (2) In refusing to give the fourth special charge requested by the defendant, which is as follows: "*Fourth*. You are charged that no matter how negligent the defendant or its employees may have been, that nevertheless, if you find from the evidence that the plaintiff, Anderson, failed to use his senses of sight and hearing to discover the approaching train, and that if he had looked for the train he could and would have seen the same in time to avoid the injury, you will find for defendant." (3) In not in some form charging the jury that it was the plaintiff's duty to use care and prudence to discover the approaching train before going on the railroad track, and in not charging the jury that it was the plaintiff's duty to look for the approaching train from the west before going on the railroad track, and that if, by the exercise of such precaution, he could have discovered the train in time to have avoided the accident, he could not recover.

In the case of Railway Co. v. Wilson, this court said: "Our statute does not require persons approaching a public crossing on a

railroad track to stop and listen and look out for approaching trains; therefore it would be incorrect for the court to instruct the jury that a failure to do so would constitute negligence. * * * Whether a failure to do so would or not constitute negligence is a question of fact, and to be determined by the jury from the facts and circumstances of each particular case." 60 Tex. 143, 144. In the case of *Railway Co. v. Chapman*, 57 Tex. 82, it was said on this subject: "In the seventh instruction refused, the court was asked to tell the jury to find for defendant, if plaintiff, on approaching the crossing, did not look for approaching trains, and that if he had done so the injury would not have occurred. There is no statutory rule or fixed rule of law prescribing exactly what a party must do who approaches a railroad crossing. If aware of the fact, he is held to use such precautions as a prudent man would resort to under the circumstances. Attempts by the court to prescribe the exact thing to be done would be infringing on the province of the jury, and charging on the weight of evidence." See *Railway Co. v. Lee*, 70 Tex. 501, 7 S. W. Rep. 857. The charges requested could not have been given consistently with these decisions. It would have been inconsistent, and equally improper, to have submitted the special issues requested. Article 1331 of the Revised Statutes reads: "The special verdict must find the facts as established, by the evidence, and not the evidence by which they are established, and the findings must be such as that nothing remains for the court but to draw from such facts the conclusions of law."

The court refused to charge the jury, at the request of defendant: "If you find from the evidence that the plaintiff, Anderson, was not on the crossing or intersection of Twenty-Seventh street, but that he was walking up the trestle-work or railroad track to the eastward of Twenty-Seventh street, on Avenue A, you will find for the defendant." It is insisted that, as the plaintiff's petition charged that he was on the crossing of the street when he was injured, this charge should have been given. We recognize the truth of the proposition contended for, that "facts proven cannot form the basis of a judgment, unless alleged." While plaintiff charged the injury occurred on the street crossing, the defendant alleged that it occurred while he was walking on the trestle-work. For the purposes of the rule now invoked, facts proved should be supported by a pleading on the subject, but it is not material by which party the facts are pleaded. An omission by one party may be cured by the other. The defendant pleaded that plaintiff's injury was caused by his own contributory negligence, and that "if he had looked or listened for the approaching train, which he could have done, he would have discovered the same in time to have avoided the accident." Plaintiff did not allege in his own pleadings that his view of the train by

which he was injured was obscured by smoke or steam, but he testified as a witness to that effect. Upon that issue the court refused to give the following charge, at the request of the defendant: "There being no allegations in the plaintiff's pleadings that his view of the train which struck him was before the time he was struck by the train obscured by smoke or steam, you are charged that you cannot take the evidence of the plaintiff as to smoke or steam into consideration in finding your verdict." What we have said with regard to the last preceding issue applies with equal force to this. In response to the plea of contributory negligence, it was proper for the plaintiff to make any proof negating its existence. It does not become necessary for us to decide upon whether the charge should have been given, if the question had depended entirely upon the state of plaintiff's pleadings.

Appellant complains of the following charge given by the court to the jury: "It is the duty of railway companies to ring the bell or blow the whistle at the distance of at least eighty rods from the place where such railway shall cross any street, and to keep ringing or blowing until it shall have crossed such street or stopped." The charge is exactly in the language of article 4232 of the Revised Statutes, as it read before it was amended by the act of March 21, 1883. As amended, the article reads: "The whistle shall be blown or the bell rung at the distance of at least eighty rods from the place where the railroad shall cross any public road or street, and that such bell shall be kept ringing until it shall have crossed such public road or stopped." We do not think the defendant could have been prejudiced by the charge. The law required the defendant to keep its bell ringing; the court charged that it was required to do that, or something else. Proof that it kept its bell ringing, as the law required, would have satisfied the charge. It would have been different if the charge had been that it was its duty to keep blowing, or to keep ringing and blowing. The following assignments of error are insisted upon: "The verdict of the jury is unsupported by the evidence, and is against the manifest weight and great preponderance of the evidence, in the following particulars: (1) The evidence shows that the plaintiff was guilty of contributory negligence. (2) The evidence shows that if the plaintiff had used ordinary precautions, or had looked to the westward before going on the railroad track or afterwards, he would have seen the approaching train in time to have remained off the track, or to get off the track and avoid the accident. (3) The evidence shows the plaintiff was negligently walking upon the trestle bridge, over a part of Galveston bay, to the eastward of Twenty-seventh street crossing, without observing any care or caution to ascertain whether a train was approaching from behind. (4) The evidence shows that, as soon as defendant's employes

discovered the plaintiff on the track, they used every effort to avoid or prevent the accident. The verdict of the jury, in view of the evidence and the charge of the court that they could not find damages for permanent injury, is grossly excessive in amount, unsupported by the evidence, and shows that it was rendered through passion, sympathy, or prejudice, and not upon a fair and impartial consideration of the evidence, upon the charge of the court." While the evidence upon the issues here presented was, in some particulars, contradictory, and in others may not so clearly demonstrate the correctness of the result reached as is to be desired in all trials, we yet find the verdict sufficiently supported by the evidence to make it our duty, under the rule uniformly declared in such cases, to sustain the judgment, and it is therefore affirmed.

C. H. MALLORY & Co. v. SMITH.

(*Supreme Court of Texas. Feb. 18, 1890.*)

WAREHOUSEMEN—NEGLIGENT STOWAGE OF FREIGHT—INJURIES TO DRAYMAN.

1. In an action for personal injuries resulting from the alleged negligent manner in which defendant had stowed freight in its warehouse, it is proper to refuse an instruction that, as the accident occurred while the freight was being handled by the agents of the consignees, who had been notified of its being in the warehouse, and had taken control of it for the purpose of removing it, defendant was relieved from all liability, since this would absolve defendant, though it had stowed the freight so negligently as to be dangerous to any person attempting to move it, no matter how careful he might be.

2. In such action, it appeared that defendant transported certain boxes of copper, 6 feet long, 4 feet wide, 5 or 6 inches thick, and weighing 500 or 600 pounds, and placed them on edge, perpendicularly, in its warehouse, where plaintiff, a drayman employed by the consignees, laid hold of one of the boxes, which immediately fell on him, and broke his leg. Defendant's stevedore testified that this was a proper and safe position for the boxes, while there was other evidence that the only safe manner to place them on edge was to lean them against some other object for support. *Held*, that the jury was authorized to find that defendant's servants were negligent in the premises.

3. When there is evidence that it required as many as four men to place one of the boxes on a dray, but the evidence is conflicting as to whether plaintiff endeavored to move the box, or only touched it for the purpose of identification, and it does not appear that he had any experience in handling such freight, its dimensions and weight being unusual, the jury is warranted in finding that he was not guilty of contributory negligence.

Appeal from district court, Galveston county.

Willie, Mott & Ballinger, for appellant.
L. E. Trezevant, for appellee.

GAINES, J. The appellee brought this suit in the court below to recover of appellant, a corporation, damages for personal injuries alleged to have been caused by the negligence of its employes. The undisputed facts, as shown by the testimony adduced upon the trial, are that the appellant, as a common carrier, transported to the city of Galveston certain boxes of copper, and deposited them in its warehouse for delivery to the consignee.

The boxes were each about six feet long, four feet wide, and four or five inches thick, and each weighed five or six hundred pounds. When placed in the warehouse, they were set up, perpendicularly, upon their edges. The consignee, being ready to receive the freight, employed the appellee, who was a drayman, to haul it to its destination. Appellee went to the warehouse; and, upon his placing his hands upon one of the boxes, or laying hold of it, it immediately toppled over, and fell. In its fall, it caught his leg between it and a post, and caused a fracture of the limb. As to the degree of force which was applied to the box, and as to his intention in placing his hand upon it, the evidence was conflicting. The agent of the consignee accompanied appellee to the warehouse, and was present when the accident occurred. Appellee testified, in his own behalf, that he did not know the character of the freight to be hauled, and that after entering the warehouse he merely placed his hand upon the box, for the purpose of identifying it, and asked the agent the question, "Is this to go?" and that all the boxes at once fell. Hinckeldey, the agent who employed appellee, testified that he told appellee, at the time of the employment, that the freight to be hauled was three heavy boxes of copper, and some other articles. He further testified: "Smith went up to the first box, and as soon as he lifted it the boxes all came over." Upon cross-examination he said: "When he [Smith] saw them, he said he did not believe they were so very heavy; and he went up to one of them, and put his hand on one, and sorter moved it, and it fell over." There was evidence that it required as many as four men to place one of such boxes on a dray, and that one man should not have attempted to move them without assistance. There was also testimony to the effect that such boxes, when laid flat, were very difficult to handle, and that it was usual to set them up on edge. The stevedore of appellant who placed the cases in the warehouse testified that such was the proper and safe way to place them. On the other hand, there was evidence that the only safe manner of placing them upon edge was to lean them against some other object for support.

The judge, in his charge, first instructed the jury as to what was negligence, both on the part of a warehouseman and on the part of a drayman, and then proceeded as follows: "If you believe from the evidence, that the defendants or their employes were guilty of negligence in the manner of stacking the boxes of copper, and that such negligence caused an injury to the plaintiff, then the plaintiff would be entitled to a verdict for his damages, unless you believe from the evidence that the plaintiff, by his own negligence, contributed to his own injuries. The burden of proof is upon the plaintiff to show that he has been injured by the negligence of the defendant company or its employes. If you believe from the evidence that the plaintiff,

by his own negligence, contributed to his injuries, the plaintiff cannot recover any damages, even if the defendant company was also guilty of negligence." After stating the rule as to the measure of damages, the charge then continued as follows: "If you believe from the evidence that the plaintiff undertook to handle a box, or test its weight, alone, and that ordinary prudence would have dictated a different action, and that such action on part of plaintiff was negligence proximately contributing to plaintiff's injuries, the verdict should be for the defendant." The defendant then asked the court to give the following special instructions, all of which were refused: "(1) It is the duty of a carrier to safely transport and deliver goods. Carriers by sea perform this duty when they place freight upon the wharf where the consignees can take the same, and the consignees are notified of the same. In this case, it being an undisputed fact that the boxes of copper were placed upon the wharf, and that the consignees, by their agent Hinckeldey, had assumed control of them, the delivery was complete, and no fault attached to the carrier for non-delivery. The question then remains for you to determine whether the boxes were placed upon the wharf in the usual and customary manner, in a reasonably safe position, and in a position to be easily and readily handled. If you find from the evidence that the boxes were placed upon the wharf in a reasonably safe position, in the usual and customary manner for facility in handling, your verdict will be for defendant. (2) The undisputed facts in this case show that the boxes had been landed on the wharf; that the consignees thereof had been notified, and had taken control of them, for the purpose of removing them from the wharf; and that the accident occurred while they were being handled by the agent of the consignees, and the drayman employed by said agent. This relieves the defendant from liability, and you will therefore find for defendant. (3) The court charges you that the plaintiff cannot recover if his own negligence contributed to the accident, because it is a principle of law that an injured person cannot have damages if his own acts of negligence, omission or commission, aided to bring about the result he complains of. It was the duty of the plaintiff to have used reasonable caution and care to avoid the accident; and if you find from the evidence that the plaintiff, either through carelessness, recklessness, over-confidence, or from the omission to perform reasonably cautious and prudent act or acts, contributed to the accident, he cannot recover, even though the defendants may have been negligent in the first instance. (4) In delivering freight, the carrier is not an insurer against accidents to other parties. He is only called upon to place freight upon wharves, or other landings, in the usual customary manner, and in a reasonably safe position to be easily handled; and if he does this he is not responsible to any person who may accidentally be injured from handling

said freight." "(6) The burden of proving negligence rests on the party alleging it; and, where a person charges negligence on the part of another as a cause of action, he must prove the negligence by a preponderance of evidence. (7) If you believe from the evidence that the plaintiff undertook to handle or test the weight of the boxes of copper alone, and that ordinary prudence would have dictated that more than one man should have been used for such purpose, and that such action on the part of plaintiff proximately contributed to the injury, then you will find for the defendant." The refusal to give each of these instructions is made the subject of a separate assignment of error. The charges as propositions of law, with the exception of the second, are correct; but, so far as they were applicable to any phase of the case, we think they were substantially given in the main charge. So much of the first instruction as related to the duty of common carrier was not applicable to any issue presented by the pleading or the evidence. The defendant was not charged with liability growing out of the neglect of any duty as a common carrier. The same may be said of the fourth. The charge given upon the burden of the proof, and that upon contributory negligence, were all that could reasonably be required. Therefore the court did not err in refusing the third, sixth, and seventh requests. The second charge requested is erroneous, and was also properly refused. It would have absolved the defendant from any liability, although the boxes may have been stored in the warehouse in such a negligent manner that they were likely to inflict injury upon any one who was called upon to move them, however careful such person may have been in making the attempt.

There are several assignments of error which relate to the ruling of the court in refusing to grant the motion for a new trial. They are substantially based upon two propositions: (1) That the evidence failed to show negligence on part of the defendant's employees; and (2) that it did show negligence on part of the plaintiff contributory to the injury. We do not assent to either proposition. We think that a box of the weight and dimensions of that which caused the injury in this case is dangerous to any one who may come in contact with it when it is set upon its edge without any lateral support. The jury were certainly authorized to infer this from the testimony in the case. They were authorized to find that the danger could have been easily and conveniently obviated by placing the box upon its edge, and resting it in an inclined position upon some other object. Such being the case, it was negligent to leave them without support. Nor is the verdict without evidence to support it on the issue of contributory negligence. Even disregarding his own testimony, we think the jury may have been justified in concluding that he was not negligent in attempting to move or to test the

weight of the boxes. It appears from the evidence that freight of the dimensions and weight of these cases was rather unusual, and it does not appear that plaintiff had had any experience in handling boxes of copper of such size and shape. While we think that the testimony leaves no doubt that the boxes, as placed upon edge, were unsafe, we cannot say that the danger was so obvious to a person inexperienced in handling packages of a like character as to require the jury to find that it was negligent in plaintiff to attempt to move them. The jury, however, may have found that he did not make such attempt, but that he merely placed his hand on the box for the purpose of identity.

There is an assignment of error which complains of the refusal of the court to admit certain testimony; but the exception by which it was sought to reserve the question appears only in the statement of facts, which was filed after the adjournment of the term. Therefore it cannot be considered. We find no error in the judgment, and it is affirmed.

SAYER et al. v. DEVORE et al.

(Supreme Court of Missouri. Jan. 27, 1890.)

PLEADING—OBJECTIONS WAIVED—FRAUD—WEIGHT OF EVIDENCE.

1. A petition, by the equitable owners of swamp land, seeking to cancel deeds thereof to defendants on the ground of fraud and want of consideration, alleged that defendants, as attorneys, associated themselves with plaintiffs' attorney to secure a patent for the land from the county, and obtained the deeds on the express understanding that, if successful, they would pay one-half the notes given by plaintiffs' ancestor to the county for the purchase price, and \$1,000 in money, and also deed back to plaintiffs' attorney one-half of the land in trust for plaintiffs; that defendants thereafter repudiated the agreement, and, by collusion with the judges of the county court, wrongfully procured an order recognizing them as owners, and that they then went into possession to the exclusion of plaintiffs. *Held*, that the petition stated a cause of action, though it failed to allege that defendants intended to defraud plaintiffs in the first instance, when the deeds were executed.

2. Plaintiffs' attorney testified that the deeds did not contain defendants' names when they were executed by plaintiffs, but that they were given him to fill out and deliver to whomsoever should get the land; that he (plaintiffs' attorney) did not pretend to own it, and that no consideration was ever paid to plaintiffs; that, having failed to obtain a patent from the court, he was induced to execute the deeds by one of defendants, who represented that he could procure the patent by reason of his relationship to the presiding judge. Plaintiffs' evidence showed that they had intrusted the matter entirely to their attorney. The evidence as to the credibility of the latter was conflicting, but his testimony, which was occasionally inconsistent, was corroborated, as were also the allegations of the petition, by defendants' first petition for the patent, which was irreconcilable with their answer. Subsequently defendants filed another petition in their own right, not recognizing the interest of plaintiffs' attorney, and obtained an order recognizing them as owners. Meanwhile, and on the day the present suit was commenced, one of defendants anxiously sought to transfer the land, and, on failing therein, remarked that, if he could have gotten it out of his hands before commencement of the suit, he would have made \$5,000. The other defendant, on two occasions, declared that he intended to and had robbed plaintiffs' attorney

of his interest. Defendants' answer and testimony showed that their undertaking was not to get a patent, but to obtain the recognition of a claim which the court seemed to have sufficiently recognized by accepting the purchase-money notes of plaintiffs' ancestor. *Held*, that a finding for plaintiffs would not be disturbed on appeal.

3. Though plaintiffs' attorney did protest against the issue of the patent to plaintiffs, and though it would probably have been issued to defendants but for his action afterwards, an objection that plaintiffs abandoned the contract, and prevented defendants from performing their part, is without merit where the evidence shows that they did not contemplate a reconveyance, but claimed the land absolutely as their own.

4. An objection that the decree for plaintiffs is inequitable in that it awards them the benefit of defendants' improvements on the land, and of their services in inducing the court to recognize the claim of plaintiffs' ancestor, is without merit, as defendants had been in possession of the land, and had obtained an order recognizing them as owners.

5. Mere informalities or defective modes of statement in a petition are waived where no demurrer, or motion of any sort, is interposed, and, after answer, the introduction of any evidence is objected to on the ground that the petition fails to state a cause of action.

Appeal from circuit court, Vernon county.
CHARLES G. BURTON, Judge.

Phelps & Brown and E. C. Devore, for appellants. *William Thompson, Kimbal & January, and Harding & Butler*, for respondents.

RAY, C. J. This is a suit in equity brought in the circuit court of Jasper county, and, by change of venue, tried and determined in the circuit court of Vernon county, Mo. A separate demurrer on the part of Jasper county was sustained, and the cause dismissed as to the county. The parties have submitted and acquiesced, so far as this record discloses, in the ruling in this behalf. This branch of the case, so far as the county is concerned, is not before us.

The main object of the action is to set aside, and hold for naught, two certain quitclaim deeds from plaintiffs to defendants Devore & Wittich, for some 200 acres of land, upon the grounds that the deeds were obtained by fraud, and without consideration. Upon the trial of the issues joined in this behalf between plaintiffs and said defendants, the court held that the deeds were falsely and fraudulently procured, and judgment was had in favor of plaintiffs, canceling and setting them aside, and awarding damages, etc., from which defendants Devore & Wittich have appealed.

At the trial, said defendants admitted that the land in controversy is a part of the swamp-land selection sold by Jasper county to George E. Ward; that A. C. Sayer, the ancestor of plaintiffs, was the purchaser of the Ward interest in the lands in controversy, with other lands of said selection, and the equitable owner thereof at the time of his death; and that plaintiffs are all, and the only, legal heirs of the said A. C. Sayer, deceased. Said A. C. Sayer, the said ancestor of these plaintiffs, in 1867, it seems, gave his two promissory notes to Jasper county for the purchase price, and in 1868 moved with his family onto the

land,—building thereon, and improving the same; his tract consisting of these lands in suit, and other lands not involved. He resided thereon until his death, in 1875; and his widow and family thereafter continued to hold the possession thereof until 1882, when they were ousted under judgment and executions in favor of the county. The judgment enforcing the vendor's lien in favor of the county was, we believe, afterwards set aside; the same having been instituted against said Sayer after his death. There were also ejectment suits, perhaps, for the possession; and the litigation, in its several forms, lasted several years. There is evidence that these heirs, through their attorney, at various times, tried to get the county court to issue them a patent for the lands upon the payment of the notes given by their ancestor for the purchase money, and that for some reason or other the county court refused and neglected to make them a deed. The testimony is, however, not uniform as to this, but considerably varied. Bowers, for example, who was the presiding judge of the county court, says that these plaintiffs never appeared before the court, or made any tender of the balance of the purchase money, and that Thompson never claimed to represent these plaintiffs, but claimed to be the owner himself, and to be entitled to a patent for the land without paying any part of the purchase money; and, if Bowers does not directly so say, he at least leaves it to be inferred that the court refused to act in the matter for these reasons, and because of its distrust of Thompson. Thompson got a deed, as plaintiffs' evidence shows, to some 250 acres of the 560-acre tract, from the heirs, for his services rendered and to be rendered in the course of the litigation. We think it fairly appears that he was before the court a number of times, claiming to be the owner of part of the tract, and to act as legal agent and attorney for the heirs as to the residue. The two quitclaim deeds for the land in controversy executed by plaintiffs were one or both prepared or written in part by said Thompson, and bear date July 9 and July 11, A. D. 1883, and were, on July 13th, delivered by said Thompson, who is a lawyer, then living at Carthage, Mo., to defendants Devore & Wittich, likewise practicing attorneys at that point. The lands are well improved, and contain two orchards,—one, of 50 acres, spoken of by some of the witnesses as the finest orchard in Jasper county. There is evidence to show that the valuation of \$10,000 given in the amended petition is not excessive. So far, there is little dispute, except as stated, material to the controversy; but these matters are perhaps somewhat useful in leading us more intelligibly to the disputed and controlling facts in the case. The two versions as to the execution and delivery of said deeds are given in the pleadings, the subject of which it is perhaps necessary to give,—particularly the amended petition, whose sufficiency is very earnestly called in

question. The amended petition is quite lengthy; but, in view of the facts heretofore stated, and especially the elimination of the county as a party to the controversy in this court, we can condense and abridge the allegations to their substance about as follows:

The amended petition charges that the lands covered by these quitclaim deeds are worth \$10,000, and that the deeds were wrongfully and fraudulently obtained, and without any consideration therefor, and upon terms and conditions about as follows: That defendants Devore & Wittich were law partners in Carthage, Mo.,—said Wittich being a brother-in-law to the presiding justice of the county court for said year A. D. 1883. That Devore & Wittich, well knowing the repeated tenders of the purchase money, and of the delay and litigation between plaintiffs and the county court in this behalf, agreed with William Thompson, attorney for plaintiffs, that, if plaintiffs would make the deeds mentioned, they would procure a patent to the land from Jasper county, pay one-half of the county's claim according to said notes, and then pay \$1,000 in money, and deed back one-half the lands, including the 80 acres on which the farm-house stands, to William Thompson in trust for plaintiffs; and Devore & Wittich were to have half of said lands on these terms for their services, as per agreement with said Thompson, which would give them about 100 acres. That, soon after Devore & Wittich obtained said deeds, they began to back out, and showed a disposition not to comply with their part of said agreement, and finally said they never intended to deed back any of the land, or pay plaintiffs any money, saying "they didn't have to," as they had the deeds. That said Devore & Wittich have refused and neglected to procure a patent to said lands, or pay plaintiffs any money therefor; and they have ignored plaintiffs' rights under said agreement, and asked the county court to patent all said lands to them, when they had previously asked said county court to patent half of said lands to William Thompson,—all of which said county court well knew; and that they procured, wrongfully and collusively, an order of the county court to be made to that effect, recognizing them as owners of all said land, except Judge Cook, one of the judges of said county court, who protested against the making of said order by the other two members of said court; and this the said county court, wrongfully, fraudulently, and collusively with said Devore & Wittich, did, notwithstanding a suit had been previously brought by these plaintiffs against E. C. Devore and L. L. Wittich and Jasper county, to set aside the deeds to Devore & Wittich on account of their said frauds, and making specific performance as to Jasper county; and the said order of said county court was wrongfully, collusively, and fraudulently made, recognizing said Devore & Wittich as the owners of said land, after service was had on all of said defendants; and said order of

said county court was wrongfully, fraudulently, and collusively made, for the sole purpose of cheating, swindling, and defrauding these plaintiffs out of their just rights in said land. The amended petition further charges that defendants Devore & Wittich have failed, neglected, and refused to perform their part of said agreement; that they are in possession of said land, committing waste, etc.,—and, so far as necessary now to notice, prays for the cancellation of said deeds, for possession, damages, and any other and proper relief plaintiffs may be entitled to.

The separate answer of Devore & Wittich contains a general denial and two further answers, as follows: "(2) And for a further answer defendants say that they never at any time made any contract with the plaintiffs for the purchase of the lands mentioned in plaintiffs' petition, nor with one Wm. Thompson as the agent or attorney for said plaintiffs, or either of them, but the defendants aver and state the facts to be that they purchased from said Wm. Thompson the said lands described in the quitclaim deeds, dated, respectively, July 9th and 11th, 1883, and signed and acknowledged by plaintiffs, and mentioned in said plaintiffs' petition as the sole individual lands of said Wm. Thompson, and not as the lands of said plaintiffs, or either of them; and the said Wm. Thompson, at the time he delivered the said quitclaim deeds to said defendants, stated that he was the *bona fide* owner of said plaintiffs' interest therein, conveyed by said deeds, and had paid to said plaintiffs therefor five hundred dollars, being the full consideration as expressed in said deeds; that the said quitclaim deeds to the said lands were delivered to defendants by Wm. Thompson upon the following contract, and no other, to-wit: William Thompson came to defendants' law-office in the city of Carthage, who were then copartners in the practice of law, and desired to retain and employ said defendants to get the county court of Jasper county to recognize the validity of the Ward contract to certain swamp lands, known as the 'A. C. Sayer Lands,' the equitable title to five hundred and sixty acres of which lands he then represented and stated he owned; that he had made repeated efforts and applications to the county court to have said court recognize the validity of the said Ward contract, and make to him a patent to said five hundred and sixty acres of land, and the county court had refused so to do, and the said William Thompson then and there proposed to said defendants, if they would get the county court to recognize the validity of said Ward contract, that he would, in consideration of their services in said county court in that behalf, deed to said defendants one-half of said five hundred and sixty acres of land, which said proposition defendants accepted, and afterwards the said Wm. Thompson, in pursuance of said contract, in payment of their agreed fee for their services, delivered to said defendants the said quit-

claim deeds for their one-half of said five hundred and sixty acres of land, and which are the identical deeds mentioned in plaintiffs' petition; that said defendants rendered said legal services in said county court of Jasper county in said matter, for which they were employed, procured a recognition by said court of said Ward contract, and fully performed all the conditions of the contract upon which they obtained the said quitclaim deeds from the said William Thompson. (3) And for a further answer the defendants say that after the said quitclaim deeds mentioned in said plaintiffs' petition were delivered by plaintiffs to said Wm. Thompson, and before their acceptance and delivery to said defendants by said Wm. Thompson, said defendants made inquiry of said plaintiffs if said deeds were their *bona fide* deeds, and if said Thompson had paid to them the consideration mentioned in said deeds, and plaintiffs informed defendants that they were their *bona fide* deeds, and that they had no interest in said lands, as they had sold all their interest to said Thompson, and he had paid to them the consideration therefor in full."

As before stated, the insufficiency of the amended petition, given in substance above, so far as the material controversy between the parties is concerned, is assigned as the first ground of error. We may premise that no demurrer, or motion of any sort, was interposed, but the first and only pleading in the cause by defendants was their said separate answer quoted above in this opinion. Objection was made to the introduction of any evidence because the petition does not state facts sufficient to constitute a cause of action against said defendants for fraud, deceit, or award of damages; and the question is before us under the exception taken to the overruling of this objection, and to a similar exception in overruling the motion in arrest of judgment. Presented in this form, mere defects and informalities, or defective modes of statement, in the pleading, are cured, and are to be disregarded.

The allegations that the deeds were wrongfully and fraudulently obtained, in themselves, are, it is true, mere conclusions of law, and not a statement of the facts themselves; but the amended petition further states facts which are abundantly sufficient, if true, to make a case in which a court of equity can and ought to find and decree relief. William Thompson had long been, as already stated, the attorney of these plaintiffs in this litigation about the land with the county, and continued to be such at this time; and it was to him, perhaps, they looked to protect their interest in this matter. But the amended petition charges that defendants associated themselves with said Thompson; and, under the various allegations in this behalf, the defendants, we think, occupied and assumed a fiduciary relation to plaintiffs, inasmuch as they undertook, as attorneys at law, in connection with Thomp-

son, representing the interest of plaintiffs and themselves, to secure the patent from the county for the lands in dispute, and to that end, as the amended petition charges, secured the deeds, upon the express understanding that, in the event of success, they would pay one-half of the notes given to the county by the ancestor of plaintiffs for the purchase money, and \$1,000 in money, and deed back to William Thompson, also associated with them as attorney in the matter, one-half the land in trust for plaintiffs. The plaintiffs, it is conceded, were the equitable owners of the land, as said heirs of A. C. Sayer, at and prior to the execution of these quitclaim deeds; and, notwithstanding the deeds are absolute in form, yet, under the allegations of the amended petition, the defendants were to acquire only a half interest in the lands conveyed, and only in the event of their success, as attorneys, in securing the patent for the whole from the county. Whether the defendants intended in the first instance, at the time the deeds were given, to perpetrate a fraud on plaintiffs, is, we think, immaterial; and a failure to so charge in the petition makes, we think, no difference, so far as the case before us is concerned. If defendants accepted said employment in connection with Thompson; and, after procuring the deeds to these valuable lands upon the conditions alleged, thereafter repudiated its terms and conditions, and procured wrongfully, and collusively with the court, as is charged, the order of the county court recognizing them as the owners of all of said land, and took possession of the whole, and continue to hold the same to the exclusion of plaintiffs, then these facts are, we think, as between the parties in a direct proceeding of this sort, abundantly sufficient to constitute a good cause of action, and to authorize a court of equity to find and decree the proper relief.

But, again, defendants complain that the finding is not sustained by sufficient evidence, and is contrary to the issues and evidence in the cause. The practice and rule of this court is to defer somewhat, in equity cases, to the finding of the chancellor. It will be sufficient for the present to say, as regards defendants' evidence, that it supports very fairly the separate answers hereinbefore set out. Portions of it will be referred to in connection with parts of the evidence given in plaintiffs' behalf.

In the first place, we will notice the testimony, in part, of William Thompson. He says that the names of the grantees were not in the deeds when plaintiffs signed and acknowledged them, but that the deeds were left blank, as they did not know who were to get the deeds, or what they were to get for the lands; that they were delivered with the understanding that he was to fill them out, and deliver them to whomever got the lands; that he wrote in the names of defendants, and the consideration, and delivered

them to defendants; that plaintiffs never got any consideration for the deeds; and that he did not pretend to own the lands.

The plaintiff Lucinda Sayer, widow of said A. C. Sayer, and Cox, a son-in-law, say that plaintiffs never received anything for the land, and corroborate Thompson as to the blanks in the deeds at date of execution. So far as plaintiffs are concerned, the evidence in this behalf shows that they intrusted the whole matter to the discretion and judgment of their said attorney, Thompson. Both sides say that Devore & Wittich were to have half the lands, the difference being that defendants claim that their share was to be half of the 560 acres, while Thompson says it was to be half of the 200 acres,—that is, 100 acres. But, in either view, that the remuneration was so large and liberal, that, of itself, in connection with other facts, might well induce a court of equity to at least scrutinize the transaction with the view of satisfying itself that it was free from fraud. The services rendered for this valuable interest were, as we shall see, not arduous, but practically formal, and without legal difficulties. But, to proceed, Thompson says that, after being before the county court, trying to get the court to take the purchase price, and issue the patent, he met defendant Wittich, who told him that he (Thompson) had been trying a long time to get the land matter through; that the court would never do it for him, but that the presiding judge was his brother-in-law, and that he (Wittich) and his partner, Devore, could get the court to receive the balance due, and make the patent, if Thompson would divide, and give them half. The matter being left to him by plaintiffs, Thompson says he then made the agreement set out in the amended petition. His testimony, as is conceded, fully supports the bill; but it is claimed in defendants' behalf that this testimony is unworthy of credit. He is impeached by a number of witnesses, perhaps a dozen, who say his general reputation for truth and veracity and honesty is bad. On the other hand, some seven or eight witnesses for plaintiff support his general reputation for truth and honesty, and say it is good. It may also be conceded that there is evidence on defendants' part that in the several trials he has not always stated the agreement in precisely the same way,—in one instance saying that defendants were to pay the \$1,000, or in lieu thereof to deed back the land. He admits on his cross-examination that on one of the trials he testified that on one occasion, in July, when before the county court, he stated that the quitclaim deeds were all right; that he had paid the consideration mentioned to plaintiffs, who then had no interest in the land; and that defendants were the *bona fide* owners thereof. But the witness says he did not understand the question. And again, in his answer, containing a somewhat similar and qualified admission, he says, in effect, that

he was told by defendants to so state, and that his statements were a part of the plan agreed upon with defendants to induce the court to issue the patent to himself and defendants.

These features, and perhaps others, it may be conceded, somewhat impair the value of his testimony. But at this time defendants and Thompson were operating harmoniously together, and in their joint efforts to effect the common design they were not very exact, to say the least of it, as we shall see in their representations and dealings with the county court in the premises. But we do not see that there is such an absence of facts and circumstances and independent testimony corroborative of Thompson's evidence as counsel for defendant seems to suppose, or that the decree is based exclusively thereon. For example, the amended petition says that the defendants asked the county court to patent all of said lands to them, when they had previously asked said county court to patent half of said lands to William Thompson. As to this, the evidence shows that after, and on the very day, we believe, the quitclaim deeds were delivered to defendants, they wrote and filed a petition with the county court, a certified copy of which, offered in evidence by plaintiff, is as follows: "In the Jasper county court. Devore & Wittich and Thompson, *ex parte*. Now at this day comes Devore and Wittich and Thompson, and represents that Henry A. Sayer, Edwin J. Sayer, J. C. Sayer, J. C. Grason, Ira Grason, Ellen C. Grason, Senora Grason, Viola Cox, H. Z. E. Cox, and Lucinda Sayer, widow of A. C. Sayer, deceased; that A. C. Sayer, deceased, during his life-time purchased of said county the S. $\frac{1}{2}$ of S. W. $\frac{1}{2}$ and N. W. $\frac{1}{2}$ of S. W. $\frac{1}{2}$, and S. $\frac{1}{2}$ S. E. $\frac{1}{2}$ and N. E. $\frac{1}{2}$, and N. W. $\frac{1}{2}$, of sec. 33, 30, and 33, for which he executed his notes to said county; that since the execution of said notes the said A. C. Sayer has departed this life, leaving said parties surviving; that, by their deeds of conveyance made, respectively, on the ——— and ——— days of July, 1883, they have conveyed their interests in said lands to E. C. Devore and L. L. Wittich, and the said E. C. Devore and L. L. Wittich, by their quitclaim deed, conveyed undivided half interest in and to said land to Wm. Thompson; that there was due on said land the sum of \$——, which amount the said E. C. Devore, L. L. Wittich, and Wm. Thompson propose to pay said county. Whereupon they pray that the court make the order that in the premises recognizing the claim of the said parties, and upon the payment of said sum of money, that the county deed or patent the said land,—an undivided half interest to E. C. Devore and L. L. Wittich, and an undivided half interest to said William Thompson. [Signed] E. C. DEVORE and L. L. WITTICH. WILLIAM THOMPSON."

This is, we believe, the occasion, previously mentioned, when Thompson made the representation already noticed to the county

court, as a part of the plan, as he testified, to induce the county court to make the order to patent the land to Devore, Wittich, and Thompson. Now, then, except as to the payment of the \$1,000, this petition corroborates, we think, Thompson's evidence, and supports the allegations of the amended petition herein, and is at all events wholly irreconcilable with the defendants' theory of the transaction, as set up in their separate answer. For example, the answer says that defendants purchased the lands as the sole individual lands of Thompson, and not as the lands of these plaintiffs; but in this petition they represent that these plaintiffs, by their deeds of conveyance made, respectively, on the ——— and ——— days of July, 1883, have conveyed their interest in said lands to Devore & Wittich. Again, the petition in the county court says that defendants and Thompson propose to pay the county the amount due on the land, which is not in the agreement as set up in the answer, but is embraced in the allegations of the amended petition, and agrees with Thompson's evidence. And, lastly, the prayer of the petition in the county court is that the court recognize the claims of the parties, and patent an undivided half interest to the defendants, and an undivided half interest to Thompson. Again, Wilson, the county clerk, at that time testified, as we find from the record itself, that he heard Wittich testify that he took this first petition out, and tore it up. Wittich testifies that he withdrew it by leave of court, and such, upon the evidence, seems to be the fact. At all events, in a few days after the suit at bar was instituted, and on August the 8th following, being about one month after the filing the first petition for themselves and Thompson, they filed a separate petition for themselves, as follows: "In the Jasper county court, Jasper county. Your petitioners, Devore and Wittich, respectfully represent they are the owners, as assignees, of the Ward interest in the following lands, lying in the county of Jasper and state of Missouri, and part of the original swamp-land selection, to-wit, the S. E. $\frac{1}{2}$ of S. W. $\frac{1}{2}$, the W. $\frac{1}{2}$, S. W. $\frac{1}{2}$, and S. $\frac{1}{2}$ S. E. $\frac{1}{2}$, of sec. 33, 30, and 33, containing 200 acres, which they hereby propose to purchase of said county at the price agreed upon between said county and A. C. Sayer, whose interest they have acquired, and now hold, by quitclaim deeds. [Signed] DEVORE AND WITTICH. Filed August 8, 1883." By this second petition, it will be observed, defendants claim all the land in dispute, whereas in the first petition they claim only the undivided half interest; and they claim to have acquired the interest of A. C. Sayer, and to hold the same, by quitclaim deeds. Between the dates of filing these two petitions in the county court, defendants and Thompson had fallen out, and were hostile in their claims. In the mean time, Thompson had brought the suit at bar; and, when the defendants filed their said second petition, asking to be recognized

as having succeeded to the entire interest of plaintiffs in the lands, under two quitclaim deeds, Thompson was on hand, protesting against the court so doing, and stating the claims of these plaintiffs, and the terms upon which the deeds were delivered to defendants. From this time he seems to have acted with promptness and energy in the interest of plaintiffs. The court, we may observe, made the order recognizing the defendants as the owners, but did not issue any patent, as the present suit had already been instituted at that time. It may be remarked that the answer does not say anything about a patent or deed from the county, but charges that their undertaking was to get the county to recognize the validity of the Ward contract. Defendants' testimony is to like effect. But the transaction with A. C. Sayer, the ancestor of plaintiff, in 1867, when the county accepted his notes for the purchase money, or for the balance thereof, would seem to be recognition enough of the Ward contract, especially as the county seems to have thereafter sought to collect the notes, and to have foreclosed a vendor's lien on the land.

The whole matter seems to have been, at this stage, merely formal; and it seems remarkable that there should have been so much delay and difficulty in issuing a patent or deed to the heirs of said Sayer upon payment of the notes. But, again, the testimony of George Parry, the notary public, is, among other things, that, the day the suit at bar was brought, Wittich said: "I want you to hurry up. Thompson is bringing suit against me for this land, and I want to get the deed made before he gets the suit brought." He further says that he went with Wittich to his house, to take his wife's acknowledgment; that he was vexed at not finding her at home; and that, after they had gone back up-town, Wittich, after a short time, returned, and remarked: "It's too late now. He has sued us,"—and that Wittich then also said: "If I could have got that property out of my hands before he brought that suit, I would have made five thousand dollars." Again, Parry says that defendant Devore, on one occasion, said "they—that is, Devore & Wittich—had a contract with Thompson by which they were to get a patent from the county, and that Thompson was to have half; that there was a section of land they were to get, but that they only got 200 acres; that Thompson construed the contract that he was to have half the land they had got deed to, but that they construed the contract that, as there was to be a section of the land, they were to have a half section, and, as they had only got 200 acres, he thought he would clean little Thompson up, and rob him of all of it." The witness Flanigan also testifies to similar declarations on the part of Devore. He (Parry) further testifies that at another time, when Devore had lost a small sum in a game

of cards, he said "he could stand it, as he had just robbed Thompson out of \$5,000." These extracts and this review, somewhat prolonged, must suffice. These features, as well as others, afford, we think, sufficient reason for not disturbing the finding of the trial court.

Counsel for defendants ask, whose fault was it that the contract as alleged by plaintiffs was not performed? We think the answer of defendants herein, their evidence in the cause, and attitude generally in the premises, afford sufficient answer to that inquiry. The claim of defendants that the evidence shows that plaintiffs abandoned their contract, and prevented and put it out of the power of defendants to perform it on their part, would have more weight and force if defendants were affirming and seeking to enforce the alleged agreement, instead of denying it, and repudiating it *in toto*, as they are now doing. Thompson did, it is true, protest to the county court against the issue of the patent to the plaintiffs; and, but for his action in the premises, the county court would, in all probability, have issued the patent to defendants for all the lands. But it is plain enough that the defendants did not contemplate or intend to reconvey any part of it, either to Thompson, or to him in trust for the plaintiffs, but they intended to claim, as they are now doing, that they were the owners absolutely of all the land in controversy through purchase from Thompson.

As to the claim that the decree is inequitable because it ignores the rights of defendants to be made whole, and awards plaintiffs the benefit of their labor, services, and improvements, but little, we think, need be said. Defendants say that the evidence shows that they gave about a month's labor and attention to the matter, and succeeded in getting the county court to recognize the Ward or Sayer interest, and to make the order to patent the lands, which Thompson had in vain tried for years to get the court to do. But what,—if this be all so,—we ask, of this, has resulted in any benefit to the plaintiffs? And are they not, on the other hand, injured, if anything, by these exertions of defendants, since the court was induced to hold that these plaintiffs had parted with their interest, and that defendants had acquired it, and made the order recognizing defendants as owners? If, as the trial court has found, defendants falsely and fraudulently procured these quitclaim deeds to be made to them, then their said claim for services, and claim of \$100 for improvements on the lands, are manifestly without merit, especially as they have been in the possession of the land in the mean while, even though they may not have derived any rent from the land.

We are, for the above as well as other reasons, satisfied with the judgment in the cause, and it is therefore affirmed. All concur.

HANDLAN v. McMANUS.

(Supreme Court of Missouri. March 10, 1890.)

EJECTMENT — EVIDENCE — ADVERSE POSSESSION — TRIAL BY COURT.

1. In ejectment, it appeared that P., as owner of a city lot 50 feet wide, conveyed the east half to S., and the west half to C. S. built a brick house on his half, the wall being exactly on the west line of his lot. R., as grantee of C., built on the east half, using the west wall of S.'s house as a support for his floor timbers, under a license from S. There were just 25 feet between this wall and the west line of R.'s lot. More than 10 years afterwards, defendant, as grantee of R., removed the old house, and built a new one, placing the beams in the S. wall, as before. Beneath this wall, and five feet below the surface of the ground, was a footing course, extending out from the wall five or six inches, and this defendant removed in underpinning the new house. *Held*, that as this five inches of ground had been on the inside of the house erected by defendant's grantor, and consequently held by him under adverse possession for over 10 years before suit was brought, plaintiff could not recover.

2. And, as the west face of the wall of S.'s house was exactly on the line of the lot, the license to R. to rest his floor beams on that wall cannot be construed as an acknowledgment of S.'s ownership of the five inches of ground sued for, in the absence of anything to show that R. knew that the footing course of the wall extended five inches on his lot.

3. Where a cause is tried before the court without a jury, the appellate court is bound by the finding of facts, to the same extent as though such finding was made by a jury.

4. Nor does it affect this rule that the evidence was heard before one judge, and tried on a transcript thereof before another judge.

Appeal from St. Louis circuit court; DANIEL DILLON, Judge.

Action in ejectment brought by Alexander H. Handlan against Camilla S. McManus. There was judgment for defendant, and plaintiff appealed.

Cunningham & Eliot, for appellant. *D. D. Fassett* and *S. T. Price*, for respondent.

BLACK, J. This is an action of ejectment for a strip of land three or four inches wide, on the north line of Locust street, in the city of St. Louis, and extending north 104 feet, to the width of five inches, to an alley. The defense made and brought forward on the trial by the instructions is the statute of limitations. On the 18th September, 1848, Henry Patterson, being the owner of 50 feet front, and extending back to the alley, conveyed the east half to Seth Ranlett, and on the same day he conveyed the west half to Charles Ranlett. The plaintiff derives title to the east half by mesne conveyances from Seth Ranlett, and the defendant to the west half from Charles Ranlett. The strip of land in dispute lies on the west line of the plaintiff's lot, and is included in his deeds, and belongs to him, unless he and his grantor have lost it by adverse possession. In 1852 one Rudolph was the owner of the west lot, and Seth Hanlett was still the owner of the east lot. Ranlett then had a brick house on his lot, extending back 39 feet from the front line. Rudolph found just 25 feet of vacant land between Ranlett's west wall and a house west of his (Rudolph's) lot, and he took pos-

session and excavated this 25 feet, and built a house thereon, extending from the front to the alley. Rudolph inserted the beams of his house in Ranlett's west wall, and raised it one story, for which use he paid Ranlett a money consideration. He also built a wall from the north end of the Ranlett wall to the alley, placing the outside thereof on a line with the west face of the Ranlett wall. Thus matters stood until 1885, when the defendant, having become the owner of the west lot by the will of her husband, who acquired it in 1871, removed the old Rudolph house, and built a new one on the exact same land, placing the beams of the new house in the Ranlett wall, as before. Beneath this wall, 39 feet in length, and some 5 feet below the surface of the ground, was a footing course of stone a few inches thick, extending out from the wall, so as to cover 5 or 6 inches. The defendant removed this projection when underpinning for her new house. The case was tried before the court without a jury, and counsel for the plaintiff treat the case in this court as if we could make a finding of facts irrespective of the instructions given by the trial court. In this they are in error. It makes no difference whatever that the case was tried by the court without the aid of a jury. The finding of facts is as binding upon this court in the one case as in the other, in an action at law like this. Nor does it make any difference that the evidence was heard before one judge, and tried on a transcript thereof before another judge. Under the instructions given, the court must have found that defendant and her grantors had actual, open, continuous, and exclusive possession of the strip of land in suit for a period of 10 years before the commencement of this suit, and that the possession was not had or held under any license or permission from Seth Ranlett, but by virtue of a claim of exclusive ownership. And how could the finding have been otherwise? The disputed 3 or 4 inches, for a distance of 39 feet from Locust street back, had been on the inside of the defendant's house and the house of her grantors since 1852 or 1853, and the 65 feet in length of the strip in the rear had been covered by the wall erected by Rudolph since the last-mentioned date. This wall was a standing monument of a claim of absolute ownership, never questioned by any one until this suit was brought. The circumstance that a few inches of the footing course of stone-work under the foundation wall of the Ranlett house projected out so as to cover the strip in suit, for a distance back of 39 feet, is overcome by the fact that Rudolph took possession up to the Ranlett wall, and built his wall in the rear up to an extension of a line drawn along the face of the Ranlett wall. There is no doubt but possession, to be of any avail as a defense under the statute of limitations, must be adverse, and not subordinate to the true title. The possession cannot be adverse, so long as it is held under a lease or license, and it is an unquestioned

fact that Rudolph acquired a right to rest the beams of his house in the west wall of Ranlett's house by license from the latter; but there is no direct evidence tending to show that this license related to or covered anything save the use of the wall itself. The direct evidence of Rudolph, and the circumstances in evidence, all tend to show that the license embraced nothing but the use of the wall. Besides this, the court found it to be a fact that, when Rudolph procured and paid for the right to join on the wall, he did not know that this footing course extended out beyond the main foundation wall. The footing course seems to have been beneath the surface of Rudolph's cellar. Certain it is there is an abundance of evidence from which the court could and did find that the possession was adverse and hostile up to the wall of Ranlett's house at the surface of the ground, and that finding is conclusive, and takes these few inches covered by the projecting footings. Where adjoining proprietors hold possession up to a given line, but without claiming or intending to claim beyond the true line, wherever that may turn out to be, the possession will not be adverse to the true owner. But where one takes and holds exclusive possession up to a wall or fence, and claims to be the owner up to that wall or fence, his possession will be adverse. *Cole v. Parker*, 70 Mo. 379. That the claim of ownership of Rudolph, and those claiming under him, included the strip in suit, admits of no doubt, and it was open and notorious. With the findings made by the trial court, as shown by the instructions given, there is little to review in this case, and the judgment is affirmed. All concur.

McMAHON et al. v. McMAHON et al.

(Supreme Court of Missouri. March 10, 1890.)

WILLS—CONTEST—PROCEDURE.

In the contest of a will, under the issue of *devisee vel non*, the court must hear the proof, and establish or reject the will, and contestant cannot take a voluntary nonsuit or dismissal.

Appeal from St. Louis circuit court; JAMES A. SEDDON, Judge.

This action was brought by Thomas H. McMahon and others against Abbie McMahon and others, to set aside the will of Patrick McMahon. From a judgment for defendants establishing the will plaintiffs appealed.

R. L. McLaran, M. F. Taylor, and Julian Laughlin, for appellants. *Rassieur & Schnurmacher*, for respondents.

RAY, C. J. Plaintiffs bring this action in the circuit court of St. Louis to set aside the will of Patrick McMahon, which had been admitted to probate in the probate court of said city. After the issues were made up, plaintiffs filed their motion in writing to dismiss the cause, which, coming on for hearing, the court struck said motion from the files, and, plaintiffs declining to further appear, the court heard the evidence offered by de-

fendants in support of the will, and entered its judgment, establishing the same as the last will and testament of said McMahon. Plaintiffs afterwards filed their motion for new trial, and appealed from the court's action in overruling the same. The only question now before us by this said appeal is whether the plaintiffs had the right to dismiss the suit. This, we apprehend, is no longer an open question in this state, in view of our express decisions that, upon the issues of *devisee vel non*, the court should take the proof and establish or reject the will, and that in such proceedings the contestants cannot take a voluntary nonsuit or dismissal. *Benolst v. Murrin*, 48 Mo. 48; *Harris v. Hays*, 53 Mo. 90; *Jackson v. Hardin*, 83 Mo. 184; *Hughes v. Burriss*, 85 Mo. 665. The ruling of the circuit court is in conformity with our said decisions upon the same question, and, as we find nothing in the suggestions of counsel for plaintiffs herein of sufficient weight to require us to overrule our prior decisions upon this subject, we accordingly affirm the judgment of the circuit court herein.

All concur. BARCLAY, J., not sitting.

BINGHAM v. DELOUGHERTY et al.

(Supreme Court of Missouri. Feb. 24, 1890.)

KANSAS CITY TAX-DEEDS.

A tax-deed, executed by the collector of Kansas City, which fails to recite that the tax-sale, when first begun, was "publicly" held, is not executed "substantially" as provided by the Kansas City charter, art. 6, § 64; and one claiming under such a tax-deed is not entitled to be repaid, on recovery of the premises by an adverse claimant, the amount paid at the tax-sale, together with 10 per cent. penalty, and interest at the rate of 24 per cent. per annum from the day of sale, as provided by section 65, since that section requires the tax-deed to be executed "substantially as provided" in section 64.

Appeal from circuit court, Jackson county; TURNER A. GILL, Judge.

Wash Adams and Bingham & Adams, for appellant. *C. W. Freeman*, for respondents.

SHERWOOD, J. Plaintiff brought ejectment for a lot in Kansas City. Defendants set up a counter-claim for certain tax-deeds, tax-bills, and taxes, and costs of recording of one of such tax-deeds. This defense was made in reliance upon the provisions of sections 64¹ and 65, art. 6, of the charter of Kansas City. Laws 1875, p. 237 et seq. Section 65 is as follows: "If any person claiming title under a tax-deed executed substantially as provided for in the preceding section shall be defeated in any suit or proceeding by or against him for the recovery of the real property conveyed, or purporting to be conveyed, by such tax-deed, the successful claimant shall be adjudged to pay such person claiming under tax-deed the full amount of all money

¹The charter of Kansas City, art. 6, § 64, provides that "tax-deeds executed by the city collector shall be substantially in the following form," by which it is made to appear affirmatively that the sale, when first begun, was "publicly" held.

paid by the purchaser at the tax-sale for such real property, and ten per centum of such amount immediately added as penalty, with twenty-four per cent. interest per annum on the whole amount thus made from the day of sale, and also the amount of all taxes, state, county, or municipal, general or special, paid by the purchaser, his heirs or assigns, after the date of the certificate of purchase, and a like penalty of 10 per centum, added as before, on the amount of each of such payments, with twenty-four per cent. interest per annum on the whole of such amount or amounts so made from the day of, or days of, payment, together with the costs of tax-deed, and fee for recording the same, and all costs in the case, which judgment shall be a lien upon the real property in controversy, and shall bear interest at the rate of twenty-four per cent. per annum, and may be enforced by execution as in other cases of judgments and decrees of such court."

The tax-deed offered in evidence was in all respects similar to the one ruled upon in *Sullivan v. Donnell*, 90 Mo. 278, 2 S. W. Rep. 264, wherein it was held that, because the deed failed to pursue that form prescribed in section 64, supra, in a single particular, to-wit, in failing to show that the sale, when first begun, was "publicly" held, that therefore it was void on its face, in that it was not "substantially in the following form." In the case at bar, the court below also ruled that the deeds were not in substantial compliance with the form given in section 64, and so excluded them, but nevertheless gave judgment for the defendants for the taxes, interest, and penalties, etc. This ruling was erroneous. But for the statute, a party who pays taxes on the land of another would have no right of recovery against the owner of such land, so that it necessarily follows that it is only by compliance with the conditions which the statute imposes that any right of recovery can spring into being. As the purchaser, in the present instance, did not present a deed which met and satisfied the demands of the statute, he had no basis upon which his defense could rest, and so a judgment should have been denied him. This case is clearly distinguishable from that of *White v. Shell*, 84 Mo. 569; for that case was ruled upon section 219 of the general revenue law, (page 1206, Wag. St.,) where the only conditions, in case the land sold was subject to taxation, and the taxes were unpaid, or the land had been redeemed, are that the purchaser should have bought the land for the taxes, and paid all subsequent taxes, in which event he became entitled to a recovery against the owner of the land. In that *status* of affairs, by complying with certain general provisions, the purchaser at the tax-sale, void though it was, acquired a "broad equity"—an equity as broad as the general statutory provisions under which he purchased—for reimbursement of the sums he had paid. There is therefore no parallelism or analogy between the case under consideration and the

one cited; and so we reverse the judgment, and remand the cause, with directions to enter judgment for the plaintiff. All concur.

GRAY v. DICKINSON *et al.*

(Court of Appeals of Kentucky. March 18, 1890.)

EFFECT OF APPEAL—REHEARING.

If the opinion of the supreme court on an appeal does not discuss, or in express language determine, any particular point in a case, its attention should be called to it by a petition for a rehearing; otherwise a judgment of affirmance must be taken to have determined all the questions below, which preceded and were involved in the judgment appealed from.

Appeal from chancery court, Campbell county.

"Not to be officially reported."

Chas. Eginton and R. C. Gray, for appellant. *Simrall & Mack*, for appellees.

HOLT, J. The appellee the Cincinnati & Southeastern Railway Company contracted with the appellee P. P. Dickinson for the building of a portion of its road. He in turn sublet about 40 miles of the work to the appellant, John Gray. The latter did a part of the work, but ceased from it on May 20, 1882, under a notice from Dickinson to do so. July 17, 1882, the appellant brought an action against Dickinson to recover for the work done and materials furnished, and also the expected profits. The railway company was made a defendant upon the ground that it was owing Dickinson for the work, who it was asserted then had a suit pending in the federal court against the company, wherein a mechanic's and material-man's lien was asserted, for his pay. By reason of this indebtedness, the appellant sought a judgment against the company for what Dickinson owed him. He had also, within 60 days from the time he quit work, filed a statement and affidavit as to it in the Campbell county court, a part of the work being located in that county, with a view of acquiring a mechanic's and material-man's lien. This was also set up in the suit, and to the extent of his claim the appellant asked to be substituted to all of Dickinson's rights against the company. This was especially attempted to be done by an amended petition offered on September 11, 1882, and which the court rejected; it then deciding that the appellant had no such lien. A few days after, he filed an amended petition wherein the company was made a garnishee defendant, and an attachment sued out attaching in its hands whatever it was owing Dickinson. The company denied owing Dickinson anything, and a protracted litigation resulted; the contest being mainly as to the indebtedness of Dickinson to Gray. January 7, 1884, a judgment in favor of the latter and against Dickinson was rendered for a considerable sum; and on September 1, 1884, a like judgment was entered against the company. The appellant was not allowed anything, howev-

er, for his prospective profits, and which he expected to realize by a completion of the work. Both Dickinson and the company appealed to this court. The appellant thereupon sued out a cross-appeal in each case, and upon the hearing the judgment below was affirmed upon both appeals, and also upon the cross-appeals. Neither the judgment against Dickinson nor the company was superseded, but the appellant appears to have taken no step to enforce them during the pendency of the appeals. After their affirmance the appellant, Gray, filed the mandate of this court in the lower court; and, upon notice to the appellees, moved to set aside the order of the court rejecting the amended petition that had been tendered on September 11, 1882, and to allow him a lien upon the railroad for his judgment. This the court refused to do, and he has appealed.

It is urged that, unless a lien be given him, his judgment is worthless. If so, yet the hardship of the case cannot control. No attachment was sued out and levied upon any property of the company. Its indebtedness to Dickinson was attached merely.

It is now urged that the chancellor has power to make his judgments effective; that he may to that end still correct any error committed by him, even before the appeals were taken to this court; that the appellant has an equitable lien upon the road, and also one by our statute, or is, at least, entitled to be substituted to that of Dickinson. We cannot, however, consider whether any such lien existed or not. There were not only appeals by the appellees from the judgments, but cross-appeals by the appellant. The entire action of the lower court, up to and in rendering the judgments were therefore involved; and their affirmance, upon both the original and cross appeals, must be regarded and treated as decisive of all that had occurred up to that time. If the opinion of this court upon those appeals did not discuss or in express language determine any particular point, its attention should have been called to it by a petition for a rehearing. None was filed, and the judgment of affirmance here must be taken to have determined all the questions below, which preceded and were involved in the judgments then in question. Judgment affirmed.

STEVENSON v. FLOURNOY *et al.*

(Court of Appeals of Kentucky. Feb. 15, 1890.)

JUDGMENT—CERTAINTY—PLEADING—RECORD.

1. A judgment in favor of "the descendants" of a person deceased, without naming them individually, is not void for uncertainty, as it is to be presumed that the papers in the case disclose their individual names.

2. In an action to enforce a judgment, an allegation that defendants were made parties to the original proceeding is not sufficiently denied by an averment that defendants were not parties to any action wherein plaintiffs were parties plaintiff, and in which any cause of action against defendants was alleged as a foundation for the judgment, when it appears that plaintiffs were defend-

ants in the former proceeding, and obtained the judgment on their cross-petition.

3. A judgment against the personal representative of a testator, in an action against him and the devisees for a settlement in which the personal representative appeared, is *prima facie* evidence against the heirs in a proceeding against them to subject to testator's debts land devised to them.

4. A judgment which subjects the property devised to a married woman to sale for the debts of the testator is conclusive against her, in an action to enforce the judgment, when it appears that the issue in the original suit was whether the property devised to her was liable for the testator's debts.

5. An allegation that plaintiffs are the same parties who obtained the judgment which they are seeking to enforce is not sufficiently denied by an averment that defendants have neither knowledge nor information sufficient to form a belief as to whether plaintiffs sustain the relation alleged by them to plaintiffs' ancestor, or any of his brothers and sisters, and they therefore deny the allegation thereof.

6. Where the record shows the service of a summons and an entry of appearance, in the absence of an averment of fraud, the record must be taken as importing absolute verity.

Appeal from chancery court, Campbell county.

"To be officially reported."

W. P. D. Bush and Wm. Goebel, for appellant. E. W. Hawkins, Butler Hawkins, and Geo. E. Prewitt, for appellees.

HOLT, J. This is an action to enforce the following judgment rendered in the Kenton circuit court on January 29, 1881, against certain real estate held by and devised to the appellant, Sibella Stevenson, by her father, Samuel Winston: "It is now further adjudged that the following defendants, to-wit, the descendants of Samuel Flournoy, deceased, the descendants of Elizabeth J. Henry, deceased, the descendants of Patsey Wells, deceased, the descendants of Robert Flournoy, deceased, the descendants of David Flournoy, deceased, (except Thomas Flournoy, T. B. Flournoy, Agnes Cross, and the descendants of Cassandra Ford,) and the descendants of Francis Flournoy, deceased, (except Robert J—, J. J—, and Walker S. Flournoy,) recover as follows: * * * And, second, from defendants, W. H. Fitzgerald, administrator of Samuel Winston, deceased, and Sibella Stevenson, Thomas M. Winston, Orville M. Winston, Susan Quattlebaum, and Mary W. Berry, the sum of eighteen thousand three hundred and seventy-five 57-100 dollars, with interest thereon from September 19, 1876, until paid, and their costs in this behalf expended, to be levied first of assets in the hands of said administrator, and then of the estate of Samuel F. Winston, deceased, and Mary F. Winston, deceased, and therefor they may have execution."

A brief statement of the matters leading up to this judgment is necessary. John J. Flournoy died testate in 1834, being the owner of a considerable estate. He gave it all to his wife, Agnes Flournoy, for life, with the right in her to dispose of one-half of it; the other half to go to his brothers and sisters, and their heirs. She became his executrix,

and took control of the entire estate. She died in 1840, leaving a will by which she disposed of one-half of the property. Samuel Winston became her executor. He took control of the entire estate of John J. Flournoy, which remained in the hands of his widow at the time of her death, and so continued until his death, in 1850. He died testate, leaving his estate to his wife, since deceased, and their six children. In 1852, E. N. Elliot and others, who were devisees of Agnes Flournoy, brought suit against the personal representative of Samuel Winston and his devisees for a settlement of the estates of John J. and Agnes Flournoy. The devisees of the one-half of the John J. Flournoy estate not devised to his wife, or at least some of them, were made defendants. They, by cross-petition against Samuel Winston's personal representative and devisees, asked, in substance, a settlement of the John J. Flournoy estate, and judgment for their portion. The judgment in their favor, copied above, resulted. Execution issued upon it against Samuel Winston's personal representative, to be levied of assets, and against his devisees, but to be levied of devised estate in their hands, and was returned, "No property." It is now urged in this action, brought in a different court from that in which said judgment was rendered, that it was void for uncertainty as to the beneficiaries of it; also because the appellant was then a *feme covert*, and because no specific relief was asked against her in either the petition or cross-petition. There is a plea of *nul tiel record*; but, as it must be determined by the record, it is unnecessary to notice it further than to say that a properly certified copy of the judgment was filed in this action. It was held in *Shackelford v. Fountain's Heirs*, 1 T. B. Mon. 252, that a judgment in favor of "Fountain's heirs," without naming them individually, was not void for uncertainty. The court said: "If the court below rendered such judgment, even if it is erroneous, we cannot say that it is void for uncertainty." In the late case of *Parsons v. Spencer*, 83 Ky. 305, such a judgment was held not to be void. It is to be presumed in such a case that the record of the suit discloses their individual names. No injustice can be done, because, if questioned, certainty can be reached as to those in whose favor the judgment was rendered by reference to the papers of the suit. The same rule applies where a judgment is in favor of the descendants of a person, without naming them individually. It is not *in forma*, but yet it is not void. It was to be levied only of assets in the hands of the personal representative, or of the estate of Samuel Winston in the hands of the devisees; and the prayer for relief, in our opinion, authorized that granted.

The appellant and her husband (now deceased) were made defendants to both the petition and the cross-petition in the old suit. The denial in their answer in this action is: "The said defendants deny that they were

parties to any action in said Kenton circuit court wherein the said plaintiffs herein or their principals were parties plaintiff, and in which any cause of action against the defendants was alleged or set forth as a foundation for or ground of the alleged judgment, to which they in any manner appeared, or in which they were served with process thereon." A pleading is to be construed most strongly against the pleader; and this denial cannot be regarded as negating the averment that they were parties to the old suit, but that they were not parties to an action wherein the appellees were plaintiffs, "and in which any cause of action against the defendants was alleged or set forth as a foundation for or ground of the alleged judgment." It is distinctly averred in the reply that the appellant and her husband were made defendants to the petition and cross-petition in the old suit; that they were served with a summons upon the petition; and that they in person entered their appearance to the cross-petition. All this is not denied. No rejoinder was filed. Moreover, a copy of the order made in the old suit, reciting that they entered their appearance, is filed in this action. All this took place years ago. It is true the appellant and her husband testify that no summons was ever served upon them, and that they never entered their appearance to the cross-action; but with the lapse of time these transactions may well have passed out of mind. Besides, proof without proper pleading cannot avail a party.

But, aside from all this, a rule of law must control. It is not claimed that there was any fraud in the obtaining of the judgment. The personal representative of Samuel Winston was regularly before the court, and a judgment against him is *prima facie* evidence against the heirs, in a proceeding against them to subject land devised to them to the payment of the testator's debt. *Hopkins v. Stout*, 6 Bush, 375.

It is a domestic judgment. It was rendered by a court of general jurisdiction, and it is not now assailed in the court which rendered it. The record shows affirmatively that the party was before the court. Our Code of Practice provides how and when a judgment may be vacated, and it has not been followed in this instance. In the absence of an averment of fraud upon the part of the party procuring the judgment, and evidence to support it if denied, the record in this instance, showing the service of a summons upon the petition and an entry of appearance to the cross-petition, must be taken to import absolute verity. The stability of judicial proceedings, the proper protection of honest litigants, and of those who acquire rights and titles from them by virtue of the litigation, require this rule. *Walker v. Robbins*, 14 How. 584; *Taylor v. Lewis*, 2 J. J. Marsh. 400; *Roberts v. Caldwell*, 5 Dana, 512; *Newcomb v. Newcomb*, 18 Bush, 562. This judgment has not been vacated or reversed, and it is not attacked for fraud. In-

deed, we incline to the opinion that an entry of appearance to the cross-petition was unnecessary to the support of the judgment. The action was to settle an estate, and the court by way of doing so, and giving complete and final relief, adjudged to the appellees, although they were defendants in the action, the sums to which they were entitled against the Winston estate. The present action was brought in the name of some of the beneficiaries in the judgment for all of them, because, as the petition states, they are very numerous and widely scattered. A special demurrer was filed for a defect of parties plaintiff, and sustained. An amended petition was then filed, over the objection of the appellant, making all the beneficiaries in the judgment parties plaintiff, and setting forth their names. It is urged that this was error, because the court had already sustained a general demurrer to the petition upon the ground that no cause of action was stated, and this amendment, merely giving the name of parties plaintiff, did not add to the sufficiency of the petition. It does not clearly appear that the general demurrer was sustained. The court evidently did not think so, as it proceeded to a judgment upon the merits. Such action upon the demurrer would have been erroneous, and, if in fact had, it was subsequently properly disregarded by the court, and it was proper to perfect the petition by making the proper parties plaintiffs.

The third paragraph of the answer attempted to rely upon limitation. By the sixth paragraph of it, the appellant endeavored, without alleging fraud, to go behind the judgment in the old suit, and relitigate the matters settled by it. The demurrer to each of these defenses was properly sustained. The judgment in the old suit was conclusive, until vacated or reversed. The appellant was a party to the old action brought in 1852. The statute authorized an action for the debt of the ancestor against both his personal representative and his heir or devisee, provided the latter received property from him. It is true the appellant was a married woman when the judgment was rendered, but it provides that it is only to be levied of estate held by her derived from the testator. An action was pending against her to subject the property which the judgment in this action orders to be sold from 1852 until 1881, when the judgment in the old suit was rendered determining that it was liable for the debt. This fixed its liability for it, and renders the plea of limitation unavailing. It was in issue in the old suit whether the estate received by her from her father was liable. The court decided there that it was, and the appellant was thereby concluded as to this question; she had her day in court as to it. Now, that judgment is merely being carried out by this suit, and the judgment in it.

It is lastly contended that the answer of the appellant raised an issue as to the right of the parties plaintiff in this action to enforce

satisfaction of the judgment of the Kenton circuit court. There is no evidence showing that they are the same parties who obtained that judgment. It is, however, averred that they are the same, and this is not put in issue. The answer says: "The said defendants say they have neither knowledge nor information sufficient to form a belief upon as to whether or not the said plaintiffs, or those for whom and in whose interest they profess to sue, sustain the relation alleged by them to the said John J. Flournoy, or to any of his brothers or sisters, and therefore they deny the plaintiffs' allegation thereof, and call for proof." This cannot be regarded as a denial that the parties now suing are those who obtained the judgment; and as it is in force, if they are the persons in whose favor it was rendered, it is immaterial what relation they sustain to John J. Flournoy, or his brothers or sisters. The judgment is conclusive of everything behind its rendition. The judgment is affirmed. LEWIS, C. J., not sitting.

CLARK v. BELKNAP et al.

(Court of Appeals of Kentucky. March 6, 1890.)

TAXATION—EXEMPTION—INDEBTEDNESS.

1. The Hewitt bill (Gen. St. Ky. c. 92, art. 1, § 19) provides that "personal property of every kind shall be separately stated and valued in the appropriate columns of the tax-book therein provided, and, if there be no column appropriate, it shall be listed in the column headed 'miscellany.' The assessor, after having listed all the property required to be listed above, shall require each person, on oath, to affix the amount he or she is worth from all other sources, after taking out his or her indebtedness from said amount." Article 6, § 27, provides for the list or tax-book, which enumerates every species of property, and also requires the tax-payer to give "the value of all other property, after deducting debts." The statute further provides that personal estate, for the purpose of taxation, includes intangible, as well as tangible, property. *Held*, that no deduction can be made from the property enumerated in the list, and, as it embraces all known kinds, the provision relating to the deduction of debts is nugatory.

2. Though the valuation of the property may be fixed by the assessor, he has no authority to list it of his own accord, on refusal of the tax-payer to do so, but must report the fact to the supervisors, as required by the statute.

Appeal from Louisville law and equity court.

"Not to be officially reported."

Helm & Bruce, for appellant. *W. O. Harris*, for appellees.

PRYOR, J. This appeal comes from a judgment of the law and equity court of the city of Louisville, perpetuating an injunction that issued to prevent the collection of taxes under what is known as the "Hewitt bill," passed during the legislative session of 1886. It involves the right of the tax-payer to deduct his indebtedness from the assessed value of his property, and, by reason of the singular provisions of the statute in reference to the subject-matter, we have had some trouble in arriving at the legislative intent,

and even now reluctantly hold that the section of the act authorizing the deduction is meaningless, and certainly cannot be made to apply to the specific list of real and personal estate from the value of which it is expressly provided no deduction can be made. That debts due the taxpayer have for a long period of time been regarded as a residuary fund, from which his indebtedness could be deducted, is unquestioned; but the recent history of legislation on the subject of state revenue, and particularly that with reference to the Hewitt bill, indicated a change of state policy in reference to the assessment of property for taxation, with a view of relieving the landed estate and the tangible property of the citizen from more than its proportionate share of taxation, by imposing on the intangible estate, including money, choses in action, and other evidence of debt, its share of the burden. The statute provides: "Personal property, of every kind, shall be separately stated and valued in the appropriate columns of the tax-book herein provided; and, if there be no column appropriate, it shall be stated and valued in the column headed miscellany. The assessor, after having taken the list of all property required to be listed above, shall require each person, on oath, to affix the amount he or she is worth from all other sources, on the day on which said list relates, after taking out his or her indebtedness from said amount." Section 12, c. 92, art. 1, Gen. St. The deduction for the indebtedness is not taken from the property, or its value required to be listed, but from what the debtor is worth from all other sources; and the list or tax book provided in the same chapter enumerates every species of property to be listed and valued, and after this enumeration, that includes every species of property known to the law or that we can conceive, the taxpayer is required to give "the value of all other property, after deducting debts." So not only by section 12, art. 1, c. 92, but by section 27, art. 6, of the same chapter, it is provided that this deduction of indebtedness is not to be made from the list found in the form of the tax-book given in the statute. If such was the legislative meaning, we are then asked, from what species or character of property is this deduction to be made? The legislature has provided for a deduction, and imposed a heavy penalty upon the taxpayer who shall make willfully a false statement as to the amount of his indebtedness. This query is not easily answered, except in saying that the legislature has designated the property from which no deduction shall be made, and if this includes all and every character of property, the provision of the act in regard to the deduction on account of debts is without meaning. The words "personal property" ordinarily apply to that which is tangible, but the list of property found in the statute excludes the idea that any such meaning was attached to those words, and, besides, the statute provides that personal estate includes, for the purpose of taxation,

that which is intangible as well as that which is tangible. So there is no escape from the conclusion that no deduction can be made by the debtor from the list of property enumerated by the statute; but the legislature, supposing that some omission might have been made in the enumeration of the various species of property, provided that as to what had been omitted the deduction could be made. In this case the appellees had accounts against those dealing with their firm for large sums of money, and were indebted perhaps in an equal or larger amount for the identical articles sold their customers. They insisted on deducting the one from the other, and this the assessor refused. The forty-ninth item of property on the list is, "Credits of money at interest, either in or out of the state;" and this the counsel for appellant insists should read, "Credits or money on interest," etc. We have not examined the enrolled bill to see whether the error exists or not, as, in either aspect of the case, it, and other headings on the list, would include, according to a fair construction of the act, accounts owing the tax-payer. It could not well be held that the merchant having accounts against his customers could deduct his indebtedness from these accounts, and one holding a note would not be entitled to a like deduction. It is true the note bears interest, and the account might not, but nevertheless it would be an unreasonable construction of the statute to make the right to a deduction apply when there were accounts owing the tax-payer, and in no other instance. Such could not have been the legislative purpose, and, after a careful consideration of this act, we are unable to ascertain the property from which the deduction can be made; and if any is to be found, or this court is mistaken in the interpretation given its provisions, the remedy is by additional legislation. Besides, the construction given the statute in this case is that given its provisions by those intrusted with the assessment of property for taxation and the collection of the revenue. All have paid taxes in this way. They have followed, as we must do, the plain letter of the statute, and, if the provision in question is nugatory, it is because there is no mode of applying it. If a deduction is to be made at all, under the provisions of this act, there is as much reason for making it from the one species of property as the other; as the legislature has not confined the deduction from the value of personalty or that of realty, and if intended to be made from the value of any of the property mentioned in the list the deduction must be made from any of the property mentioned, or if applied to personalty it must be made from the value of any species of personalty set forth in the tax-book. If a deduction is allowed under any rule prescribed by this court, it would be purely arbitrary, and in fact against the legislative intent; and therefore we must reverse the judgment, allowing the appellee a deduction by reason of his indebtedness.

Another ground for the injunction is that the appellees refused to list this property for taxation for the year 1887, and the assessor, of his own motion or from mere surmise, undertook to list the property. This was erroneous. The assessor had no right to list the property for taxation, in whole or in part; but it was his duty when the appellees refused to list it to report the fact to the supervisors, as required by the statute. The assessor has no such power conferred upon him, and, if such has been the custom heretofore, it must be recollected that the Hewitt bill is a departure from the usual mode of assessment, and if the custom is not to be followed in the one instance it ought not to be in the other. The fact that the valuation may be fixed by the assessor does not authorize him to make the assessment,—that is, to list the property; and, in 1887, it is distinctly alleged that the assessor undertook to act, not only for himself, but for the tax-payer, and when the tax-payer refused to list the assessor performed that duty. This he had no right to do.

As to 1886, the list was given by the tax-payer, but under protest; and, being liable for the tax, there is no reason why he should not be compelled to pay it. Whether the list was properly made in 1887, by the assessor, this court is unable to state; and therefore, as to this branch of the case, the injunction should be sustained, on the ground that the act of the assessor was void, and then the state can proceed as the statute requires to collect the tax.

The judgment is reversed, and remanded, for proceedings consistent with this opinion.

KING v. HUNT *et al.*

(Court of Appeals of Kentucky. March 8, 1890.)

PRE-EMPTION LANDS—CONSTRUCTIVE POSSESSION.

1. M. occupied and improved certain land in 1846. There was no proof that he occupied it with the intention of pre-empting it. He abandoned it within a year; and there was no proof that he ever gave any one the right to be his successor, or that any one entered under him. *Held*, that it would be presumed that, when it was surveyed by another person, in 1853, M. had abandoned any intention of pre-empting the land that he might have had, and that the land was vacant.

2. Where one has made a survey of lands, for the purpose of pre-emption, which includes a prior survey by another person, his possession of that part of his survey outside of the former survey will not have the effect of extending such possession within the former survey, though there is no one in actual possession of it.

Appeal from circuit court, Whitley county.
"Not to be officially reported."

R. D. Hill, for appellant. D. W. Lindsey and John B. Lindsey, for appellees.

BENNETT, J. To the action of ejectment by the appellees against the appellant to recover the possession of the southern half of a 200-acre tract of land, the appellant interposed the pleas of a general traverse, adverse

possession, fraud on the part of the appellant's vendor in antedating the survey, a prior pre-emption right, and estoppel.

There is no proof whatever tending to sustain the plea of fraud on the part of Jacob Harmon, the locator and patentee of said survey of land. It is contended that at the time said Harmon surveyed said land, to-wit, the 21st of December, 1853, one Murphy had pre-empted the part in dispute, by improving and occupying the same, which rendered said Harmon's effort in that regard void as to said land in dispute. There was positive and direct proof before the chancellor that said Murphy's improvement and occupation took place as far back as 1846, and that he did not occupy the same longer than one year, at which time he moved away from the same. There is no proof that he sold his improvement to any one, and there is no proof that any one entered under said Harmon. Mr. Wilson, who testified in the case, means nothing of the kind. The testimony of the appellant in regard to how said Wilson obtained possession, and as to when he obtained it, are evidently mere inferences of his. There is no proof tending to show that said Murphy improved and occupied said land with the intention of pre-empting it. While such intention would ordinarily be presumed,—nothing, in the way of fact in circumstances, showing to the contrary,—we think the legitimate inference from Murphy's conduct is that he either squatted upon said land, without any intention of pre-empting it under the law, or that he abandoned his intention of pre-empting it; for the proof is that he abandoned the place within a year after he entered upon it, and there is no proof that he ever gave any one the right to be his successor. And the strong inference from all the facts is that on the 21st of December, 1853, the land was vacant. Therefore Harmon's survey was not void in whole or in part.

As to the plea of adverse possession, the proof is that the improvements of both Murphy and appellant are outside of the interference; and there is no proof whatever that the appellant's clearing or fencing is inside of said interference. His survey upon Harmon's previous survey was void to the extent of the interference, and gave him no right to it whatever, except so far as he might have acquired it by an actual hostile entry upon the interference, and holding it adversely, which the proof does not establish. His holding possession of his survey outside of the interference, said survey being junior in time to that of Harmon's, did not have the effect of extending such possession within the interference, although those claiming under Harmon had no actual possession of any part of his survey. The appellee Hunt did not sell to his co-appellee all his interest in said land. He only sold half of it. Therefore he was a proper party. The judgment is affirmed.

HYATT v. STATE, to Use of DREW Co.*(Supreme Court of Arkansas. March 8, 1890.)***CONVICTS—HIRING—EVIDENCE—SHERIFF'S FEES.**

1. In an action on a bond to pay \$25 for the services of a convict hired from a county, evidence of a contemporaneous verbal contract with the sheriff, whereby defendant was to be permitted to deduct the cost of medicine and clothing furnished the convict, is inadmissible.

2. The fees paid by defendant to the sheriff for making the contract of hire, and preparing and approving the bond, are a proper set-off to the claim of the county, as Mansf. Dig. Ark. § 1225, provides that these fees are to be paid in advance by the person hiring the convict, to be repaid, when demanded, out of the convict's wages.

Appeal from circuit court, Drew county; C. D. WOOD, Judge.

Action by the state, to the use of Drew county, against R. F. Hyatt, on a bond executed by defendant to Drew county. On September 1, 1886, defendant hired from the sheriff of Drew county, one Frank Wells, who had been convicted of a misdemeanor, and sentenced to imprisonment in the county jail for 65 days. The contract was made under the act of the legislature of March 10, 1877. Mansf. Dig. Ark. c. 39. The convict had been lying in jail several weeks, and the sheriff made a verbal contract with defendant, that, if he would hire the convict, any necessary sums expended for clothing and medicine furnished the convict should be deducted out of the convict's wages. With this understanding, defendant executed a bond for the payment of \$25 for the hire of the convict. Defendant also paid the sheriff \$2.50 as his fees for making the contract, and preparing and approving the bond, with the understanding that this sum should likewise be allowed him out of the convict's wages. Defendant furnished the convict with clothing worth \$4.25, and expended 75 cents for medicine used by the convict. The convict stayed with defendant 18 days, including Sundays, when he escaped. Defendant immediately notified the sheriff of the escape, and afterwards made affidavits as to the time labored, etc., as required by law. Suit was afterwards brought on the bond for \$5.76, for 15 days' work of convict. Defendant filed his answer and set-off, claiming that the time worked by the convict did not amount to as much as he had paid out for necessary clothing and medicine, and the sheriff's fees in preparing the bond, etc. The court refused to allow both the \$2.50 paid to the sheriff and the amount expended for clothing and medicine. Defendant appeals. Mansf. Dig. Ark. § 1225, provides that the sheriff's fees on hiring out a convict shall be as follows: \$1 for making the contract of hire, \$1 for preparing the bond, and 50 cents for approving the bond,—“said fees to be paid, in every instance in advance, by the party or parties hiring such convict, to be repaid to the contractor or employer, when demanded, out of the wages of such convict.”

W. F. Slemms, for appellant. Wells & Williamson, for appellee.

PER CURIAM. The evidence as to verbal contract with the sheriff to deduct cost of clothing and medicine furnished the convict was properly excluded. It contradicted the written contract of Hyatt. The fees advanced by him were a proper set-off to the claim of the county, and should have been allowed. Mansf. Dig. § 1225. Appellee offers here to remit \$2.50, which will be allowed, and the judgment affirmed for \$3.50. Affirmed.

DAVIS' ESTATE v. HERRINGTON.*(Supreme Court of Arkansas. March 1, 1890.)***SUPPORT OF BASTARDS—LIMITATION OF ACTIONS.**

1. Mansf. Dig. Ark. § 445, et seq., enabling the mother of a bastard child to cast the legal liability for its support on the father, furnishes a sufficient consideration for the father's promise to pay her for the maintenance of the child.

2. In an action on the promise, which was not in writing, where the mother's statement of her claim shows that the payments by the father were to be made in annual installments, the remedy on the installments that fell due more than three years before the institution of the action is barred by the Arkansas statute of limitations.

Appeal from circuit court, Jefferson county; J. A. WILLIAMS, Judge.

Action by Hester Herrington against the estate of R. G. Davis on the following claim: “For taking care of Willie Davis, a minor child, by contract, for the period of five years, commencing 1st day of January, 1881, and ending the 15th day of January, 1887, at \$3 per month, \$180.” She also charged interest annually for the years 1881–85, at the rate of 6 per cent., making the total amount of her claim \$212.58. The administrator rejected her claim, but, on its presentation to the probate court, it was allowed. The administrator appealed to the circuit court. At the trial, it was proved that the child was the illegitimate child of the claimant and the deceased, R. G. Davis; that, after the birth of the child in 1881, deceased recognized it as his; that he contracted with claimant to take care of it, and promised to pay her for so doing; and that the support of the child was worth three dollars per month. There was a verdict in claimant's favor, and the administrator appeals.

Harrison & Harrison, for appellant. Met. L. Jones, for appellee.

PER CURIAM. By the common law, the mother, and not the putative father, of an illegitimate child, is bound to maintain it. The father's promise to the mother to pay her for the maintenance is a promise to pay her for doing what she is already legally bound to do, and is not enforceable, because not supported by a consideration. One is not legally bound by a promise to fulfill a moral obligation, where no legal obligation or liability for the thing promised ever existed. But the statute in this state confers upon the mother of a bastard child the right to compel the father to contribute to the support of their offspring by affiliating it upon

him. *Mansf. Dig. § 445 et seq.* His promise to pay her for the maintenance is therefore based not only upon a moral obligation, but also a legal liability which she may cast upon him, and that fact furnishes a consideration for his promise. *Smith v. Roche*, 6 C. B. (N. S.) 223; *Hargroves v. Freeman*, 12 Ga. 342; *Maxwell v. Campbell*, 8 Ohio St. 265. The promise of the appellant's intestate was therefore based upon an adequate consideration, and was enforceable against his estate.

But the statement of the appellee's claim shows that it was due in annual installments; and, as the promise was not in writing, the remedy upon the installments which fell due more than three years prior to the institution of this suit is barred. If the appellee will remit the amount recovered upon the installments indicated, the judgment for the residue will be affirmed; otherwise, the judgment will be reversed, and the cause be remanded for a new trial. It is so ordered.

WORTHLEY v. GOODBAR *et al.*

(*Supreme Court of Arkansas. Feb. 22, 1890.*)

ATTACHMENT—AGAINST INDIVIDUAL PROPERTY OF PARTNER.

Under *Mansf. Dig. Ark. § 309*, providing that a plaintiff may have an attachment against the property of the defendant for certain causes, but that, where there are several defendants, there shall be no attachment against those not embraced in such causes, the wrongful act of one partner, in the conduct of partnership business, which would warrant an attachment against his property, will not authorize an attachment against the individual property of the other partner, who did not participate in the wrongful act.

Appeal from circuit court, Phillips county; M. T. SANDERS, Judge.

This was a suit, by attachment, brought by Goodbar, Love & Co. against M. B. Woodyard and James L. Worthley, doing business as M. B. Woodyard & Co. The complaint alleged that defendants were indebted to plaintiffs in the sum of \$676.75, of which sum \$296.75 was then due, and the balance would mature subsequently. As ground for attachment, that defendants had removed their property out of the state, and that they had sold, conveyed, and otherwise disposed of their property with the fraudulent intent to hinder and delay their creditors. Under the writ of attachment, the sheriff levied upon certain property described in the return as the property of James L. Worthley, one of the defendants. The defendant James L. Worthley filed his affidavit controverting the grounds of attachment, stating that the writ of attachment had been levied upon his individual property, and not upon the property of the firm of M. B. Woodyard & Co.; that he had not removed his property, or a material part thereof, out of the state of Arkansas; that while he was a member of the firm of M. B. Woodyard & Co. he had no control of the business of said firm, nor did he have any knowledge as to how the same was being conducted; that he was engaged

in other business, was not in attendance upon the store, and resided in Helena, Ark., a distance of fully 20 miles from the town of Marvell, where said firm conducted its business; and that, if any of the property of said firm was removed out of the state of Arkansas, it was done without his knowledge, consent, or procurement. On motion of plaintiff, this affidavit was struck out. Defendant then moved to quash the levy and return of the writ of attachment because the writ did not authorize a levy on his individual property. Plaintiffs filed an amended complaint, in substance the same as the original, except as to the amount for which judgment was demanded. Worthley then filed an amended counter-affidavit, stating that he had not removed his property, or a material part thereof, out of the state, nor sold, or otherwise disposed of, same with fraudulent intent to hinder or delay his creditors in the collection of their debts; that, if any of the property of the firm of Woodyard & Co. was removed out of the state, or sold, conveyed, or otherwise disposed of, with the fraudulent intent to hinder and delay the creditors of the said firm in the collection of their debts, it was done without his knowledge, consent, or procurement. To this amended counter-affidavit, plaintiffs also filed their motion to strike. The court sustained the motion to strike so far as it related to the first ground of attachment, and overruled it as to the second ground of attachment, and overruled the motion to quash the levy and return of the sheriff. Judgment was rendered for plaintiff and defendant Worthley appealed.

Mansf. Dig. Ark. § 309, subd. 9: "The cause of attachment mentioned in the preceding subdivisions, against one or more defendants to a civil action shall not authorize an attachment against any of the defendants who are not embraced in any of said subdivisions, but the estate or interest of such defendants only as are embraced therein shall be subject to attachment."

J. J. & E. C. Horner, for appellant. *R. W. Nichols* and *John C. Palmer*, for appellees.

PER CURIAM. Each defendant is answerable to the remedy by attachment, under the statute, for his own act, but not for that of his co-obligor. *Mansf. Dig. § 309, subd. 9.* The law confines the remedy to the actual wrong-doer. Acts of one partner, therefore, in the conduct of a partnership business, which warrant the issuance of an attachment against his property, will not warrant the condemnation of the individual property of a partner who has not participated in such an act, if seized under a writ issued against all the members of the firm. The rule which holds an innocent partner responsible for the fraud of his copartner is only compensatory, and was devised to prevent a failure of justice. None of the penalties for fraud can be visited upon an innocent partner. His body cannot be taken upon process as for a debt

contracted through fraud by himself; and no more can the provisional remedy by attachment, which is purely statutory, be enforced against his individual property, when limited, as ours is, to the particular wrong-doer, unless some participation by him in the wrongful act is shown. As to what are the rights of a firm creditor who attaches partnership property in a writ against one member of the firm, or against all, when it is shown that one has committed a fraud in relation to the firm business, is not presented by the record. See 2 Bates, Partn. § 1117; Williams v. Muthersbaugh, 29 Kan. 780; Hadley v. Bryars, 58 Ala. 189; Inbusch v. Farwell, 1 Black, 566; Bryant v. Simoneau, 51 Ill. 324. Judgment condemning the property of Worthley is reversed, and cause remanded for further proceedings.

FEUCHT et al. v. EVANS et al.

(Supreme Court of Arkansas. March 1, 1890.)

PARTNERSHIP—FRAUDULENT CONVEYANCES.

A transfer of all of the firm property by one of the partners to his father, in payment of a loan made by the father to aid him in buying his interest in the business, which transfer was made without the consent, express or implied, of his copartner, is void, as against the partnership creditors, though no wrong was actually intended, and though a part of the money loaned by the father was used in paying firm debts.

Appeal from circuit court, St. Francis county; M. T. SANDERS, Judge.

Action by Simon Feucht and others, judgment creditors of the firm of Collins & Evans, against J. J. Evans and H. Evans, to set aside the sale of a drug-store, made by J. J. Evans to H. Evans. J. J. Evans was a member of the firm of Collins & Evans, who owned the store, and the other defendant, H. Evans, is his father. At the time the sale was made, Collins had removed from the state. On his cross-examination the defendant J. J. Evans deposed as follows: "When I first bought into the drug-store, in January, 1885, Collins, Hamilton & Norton owned it. I gave Collins \$1,200 for his one-third interest,—\$500 cash, and \$700 in March following. *Interrogatory 4.* Is not this \$1,200 a part of the \$1,768 you got from your father? *Answer 4.* A portion of it is. *Int. 5.* What portion did you get from any other source, if any? *A. 5.* I got from my father, of the \$1,200, \$700 only. About the 4th of July, Hamilton and Norton sold to Collins. The style was then changed to Collins & Evans. About four months afterwards I bought a one-third interest of Collins for \$700. Collins bought of Hamilton and Norton one-third each, and he represented to us that J. M. Levesque was equally interested with him. The money I got from my father, outside of the \$700, was put in the business. The house kept a regular set of books. *Int. 12.* Who was credited with this money when it was put in, and in what amount? *A. 12.* H. Evans, \$1,768." The father, H. Evans, also testified: "I let my son have \$400 or

\$500 to go into the business. I afterwards loaned him money to help him in the business. He was to pay me back when the business would enable him to do it. I don't remember the amounts I let him have at different times; the whole was \$1,768. I let him have, on January 6, 1886, \$400." This \$400 was used to pay a firm debt. On that day, January 6, 1886, the son delivered a bill of sale of the store to the father, as a repayment of the sums so loaned. On the hearing, the circuit court dismissed the case for want of equity, and complainants appeal.

N. W. Norton, for appellants. *Sanders & Watkins*, for appellees.

HEMINGWAY, J. Upon an examination of the evidence, we cannot find that the sale was made with intent, in fact, to hinder, delay, or defraud the creditors of Collins & Evans. On the contrary, we think it was made by a son, unsuccessful in business ventures, to repay, in part, loans from an indulgent father. The purpose that prompted it was commendable. But did J. J. Evans have the authority to make the sale? or was it a transaction from which the law implies fraud? It appears by the recitals of the bill of sale that the property in controversy belonged to a firm composed of J. J. Evans and Marcus Collins, and J. J. Evans claimed to have bought only a two-thirds interest in the business. We therefore find that the property belonged to a firm of which he was a member. It was sold to satisfy a debt due to H. Evans for money loaned. A part of the loan was made to the firm, and went to pay firm debts; but a part, and it would seem the greater part, was made to J. J. Evans, to aid him in buying his interest in the business. It is a general rule, in commercial matters, that, with respect to all articles kept by a partnership to be sold, for the benefit of the concern, each partner has, in the course of trade, the right to dispose of any part or the whole. This authority is general, and implied from the relation, because it is necessary to the expeditious and successful prosecution of the business; but, being founded upon this reason, it is subject to the condition that it must be exercised in the course of the partnership business. The satisfaction of the individual liabilities of one partner is not within the scope of the partnership; therefore no partner has any authority, implied from the relation, to dispose of partnership effects to satisfy his individual indebtedness. This may be done by the consent of his copartner, and such consent is sometimes implied from the past dealings between the partners. But consent, either express or implied, is necessary to authorize it. *Pars. Partn.* 202-213. The sale was made by one partner without the knowledge or consent of his copartner. It was made to satisfy an individual liability, and not in the course of business, and this was known to the purchaser. It was therefore void. Although no wrong was intended, the partnership effects were illegally delivered to

the purchaser, to be by him disposed of for his own benefit. The effect was improperly to hinder and delay the partnership creditors, and from this the law presumes fraud. This case does not involve the question of the right of one partner to dispose of the partnership effects and business to satisfy or secure firm debts. That we have not felt called to consider or decide. The plaintiffs were entitled to a decree canceling the bill of sale, in order that they might sell the property for the satisfaction of their claims. It does not appear that they caused the property to be impounded, but they are now entitled to have such of it sold as can be seized. The judgment will be reversed, and the cause remanded, with directions to enter a judgment in accordance with the law as herein announced.

KIMBROUGH v. STATE.

(Court of Appeals of Texas. Feb. 5, 1890.)

LARCENY—EVIDENCE—INSTRUCTIONS.

1. Code Crim. Proc. Tex. arts. 814, 815, require an examining magistrate to certify the proceedings had before him, including defendant's bail-bond, to the proper court, and require the clerk of such court to deliver such proceedings to the foreman of the next grand jury. An indictment for theft of money charged that it was the property of one D., whose Christian name was to the grand jury unknown. *Held*, that the docket of the examining magistrate, which recited that the complaint was made by S. W. D., and the bail-bond, which recited that defendant had been committed on a complaint charging him with the theft of money from said S. W. D., were admissible to show that the grand jury, by reasonable diligence, might have known D.'s Christian name.

2. Evidence of the magistrate that he made the entries on the docket from the complaint; that he kept a correct docket; and that he knew from the entries in his handwriting that the complaint was signed by S. W. D.,—is admissible, though he has no personal recollection of the transaction.

3. An averment of the theft of "United States paper currency money of a certain value" is sustained by proof that the stolen property was either United States treasury notes, or national bank notes, or United States gold or silver certificates.

Appeal from district court, Cooke county; D. E. BARRETT, Judge.

George Kimbrough appeals from a conviction of theft of money.

J. H. Garrett and Davis & Harris, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. In the indictment, the money alleged to have been stolen is described as "United States paper currency money, of the aggregate value of twenty dollars." The particular kind or character of paper money was not proved; that is, it was not proved whether the paper bills were legal-tender notes, gold or silver certificates, or bank-notes. The first state witness says: "The bills were money like we use now—U. S. currency. There was twenty dollars in paper money, of the value of twenty dollars." Again, he says: "The bills were 'greenbacks.' That is what they call them. I do not know whether the bills were silver certificates, gold cer-

tificates, national bank-notes, or treasury certificates." Other witnesses who saw the money said they did not know whether it was legal tender or not, but they say "it was United States money."

The court instructed the jury that "the term 'United States paper currency money' means either United States Treasury notes, or what is known as 'national bank-bills,' or United States gold or silver certificates." Defendant specially excepted to this charge "because gold and silver certificates are not United States paper currency money, and because national bank-notes are not United States paper currency money, within the meaning of the law." We are of opinion that the instruction was correct. "United States paper currency money" embraces all the character of paper currency issued and allowed to be used as a medium, and circulated as money under authority of the laws of the United States. *Cook v. State*, 4 Tex. App. 265. Under our Statute with regard to theft, such money or bank-bills is property, and is a subject of theft. Pen. Code, art. 732; *Sansbury v. State*, 4 Tex. App. 99. It was not larceny, at common law, to steal a bank-note. *U. S. v. Bowen*, 2 Cranch, C. C. 183. There is no general definition of "money" in our Code. It is defined with reference to the offenses of embezzlement and swindling. With regard to these offenses, as also to the offense of a misapplication of public funds, the meaning and significance of the term "money" has been held to be limited and restricted to that which is a legal tender, as legal-tender coins or legal-tender treasury notes of the United States. *Sansbury v. State*, 4 Tex. App. 99; *Block v. State*, 44 Tex. 621; *Lewis v. State*, 12 S. W. Rep. 736. If the indictment had described the money as "current money of the United States," then, indeed, such allegation could only have been sustained by proof of money which would be legal tender for debt. But, where the allegation is, as in this instance, "United States paper currency money," then, in our opinion, any paper currency authorized by the laws of the United States as a circulating medium for money would come within the description, and would be sufficient to prove such allegation. This, we think, is a clear and legitimate construction of the language, "United States paper currency money." Viewed in the light of this plain construction, it is clear that there is no inconsistency or discrepancy between the decision in *Cook's Case*, 4 Tex. App. 265, the decisions in *Block's Case*, 44 Tex. 621, and *Lewis' Case*, 12 S. W. Rep. 736. Defendant's exception to the charge of the court in this particular is not maintainable.

The indictment alleged that the money taken was the property of one Dodd, whose Christian name was to the grand jury unknown. The defendant, however, had been arrested upon the affidavit of S. W. Dodd in the examining court of H. S. HOLMAN, justice of the peace of Cooke county, Tex., and had been held to bail, and had given bail, for his ap-

pearance before the district court. And defendant, for the purpose of showing that Dodd's Christian name was known to the grand jury, or might have been known by the use of reasonable diligence, proposed to introduce the entries on the justice's docket, which recited that the complaint was made by S. W. Dodd, and the bail-bond, which recited that the defendant had been committed upon a complaint, made by S. W. Dodd, charging him with the theft of the money from the said Dodd of the value of \$20, and proposed to prove that the complaint, which had become lost, was in fact signed by S. W. Dodd, and that the aforesaid papers were before the grand jury that found the bill of indictment. The court excluded the bail-bond, holding that it was not evidence that the owner of the property was S. W. Dodd, or that he was called S. W. Dodd. He held that the justice's docket was not admissible for any purpose, and was not competent evidence to show that the complaint was signed "S. W. DODD." A magistrate, sitting as an examining court, is required to certify all the proceedings had before him to the proper court before which the defendant is subject to be tried; and among the papers required to be thus certified and transmitted by him is the bail-bond of the defendant. Code Crim. Proc. art. 314. It is also provided that, "if the proceedings be delivered to a clerk of the district court, he shall keep the same safely, and deliver the same to the foreman of the next grand jury as soon as said grand jury is organized." Id. art. 315; *Kerry v. State*, 17 Tex. App. 179. The purpose of this evidence, or these certified proceedings, is to furnish such information to the grand jury as came to the knowledge of the examining court. We are of opinion the proposed evidence was admissible to show that the grand jury, by the use of reasonable diligence, might have known the Christian name of Dodd, the alleged injured party. "It is a well-settled rule that, when the grand jury could have ascertained the name of the owner of stolen property by the use of reasonable diligence, it is their duty to do so, and, failing in this duty, a new trial should be granted." *Langham's Case*, 26 Tex. App. 533, 10 S. W. Rep. 113; *Willson, Crim. St.* § 1965.

The defendant next introduced the justice, H. S. HOLMAN, who testified that he made the entries on the docket at the time they purport to have been made, to-wit, August 6, 1885, and that he then had the complaint before him, and made the entries on the docket from the complaint, and that he kept a correct docket, and that, while he had no personal recollection of the transaction, he knew, from the entries on the docket, which were in his handwriting, and made by him at the time, that the complaint was signed "S. W. DODD." The court held this evidence inadmissible because the witness, after examining the docket, could not testify from his personal recollection. We are of opinion the court erred in this ruling. The testimony was ad-

missible under the well-established rule with regard to writings which may be used to assist memory, viz.: "Where the witness recollects having seen the writing before, and though he has now no independent recollection of the facts mentioned in it, yet he remembers that, at the time he saw it, he knew the contents to be correct." 1 Greenl. Ev. § 437. For error in excluding the evidence we have discussed, the judgment is reversed, and the cause remanded.

LOPEZ v. STATE.

(Court of Appeals of Texas. Jan. 23, 1890.)

THEFT—EVIDENCE—INSTRUCTIONS.

1. On indictment for theft, the evidence showed that a horse was stolen from its range, and that at about the same time defendant and others were seen there; that, soon after, defendant and his companions were seen in a town with several horses, defendant riding the horse described in the indictment, and one of his companions riding another stolen horse; that the companion offered to sell the horse that defendant was riding; and that defendant immediately exclaimed, "If you sell this horse, I want my horse back." The companion had been convicted of theft of the horse in question. *Held*, that defendant could not be convicted of driving a horse from its range with intent to defraud the owner, under Pen. Code Tex. art. 749, as the evidence showed that, if guilty at all, he was either the guilty agent who took the horse, or was guilty as a principal by acting with his companion in the taking, and could not be convicted of a different crime.

2. It was error to refuse to permit defendant to prove by the sheriff that, immediately upon being informed of the cause of his arrest, he told the sheriff, in explanation of his possession of the alleged stolen horse, that he traded another horse for it with his companion, and that the latter was present, and assented to the statement.

3. The court instructed as follows: "Evidence of the theft and possession of another animal by the defendant at the same time and place as that where it is testified the animal in question was lost or missing has been admitted, and you are instructed that the object of this testimony * * * is to explain the intent with which the animal in question was taken if taken, and not as proof of the taking of the animal charged." *Held* obnoxious to the objection that it assumes as a fact that the evidence established the contemporaneous theft of another horse.

Appeal from district court, Uvalde county; T. M. PASCHAL, Judge.

Indictment for theft. The proof shows, in substance, that Cagnion's certain horse was stolen from its range about the time alleged in the indictment. It shows, in the same connection, that Sanchez's horse, which ranged with Cagnion's horse, was taken at the same time. One Campo, one Reyes, and defendant were seen on the range of the said horses about the time of the theft. Subsequently the three parties named, in possession of the said horses and other horses, were seen in the town of Uvalde. Campo offered to sell the Cagnion horse (the one described in the indictment,) which defendant was riding at that time. When Campo offered to sell the said horse, defendant said to him: "If you sell this horse, I want my horse back." The three parties were then arrested, and subsequently Cagnion and Sanchez recovered their said horses. When arrested,

the parties were not told why they were arrested, but about four hours afterwards the sheriff told them he suspected them of being horse-thieves, and arrested them for that reason. Defendant thereupon proposed to prove by the sheriff that he at once told the sheriff that he traded another horse to Campo for the sorrel horse, and that Campo, being present, assented to this statement. The court instructed the jury as follows: "Evidence of the theft and possession of another animal by defendant at the same time and place as that where it is testified the animal in question was lost or missing has been admitted, and you are instructed that the object of this testimony * * * is to explain the intent with which the animal in question was taken, if taken, and not as proof of the taking of the animal charged."

Baker & Powell and De Montel, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. Three parties were separately indicted for the theft of the horse involved in this prosecution. One of them, to-wit, one Pedro Campo, was convicted of the theft of said animal; and on appeal the judgment of conviction in his case was affirmed by this court at its last Tyler term.¹ Our recollection is that the facts on that appeal were, if not identically, substantially the same as submitted on this appeal. In this case, this appellant has been convicted, not of the theft *per se* of the animal, as was Campo, but of a different offense,—that is, of willfully driving the animal from its accustomed range without the consent of the owner, and with intent to defraud the owner thereof, as provided for in article 749 of the Penal Code. In our opinion, the facts proved do not warrant a verdict and judgment of conviction for willfully driving an animal from its accustomed range, as provided by article 749 of the Code, and that the court erred in submitting that issue to the jury, upon the facts in the case. Defendant, if guilty at all under the facts, was either the guilty agent who took the horse himself, or he was guilty as a principal by acting with the thief Campo in the taking. If defendant was guilty only as a principal from his connection and acting together with Campo, then, if Campo's crime was theft of the animal, defendant's must have been the same. He could not, as a principal, be guilty of a different crime from that of the actual taker. Trial courts are not authorized to charge the jury on a phase of case not presented in the evidence. *Spoone-more v. State*, 25 Tex. App. 358, 8 S. W. Rep. 280.

We are of opinion that the court erred in refusing to permit the defendant to prove by Baylor, the sheriff, what his statements to the sheriff were relative to and explanatory of his (defendant's) possession of the animal. Defendant had not been informed that

he was suspected or charged with the theft of the horses until so informed by Baylor; and the statements proposed to be proved were immediately made by defendant, to the effect that he had traded another horse to Campo for the alleged stolen horse. He also proposed to prove by the same witness, in connection with these statements, that Campo was present, and heard and assented to said statements. *Taylor v. State*, 15 Tex. App. 856; *Roberts v. State*, 17 Tex. App. 82; *Heskew v. State*, Id. 162; *York v. State*, Id. 441; *Moreno v. State*, 24 Tex. App. 401, 6 S. W. Rep. 299; *Field v. State*, 24 Tex. App. 422, 6 S. W. Rep. 200; *Willson*, Crim. St. § 1800.

We are also of opinion that the ninth paragraph of the charge is obnoxious to the objection that it assumes as a fact that the evidence established the theft and possession by defendant of another animal at the same time and place that the animal in question was stolen. Judgment reversed, and cause remanded.

BENNETT *et al.* v. KIBER *et al.*

(Supreme Court of Texas. March 4, 1890.)

EXECUTION SALE—EXECUTORS AND ADMINISTRATORS—EVIDENCE—HARMLESS ERROR.

1. Where land sold upon a judgment recovered by an executor is bid in by him at execution sale, and by mistake the sheriff's deed is made out to the heirs of the testator, the land becomes an asset of the estate, and the fact of the mistake may be shown in a subsequent suit between the devisees of the testator and parties deriving title from the executor.

2. In such suit, it is proper to refuse to compel the executor to intervene.

3. In such suit the executor may testify to the facts with regard to the purchase at sheriff's sale.

4. In such suit, permitting the executor to testify that he paid taxes on the land after he bought it is harmless error.

5. Where one of the two executors of an independent will, after qualifying and executing two deeds, refuses to have anything more to do with the estate, the remaining executor may be treated by creditors of the estate as sole executor.

Appeal from district court, Brazoria county; WILLIAM H. BURKHART, Judge.

W. S. Brooks and Geo. W. & F. J. Duff, for appellants. *L. R. Bryan and Eugene J. Wilson*, for appellees.

HENRY, J. This suit was instituted by appellants on the 30th day of April, 1888, to recover 3,454 acres of land lying in Brazoria county. Plaintiffs alleged that they owned the land as devisees in the last will of Sarah A. Wharton, who, they charge, died in the year 1878, having named J. P. Bryan and J. W. Harris executors of her will. The petition alleges that the will was an independent one, and was duly probated, and that both of the executors qualified as such; that afterwards a creditor of the estate sued J. P. Bryan as executor of said will, and recovered against him a judgment for money, under which the land in controversy was sold to the vendor of defendants; that both of the executors were acting when said proceedings

¹ No opinion filed.

were had, though only one of them was made a party to them; that the land was sold under execution for the grossly inadequate price of \$190, when it was then worth the sum of \$7,000; that the sacrifice of the property was caused by frauds patent upon the face of the proceedings, and by combinations at the sale which prevented fair competition,—of all which defendants had notice. The petition charges that said sale was made on the 8th day of July, 1881; and plaintiffs offer to refund to defendants the price bid at the sale, with interest, and also such other amounts as to the court might seem equitable. Plaintiffs prayed for the recovery of the land, and for damages, and for the cancellation of said judgment and of the deed made to the purchaser at the execution sale, as well as for general relief. Defendants answered by a general denial, and specially denied that J. W. Harris ever qualified as executor, and charge that, if he did so qualify, he had renounced and abandoned such executorship before said judgment was rendered, leaving said Bryan sole executor at the date of said judgment. Defendants further pleaded that plaintiffs and intervenors were barred in equity by their acquiescence and long delay in bringing suit. Defendants also alleged that on the 12th day of November, 1879, J. P. Bryan, as sole executor of said will, recovered a judgment for money against one A. C. Herndon as independent executor of the will of A. H. Herndon, for the benefit of said estate, for the sum of \$412.35 and interest, with foreclosure of a mortgage on the land in controversy; that, at a sale made on the first Tuesday in January, 1880, by virtue of an order of sale issued from said judgment, the said J. P. Bryan, acting in behalf of the estate of Sarah A. Wharton, purchased said land for the sum of \$425, and the purchase money was paid by allowing it as a credit on said judgment; that, in addition to the aforesaid judgment, the estate of Sarah A. Wharton was otherwise largely indebted. Defendants further allege that the officer who made the sale, by mistake in making his return thereof, and in executing his deed for the land, recited that the bid was made for the heirs of Sarah A. Wharton, and made the deed to said heirs. Defendants charge that through proper and regular proceedings a judgment was rendered against said Bryan as sole executor, and that at execution sale thereunder the land was bid off by one D. P. Carroll, by whose request the sheriff's deed was made to one H. Masterson, who paid the amount of the bid, and subsequently conveyed the land to said Carroll. Defendants allege that they are innocent purchasers of said land from said Carroll. Plaintiffs excepted, and, in reply to the answer they say that it is not true that the land was bid in for the estate of Sarah A. Wharton; but they aver that plaintiffs were the purchasers at the sale, and that they took the land by purchase at said sale, and not by devise, and that said land never in fact became the prop-

erty of the estate in the hands of J. P. Bryan as executor. They allege that at the date of the last-mentioned sale the estate was solvent, having assets much greater in value than required to liquidate its indebtedness. The reply further alleges that, if the estate ever acquired any interest in the land, it was a mere equitable interest, uncertain in its character, and not subject to sale under execution. Other devisees under the will of Sarah A. Wharton intervened, and adopted the pleadings of plaintiffs. Plaintiffs filed in the cause a motion asking the court to require of J. P. Bryan, as executor, to intervene in the cause for the protection of the interest of the estate of his testatrix, and, in case he refused to appear and plead, that the court appoint a receiver to perform that service for the estate. This motion was overruled. The cause was tried without a jury, and a judgment was rendered in favor of the defendants.

The plaintiffs excepted to so much of the answer as charged that the land, when it was sold under the execution in favor of J. P. Bryan as executor, was purchased by him, as executor, for the benefit of the estate, and that the return of the sheriff, showing that the sale was made to the heirs of Sarah A. Wharton and his executing to such heirs the deed for said land, were caused by the mistake and inadvertence of the officer. The court overruled the exception, and that ruling is now assigned as error. We think that the facts attending the sale were proper subjects of pleading and proof. The fact that the deed was made to the heirs of Sarah A. Wharton did not divest the land of its character as an asset of the estate in the hands of the executor. It simply took the place of the debt in satisfaction of which it was acquired, and did not require to be inventoried.

Appellant complains of the action of the court upon his motion to compel the executor to intervene in this suit, or to appoint a receiver for that purpose. We do not think that the court could have properly ruled otherwise than it did on the motion.

Appellants complain that "the court erred in admitting in evidence, over objections of plaintiffs, the deed from W. H. Sharp, sheriff, to H. Masterson, and dated August 5, 1881, because the judgment under which said sale was made was against only one of two joint executors, and because defendants had failed to show that said land was the property of the estate of Sarah A. Wharton in the hands of J. P. Bryan, executor, and because, if said estate of Sarah A. Wharton ever had an interest in said land, it was such an undetermined, equitable right or interest as was not subject to levy and sale under execution, and because the proof showed that said Masterson was not the purchaser at said sale." The evidence in regard to John W. Harris was that "he had declined to act as executor, and said he never wanted the position; that he did not have time to attend to it, and did not want to have anything to do with it." He qualified, however, by taking

the required oath as an executor, and joined in the execution of two deeds. When he executed the last one, in the year 1879, he declared that he would not have anything more to do with the estate, and never did. It has been repeatedly held by this court that, when one of two executors of an independent will refused to qualify or act as such, the other one was authorized to act as if he was the sole appointed executor. *Johnson v. Bowden*, 43 Tex. 670; *Anderson v. Stockdale*, 62 Tex. 54; *Mayes v. Blanton*, 67 Tex. 245, 3 S. W. Rep. 40. See articles 1936, 1937, Rev. St.

The interest of the estate in the land was subject to execution, and the deed from the sheriff to Masterson was admissible as a link in the defendants' chain of title. There was no error in permitting the executor to testify to the facts with regard to the purchase of the land at the sheriff's sale under the judgment against the estate of Herndon. His testimony to the effect that he paid taxes upon the land after he purchased it could not have prejudiced defendants. The evidence did not affect any material issue in the case.

The admission of evidence that the executor had paid taxes on the land, if an error at all, was an immaterial one. We find no error in the proceedings, and the judgment is affirmed.

WOODWARD v. McNEILL.

(Supreme Court of Texas. Nov. 19, 1889.)

MARRIED WOMEN—PROPERTY RIGHTS—INSTRUCTIONS.

In an action by a married woman to recover a piano, on the ground that it was her separate property and had been sold by her husband to defendant without her knowledge or consent, the jury were instructed to find for plaintiff if the piano was owned by her before her marriage, unless they should find for defendant under other instructions to be given. They were then told that plaintiff could not recover if, with knowledge of the facts, she accepted any of the money paid on the piano, without returning, or offering to return, the money so received to defendant. They were then told that receiving the money merely would not estop plaintiff, unless she knew of the sale at the time. *Held*, that error could not be predicated of the charge on the ground that it did not set forth in clear and distinct terms, and in such a manner as not to confuse or mislead the jury, the conditions on which plaintiff would be entitled to recover.

Commissioners' decision. Appeal from district court, Live Oak county; D. P. MARR, Judge.

Action by Mary Woodward against Toll McNeill, to recover a piano which she claimed was her separate property, and had been sold by her husband in her absence, and without her knowledge or consent, to defendant. From a judgment for defendant and an order denying a motion for a new trial plaintiff appeals.

Elias Edmunds, for appellant. *J. M. Eckford*, for appellee.

COLLARD, J. Appellant's third assignment of error, that "the court erred in over-

ruling plaintiff's motion for a new trial," is too general, and cannot be considered. His second assignment is abandoned, because the special charge asked and refused is not found in the record. Her first assignment of error is the only one that can be considered. It does not complain of the principles charged by the court as the law of the case, but complains that "the court did not make separate and distinct the circumstances under which the plaintiff would be entitled to recover, and those under which the defendant would be entitled to recover," but blended the two together in such a way as to distract the minds of the jury and mislead them as to the law applicable to the case. We do not find the charge subject to the criticism made. The jury are instructed to find for plaintiff if the piano was owned by her before her marriage, unless they should find for defendant under other instructions to be given. In the next paragraph of the charge they are told that she cannot recover if, with knowledge of the facts, she accepted the money paid on the piano, or a part of it, without returning or offering to return to defendant the money so received by her, although she had not authorized the sale. Then the jury were told that receiving the money merely would not estop plaintiff, unless she knew of the sale at the time. We think the conditions upon which the plaintiff would be entitled to recover are set forth in clear and distinct terms, and in such manner as not to confuse or mislead the jury. There is nothing abstruse or difficult to understand in the charge. A jury of ordinary intelligence would comprehend it without any trouble. The error assigned is not well taken, and we conclude the judgment ought to be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

LOVE v. BREEDLOVE.

(Supreme Court of Texas. Jan. 24, 1890.)

APPEAL—FINDINGS OF FACT—NEW TRIAL.

1. Where no fact is shown by the record which will enable the supreme court, as matter of law, to declare that a grantee in a deed had notice of a pre-existing mortgage when the deed was executed, the same weight will be given to the finding of the lower court on the question of notice that would be on any other question of fact.

2. An application for a new trial, based on surprise at the absence of a material witness, will be denied where it appears that the party making the application took no steps to enforce the attendance of the witness, nor had any reasonable ground to believe that he would attend, and made no objection to going to trial in his absence.

Appeal from district court, Washington county.

Trespass to try title to a lot in Brenham, by C. R. Breedlove against Angelina Love, who claimed the lot as her homestead, and based her defense on the ground that the deed from her husband and herself under which plaintiff claimed, while absolute in form, was in

fact only a mortgage or deed of trust to secure a debt of defendant's husband, and that it was void because given upon the homestead. The cause was tried before the court, and judgment was rendered for plaintiff, from which defendant appeals.

J. T. Sweartingen, for appellant. *Bassett, Muse & Muse*, for appellee.

STAYTON, C. J. Appellant and her husband conveyed the property in controversy to Scott Porter, by a deed executed in form and manner sufficient to convey the homestead, which recited consideration paid. Appellee claims through a mortgage with power of sale, executed by Scott Porter, after appellant and her husband had conveyed to him. Appellant now claims that the property was the homestead of herself and husband at the time the conveyance was made to Porter, and that the instrument through which this was done was understood by the parties to be only a mortgage; that the property was a homestead; and that appellant and her husband remained in possession after the deed was made to Porter; and that she so remained until this action was brought is fully shown. It must further be conceded, under the uncontroverted evidence, that appellee is a purchaser for valuable consideration; and, if he purchased without notice that the conveyance to Porter was not on its face what it purported to be, then he is entitled to protection, whatsoever may have been the agreement or understanding between Porter and appellant and her husband. No facts are shown on which the conveyance to Porter could be deemed a mortgage, for there was no indebtedness shown to sustain it. If the deed was not what on its face it purported to be, from all the evidence, it must have been the purpose of appellee and her husband to place the title to the property in Porter, in order that he might raise money on it as a security for the benefit of the husband, or to indemnify him in case he thereafter assumed liabilities on his account. There is some evidence tending to show that some such purpose may have existed, but on the entire evidence the court below found, if the deed to Porter was not intended as an absolute conveyance, that appellee had no notice of that fact at the time of the transaction through which his right came. The evidence, we think, shows that appellee knew that the property in controversy was the home of Love and family at the time the deed was made to Porter, and that they were in possession at the time the mortgage was executed by Porter; but, as has been heretofore held, these facts were not sufficient in the face of the absolute deed to Porter to affect appellee with notice of any secret agreement between Love and wife and Porter. *Eylar v. Eylar*, 60 Tex. 315; *Hurt v. Cooper*, 63 Tex. 362; *Heidenheimer v. Stewart*, 65 Tex. 321. There is no fact shown which enables us, as matter of law, to declare that appellee had notice of any such state of facts as appellant alleges existed when the

deed to Porter was executed; and, in the absence of this, the same weight must be given to the findings of the judge on the question of notice that would be on any other question of fact.

An application for new trial, in part based on surprise at the absence of Scott Porter, by whom appellee expected to prove that appellee knew that the conveyance to Porter was as claimed by her, was overruled, and this is assigned as error. The record does not show that appellant had taken any steps to enforce the attendance of Porter as a witness, or that she had any reasonable ground to believe that he would attend, nor that any objection to going to trial in his absence was made. Under this state of facts, a surprise, on account of the non-attendance of the witness, could not be claimed. Accepting the findings of fact as true, there is no error in the judgment, and it will be affirmed.

INTERNATIONAL & G. N. RY. CO. v. GARCIA.

(Supreme Court of Texas. Jan. 14, 1890.)

RAILROAD COMPANIES—PERSONS ON TRACK—INSTRUCTIONS.

1. Deafness of one about to cross a railroad track imposes on him increased vigilance in the use of his eye-sight; and those operating a train may, in the absence of knowledge, and of any fact that would arouse their suspicions, assume, on seeing him, that he is in the possession of all his senses, and using them for his own safety.

2. An instruction that the proximate cause of the injury was not the trespass or negligence of plaintiff in going upon or remaining on the track, but the failure of the company's servants to stop or slacken the train when plaintiff's danger was discovered, if in time to prevent the accident or lessen the injury, is misleading, in view of the fact that, though plaintiff was discovered in time to have stopped the train before it reached him, his deafness, and the consequent exposure to danger, were not known till after the accident.

3. It was error to refuse to charge that, if the company's servants used ordinary care to prevent the accident as soon as they became aware, or had reason to believe, that plaintiff would not probably leave the track in time, and that, when they became aware that plaintiff would not move off the track, they used all their efforts, but were unable to stop the train in time to prevent the injury, they were not guilty of negligence.

Error from district court, Webb county.

Action by Evaristo Garcia against the International & Great Northern Railway Company to recover for personal injuries. There was a judgment for plaintiff, and defendant brings error.

J. O. Nicholson, for plaintiff in error. *C. A. McLane, R. L. Randall*, and *A. Winslow*, for defendant in error.

STAYTON, C. J. Appellee's evidence, in so far as necessary to be stated, is as follows: "I do not remember when I was hurt, as my memory has not been good since I was hurt. I was coming from where I had my flocks to town when I was hurt. I had a defect in my hearing at the time I was hurt. I was deaf at the time I was hurt. The train took me up, and took me home. The doctor cut my leg off. I was crossing the railroad at the time I was

hurt. It was at a road crossing. I looked to the right and left along the track when I came up to the track, but I did not see any train. I was only on the track a moment before I was struck down. I was just kicking my toe while crossing the track. I was traveling a road which crossed the railroad at the time I was hurt. People travel on that road on foot and horseback, and in wagons. It is called the 'Road of the Eagle.' On cross-examination: "There were boards between the rails at the place where I was crossing. The carts do not cross much there now, but those who have lands along there use it some. It is abandoned by the people who have carts. It was the old Eagle Pass road, which at that time had been abandoned. It was less than half a league to the nearest house. I was hurt about 11 o'clock A. M. I was coming to town at the time I was hurt. The country along where I was hurt is called a plain, but there are a few mesquite trees; the railroad is clear, but there are some mesquite trees on both sides. The railroad is straight along there where I was hurt. As a prudent man, I looked along the track in both directions as far as I could see, but I saw no train. Looking to the right, coming this way, there were some mesquite trees which could have impeded my sight. I turned this way, and saw something like a figure; and I was knocked down. I had been on the track a quarter of a minute before I was struck. I was shaking my foot, trying to get a stick out of my shoe, while I was walking along. I was kicking my foot against the cross-tie to get the stick out. I was deaf at the time, just as I am now. I cannot hear anything at all now. I heard the sound that was passing over me after I was already struck down. I was hurt within the corporate limits of the city of Laredo. I do not know where the limits are. I cannot read or understand the English language." Redirect. Plaintiff testified: "I looked up the track, in the direction the train came, as far as the round-house, and could see no train at all. It looked like there was some engines around the round-house. As well as I can judge, it was one league from the place where I was hurt to the round-house, although I am not a good judge. It was not more than a league to the house. I do not know how many Eagle Pass road crossings there were at the time I was hurt. I only know of one, and I was hurt at the main crossing." Recross by defendant. He said: "It was at the main crossing of the Eagle Pass road where I was hurt. It was not abandoned at the time, and it is not abandoned yet; and it is still used by the public. The round-house is the nearest house to the road crossing. It is less than half a league."

C. A. McLane, a witness for plaintiff, testified: "I am one of plaintiff's attorneys in this case. I went out with plaintiff and Mr. Winslow and Mr. Randall, my associate counsel in this case, to the spot where plaintiff said he was hurt. This spot is about three-

fourths of a mile north of the round-house. The Texas-Mexican Railway crosses the L. & G. N. track two hundred yards north of where plaintiff said he was hurt. It was on the old Eagle Pass road. I and Mr. Winslow stepped the distance from where the plaintiff says he was hurt to a stop sign fifty yards south. On the other side of the Texas-Mexican crossing there was another stop sign. There was a plain stretch of track, where there was no obstruction to the view of the track, for a distance of seven hundred and fifty yards south from the point where plaintiff said he was hurt. There is a curve in the track about two hundred yards north of the round-house. It was possible for a man on a train, with due caution, to see a man on the track at the point where plaintiff said he was hurt from said curve."

The train which injured appellee was moving north; and the evidence shows that the track of the Texas-Mexican Railway, where it had crossed the railway of appellant, had been taken up.

Only two other witnesses testified to the manner in which appellee was hurt; and their testimony was, so far as necessary to be stated, as follows: Joseph Miller, a witness for defendant, testified, in substance, as follows: "I am a locomotive engineer. On the 10th day of September, 1885, I was running an engine on the L. & G. N. road from Laredo to San Antonio. On the morning of the 10th, about 9 o'clock, I started from the depot at Laredo as engineer on a freight train of cars north-bound for San Antonio. There were about sixteen cars in the train, besides the engine and caboose. The cars were heavily laden with cattle. Augustus Smith was conductor. When I had gone about two and a half or three miles on the road north of said depot, I saw a man ahead of me on the track—about a half mile—walk on the track towards the north. As soon as I saw him, I blew the whistle of the engine to give him warning that the train was approaching him. I kept blowing the whistle until the train had gotten within three hundred or three hundred and fifty yards of the man on the track; and, seeing that he did not get off the track, I whistled a signal for brakes to be applied. The brakes were applied, and I at the same time reversed the engine to stop the train, and the train was stopped as quickly as it was possible to do. When the train got within fifteen feet of the man on the track he looked back, and I saw his face as he looked back. Just as soon as he looked back, he began to walk off the track to the right-hand side; but he walked slowly and deliberately off the track, but did not get off in time, because before he had gotten entirely off the track the engine struck him, and knocked him down. When I passed him, he was lying in the ditch, about 8 feet from the track. I stopped the train as quick as I could. The man was put in the caboose, and I backed the train to the depot in Laredo, and turned the man over to Mr. Campbell, the station agent. When I backed the train to where the

man was lying on the ground, and before we put him in the caboose, I asked him why he did not get off the track when I whistled. He said nothing, but put his hand up to his ear, and made a motion which to me indicated that he could not hear. At the place where the injury happened the railroad track was in first-class condition. The track is straight for over half a mile back from the point where the injury occurred towards Laredo, and north towards San Antonio, for four or five miles. The injury occurred on a straight track. The track was level and smooth. The right of way along said track was open and clear, with probably here and there a small mesquite bush on it, but not enough to obstruct the view along said track; and the country on either side of the track where the injury occurred has mesquite brush on it, but not thick. There were no houses or public improvements or streets near the place where the injury occurred. The track was in plain and unobstructed view for the distance I have mentioned,—that is, half a mile on one side, and four or five miles on the other side. The plaintiff was about a half mile ahead of the train when I first saw him walking on the track. He was just walking slowly along in the direction the train was moving. When I first saw him, I blew the whistle several times, and until I got near him, to warn him of the approach of the train; and when I got near him I whistled 'down brakes,' and the conductor and brakemen applied the brakes, and at the same time I reversed the engine to stop the train, and the train was stopped as quickly as possible. I do not know the plaintiff personally. The first time I ever saw him, that I know of, was the day he got hurt. I do not know, of my own knowledge, whether, at the time plaintiff got hurt, he was suffering from any defects in his hearing or not. I know that after he got hurt, and I asked him why he did not get off the track when I whistled, that he acted in such a way, by putting his hand to his ear, as to give me to understand he was deaf." Cross-examined: "When I first saw plaintiff on the track, my engine and train were running at about eighteen or twenty miles an hour, and I was about a half a mile from him, and without what is known as the 'yard limits.' My engine and train were provided with the best and latest improved brake appliances now in general use on the freight-cars running on the great railway trunk lines in the state of Texas. The engine had a whistle and a bell, which were blown and rung; also, a hand brake. The cars on the train had hand brakes. The Mexican National crossed defendant's track about 2½ miles north of Laredo depot, but about that time the Mexican National track was torn up; and on the 10th day of September, 1885, said crossing was not in use, and trains of defendant's road did not have to stop there." Augustus Smith testified as follows: "During September, 1885, I was conductor of the train of defendant's road. On September 10, 1885, * * * the train

on which I was conductor on said day left Laredo, September 10, 1885, bound north. I was on the fourth or fifth car from the engine, and saw a man walking on the track, going in the same direction the train was moving. When the train got within a reasonable distance of the man, the engineer whistled for him to get off the track. The man was in the middle of the track going north,—same way the train was going. The man was deaf, and, of course, did not hear the whistle. When the train got near the man, the engineer whistled 'down brakes' to draw the man's attention; but the man could not hear, and the engine struck him, knocked him down, and run over his foot. The condition of the track where the man was hurt, first-class. It was straight, and the country on each side was open. To the north, the track was straight for several miles; to the south, for half a mile. The country was open, with a little mesquite in it, but not much. There were no houses, streets, or public improvements of any kind in that vicinity. The right of way was clear all along the place where the accident occurred, except here and there a mesquite bush which had grown in the last year or two, but not enough to obscure the view of the train. To the north, I could see several miles along the track. To the south, about half a mile, the track was in plain and unobstructed view. When I first saw plaintiff on the track, he must have been a half a mile ahead of me, walking on the track. The whistle was sounded to warn him of the approach of the train; and, when the man did not get off, the engineer whistled for brakes, and the brakes were applied to stop the train, to keep from running over him. When the whistle sounded, plaintiff was about four hundred yards ahead of the train; and when the whistle sounded 'down brakes' the man was about one hundred yards ahead of the train. I did not know plaintiff before he was hurt. Never saw him before."

If appellee's statement of the manner in which he was injured be accepted as true, then a case probably exists in which it might be held that his own negligence did not contribute to the injury; but it is difficult to believe that his version of the transaction is correct. He states that he was injured while crossing the track, on which he was not more than 15 seconds,—time ordinarily more than sufficient to enable one no way disabled to cross a railway track; that he looked in the direction from which the train came before entering on the track, and saw no train approaching, although he could and did see to the round-house, which, according to his own and other testimony, must have been distant at least three-quarters of a mile. His petition seeks a recovery on the ground that he was injured while crossing the railway track at a public crossing, and, as evidence of negligence on part of appellant, alleges that it was the duty of appellant to stop its train at the point where its track was crossed by the track of the Texas-Mexican Railway Com-

pany, which, however, is shown not to have been necessary, because that track had been taken up before that time, and no longer used; but, had this not been so, that point of crossing was about 200 yards north of the place where appellee was injured.

The charge of the court was in the main based on the theory that appellee was walking on the track, as stated by the other witnesses, but the charges were not strictly applicable to the uncontroverted fact of the case. That appellee was deaf is a conceded fact; and, in determining whether the servants of appellant used such care as was incumbent on them, the jury should have been given to understand, in the absence of knowledge on their part, that appellee was deaf; that the conduct of such employees should be considered as though appellee was not thus deficient, and their care measured from that stand-point.

If appellee, as he states, was attempting to cross at a public crossing, he was not a trespasser, and it was incumbent on the employees of appellant, in such case, to exercise at least ordinary care for his protection; and what would be ordinary care in case of exposure to danger of a man possessed of all his faculties would not be such care as to one who was deaf, and therefore unable to hear the warnings given of the approaching train. In either case, the supposition might be reasonably indulged and acted upon that appellee, having ability to do so, would leave the track when warned of his danger; but the act which would warn the man whose hearing was unimpaired would not give warning to the deaf man. In the absence of knowledge to the contrary, or of some fact which ought to arouse suspicion that this is not true, employees operating a railway train may assume that a man seen at a public crossing, or elsewhere on the track, is in possession of all his senses, and that care for his own safety will induce him to use them, and to act on the warnings conveyed through them. On the other hand, "deafness, so far from excusing one for a failure to use his eye-sight, rather imposes upon him the duty of increased vigilance in the employment of that faculty; and, when contributory negligence is charged, it is, as a rule, not sufficient for the plaintiff to urge his deafness by way of excuse. It may be of the very essence of the plaintiff's default that, being deaf, he put himself in a position where his deafness would especially expose him to injury. The rule is, *caveat surdus*." Beach, Contrib. Neg. § 66; Railway Co. v. Smith, 62 Tex. 254.

Among other like charges, the court gave the following: "(4) If you find from the evidence that the plaintiff was walking on the track of defendant company's railway when he received the injury, if he received any, and that he may have been wrongfully on the track, or, being rightfully there, may have negligently remained upon it until too late to avoid collision, nevertheless, if the

company's servants managing the train discovered the danger to which the plaintiff's negligence was exposing him in time to prevent the accident, or at least to lessen the injury by the exercise of ordinary care or diligence on their part, but negligently failed to do so, the company is liable in damages. The negligence of the company in failing to stop or sufficiently slacken the train when the danger was discovered, and not the trespass or negligence of the plaintiff, was the proximate cause of the injury, if any injury he received, under such state of facts." In view of the facts, this charge was misleading, if not erroneous. Appellee, being deaf, was exposed to danger, notwithstanding all the warnings which were or could be given to him, from the time he entered upon the track, and he was discovered in time for the employees to have stopped the train before it reached him; but it was not discovered until after the accident that his condition was such as to render that care to protect him which would ordinarily be sufficient to protect a man similarly situated insufficient in his case.

Appellant asked the following charges, which were refused: "The jury are instructed that if you believe from the evidence, if any, that, when defendant's employees in charge of the train became aware, or had reason to believe, that plaintiff would not probably leave the railroad track in time to avoid collision with said train, that then they used ordinary care to prevent such collision, then you will find in favor of defendant. The jury are instructed that if they believe from the evidence that, as soon as the agents and employees of defendant became aware that plaintiff would not move off the railway track, they used all the efforts in their power, and within their means and ability, to stop the train, and prevent the same from striking plaintiff, but that, notwithstanding such efforts, they were unable to stop the train in time to prevent the injury, then said agents and servants were not guilty of negligence, and your verdict must be for defendant." These charges were applicable to the case made by the facts, would have called the attention of the jury to a vital issue in the case, and the first was strictly correct, even if appellant was injured at a crossing, and they both conceded as much as appellee could ask, if he was injured while walking on the track at a place other than a crossing. If appellee was injured while walking on the track, as evidence for appellant tends to show, in the absence of all evidence tending to show that he had permission or right to be there, it must be held that he was injured while trespassing on appellant's track; and there is no single fact, if that testimony be true, to relieve him from the charge and effect of contributory negligence. By "contributory negligence" we understand to be meant such act or omission on the part of a plaintiff as an ordinarily prudent man would not do or suffer under similar circumstances, which, concurring with a negligent act or omission of a

defendant, becomes the proximate cause of an injury. Can any one suppose that any prudent man, bereft of the sense of hearing, would have pursued, under the same circumstances, the course of conduct attributed to appellee by witnesses for appellant? He must have known the danger of his course, if he had ordinary intelligence; but, if appellant's witnesses tell the truth, he used no precaution for his own safety. It would be a harsh rule which would fix liability on a defendant for a failure to use more care for the safety of a plaintiff than he thought necessary himself to use. If the accident occurred as witnesses for appellant state, there can be no doubt that, by the exercise of ordinary care, appellee could have avoided it. In *Railway Co. v. Smith*, 52 Tex. 185, it was said that "the law presumes that a person walking upon a railroad track will leave the same in time to prevent injury from an approaching train of which he has knowledge, or should have, by the ordinary use of the senses of hearing and seeing; and the managers of the train may act upon this presumption." It was for the jury to determine what the facts were, and charges should have been given with reference to the facts in evidence.

The effect of contributory negligence on a plaintiff's right to recover has been recognized in all the cases passed on by this court in which it was involved, and the rule fixing liability or denying it on the basis of comparative negligence has been condemned; but there may be expressions in some of the opinions from which it may be inferred that this court intended to hold that, notwithstanding the existence of contributory negligence on the part of a plaintiff, a defendant may be liable for a failure to use ordinary care. We do not understand such a ruling to have been intended in any of the cases involving injuries on railway tracks or elsewhere, but understand the rule to be that contributory negligence on the part of a plaintiff defeats his action, if based solely on negligence; but that, in determining whether contributory negligence exists in a given case, the age, intelligence, and capacity of a plaintiff must be looked to, as well as his act or omission at the time of the accident. What state of facts will give right to a recovery when a plaintiff is shown to have been guilty of contributory negligence, it is not now necessary to consider. We do not think that the charges gave the jury a proper conception of the law which should have governed them; that the charges referred to should have been given; and that a new trial should have been granted on the facts; and for these reasons the judgment will be reversed, and the cause remanded.

WOOD v. CITY OF GALVESTON.

(*Supreme Court of Texas. Feb. 18, 1890.*)

STREET IMPROVEMENTS—PLEADING—WRITS—JURISDICTION OF DISTRICT COURT.

1. The city charter of Galveston authorizes the city to pave and improve streets whenever, by a

vote of two thirds of the aldermen, they may deem it necessary, provided the city pays one-third, and the abutting owners two-thirds, of the cost. *Held*, that a petition by the city to collect of an abutting owner his share of the cost is insufficient to support a judgment by default, if it fails to allege that the two-thirds vote of the aldermen was passed, as required.

2. Since the district courts alone have power to enforce liens against land, they have jurisdiction to foreclose the lien created by the charter for the two-thirds of the cost, though the amount is less than \$500.

3. An affidavit, on a motion to set aside a default on the ground of a defect on the face of the citation, and an annexed citation showing such defect, and alleged to be the citation which was served, are insufficient to overthrow the return of the sheriff showing that no such defect existed.

4. Rev. St. Tex. art. 1228, providing that, in order to compel defendant to plead at the return term, "the citation must have been served at least five days before the first day of such return-term, exclusive of the days of service and return," does not require that the five days be secular days.

Commissioners' decision. Appeal from district court, Galveston county.

Trezevant & Franklin, for appellant. *Geo. P. Finlay*, City Atty., for appellee.

ACKER, J. The city of Galveston brought this suit against Mrs. Ann E. Wood to recover \$458.66, alleged to be one-third of the cost of filling, grading, and paving Twenty-Third street in front of a lot belonging to defendant, and abutting on said street, and to foreclose a lien on the lot for the sum sued for. The petition was filed on the 22d day of May, 1888, and citation was served on defendant on the 29th day of the same month. The court convened on the 4th day of June, 1888; and on the 8th day of that month, the defendant having failed to answer, judgment by default was entered, and the cause passed for the assessment of damages by the court. On the 11th day of June, defendant filed a motion to quash the citation, and set aside the judgment, on the ground that the citation served on her required her to appear at a court to be holden on the first Monday in June to answer a petition stated therein to have been filed on the 22d day of the same month. The motion was under oath; and the copy of the citation attached to the motion, and alleged to be the one delivered to defendant, recited that the petition was filed on the 22d day of June. This motion was overruled; and on the 12th day of June the court assessed the damages, and rendered judgment final for the sum of \$483.12, interest and costs, and that the lien claimed by plaintiff be foreclosed, and the lot sold to satisfy the judgment. On the 14th day of June, defendant filed a motion to set aside the judgment on the ground that the petition shows that "the city council of the city of Galveston has authority to grade, shell, repair, pave, or otherwise improve any street or alley in said city only when, by a vote of two-thirds of the aldermen elected, they may deem such improvement for the public interest, and said petition does not allege that such vote was ever taken or made by said city council," and said petition is therefore insufficient to

support a judgment by default. On the 19th day of June, defendant filed an amended motion, on the grounds that the amount in controversy was not within the jurisdiction of the district court, and that the court had no jurisdiction to enforce a lien created under and by authority of the charter of the city of Galveston. The motions were overruled, and the defendant appealed. The first assignment of error is: "The court erred in holding as sufficient to authorize the judgment by default the citation stating the date of filing plaintiff's petition to be the 22d day of June, 1888, while the term of the court when defendant is cited to appear is stated to be the first Monday in June, 1888." The original citation recited that the petition was filed on the 22d day of May, 1888; and the sheriff's return thereon shows that it was executed on defendant by delivering to her in person a true copy of the original. The motion and affidavit of defendant were insufficient to overthrow the sheriff's return, and the court did not err in so holding. *Randall v. Collins*, 58 Tex. 231; *Gatlin v. Dibrell*, 11 S. W. Rep. 908.

The next assignment of error is: "The court erred in holding as sufficient to authorize the judgment the citation served on defendant on the 29th day of May, 1888, and that said citation was served five days, as contemplated and required by law, before the first day of the return-term, to-wit, the 4th day of June, 1888, and that such service was sufficient in law to compel defendant to appear and answer at a term of the court beginning on the 4th day of June, 1888." Under this assignment, it is contended that the five days prescribed by statute to intervene between the service of citation and the first day of the term to which it is returnable must be five secular days. The language of the statute is: "Art. 1228. The citation shall be served before the return-day thereof; and, in order to compel the defendant to plead at the return-term of the court, the citation must have been served at least five days before the first day of such return-term, exclusive of the days of service and return." Under the act of December 22, 1836, (1 Laws Tex. 201.) which simply provided that the citation "shall be executed at least five days before the return-day thereof," it was held that there must be five intervening days, exclusive of the days of service and return. *O'Connor v. Towns*, 1 Tex. 107. By the act of March 16, 1848, the statute was amended so as to exclude from computation both the days of service and return, in conformity with the decision in *O'Connor v. Towns*; and such has been the statute ever since. From the beginning, the statutes of Texas have declared Monday to be the day for beginning the terms of courts; and we think that, if the legislature had designed that five secular days should intervene between the day of service and the return-day of the writ, the law would so declare. The unvarying construction of the statute has been that service

of citation on Tuesday before the return-day, on the Monday following, is sufficient to require appearance of the defendant at the return-term. To sustain the view contended for by appellant, we think, would be to disregard the long-established construction of the statute, and to add to it, in contravention of the obvious intent of the legislature. *Dickson v. Burke*, 28 Tex. 118; *Williams v. Downes*, 30 Tex. 52.

The next assignment of error is: "The court erred in holding that plaintiff's petition was not insufficient in law to support the judgment, in not alleging that the city council of Galveston had, by a vote of two-thirds of the aldermen elected, indicated that they deemed the improvement in question to be for the public interest." To sustain a judgment by default, the petition on which it was rendered must be good on general demurrer; that is, it must contain averments which in terms, or by reasonable intendment, would admit evidence of every fact essential to be proven to authorize the judgment. The petition in this case contains the following averments: 1. "That, by virtue of its charter, the said city, at the times and dates hereinafter named, was invested with full power and authority to grade, shell, repair, pave, or otherwise improve any street or alley, or any portion thereof, within the limits of said city, whenever by a vote of two-thirds of the aldermen elected, they may deem such improvement for the public interest; provided the city paid one-third, and the owners of the property two-thirds, thereof, except the intersection of streets, which was to be paid by the city alone. Said two-thirds of said costs to be paid by the owners of the property fronting on said thoroughfares, to be assessed on or against said property, and collected by the city, whenever such improvement is completed and accepted by the city council of said city. (2) That the charter of said city provided that the city council, before beginning any such improvement, shall, for the purpose of acquiring the most reliable information practicable of the probable cost thereof, cause an estimate to be made of said probable cost by the city engineer, and report a full list of all fronting lots or fractional lots, with number and size of same, and number of block in which situated, and the names of the owners thereof, and such other information as may be required by the city council, and that said officer shall enter in said list, opposite each lot or fractional lot lying and being on each side of the street, avenue, or alley the improvement whereof is contemplated, one-third of the estimated expense of such work or improvement on such avenue, street, or alley, fronting; adjoining, or opposite such lot or fractional lot; that thereupon the council shall determine whether the said work or improvement should be made, and proceed accordingly; that when said work or improvement is ordered by the council, and shall have been completed, the council shall cause an accurate report of the cost thereof to

be made by said officer; that, as part of said report, said officer shall present a list of the lots or fractional lots lying and being on each side of the street, avenue, or alley so improved, and upon such list of lots or fractional lots, shall be entered, opposite each lot or fractional lot, one-third of the actual cost and expense of such work or improvement on said avenue, street, or alley fronting, adjoining, or opposite such lot or fractional lot; that upon the acceptance and approval of said report and list by the city council said amounts shall be imposed, levied, and assessed by the city council on said lots or fractional lots, respectively; and that the same should be a lien upon the property until paid. (3) That heretofore, to-wit, on the 4th day of April, 1887, the said city council adopted a resolution declaring that Twenty-Third street should be improved by filling, grading, and paving same from avenue K to avenue N, in the city of Galveston, and ordering the city engineer to make a survey and estimate of the cost of said improvement, in accordance with the charter and ordinances." It appears from the provisions of the charter set out in the petition that to authorize the improvement, and fixing one-third the cost of it as a charge against the abutting property, the city council must have declared, by a vote of two-thirds of the aldermen elected, that they deemed the improvement for the public interest; then caused the estimate to be made by the city engineer of the probable cost of the improvement; and then, upon the estimate so furnished by the engineer, the council should have determined upon making the improvement. It appears from the petition that the first step taken by the council was to adopt a resolution declaring that the improvement should be made, and ordering the city engineer to make a survey and estimate of the cost. It is not alleged that two-thirds of the aldermen elected voted at any time to make the improvement, nor is it alleged that the determination to make the improvement was upon the engineer's report and estimate of its cost. It is not even alleged in general terms that the resolution declaring that the improvement should be made was adopted in conformity to the requirements of the charter. It is a familiar principle that the authority conferred upon municipal corporations to exercise the taxing power is to be strictly construed, and must be closely followed. *Burroughs, Tax'n*, 372, 471; *Frosh v. City of Galveston*, 73 Tex. 409, 11 S. W. Rep. 402. We think the requirement of the charter as stated in the petition, that the improvements should not be made unless two-thirds of the aldermen elected should vote therefor, a very important requirement, and a condition precedent to fixing one-third of the cost of such improvement as a charge against the abutting property; and we also think that it should be affirmatively shown that the aldermen had so voted. In the case of *Frosh v. City of Galveston*, supra, it was decided that the engineer's report of the probable cost is a condition pre-

cedent to the exercise of the power to order the improvement made. It does not appear from the petition that that condition was performed, but, on the contrary it does appear that the improvement was determined upon without such report and estimate of probable cost. We think that proof of every act alleged in the petition to have been performed by plaintiff would not sustain the judgment, and that the court erred in refusing to set it aside.

Under the eighth and ninth assignments it is urged that the court did not have jurisdiction of the case, because (1) the amount in controversy was less than \$500; and, (2) the court had no jurisdiction to foreclose a lien created under and by authority of the charter of the city of Galveston. We think the questions here presented have been settled, by previous decisions, adverse to appellant. In the cases of *Roundtree v. City of Galveston*, 42 Tex. 613; *Allen v. City of Galveston*, 51 Tex. 302; and *Adams v. Fisher*, 63 Tex. 654,—the power to create the lien against abutting property for its proportion of the cost of improvements upon the streets, as provided by the charter of the city of Galveston, was recognized and sustained. The district court alone has jurisdiction of suits for the enforcement of liens against land. Because of the insufficiency of the petition, we are of opinion that the judgment of the court below should be reversed, and the cause remanded.

STAYTON, O. J. Report of commission of appeals examined, adopted, and judgment reversed, and cause remanded.

NOBLE v. MEYERS et al.

(Supreme Court of Texas. Feb. 25, 1890.)

INTERVENTION—DEFAULT—JUDGMENT.

Where an intervenor in partition, against whom no affirmative relief is asked, fails to appear, the intervention should be dismissed without prejudice, and a decree that he take "nothing by his intervention" is erroneous.

Appeal from district court, Harris county.
Frank S. Burke, for appellant. *F. M. Poland*, for appellees.

HENRY, J. This suit was brought by all of the heirs of Grace B. Noble, except one, against that one, for partition of land. Appellant intervened, claiming that he and the other heirs of his father, whose names were given, owned an undivided interest of one-half in the lands sought to be partitioned. Plaintiffs replied to the intervention, defending against it, by pleading the proceedings in a former suit as an adjudication against intervenor of the issue of title, and also pleading the statute of limitations of five years, but not praying for any affirmative relief against the intervenor. The intervenor did not appear at the trial, and a decree was rendered that he take "nothing by his intervention," and directing the partition of the land between plaintiffs and defendant.

We think that the proper judgment for the court to have rendered, under these circumstances, would have been to dismiss the intervention without prejudice. An intervenor against whom no affirmative relief is asked by the pleadings of the other parties to the cause occupies so much the position of a plaintiff that the only proper action to take with regard to him, when he fails to appear, is to dismiss his suit for want of prosecution. The fact that the intervention is in a suit for partition does not change or affect the rule. As long as the pleadings or evidence fail to show, in a suit for partition, that there are persons interested in the title that is the subject of that suit who have not been made parties to it, the proceeding may properly be prosecuted to a final decree and execution. If there be a superior title outstanding in persons not made parties to the suit, or if there be persons interested in the title adjudicated who have not been made parties, their title would remain unprejudiced, and the decree rendered would not be binding upon, or of any effect as to, them. It was not incumbent upon plaintiffs to make either the intervenor or the other persons named by him parties, as their claims did not originate in the title of which they sought partition, but, on the contrary, were adverse to it. If plaintiffs saw proper to do so, they could, by making its owners parties, have had that or any other adverse title litigated. If they did not do so, every owner of a title not litigated, and every owner under the title that was in issue, not properly made a party to the proceedings, should have been left unprejudiced by the final decree. This would have been the effect of not making the intervenor a party to the suit. The effect of a judgment upon the merits against him, when he had voluntarily become a party, is to bind him.

Other errors assigned are not properly presented for decision by the record. The judgment is reversed, and the cause is remanded.

HOOKS v. FITZENRIETER.

(Supreme Court of Texas. Feb. 25, 1890.)

EXEMPLARY DAMAGES—PLEADING.

In an action for breach of contract, a general allegation that defendant broke the contract "willfully, fraudulently, and with malice" is not sufficient to authorize a recovery of exemplary damages.

Commissioners' decision. Appeal from district court, Hardin county.

Action by Middleton Hooks against Charles Fitzenrieter for breach of contract. Judgment for defendant for want of jurisdiction. Plaintiff appeals.

P. A. Work, for appellant. *Douglass & Lanier*, for appellee.

HOBBY, J. There was no error, we think, in sustaining the defendant's exceptions to the plaintiff's petition. It alleged with particularity the contract entered into between plaintiff and defendant; its breach by the latter, for which actual damages were claimed in the sum of \$150. It does not appear whether the contract was in writing or verbal. The breach was further alleged to have been committed by the defendant "willfully, fraudulently, and with malice," for which exemplary damages were sought in the sum of \$2,000. The claim for actual damages being for an amount less than \$200, it was therefore not within the jurisdiction of the court, unless the averments were sufficient to entitle plaintiff to a recovery for exemplary damages, which were claimed in the sum of \$2,000. Whether they were sufficient to authorize such a recovery is the question in the case. This question has been discussed in several cases. In the case of *Rich v. Railroad Co.*, 87 N. Y. 890, it was elaborately treated. There is high authority for the doctrine that "the allowance of exemplary damages for the breach of a contract is a departure from the true principles of the law of damages, and of public policy." *Field, Dam. 28, note; Railway Co. v. Shirley*, 54 Tex. 125, 148. In our state, however, the right to sue for a breach of contract and for a tort, where both grow out of the same transaction, and can be properly litigated together, is recognized. *Id.* 148. It would be difficult to formulate an inflexible rule, which would apply to all cases of this character. The allegations upon which the exemplary damages are sought, should show that the manner in which the breach was committed by the defendant amounted to a tort, for which an action would lie for exemplary damages, independently of any right to recover actual damages by reason of the breach of the contract alone. The general averments in the petition before us, that it was done "with malice, willfully, and fraudulently," etc., are not sufficient for this purpose. The facts should be stated attending the breach, so that it could be ascertained from them whether they constituted, as alleged by the pleader, malice and fraud, and whether the circumstances connected with the breach amounted to a tort. At common law no such recovery could be had of exemplary damages for the breach of a contract, except in cases of breach of promise of marriage. In many cases now, against common carriers, they are recoverable to a great extent by reason of the supposed violation of some duty springing out of the relation between the parties. The judgment in the case, we think, should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

HALCOMB et al. v. STUBBLEFIELD.*(Supreme Court of Texas. Feb. 25, 1890.)***SHERIFFS — UNLAWFUL SEIZURE — EVIDENCE — INSTRUCTIONS — HARMLESS ERROR.**

1. In an action against a sheriff for the unlawful seizure of mill machinery which caused a delay of 10 days in putting the machinery in operation, it is proper to show the value of the use of the machinery during that time in order to estimate the damage.

2. In such an action, an instruction that the sheriff's return is conclusive is harmless error, where the fact of the seizure is proved independently of such return.

Commissioners' decision. Appeal from district court, Houston county.

A. A. Aldrich and J. R. Burnett, for appellants. D. A. Nunn and S. A. Denny, for appellee.

ACKER, J. D. R. Stubblefield brought this suit on the 24th day of September, 1888, against B. F. Halcomb, sheriff, and the sureties on his official bond, to recover damages alleged to have been sustained by plaintiff by reason of the wrongful seizure of saw-mill machinery under an execution against Collins & Gregg. The plaintiff in the execution, and surety on his indemnity bond to the sheriff, made themselves parties defendant, and answered, denying the trespass alleged, and pleaded that the sheriff did not take actual possession of the machinery, or disturb the possession of plaintiff, but only levied on the interest of Gregg in the machinery. The trial was by jury, and resulted in a verdict and judgment for plaintiff for \$250, from which this appeal is prosecuted. The sheriff's return indorsed on the execution, recited that he had seized and taken the machinery into his possession. The machinery was not in operation. It was out of position, having been taken down, and was scattered around on the ground. The sheriff testified that he went to where the machinery was, informed the men at work with it that he levied on it, and requested them to inform plaintiff of the levy; that he advertised the machinery for sale, and after 8 or 10 days he released the levy, and informed the plaintiff of the release. Plaintiff testified that when he returned, on the evening of the levy, he was informed of it; that his employees quit work at the close of that day; that he told them he could not pay their wages unless the machinery was released from the levy; that the belts, pulleys, and machinery were lying around, exposed to the weather; that he knew the machinery was injured, but could not estimate the extent of the injury; that the levy was on the machinery about 10 days, and the operation of the mill was suspended about 20 days in consequence, because it was 10 days after the levy was released before he could get his hands together again to go on with the work of putting up the machinery; that he had 50,000 feet of timber cut down in stock at the time of the levy worth \$3 per 1,000 feet; and that, on account of the delay occasioned

by the levy, it became worm-eaten, and a total loss; that the value of the use of the machinery when in operation was \$25 or \$30 per day, net; that he was paying his sawyer \$50 per month, whether the mill run or not.

It is insisted that the court erred in admitting, over the objection of the defendants, the testimony of the plaintiff as to the value of the use of the machinery when in operation. It is believed that there is no error in the ruling here complained of. If the levy occasioned a delay of 10 days in putting the machinery in operation, it necessarily caused the loss of the earnings for 10 days; and it seems to be the most reasonable method of determining the extent of the damage, by showing the value of the use for the time of the delay.

It is contended that the court erred in charging the jury that the sheriff's return on the execution was conclusive, and that it was plaintiff's duty to respect the levy and possession of the sheriff. In view of the fact that the levy was proven independently of the return, if there was error in the charge, it was immaterial, and could not have injured appellants. It is thought that the judgment is correct, and should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

WALKER v. NOELL et al.*(Supreme Court of Texas. Feb. 25, 1890.)***NEGOTIABLE INSTRUMENTS — PARTIES.**

Where there is no evidence that defendant assumed payment of a due-bill given by a third person, the fact that he did pay part of it does not render him liable for the balance.

Commissioners' decision. Appeal from district court, Angelina county.

E. J. Mantooth, for appellant. H. G. Lane and J. D. Gaun, for appellees.

ACKER, J. J. B. Walker brought suit in the justice's court against J. M. Noell and C. M. Noell, for the sum of \$49.05, claimed as balance due on an account for \$162.25 for board of hands, timber furnished, and hauling done for Coy & Lampley in getting cross-ties; credited with \$113.20, as having been paid by C. M. Noell. A trial by the justice resulted in judgment for plaintiff for the amount sued for, and defendants appealed to the district court, where the case was tried without a jury, and judgment rendered for defendants, from which plaintiff prosecutes this appeal. The account sued on was made up of the items for which the following due-bill was given: "\$162.25. March 11th, 1888. Amount due to James Walker, one hundred and sixty-two dollars and twenty-five cts. COY & LAMPLEY." Plaintiff and two other witnesses testified that the due-bill was presented to C. M. Noell, and he verbally promised to pay it, and did pay the sum of \$113.20.

C. M. Noell testified that he never promised to pay the account sued on, or any part of it, and that he promised to pay only so much of the due bill as it might be ascertained on settlement was due to Coy & Lampley, which he paid in the \$118.20 credited thereon. No witness testified that either of the defendants ever assumed payment of the account sued on. The court found, as a conclusion of law, that "the defendants are not legally bound for the account sued on, nor any part thereof; never having in any manner assumed to pay the same." Under the several assignments of error, it is urged that the court erred in this conclusion of law. There being no evidence at all upon which any other conclusion could have been predicated, it seems to us a useless consumption of time to indulge in any discussion of the case. We are of opinion that the judgment of the court below is correct, and should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

BELL *et al.* v. BOYD *et al.*

(Supreme Court of Texas. Feb. 25, 1890.)

NEGOTIABLE INSTRUMENTS—PAYMENT—CONTRIBUTION—EVIDENCE.

1. A party who signs as surety a note renewing one wherein he is a joint maker is so benefited by the new note as to render his estate liable in equity, upon his decease, for the payment of the new note. Following *Boyd v. Bell*, 7 S. W. Rep. 657.

2. Plaintiffs, bankers, held defendants' joint note, and one of the defendants, a tax collector, deposited with plaintiffs tax funds collected by him, part of which plaintiffs applied in payment of the note. The defendant objected, but afterwards accepted from plaintiffs a new loan for the amount of the note, for which he gave a new note. Held, that the first note was thereby discharged. Following *Boyd v. Bell*, 7 S. W. Rep. 657.

3. Where a note signed by a principal and several sureties is discharged by a new note signed by the principal and one of the sureties, such surety, on being compelled to pay the second note, cannot exact contribution from his co-sureties on the first note, since he did not pay such first note, but merely changed the form of the contract.

4. A note whose time of payment has been altered is admissible in evidence when it is shown that the alteration was made by the maker before delivery.

Commissioners' decision. Appeal from district court, Goliad county; H. C. PLEASANTS, Judge.

For statement of facts, see former opinion. 7 S. W. Rep. 657.

S. F. Grimes and A. B. Peticolos, for appellants.

COLLARD, J. When this case was before the court on a former appeal, it was held that "plaintiffs could not, without Bell's consent, apply to the first note money on deposit known to be collections for taxes; but it is evident from the facts that he afterwards consented to the application, without injury to the state, by accepting from them a loan of the amount upon tendering them the last

note, which they accepted. * * * The first note, then, for \$850, signed by Riggs and Baker, was fully discharged." The facts on the last trial, so far as plaintiffs' evidence goes, support the same conclusion, though there is quite a conflict in the testimony; and the court below so found. It is clear that the first note was not discharged until the last note was executed. The first note was joint and several; and it was held on the former appeal that, because Von Dohlen's liability was several, he was benefited by the change of his liability in the last note as a joint obligor with the principal, and that such benefit was a good consideration to him, so that the cause of action would survive, after his death, against his estate, on the last note, notwithstanding it was only a joint note. *Boyd v. Bell*, 69 Tex. 786, 7 S. W. Rep. 657. From this it follows that plaintiffs could maintain their suit against the estate. The facts of the case are not materially different from what they were alleged and proven to be on the former trial; and the former opinion, upon the points then presented, is the law of the case on these points, and we must still hold as before.

But it is now contended that the co-sureties of Von Dohlen on the first note are liable to his estate for contribution, upon the ground that he discharged the first note. There would be no difficulty in establishing by ample authority the proposition that, where a co-surety pays off and extinguishes the original obligation by his individual note, he would be entitled to contribution; but we are unable to find authority for holding that he would be so entitled where the original obligation is paid and discharged by a new note of the principal, and one of the sureties. *White v. Carlton*, 52 Ind. 372; *Ralston v. Wood*, 15 Ill. 160; *Anthony v. Percifull*, 8 Ark. 494; *Stallworth v. Preslar*, 34 Ala. 509; and *Pinkston v. Tallaferro*, 9 Ala. 543. The surety need not wait for suit, but may pay the debt as soon as he is obliged to do so. He must be able to show, however, that the principal was insolvent at the time of payment. *Brandt*, Sur. §§ 249, 254; *Baylles*, Sur. 327, 332. Von Dohlen did not discharge the first note by his own negotiable note. The first contract was merely changed; the principal giving a new note with Von Dohlen as a joint obligor, though in fact a surety only. Hence it cannot be said that the surety paid the first note, and so the law allowing contribution does not apply.

Plaintiffs' evidence shows that the change in the date on which the note was to become due was made, at the instance of the parties bound by it, before it was delivered to him; that Boyd, one of the plaintiffs, drew up the note, and handed it to Bell, to have it signed by him and Von Dohlen; that it was drawn, due at three months. Bell took it away; and, when he returned, it was signed and changed as it now is,—due at "six" months. Defendants' testimony showed a contrary state of facts, but the court found that the note

was altered, as plaintiffs contend. It was the duty of the court below to find the facts proved, and we cannot say his finding was incorrect. When the note was so returned, Von Dohlen, in Bell's presence, entered on the note, "Three months paid," to show, as he said, that three months' interest had been paid. These explanations, if true, sufficiently explained the apparent alterations in the note, and relieved it of all suspicion. The court did not err in admitting the note. We conclude the judgment should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

PALMER *et al.* v. STATE.

(*Supreme Court of Tennessee. Feb. 23, 1890.*)

POOL-SELLING—LICENSES.

Act Tenn. April 8, 1889, entitled "An act to provide revenue for the state," etc., imposing a license fee "upon each person * * * engaged in selling pools upon any running, trotting, or pacing race in this or in any other state," does not extend the law authorizing the sale of pools on races run on licensed tracks within the state, so as to legalize the selling of pools on races taking place out of the state.

Appeal from criminal court, Davidson county; G. S. RIDLEY, Judge.

Indictment against Palmer and Cartwright for gambling. Defendants were convicted, and brought this appeal.

S. Hill and J. M. Quarles, for appellants. G. W. Pickle, Atty. Gen., for the State.

LURTON, J. Appellants have been convicted of gambling. The indictment charged that they had bet, gambled, and put to hazard upon a horse-race run upon a track not authorized by this state; and, in a second count, that they had encouraged and promoted gambling upon races upon track not licensed by this state. The case was tried without a jury upon an agreement as to the facts. The agreed state of facts is as follows:

(1) That the defendants did, on the 15th day of May, 1889, and before the presentment in this case was found, and within the city of Nashville, Davidson county, state of Tennessee, and within the jurisdiction of this court, both sell and offer to sell wagers or bets upon horse-races to be run both in and out of the state of Tennessee, upon a race track other than the lawfully chartered or incorporated blood horse or turf association, or trotting association, or stock or agricultural fair association. (2) In this case there were four horses to be run in the race. The defendants offered to sell at public outcry the first choice for the winner in said race, when \$50 was bid therefor by a by-stander, which, being the highest bid, was accepted, and the money paid over to the defendants; and thereupon the defendants offered the second choice on the horses to be run in said race, whereupon a by-stander bid \$40, which bid,

being the highest, was accepted, and the money paid over as before; and thereupon the defendants offered for sale in the same manner the third choice of the horses to be run in said race, whereupon a by-stander bid \$30, which, being the highest bid, was accepted; and thereupon the defendant offered the remaining and unsold horse in the same manner, whereupon a by-stander bid \$20, which, being the highest bid, was also accepted. These several sums, making altogether the gross sum of \$140, from which gross sum the defendants deducted 5 per cent. or \$7, as their compensation for their services; leaving remaining, net, \$133. On the succeeding day the horse-race was run, and the party who had purchased, in the manner hereinbefore stated, the horse that won, or came out ahead, in the race, was entitled to and did receive from the defendants the whole sum of \$133, which was accordingly paid over to said party. The defendants kept books or memoranda of each bid made and accepted, as hereinbefore stated. These transactions hereinbefore related all occurred in a room called a "pool-room," or place for selling pools on horse-races. This particular race was run upon a track outside of the state of Tennessee, but in the state of Kentucky, and within the six months next preceding the presentment in this case. This is known as "auction pools." (3) It is further agreed and admitted that the defendants, at the time of the selling of said pools as stated in paragraph 2, had duly paid to the county court clerk of Davidson county the privilege tax of \$500 imposed upon pool-selling by an act of the general assembly of the state of Tennessee, entitled "An act to provide revenue for the state of Tennessee, and the counties thereof," approved April 8, 1889. And that the said clerk of the county court of Davidson county had, in consideration of the payment of said privilege tax, duly issued and delivered to the defendant a license, as provided in said act of the general assembly, for pool-selling, and that said license was in full force and effect prior to the 15th day of May, 1889, and on said day, and continuing until that date.

The question for decision is as to the effect of the alleged license in legalizing the sale on pools upon races run outside of the state. By section 4870 of the Code of Tennessee, it is made a misdemeanor to "make any bet or wager for money or other valuable thing." By section 4881, horse-racing "upon a track or path kept for that purpose" is exempt from the provisions of the statute against gaming. The betting of money upon a horse-race upon a track within the state, not licensed by the state, has been held to be gambling, within section 4870. *Huff v. State*, 2 Swan, 279. The act legalizing racing upon a licensed track has been held to have been intended to encourage the improvement of domestic stock, and not intended to make gaming lawful upon races run outside of the state, and that betting upon races run in an-

other state was a misdemeanor, under section 4870. *Edwards v. State*, 8 Lea, 412; *Daly v. State*, 13 Lea, 228; *State v. Blackburn*, 2 Cold. 235. By the revenue act of 1885, a tax of \$300 was put upon the occupation of pool-selling. Acts 1885, Extra Sess. p. 43. By the assessment act of 1887, the occupation of pool-selling was declared to be a privilege, and not to be pursued without license. Act 1887, p. 43. By the revenue act of the same year, a tax was placed upon this business. Act 1887, p. 17. By the assessment act of 1889, § 52, the avocation of pool-selling is again declared a privilege, and, as such, not to be pursued without license. Act 1889, p. 168. By the revenue act of same year, a tax is placed upon each person, company, or corporation or agent engaged in selling pools upon any running, trotting, or pacing race in this or any other state. Acts 1889, p. 260. If the selling of pools be not a lottery,—a question not here decided, for reasons hereafter noticed,—then the sale of pools upon races to be run upon a track licensed by this state would not be gaming, within our statute. *Daly v. State*, 13 Lea, 228. It was, however, within the power of the legislature to make the business of selling pools a privilege, and to assess upon the privilege such tax as was deemed wise. Both of the acts erecting pool-selling into a privilege—that of 1887, and that of 1889—designate the business as “pool-selling,” without further words describing the limits of the business. To make this business, by its general designation, a privilege, would no more authorize a seller to sell pools upon an unlawful race than does the liquor dealer's license authorize him to sell liquor to minors, or on Sunday, or within four miles of a school-house.

The privilege of “selling pools,” which is not to be pursued without a license, is limited to the sale of lawful pools; that is, pools which are in substance bet upon races to be run upon a licensed track or turf within this state. The tax assessed upon the privilege by the acts of 1885 and 1887 was assessed upon “pool-selling;” no effort being made to designate whether upon races in or out of the state. The change made in the assessment of the tax upon this occupation by the act of 1889 is made by adding the words, “in this state, or any other state.” The contention is that the addition of these words, not in the act creating the privilege, but in an act simply fixing the tax upon a privilege created by another and different act, operates to license the sale of pools upon races run upon unlicensed tracks in this state, and upon all tracks in other states, and that the licensing of an act theretofore criminal operates to make the act legal, and entitles it to the protection of the law. To put this construction upon this clause in a revenue act would operate to repeal in part the criminal law of the state, and to make lawful a species of gambling which has been heretofore unlawful. Was it the intent of the leg-

islature, by words added to the language theretofore used in fixing the amount of tax upon the occupation of pool-selling, to enlarge the privilege of selling pools beyond such pools as were sold upon lawful races? Or was it the intent of the law-makers, by the levying of this tax, to create the privilege of selling pools upon races to be run outside of the state? If the act which enumerated and created privileged occupations had in express words authorized the licensing of the business of selling pools upon races run in other states, we should then have had a very different question to deal with; for in that case there would be no doubt that the intent of the legislation was to make that species of business a privilege. The effect of such legislation in an assessment act, in repealing the statute making such pool-selling criminal, would present a very grave question. But the question we have to deal with here is as to whether the legislature intended, by the words they have used in describing this business, to authorize or license the sale of pools upon illegal races.


The case of *Dun v. Cullen*, 13 Lea, 202, is cited by the learned counsel as settling this question of legislative intent. That cause was this: The business of commercial agencies was not made a privilege in the act creating and enumerating privileged avocations. In the revenue bill, a tax was levied upon the occupation. The court were agreed that the language of the revenue act, namely, “that the rate of taxation on the following privileges shall be as follows,” naming the avocations, and the rates of tax would ordinarily be sufficient to create a privilege, and forbid its exercise without license. The “difficulty,” said Judge COOPER, speaking for the court, “grows out of the fact that the legislature has passed two acts,—one of them apparently intended, among other things, to designate the taxable privileges, and the other to fix the rate of taxation upon privileges; and the doubt is whether the latter act was actually intended to create a privilege.” “The point,” said he, “is one of some nicety.” He reaches a conclusion of this question by the suggestion that this business of a commercial agency was “mentioned, unquestionably, with the expectation that [it was] to be taxed; and, if the legislature have used language sufficient to enable us to carry that intent into effect, it would seem to be our duty to effectuate the intent. We think this the better conclusion, and hold the occupation taxable.” 13 Lea, 205. The sole inquiry in that case was as to whether the intent of the legislature was to make that occupation taxable; and the duty of the court was to carry out that intent, if made sufficiently plain. There the question of “nicety” is not as to whether the legislature intended to create pool-selling a privilege. That they have done in express words. But did they intend, by the words used in describing a privilege created by another act, to enlarge it so as to make legal that which by the general law was criminal, or to create

a new and different privilege from the one created by the act enumerating taxable privileges? This case is distinguishable from that in many obvious particulars.

Neither is the case of *State v. Duncan*, reported in 16 Lea, at page 81, a controlling case. By an act approved March 30, 1883, it was made a misdemeanor to buy or sell futures. By the assessment act approved on the same day, the business of selling futures was made a privilege, and a tax assessed by the revenue act thereon. The two acts then passed together were for this reason construed together, for the purpose of arriving at the meaning and intent of each. "The effect of the acts of 1883, taken together," said Judge COOPER, "is to make it a misdemeanor, both in the buyer and seller, to deal in futures without a license, and at the same time legalize the dealing, by taking out a license." 16 Lea, 81. We have no such case here. By very ancient statute law, betting upon races other than such as were run on licensed tracks was a misdemeanor. This exception in favor of domestic races was, in its evil results, comparatively limited. To extend this exemption to races run everywhere is, as we can very well know from our knowledge of affairs, to open the doors of gambling establishments all the year round. Did the legislature intend, by the revenue act of 1889, to repeal the general and ancient laws of the state, which made such betting criminal? It is not the case of two acts upon the same subject, passed upon the same day; and the rule of construction applicable in the *Dun Case* has no application here.

The tax upon the business of selling pools upon races to be run upon licensed tracks within this state is a tax upon a lawful business, if it be not a lottery,—a question which we do not decide, for the reason that a majority of the court are of the opinion that, for the reasons stated, the provisions concerning the sale of pools upon races run outside of the state is ineffectual, whether it did or not attempt to license a lottery, as it did not in fact license pool-selling on races run outside of the state. But, so far as it seems to be a tax upon the selling of pools upon races not so run, it is at most a tax assessed upon an unlawful occupation. Taxation so imposed will not be construed to operate as a license legalizing such unlawful betting. Taxation, even under the form of a privilege tax, does not necessarily operate to license the business. The constitution of Michigan prohibited the passing of any law licensing liquor dealers. A specific tax was assessed upon liquor dealers. It was held by the supreme court of that state, Judge COOLEY delivering the opinion, not to be, in its legal effect, a license tax, or in any way to sanction, authorize, or countenance the business. "The idea," said Judge COOLEY, "that the state lends its countenance to any particular traffic by taxing it, seems to us to rest upon a very transparent fallacy. It certainly overlooks or disregards some ideas that

must always underlie taxation. Taxes are not favors, they are burdens. They are necessary, it is true, to the existence of government; but they are not the less burdens. * * * It would be a remarkable proposition, under such circumstances, that a thing is sanctioned and countenanced by the government, when this burden, which may prove disastrous, is imposed upon it, while, on the other hand, it is frowned upon and condemned when the burden is withheld. * * * The taxation of a thing may be, and often is, when police purposes are had in view, a means of expressing disapproval, instead of approbation. * * * A business may be licensed, and yet not taxed; or it may be taxed, and yet not licensed. And, so far as the tax from being necessarily a license, that provision is frequently made by law for the taxation of a business that is carried on under a license existing independent of the tax." He concludes a most elaborate discussion by saying: "If one puts the government to special inconvenience and cost by keeping up a prohibited traffic, or maintaining a nuisance, the fact is a reason for discriminating in taxation against him; and, if the tax is imposed on the thing which is prohibited, or which constitutes the nuisance, the tax law, instead of being inconsistent with the law declaring the illegality, is in entire harmony with its general purpose, and may sometimes be even more effectual. Certainly, whatever discriminations are made in taxation ought to be in the direction of making the heaviest burdens fall upon those things which are obnoxious to the public interest, wherever that is practicable." *Youngblood v. Sexton*, 32 Mich. 406.

An instance of a license which does not carry with it protection is that of the federal tax upon the occupation of liquor dealing, in states or localities where such traffic is illegal. *License Tax Cases*, 5 Wall. 462. Concerning this class of cases, it is said: "These burdens are imposed in the form of what are called 'license fees'; and it has been claimed that, where the party paid the fee, he was thereby licensed to carry on the business, despite the regulation which the state government might make upon the subject. This view, however, has not been taken by the courts, who have regarded the congressional legislation imposing a license fee as only a species of taxation, without the payment of which the business could not be carried on, but which, nevertheless, did not propose to make any business lawful which was not lawful before, or to relieve it from any burden or restrictions imposed by the regulations of the state." *Cooley*, Const. Lim. (5th Ed.) 721. The tax imposed by the act of 1889 is, so far as it is imposed upon the illegal business of selling pools upon races run upon unlicensed tracks, not operative as a license, and does not, by necessary implication, repeal the criminal law affecting such betting. The defendants could not, therefore, interpose their receipt for this tax as a defense to the criminal charge. The judgment must be affirmed. 

BROWN v. STATE.

(Supreme Court of Tennessee. Feb. 22, 1890.)

LICENSE—BOOK-MAKING—CONSTRUCTION OF STATUTE.

Acts Tenn. 1889, c. 130, imposing a privilege license on book-making at horse-races, does not extend the law authorizing persons to bet on horse-races run on a licensed track within the state, so as to legalize book-making on races taking place in other states.

Error to criminal court, Davidson county; G. S. RIDLEY, Judge.

Indictment against Henry C. Brown for gambling.

S. Hill and J. M. Quarles, for plaintiff in error. G. W. Pickle, Atty. Gen., for the State.

FOLKES, J. Plaintiff in error was indicted and convicted for gambling, in that he "did bet and put at hazard, upon a certain horse-race run upon a track not authorized by the laws of Tennessee, money of the value," etc. The case was tried by consent before the judge of the criminal court without a jury, who found the defendant guilty as charged, and imposed a fine of \$50. Motion in arrest and for new trial being made and overruled, the defendant has appealed in error. The record discloses the following facts: The defendant had taken out a license under the act of 1889, c. 130, p. 261, entitled "An act to provide revenue for the state of Tennessee, and the counties thereof," wherein is imposed a tax or privilege license in the following language: "Book-makers on horse-races, each agent, firm, or person, corporation, or firms, in each county, each, per annum, or any shorter time, \$25." That within six months preceding the finding of the indictment the defendant had acted as book-maker in making bets on a horse-race to be, and that was thereafter, run on a track outside the state of Tennessee. The transaction is thus described in the bill of exceptions: "There were four horses to be run in the race. The defendant made and offered at public outcry the following pools on each horse, to-wit: \$5 on a certain horse named, that it would not win. This pool was bought by a by-stander for \$5, making in this pool \$10. \$6.66 $\frac{2}{3}$ for \$3.33 $\frac{1}{3}$ that another certain horse named would not win. This pool was bought by a by-stander for \$3.33 $\frac{1}{3}$, making in this pool \$10. \$7.50 for \$2.50 that another certain named horse would not win. This pool was bought by a by-stander for \$2.50, making in this pool \$10. \$8 for \$2 that another certain named horse would not win. This pool was bought by a by-stander for \$2, making \$10 in this pool. On the succeeding day the race was run, and the party who had bought the pool on the winning horse was entitled to and did receive from the defendant the \$10 in the pool purchased by him. The party only who purchased the pool on the winning horse was entitled to the money in his pool. If the horse lost, the seller of the pool, the defendant, would and did retain the entire pool; the money in each pool con-

stituting the stake, the winner taking the whole stake or pool. This making, offering, and selling of the pools was all conducted in a place or room called a 'pool-room,' where pools are sold on horse-races. The defendant kept books or memoranda of each bid made and accepted, as hereinbefore stated."

The defendant had also taken out a license under the same act of 1889, wherein, under the head of "Pool-Selling," it is enacted that "each person, company, firm, or corporation, or agent, engaged in selling pools upon any running, trotting, or pacing race in this or any other state therein, each, per annum, or shorter time, \$500."

From the argument of counsel at the bar we are led to infer that the transaction shown in this cause is not now sought to be justified under the last-mentioned license. If we are mistaken in this, it is sufficient to say that the defendant can find no refuge here, for the reasons fully given in the opinion of this court in the case of Palmer v. State, ante, 233, (heard and disposed of at the same time with the case now under consideration,) which will not be repeated here. It is somewhat curious, however, that the transaction as stated in that portion of the record which we have so largely quoted should be spoken of so frequently therein as the "pools sold," when it is manifest that, stripped of needless verbiage, there was no selling of pools in the commonly accepted sense of the term. It was in fact a public offer by the defendant, under the title of "book-maker," to bet against each of the horses named for the race. Against one he offered to bet even money, against another two for one, against another three for one, and against another four for one. Each bet was accepted by some one present, and the amount such person proposed to bet was handed to the book-maker, as stakeholder, until the race was run, he issuing a card showing the amount, terms of bet, and name of the horse. Whatever may have been the object in persistently speaking of thus "selling pools," it is finally admitted that the defendant was acting as a book-maker, within the sense of the \$25 license.

The main contention here, on behalf of the defendant in the present case, is that the transaction disclosed in this record is known as "book-making," and is protected and made a privilege under the \$25 license above herein quoted. It will be noticed that under the \$500 tax, as to pool-selling, it is extended in terms to races in this or any other state; while in the book-making tax nothing is said as to where the race is to be run. The argument is that, the latter tax being without limit as to place of race, the court should imply none; and that, having accepted the pecuniary consideration for such license, it would be in bad faith for the state to now insist on a limitation not contained in the license, nor in the act authorizing it; that it is as competent for the state to legalize book-making on races run out of the state as in it. Without elaboration, it is sufficient to say that

if it were to be granted that the legislature had such power, and could exercise it in a revenue bill, this court would never assume that the legislature had intended to grant such a privilege, where the act does not in terms so provide, and where it does not by any fair implication disclose such an intention.

At the time of the passage of this act it was lawful to bet on a horse-race run upon a licensed track in this state, and, being so, the legislature might well license the privilege of book-making (which is one of the most common forms of betting on a horse-race) as to races so run; while under judicial decisions, presumably known to the legislature, it was unlawful to bet upon races to be run out of the state. *Edwards v. State*, 8 Lea, 411. In this condition of the law, we must, in the effort to arrive at the intention of the legislature, presume that it purposed, by the use of general language, to license a then legal, but not a then illegal, form of betting. That book-making was intended to be confined to races to be run in this state, and upon licensed tracks in this state, would be the construction, therefore, that we would be compelled to place upon the book-makers' tax, if it stood alone upon the statute book. But the question is placed beyond the region of debate, when we find that in the very same act the legislature, when it comes to tax, but not license, pool-selling, (merely another form of betting,) on races to be run outside of the state, has said so in no ambiguous terms. *Expressio unius, exclusio alterius*. Again, to extend the license to a race run out of the state would be, by implication, to repeal the criminal laws of the state, which construction is never given to a statute unless the repugnance is clear and unavoidable; while to limit it as we do to races to be run in the state on a licensed track avoids all repugnance, and all conflict with, or implied repeal of, the law as it existed at the time of the passage of the act in question. We have not discussed the moral aspect of the subject so much lauded on the one hand, and condemned on the other, in argument at the bar, for the reason that this phase of the question is one that addresses itself to the legislative, and not to the judicial, department of the government. As individuals, we may have and entertain views on this as on all questions affecting the welfare of the public; but as judges our duty ends in expounding the laws as they come from the hands of the legislature, when they are not in conflict with the constitution of the state. Let the judgment be affirmed, with costs.

STATE *ex rel.* HENDERSON *et al.* v. LESUEUR, Secretary of State.

(Supreme Court of Missouri. Feb. 24, 1890.)

CORPORATIONS—TAXATION—EXEMPTIONS.

1. Const. Mo. art. 10, § 21, provides that no corporation, company, or association, other than those formed for benevolent, religious, scientific,

or educational purposes, shall be created unless the persons named as incorporators shall first pay into the state treasury \$50 for the first \$5,000 of capital stock, and \$5 for every additional \$10,000 of stock. Rev. St. Mo. 1889, § 2821, provides that associations may be incorporated for benevolent, religious, scientific, fraternal, beneficial, and educational purposes; and section 2825 provides for the incorporation of any association which tends to the public advantage in relation to education, literature, history, or skill among the learned professions. *Held*, that an association for the "encouragement of debating, reading, and literature, and the enjoyment of rational and social amusements, and the playing of ten-pins, chess, and checkers, and other lawful games of the kind," but which excludes all drinks, and has no connection with business purposes of any kind, nor politics, nor has in view any pecuniary profit of any kind, may be incorporated without the payment of the tax.

2. So much of Rev. St. Mo. 1889, § 2824, as undertakes to allow corporations to be created for other than benevolent, religious, scientific, or educational purposes, without payment of the tax, violates Const. Mo. art. 10, § 21, requiring that corporations other than those mentioned shall provide for a capital stock, and pay a tax.

RAY, C. J., and BRADEN, J., dissenting.

Application for *mandamus*.

Gibson, Bond & Gibson, for petitioners.
The Attorney General, for respondent.

BLACK, J. The relators joined in articles of agreement for the purpose of being incorporated by the name of the "La Fayette Park Club," under article 10, c. 42, Rev. St. 1889, which article consists of sections numbered from 2821 to 2835. On the petition of the relators, the circuit court of the city of St. Louis made a *pro forma* decree, declaring that the articles of agreement and the purposes of the association came within the purview of said article, and were not inconsistent with the constitution or laws of the United States or of this state. The decree was made pursuant to section 2822. The articles of agreement and the decree having been duly recorded in the office of the recorder of deeds, the relators presented the same to the secretary of state, and, without the payment or offer to pay the tax mentioned in section 21 of article 10 of the constitution, requested him to file the same, and make out and deliver to them a certified copy thereof; that being the final act which gives to the association a corporate existence. The secretary refused to file the articles and issue a certified copy, and hence this proceeding against him by *mandamus*.

The refusal of the secretary is put upon the ground that the proposed corporation is not one for benevolent, religious, scientific, or educational purposes, and therefore not exempt from the payment of the tax; and on the further ground that this association could only be incorporated for the purposes designated in its charter, under section 2834, and that that section is unconstitutional and void. The objects and purposes of the proposed corporation, as set forth in the articles of agreement, are as follows: "The purposes and scope of said corporation shall be for the encouragement of debating, reading, and literature, and the enjoyment of rational social amusements, and the playing of ten-

pins, chess, and checkers, and other lawful games of the kind. But it is hereby expressly declared that there shall be no saloon in connection with said club, and no drinks shall be sold by the said club or any of its members. It is further declared that this association shall have no connection with any manufacturing, agricultural, or business purposes of any kind, nor shall it have any connection with politics or a political organization, nor shall it have in view any pecuniary profit of any kind, but it shall be limited to the general objects above set forth." Section 21 of article 10 of the constitution provides: "No corporation, company, or association, other than those formed for benevolent, religious, scientific, or educational purposes, shall be created or organized under the laws of this state, unless the persons named as incorporators shall, at or before the filing of the articles of association or incorporation, pay into the state treasury fifty dollars for the first fifty thousand dollars or less of capital stock, and a further sum of five dollars for every additional ten thousand dollars of its capital stock," etc. Section 2821 of the Revised Statutes of 1889 provides, in general terms, that associations may be incorporated for "benevolent, religious, scientific, fraternal, beneficial, or educational purposes;" and section 2825 enters more into details, and, after providing for the formation of corporations for benevolent and religious purposes, provides: "Any school, college, institute, academy, or other association formed for educational or scientific purposes, including therein any association formed especially to promote literature, history, science, information, or skill among the learned professions, intellectual culture in any branch or department, * * * and, in general, any association, society, company, or organization which tends to the public advantage, in relation to any or several of the objects above enumerated, and whatever is incident to such objects, may be created a body corporate and politic."

In the view we take of this case, it is unnecessary to recite other statutory provisions. Section 21 of article 10 of the constitution is plain. By it no association can be incorporated for any purpose other than for benevolent, religious, scientific, and educational purposes without the payment of the tax. This tax, it will be seen, is fixed at \$50 for the first \$50,000 or less of capital stock, and at \$5 additional for every additional \$10,000 of stock. Now, it is plain that the payment of the tax cannot be evaded by organizing a corporation under a law which makes no provision for stock. It is equally clear that the legislature has no power to authorize the evasion of the payment by allowing corporations to be organized under this benevolent law, as it is called, without a capital stock. This court held in express terms in *State v.*

McGrath, 95 Mo. 193, 8 S. W. Rep. 425, that the payment could not be avoided by reason of a legislative declaration that the corporation was one formed for benevolent purposes, when the law under which it was brought into existence showed that it was a money-making institution. To give effect to the constitution, corporations, not falling within one of the four classes, must be organized, if at all, under some law providing for capital stock. In so far, therefore, as section 2834 undertakes to allow corporations to be created for other than benevolent, religious, scientific, or educational purposes, it is void. The important question here, however, is whether the proposed corporation can be fairly said to be one for educational purposes. And it is to be observed, in the first place, that the constitution uses the words, "for benevolent, religious, scientific, and educational purposes," in a broad and comprehensive sense. The corporations thus exempted from the payment of the tax are, to a certain extent, mentioned in contradistinction to such as are organized for pecuniary profit. As applied to minors, it has been said "education" comprehends not merely the instruction received at school or college, but the whole course of training, moral, intellectual, and physical. *Ruohs v. Backer*, 6 Heisk. 395. The following definition appears to have been prepared with care: "'Education' is the bringing up, physically or mentally, of a child, or the preparation of a person, by some due course of training, for a professional or business life or other calling." 6 Amer. & Eng. Cyclop. Law, 158. The objects and purposes of the proposed corporation are: (1) The encouragement of debating, reading, and literature; (2) the enjoyment of rational social amusements; (3) the playing of ten-pins, chess, checkers, and other lawful games of the kind. The first of these declared purposes is clearly educational, and the others seem to be added as matters of amusement, and incidental to the first. That they are incidental is shown by the subsequent statements, wherein it is expressly declared that there shall be no saloon in connection with the club; that drinks shall not be sold by it, or any of its members; and that the association shall not have in view any pecuniary profit. Had the articles of association specified only the first of the designated objects, still the members of the association, under appropriate by-laws, might indulge in any of these amusements without violating the charter. Some degree of liberality must be allowed in the formation of these associations, where all pecuniary profit is excluded. These articles of association can stand on sections 2821 and 2825, and it is our opinion that the proposed association may be incorporated without the payment of the tax. A peremptory writ is therefore awarded. All concur, except RAY, O. J., and BRACE, J., who dissent.

BRYSON v. JOHNSON COUNTY.

(Supreme Court of Missouri. Feb. 24, 1890.)

COUNTIES—CONTRACTS—STATUTES—TRANSCRIPT.

1. Plaintiff contracted in writing with the bridge commissioner for the building of abutments to a bridge according to plans and specifications mentioned, but, pursuant to a subsequent oral agreement with the commissioner, the abutments were built up square to the surface of the ground, instead of being battered, as required in the written contract, and were made of better material. *Held*, that the better work done being in keeping with the spirit of the written contract, and a substantial compliance with its terms, plaintiff was entitled to recover for the value of the work, under Rev. St. Mo. 1879, § 1218, which provides that, if a claim against a county be for work done under contract with the county authorities, the claimant shall be entitled to recover, though the authorities, in making the contract, may not have pursued the form of proceeding prescribed by law.

2. Rev. St. Mo. 1879, § 5360, requiring all contracts with counties to be in writing, and subscribed by the parties thereto, not having been re-enacted by a revised bill in 1879, but being simply collated by the revision committee, is controlled by section 1218, so far as the two sections are in conflict, as section 1218 was re-enacted in 1879, and is therefore the last expression of the legislative will.

3. Rev. St. Mo. 1879, c. 84, as amended by Laws 1883, p. 81, provides that a contract for building a bridge shall be let to the lowest bidder, and, when approved by the county court, it is then the duty of the court to make an appropriation, and "order the commissioner to contract therefor at the price let." *Held*, that a written contract which recites that it is made by one "ex officio road and bridge commissioner of the county," which is signed by the contractor, but not signed by the commissioner, is the contract of the county; as the order of the court approving the bid, and the contract as signed by the contractor, when read together, shows a binding contract.

4. As it is the duty of the court to make an appropriation to pay for work done on a bridge, when it orders the commissioner to enter into the contract, it will be presumed that the court performs its duty until the contrary is proved.

5. Evidence not appearing in the transcript will be disregarded, but that which appears in the transcript must be considered, as the transcript, if incorrect, should be corrected by *certiorari*.

Appeal from circuit court, Johnson county; CHARLES W. SLOAN, Judge.

H. Neill and S. T. White, for appellant.
J. W. Suddath and W. W. Wood, for respondent.

BLACK, J. F. M. Keen constructed two stone abutments for Johnson county under a contract with the bridge commissioner, and then assigned his claim for compensation to the plaintiff, in order to raise money to pay debts incurred in doing the work. This is a suit by the assignee to recover a balance alleged to be due for the work. The trial court sustained a demurrer to the plaintiff's evidence, and the case is here to review that ruling.

It may be stated here that certain exhibits said to have been attached to the deposition of the witness Koehler, and set out in the plaintiff's abstract, do not appear in the transcript, and they must therefore be disregarded. On the other hand, the defendant insists that some of the documentary evidence appearing in the transcript should be disregarded, because not called for by the bill

of exceptions. The bill of exceptions professes to set out the evidence, and then follows that to which the objection is made, as well as the other evidence adduced on the trial. There is nothing in the bill of exceptions from which we can say that any of the evidence is improperly incorporated therein. If the transcript is incorrect, it should be corrected by and through a writ of *certiorari*. We must take the transcript as we find it.

The petition is in two counts. The first sets out, in substance, a written contract which was put in evidence, and by which Keen agreed to construct two stone abutments for an iron bridge of 110 feet span, "according to the following general specifications," among which it is provided that all work shall have a batter of one inch to one foot on all sides, and a chisel draft of an inch and one half on both faces; the work to be done in a thorough, workman-like manner, in accordance with the plans and specifications made a part of the contract. The price is fixed at \$3.93 per cubic yard, to be paid on the completion of the work. It is alleged that, pursuant to a verbal agreement with the bridge commissioner, the abutments were built up square to the surface of the ground, and of better material, and that the commissioner agreed to accept the work thus done as battered work. The second count declares for the value of the work. The answer is a general denial.

The evidence shows that in August, 1885, the county court of Johnson county ordered Zoll, the bridge commissioner, to let contracts for the construction of several bridges, including the one in question. An order of the court, made on the 22d of September, 1885, shows that a contract was that day let by the commissioner to Keen, and approved by the court, for building the two abutments in question; and on the same day Keen signed the contract before mentioned, and gave bond for the performance of the contract. The abutments were about 20 feet long, 8 feet below, and from 7 to 9 feet above, the surface of the ground. The bridge commissioner testified: "The banks of the pits were caving in from the water. I told Keen if he would carry up the faces from the bottom to the surface square, so that the headers would reach entirely through the piers, I would accept it as battered work. The change was necessary. The square work kept the banks from caving, and was better work than that called for in the specifications, and better laid to the surface of the ground. The work as done was square work to the surface, and battered work from the surface to the top. I made no extra allowance for extra material or extra work. These piers are the best in the county. My estimate of the work done shows 196.35 cubic yards, amounting to \$771.65." Other evidence shows that the court became dissatisfied with the measurement made by Zoll, and sent a committee to remeasure it; and the court then paid plaintiff \$465.75, withheld \$110.50 because claimed

by another person, and refused to pay the balance of \$195.40. The evidence offered upon the trial tends to show that the piers contain some 200 cubic yards of work, instead of 196.35, as reported by Zoll.

1. The point made that the written contract was simply the contract of Zoll, and not that of the county, is untenable. It says: "This contract made this 22d day of September, 1885, by and between F. M. Keen, party of the first part, and C. H. Zoll, *ex officio* road and bridge commissioner of the county of Johnson and state of Missouri, party of the second part, witnesseth," etc. It is signed by Keen, but not by Zoll. A contract executed by an agent or officer of a corporation is the contract of the corporation, where the officer or agent acts within the scope of his authority, and the purpose to act for the corporation is manifest from the contract taken as a whole. 1 Dill. Mun. Corp. (3d Ed.) § 452; Story, Ag. (9th Ed.) § 154. Zoll had been authorized to let the contract, and it is plain to be seen that he acted for the county as road and bridge commissioner.

2. A further point made by the defendant is that the contract is void because not signed by Zoll. Chapter 84, Rev. St. 1879, as amended in 1883, (Acts 1883, p. 31,) provides that the contract for building a bridge shall be let to the lowest bidder, upon plans and specifications then prepared, subject to the approval or rejection of the county court. If the court approves the bid, it is then made its duty to make an appropriation for building the bridge, and to "order the commissioner to contract therefor at the price let." Regularly, the contract should have been signed by the commissioner as well as by Keen. The commissioner, however, could only make a contract in compliance with the bid which the court had approved. The order of the court approving the bid and the contract signed by Keen may be read together, and when thus read they show a binding contract upon the county, though Zoll did not sign it. At all events, section 1218, Rev. St. 1879, hereafter set out, would entitle the contractor to recover the value of the work, provided he complied with the contract.

3. The only question of any merit arises out of the parol agreement between Keen and the commissioner, whereby the foundations of the piers were built up square to the surface, instead of being built with a batter of one inch to the foot. The defendant relies upon section 5360, Id., wherein it is provided, among other things, that no county, city, town, village, etc., shall be bound or held liable upon any contract, unless it "shall be in writing, and dated when made, and subscribed by the parties thereto, or their agents authorized by law, or duly appointed and authorized in writing." And the plaintiff relies upon section 1218, Rev. St., which is as follows: "If a claim against a county be for work and labor done or material furnished in good faith by the claimant, under contract

with the county authorities, or with any agent of the county lawfully authorized, the claimant, if he shall have fulfilled his contract, shall be entitled to recover the just value of such work, labor, and material, though such authorities or agent may not, in making such contract, have pursued the form of proceeding prescribed by law." Section 5360 was enacted in 1874, and was not re-enacted in the form of a revised bill in 1879, but simply collated by the revision committee. Section 1218 has been a part of the statute law of this state since 1863, and was re-enacted by a revised bill in 1879, and is therefore the last legislative expression, and must prevail over section 5360, so far as the two sections are in conflict. Section 1218, however, does not profess to give the claimant a right to recover on a contract with a county official when such official had no power in law to make it. It contemplates those cases where the official or agent has the power to make the particular contract, but fails to pursue the proceeding prescribed by law in making it. The bridge commissioner is a county authority within the meaning of said section, but he had no power to make any contract which differed in any substantial respect from the bid approved by the county court. It is the approval by the county court which gives validity to the bid, and gives the commissioner power to make the contract. The commissioner could not alter the plans upon which the bid was made and approved in any material respect. To allow the commissioner to materially change the contract, after the bid had been approved, would open wide the door to fraud and favoritism, the thing which the law seeks to guard against. But the building of the bridge pursuant to the plans and specifications is under his direction, and it is but reasonable to say that unimportant changes, made to meet unforeseen exigencies, ought not to defeat a recovery. A fair and substantial compliance with the contract is all that can be asked. The proof shows that the work was superior to that required by the specifications, and the piers are battered above ground. The fact that they were not battered below the surface, but were built up square, and with better stone, to secure a better foundation, is rather in keeping with the spirit of the contract than a variation from it, and ought not to defeat a recovery. In determining whether there was any substantial variation from or change of the plans and specifications, we must look to the nature and character of the work, and the purposes for which these abutments were built. The defense now set up seems to be an afterthought, and the evidence does not show any substantial change of the plans or alteration of the contract.

4. It is again said that there is no evidence that the court made an appropriation to pay for the work. It was the duty of the court to make the appropriation when it ordered the commissioner to enter into contract with Keen, and it will be presumed that the court

performed its duty until the contrary is made to appear. But, even if the court failed to perform its duty in this respect, that would not defeat a recovery by the plaintiff for the work done by Keen. The judgment is reversed, and the cause remanded. All concur.

FRITSCH v. KLAUSING.

(Court of Appeals of Kentucky. March 4, 1890.)

CONSTRUCTION OF DEEDS—POWER OF SALE—INFANCY—PARTIES.

1. A grantor conveyed land to his daughter for life, remainder to her children, or, in case she should die without leaving children or their descendants, to the grantor's heirs on the death of the daughter and her husband: provided, that if she and her husband shall ever sell the land the purchase money shall be invested in other land, the title to which shall be secured to the daughter in the same manner as was the title to the land originally conveyed. *Held*, that the deed conferred on the daughter a power of sale which enabled her to convey a fee-simple title.

2. The power of sale thereby conferred is exhausted with the sale of the land originally granted, and does not extend to land purchased with the proceeds.

3. Carr. Code Ky. § 493, relating to the sale of land of persons under disability, provides, *inter alia*, that the guardian of each infant shall execute a bond with at least two sureties worth not less than double the value of the estate to be sold; and that, if the bond be not given, any order of sale and any sale or conveyance under it shall be absolutely void. *Held* that, the power of sale conferred by the deed having been exhausted by a sale of the land originally granted, the interest of the minor children in the land purchased with the proceeds did not pass to the purchaser under the decretal sale in an action which the grantees, their mother, instituted to pass their title without having executed the requisite bond.

4. Where the contingent rights of the grantor's heirs are secured in the reinvestment, their interest is too remote to make them necessary parties in an action to pass the title of the grantee's children in the purchased land.

5. All parties having a vested interest in such action being represented therein, and the adult children having elected to take title in the purchased land by their failure to assert any claim, the commissioner's deed passes title to all interests in such land except those of the infants.

Appeal from Louisville chancery court.

"Not to be officially reported."

J. K. Goodloe, for appellant. M. A., D. A. & J. G. Sachs, for appellee.

PRYOR, J. The question in this case involves the validity of the title to a house and lot in the city of Louisville that the appellant, Fritsch, was compelled to accept under the judgment of the chancellor. Fritsch purchased the property of the appellee, Klausing; and the latter derived his title by purchase from Julia Evans, and by a purchase under a decretal sale in Case 41,049, instituted and adjudged by the Louisville chancery court. Mrs. Evans was a daughter of James R. Anderson, who resided in Montgomery county, Ky. Anderson executed to his daughter Mrs. Evans a deed for 37 acres and 2 roods of land in that county, vesting in her an estate for life, remainder to her children, and at her death, and that of her husband, to his (Anderson's) heirs at law, in the event Mrs.

Evans left no children at her death, or the descendants of children. The deed also provided that if Mrs. Evans and her husband should ever sell the land conveyed the purchase money was to be invested in other lands, and the title to the land in which the investment is made to be secured in the same manner as in the original conveyance, and the purchaser was required to look to the reinvestment, etc. Evans and his wife, in February, 1869, conveyed that land to a man by the name of Bridgforth, and, obtaining the money, invested the proceeds in this house and lot, the title to which is in controversy. It is claimed that, by the purchase from Evans and wife, Bridgforth derived no title, because there was no power of sale conferred by the deed from Anderson to Mrs. Evans, and she, having a life-estate, could convey no greater interest. We think the clause in the deed providing that if Evans and wife sold the property the proceeds should be reinvested, and the title held in the same way, was, in effect, an expressed power of sale, and that such was the intention of the maker of the deed; and, if the power is to be implied, the language used is of such a character as to leave no doubt on that question.

Crisman and wife owned this house and lot when Evans and wife sold the Montgomery land, and the proceeds were invested in the house and lot by Evans and wife, and a deed made by Crisman to Mrs. Evans on the 20th of March, 1872, vesting in Mrs. Evans the fee-simple title. In September, 1875, Mrs. Evans, at her own instance, or that of the purchaser of the land in Montgomery, being invested with the fee in the lot purchased with the funds arising from the sale of the land to Bridgforth, conveyed this house and lot to her children, reserving a life-estate, and containing, in substance, the stipulations of the deed to her from her father, thus making the reinvestment as directed by Anderson in the original deed; Mrs. Evans in the deed to her children, reserving the power to sell the house and lot, and reinvest the proceeds. On the 14th of March, 1888, Mrs. Evans sold and conveyed this house and lot to the appellee, Klausing, making him a general warranty deed, claiming the right to make this sale under the power reserved in the deed made to her children; it being similar in effect to the power given in the original deed from her father. It may not only be argued that the power to sell found in the deed to Mrs. Evans was exhausted when the land was sold by herself and husband, and a reinvestment made, but we think it plain from the deed made by her father that such was his intention, and the restriction placed upon the purchaser of that land to see that the proceeds were to be reinvested in other land was never designed to follow the property in which the investment was made, with the authority to sell and reinvest, and the purchaser of the invested estate also required to look after subsequent investments that might be made. This was

never contemplated by the grantor, Anderson; and in the conveyance to his daughter, where he says, "the title to the land purchased by reason of the reinvestment shall be secured to the said Julia F. in the manner that the land herein conveyed is," he does not mean to invest in the husband and wife the power to sell, and make another investment requiring the next purchaser to look to the investment. The restriction placed upon the purchaser or his title by the father's deed evidences a plain intent that the power shall not be further exercised, but has said to his daughter: "You may sell this land, and invest the proceeds in other land; but, if you do so, the purchaser must see that the investment is made, or he acquires no title." This is as far as the power extends, and such was the purpose of the grantor.

The power having been exhausted, the interest of the infant defendants in the house and lot did not pass to the purchaser at the decretal sale in Case 41,049, because no bond was executed to the infants as required by the Code. The action (41,049) was brought by the mother, Mrs. Evans, against her children, to sell and reinvest the second time the proceeds of the land given her by her father. The proceeds had been invested in the house and lot in controversy; and the mother, by filing the petition, pursued the proper course to enable her to make the investment, and to pass the title of the infants. Her children were all before the court, and properly served. All the parties having a vested interest were represented, and had their day in court. The sale was made; and F. S. Klausing, the purchaser from Mrs. Evans, became the purchaser, and, we assume, complied with the terms of sale. It was not necessary to make those who might be the heirs of Anderson parties to the action. Their interests, if any, were of so remote a character as not to be estimated or defined,—the contingency upon which the heirs at law of Anderson are to take depending on the death of the life-tenant without children; and, as their rights are fully secured, if they should ever have any in the reinvestment, there was no reason for making them parties. The deed by the commissioner passed to the purchaser the title to all the interests in the property except the infant defendants; and, as some of them were adults, and before the court, in Case 41,049, the proceeding is binding on them, and their title passes, for the reason that, by their failure to assert any claim, they have elected to take the title in the invested estate. As to the infant defendants in the present case, the sale is void, as was expressly held in *Barnett v. Bull*, 81 Ky. 127. The mode of getting title from the infants will be by an original petition seeking the reinvestment, and a sale of their interests; and when the reinvestment comes to be made the chancellor may approve the investment already made. A bond, however, must be given to the infants. The legislature has seen proper to require it, although the in-

vestment is to be made by the chancellor; and this court cannot disregard this plain provision of the Code. See section 493, *Carroll's Code*.¹ Judgment reversed, and remanded for proceedings consistent with this opinion.

STEVENSON v. BRASHER *et al.*

(*Court of Appeals of Kentucky*. March 8, 1890.)

ACKNOWLEDGMENT OF DEEDS—MARRIED WOMEN.

1. In Kentucky, where only the county clerk and his deputies are authorized to take acknowledgments of deeds, the clerk may take the acknowledgment of a deed in which he is grantee.

2. Where the clerk who takes the acknowledgment is a party in interest, it is competent for him to testify that the husband was present when the wife acknowledged the deed, though he could not testify to this if he was not a party in interest, unless fraud on the part of the person benefited was charged, and such evidence was germane to the investigation.

3. As the law requires that a wife's acknowledgment shall be taken separate and apart from her husband, the failure of the clerk to do this cannot be excused by ignorance of his duty, and he and his co-vendees will not be permitted to profit by his failure to perform his duty.

4. Plaintiff's husband exchanged land with defendants, and one of them, who was the county clerk, took plaintiff's acknowledgment in the presence of her husband. She joined her husband in mortgaging the land received in exchange. This land, including her dower right therein, was afterwards sold to satisfy the mortgage debt. *Held*, that she could recover the full value of her dower in the land sold to defendant.

Appeal from court of common pleas, Christian county.

"To be officially reported."

J. H. Stiles, for appellant. *Petres & Downer*, for appellees.

BENNETT, J. W. L. Stevenson, since deceased intestate, exchanged his house and lot in the city of Hopkinsville with a portion of the appellees and the representatives and immediate vendee of the others, for a small farm in Christian county, the said vendee paying some boot. The deed to said house and lot was acknowledged by said Stevenson and the appellant, his wife, before E. G. Callis, deputy-clerk, who was one of the vendees. After the death of W. L. Stevenson the appellant, as his widow, instituted this action to set aside the said deed, as far as her dower right was concerned, upon the ground that her husband was present when she acknowledged the same, and said Callis was one of the vendees, and her acknowledgment was obtained by fraud, etc. As said, said Callis was made one of the defendants to the action. He states in his deposition that the husband of the appellant was present when he took her acknowledgment to the deed; but he pleads ignorance of duty in that regard, rather than fraud. We do

¹ *Carroll's Code Ky.* § 493, relating to the sale of land of persons under disability, provides, *inter alia*, that the guardian of each infant shall execute a bond with at least two sureties worth not less than double the value of the estate to be sold, and that, if the bond be not given, any order of sale and any sale or conveyance under it shall be absolutely void.

not agree to the proposition that the fact that Callis was one of the vendees rendered him incompetent to take the acknowledgment. A large majority of the authorities hold that, if the officer taking the acknowledgment is a vendee or has such an interest that would render him incompetent to testify as a witness, he is, for that reason, not competent to take the acknowledgment. The ground of these decisions is that, the officer's duties in taking the acknowledgment being purely judicial, and his certificate of acknowledgment being evidence of the facts therein contained, and the temptation by reason of his interest being strong to manufacture evidence for himself, he will not be permitted to do so, especially as he would not be permitted, by reason of his interest, to testify to the same facts as a witness, and the other party would be likewise incompetent as a witness. The foregoing reasoning is now not applicable in this state, for the reason that either party may testify concerning said matter. Besides, while some of the duties of the officer are judicial in character, his acts and certificate belong to the ministerial class, and are known as ministerial duties. Besides, in such cases, the statute of this state gives no one but the county clerk or his deputies authority to take the acknowledgment to deeds; and if the clerk, by reason of his interest, could not take the acknowledgment according to the statute no one could; and he, in consequence thereof, would be deprived of making a purchase of real estate in all cases where an acknowledgment was essential to convey the title, and would be deprived of acquiring a perfect title where an acknowledgment was essential to such a title. In the cases of sheriffs, etc., the statute provides that, where they are interested, others must act in their stead, and their actions in such cases are generally held to be void; but there is no such provision in reference to acknowledgments by others in case the clerk is interested. This shows that the law-makers regarded clerks' duties in reference to acknowledgments as ministerial, and therefore considered them competent to take acknowledgments, notwithstanding they might be interested. *Lynch v. Livingston*, 6 N. Y. 484.

But there is this qualification in case of the interest of the officer taking the acknowledgment, to-wit, he renders competent as evidence that which would otherwise be incompetent, and which would authorize the setting aside of the acknowledgment which would not otherwise authorize it. In the case of his having no interest, he would not be permitted to testify that the husband was present when the wife was examined, for the reason that such evidence would stultify his certificate, unless fraud on the part of the person benefited should be charged, and such evidence should be germane to the investigation of that matter. But where the clerk is a party in interest, and the issue is made as to the validity or legality of his acts

in taking the acknowledgment, it is competent and highly proper for him to testify to any omission or violation of duty in taking the acknowledgment. He, being one of the parties to whom the conveyance was made, and one of the beneficiaries of the wife's acknowledgment, may show that her acknowledgment was not taken as the law directs. The fact that he was innocent in this omission of duty makes no difference, for the wife cannot convey away her right of dower, unless the requirements of the statute are pursued in every particular, and that she shall be examined separately and apart from her husband is one of the requirements which is indispensable, the performance of which devolves upon the clerk taking the acknowledgment. And if he, in taking the acknowledgment for his own benefit, fails to perform said duty, he and his co-vendees should not be permitted to profit by such failure; but they should be considered to have failed to get the wife's dower right by the fraud or laches of said clerk, and for that reason not entitled to it.

The appellant properly joined her husband in mortgaging the farm that the husband received in exchange for said house and lot, and the same, including the appellant's dower therein, was sold to satisfy said mortgage debt. The chancellor estimated the value of the appellant's dower right in said farm, and deducted the same from the value of her dower right in said house and lot, and allowed her the value of her dower therein, subject to said deduction. In the case of *Mahoney v. Young*, 3 Dana, 588, Mahoney conveyed a house and lot which he owned in Shelbyville to Frederick Young, in exchange for 179 acres of land in Jefferson county. Young, in his life-time, his wife joining in the conveyance, sold and conveyed away said house and lot. After his death his wife sued for dower in the Jefferson county property. Her right was resisted upon the ground that she was not entitled to dower in both pieces of property, and, she having relinquished her dower in the house and lot, the same amounted to an election on her part to take dower in said house and lot. But the court said: "We are aware that a widow cannot be endowed of lands given in exchange, and also of the lands taken in exchange, but she may have her election to be endowed of which she will. * * * But the fact of her relinquishing her dower in the life of her husband, in the house and lot, should surely not preclude her from her dower in the land. Such relinquishment cannot amount to an election to take her dower in the house and lot relinquished, but, so far from it, rather indicates her election to take her dower in the tract not relinquished." That case settles this. The appellant is not estopped from claiming her dower as against the sub-vendees. The judgment is reversed, with direction to allow the appellant her dower in said house and lot free from the value of her dower right in said farm.

BOSQUETT v. HALL.

(Court of Appeals of Kentucky. March 8, 1890.)

HOMESTEAD—HOUSEKEEPER.

Children residing with a debtor, who have no natural or legal obligation on him for support, being strangers in blood to him, do not constitute him a housekeeper with a family, so as to entitle him to the benefit of the homestead exemption law.

Appeal from circuit court, Hardin county.

"To be officially reported."

Bush & Robertson and *J. D. Erwin*, for appellant. *James C. Poston*, for appellee.

LEWIS, C. J. To entitle a person to the benefit of homestead exemption, he must, when a debt against him is attempted to be satisfied, be a *bona fide* housekeeper with a family, whether such debt was created before or after the homestead was acquired. "In legal contemplation, whomsoever it is the natural or moral duty of the debtor to support, or is dependent upon him for support, may be considered and treated as a member of his family." *Bell v. Keach*, 80 Ky. 42. And accordingly an infant brother or sister, or aged and helpless parent, or even a bastard child, may and have been held to constitute a "family," in the meaning of the statute. But the persons in this case residing with the debtor, though children, have no natural or legal obligation on the debtor for support, being strangers in blood to him. He may at any time separate from, and cease to support or care for, them, without violating any legal or natural obligation. And to so extend the operation of the statute as to exempt the homestead in such case would be not only contrary to the policy of it, but place it in the power of a debtor, by subterfuge and fraud, to defeat his creditors. The construction and operation of the homestead law must be determined by some well-defined rule that is reasonable and just, not according to the mere will or caprice of the debtor. It seems to us appellee is not entitled to benefit of the homestead exemption, and the judgment must be reversed, and cause remanded for further proceedings consistent with this opinion.

MORRISON v. HOWE et al.

(Court of Appeals of Kentucky. March 18, 1890.)

APPEAL—WEIGHT OF EVIDENCE.

The supreme court will not reverse a chancellor's findings of fact, unless clearly against the weight of evidence.

Appeal from circuit court, Menifee county.

"Not to be officially reported."

Wood & Day, for appellant. *Thos. Turner* and *O. Cyrus Turner*, for appellees.

BENNETT, J. The appellees sued the appellant on three notes, for \$500 each, executed by the appellant to Helm and Bullitt, as agents for Robert's heirs, and assigned by them to the appellees. There was a lien retained on some land to secure the payment of these notes; and to the suit of the appellees

thereon the appellant interposed several defenses in the nature of payment, offset, etc. The appellant contends that the appellees purchased these notes for him, and as a means of paying off a judgment for about \$1,500, which he held against them. Said judgment is receipted in full, etc., by the appellant. He contends that the agreement to purchase these notes, etc., was the foundation of said receipt, etc. The decided weight of the evidence is that there was no such agreement as that contended for by the appellant; that the appellees paid off said judgment and purchased said notes as independent transactions,—the one because they were bound to pay, and the other as a business transaction. The pleadings also opened up the business transactions between the appellant and appellees for years prior to the purchase of these notes, which involved many transactions, ranging from nine dollars up to thousands of dollars. These transactions were overhauled by the commissioner and chancellor, and judgment was rendered on said notes, subject to the offset of items amounting to a few hundred dollars, found to be due the appellant, growing out of these transactions. There was direct and positive evidence *pro* and *con* to all the issues made in reference to these transactions; and the court passed upon them, as we think, intelligently and properly. But in a case like this, requiring an auditing by a commissioner of the multifarious items of account between the parties, and that auditing overhauled and corrected, if erroneous, by the chancellor, we must, in justice to all parties, decline to weigh mere probabilities as to which party is right in reference to these multifarious issues of fact, and reverse the judgment only in the event that the chancellor's findings are clearly against the weight of evidence. The evidence in this case does not justify such a conclusion. The judgment is affirmed.

MURRAY v. MURRAY.

(Court of Appeals of Kentucky. March 8, 1890.)

HUSBAND AND WIFE—CONVEYANCE BEFORE MARRIAGE.

1. A conveyance on the eve of marriage, to be regarded in equity as a fraud on the marital rights of the intended wife, must be made without her consent or knowledge.

2. If, however, a gift or voluntary conveyance of all or the greater portion of his property be made, by one about to marry, to his children by a former marriage, without the knowledge of the intended wife, or it be advanced to them after marriage without the wife's knowledge, a *prima facie* case of fraud arises, and it rests on the beneficiaries to rebut the presumption.

Appeal from circuit court, Franklin county.

"To be officially reported."

Action by Jane C. Murray, seeking a settlement of her husband's estate, and the cancellation, as to herself, of certain conveyances and gifts by him to his three sons, upon the ground that they were in fraud of her marital rights.

John W. Rodman and George C. Drane, for appellant. Wm. Lindsay and John B. Lindsley, for appellee.

HOLT, J. In May, 1882, the appellant, Jane C. Murray, then Jane C. Jillson, first met Henry H. Murray. He was then a widower for the second time. During the summer of that year they became engaged to marry; the Christmas following being the time fixed for the consummation of the agreement. It was, however, postponed from time to time, at his instance, and upon one excuse or the other, until February 17, 1884, when they were married. He had three children living, to-wit, William H. Murray by his first wife, and James A. and John W. Murray by his second wife. When he and the appellant became engaged, he was a gentleman of considerable fortune, being worth, in lands and personalty, probably not far from \$70,000. This was then known to her. They lived together until December, 1886, when he died. In April, 1887, the appellant brought this action, seeking a settlement of his estate, and the cancellation, as to herself, of certain conveyances and gifts by him to his three sons, upon the ground that they were in fraud of her marital rights. Subsequent to their engagement to marry, and on August 17, 1882, he conveyed to his sons James A. and John W. Murray four houses and lots worth four or five thousand dollars. It is conceded, however, in argument by appellant's counsel, that the consideration recited in the conveyance, to-wit, that this property had come by the mother of the grantees, is true. The testimony so shows, and no recovery is now asked on account of it. It is therefore out of the case, and needs no further mention. Subsequent, also, to their engagement, he, by a deed dated August 1, 1882, and acknowledged on October 30th, and recorded November 28th, following, conveyed to his sons James and John, in consideration of love and affection, the homestead where they were living, and another house and lot; the two pieces of property being worth from fifteen to twenty-five thousand dollars. The appellant admits, however, both in pleading and her evidence, that he informed her, before the making of this conveyance, of his intention to execute it, and she made no objection to it. She says, however, that she supposed it was to be an absolute one, by way of advancement to the two sons, and that it was not unreasonable, in view of his financial condition as stated to her by him. She also says he then promised to do right by her, and provide well for her. She now claims, however, that the deed was in the nature of a testamentary disposition of the property, and in fraud of her coming marital rights, because it provided: "But there is reserved in said party of the first part [H. H. Murray] a right for life, at his option, to occupy, use, lease, and enjoy the profits of each and all of said property for and during his natural life."

A conveyance upon the eve of marriage, to be regarded in equity as a fraud upon the marital rights of the intended wife, and consequently not binding upon her, must be made without her consent or knowledge. *Leach v. Duvall*, 8 Bush, 201. Here she knew of it, and the fact that it conveyed a less estate than she supposed cannot serve as a ground of complaint for her. It was an advantage to her. She, together with her husband, enjoyed during his life the use of at least the homestead, if not all of the property covered by the deed. The conveyances named appear to have embraced all the real estate owned by H. H. Murray.

April 3, 1884, he, in consideration of love and affection, assigned to his son James A. Murray a judgment against the Blantons, secured by mortgage lien, and amounting to about \$7,000. The son says that his father had told him some four or five years before that he was to have this debt; and in this statement he is supported by the evidence of the draughtsman of the assignment of the debt, who says that the father said, when he executed it, that he had heretofore given it to the son. The gift was, however, not perfected until April 3, 1884. At the same time, the father, for the same consideration, assigned to the same son a mortgage debt on one Herrman for about \$4,000; also a certificate for 30 shares of bank-stock, worth \$4,500. In November, 1885, he gave to James A., for John Murray, United States bonds of the value of \$13,750. Also, at about the same time, he gave to his son William railroad bonds, payable to bearer, worth \$4,800. Thus we see that shortly after his marriage he gave to his three sons about \$34,000. With the last of these gifts his fortune was substantially gone. The wife had no knowledge of those made after their marriage. At his death he was worth but about \$12,500, consisting altogether of personalty. A few days after his marriage he made a will by which he bequeathed all his estate, without naming his wife. It is contended for her that these gifts were merely colorable, and intended to be effective only in case his wife outlived him. In support of this, it is shown that the bank-stock was never transferred upon the bank-books until after his death; that the checks for the dividends thereon, and for the interest on the United States and railroad bonds, were issued payable to him until his death; and there is some evidence tending to show that he took some control of the property which was purchased in payment of the Blanton debt. The transfers, however, vested the donees with either the legal or equitable title; and there is rebutting testimony showing that they controlled the property from the date of the gifts, and received the money upon the checks issued in payment of the bank dividends, and the interest upon the bonds. The question remains, however, whether the gifts of the personalty are, under the circumstances, to be regarded as having been made in fraud of

the appellant's marital rights. The sons testify—and they are doubtless honest in the belief—that they were *bona fide*, and made without any intention to defraud the appellant as to her inchoate rights in the estate of her husband. It is difficult, however, in the face of this record, to believe that there was not a purpose upon the part of the husband to lessen the wife's interest in his estate, in the event she survived him, by giving it to his sons. We do not mean to intimate that a husband cannot make any advances to his children, and must preserve his estate intact to meet the inchoate claims of his wife. If the advancements or gifts be reasonable, when considered with reference to the amount of property owned by the husband, and his purpose be to provide for the children, and not to defraud the wife, then she cannot complain, although they in fact diminish the property to which her inchoate rights have attached by the marriage. It is a question of intention upon the part of the grantor. If the property given away constitute all, or the principal part, of the husband's estate, and be such an advancement as is unreasonable, when compared with his entire property, then, while it should not be conclusively presumed to have been made in fraud of the wife's marital rights, yet *prima facie* it should be so regarded, and the *onus* of showing otherwise be cast upon the donee. Each case must depend upon its own circumstances. If not done to prevent the wife from enjoying a reasonable portion of the husband's estate, or to deprive her of such an interest in it as she might reasonably expect upon her marriage, then the advancement should be upheld as to her. The court must look to the condition of the parties, and all the attending circumstances, in judging of the transaction. It should take into consideration the amount of the husband's estate, the value of the advancements, the time within which they are made, and all other *indicia* which will serve to determine the intention accompanying the transaction.

If, however, a gift or voluntary conveyance of all or the greater portion of his property be made to his children by a former marriage without the knowledge of the intended wife, or it be advanced to them after marriage without the wife's knowledge, a *prima facie* case of fraud arises; and it rests upon the beneficiaries to explain away such presumption. If the husband have an ample estate, he may, of course, give to the children of a former marriage a reasonable portion of it; and the wife cannot complain. If this were not the rule, then the hands of the husband would be completely and unreasonably tied, and he could make no advancement to his children by a former marriage, however large his estate, and however needful to them; but he would be compelled to hold it all, except from purchasers for value, to meet the inchoate claims of the wife. Justice Story says that reasonable provision may be made for the children of a former marriage

if done under such circumstances as evidence good faith. 1 Story, Eq. Jur. § 273. In this instance, however, the husband, by successive gifts, advanced to his children, without the knowledge of his wife, nearly all his large estate. They were not her children, and the transfers deprived her of that reasonable expectation as to the enjoyment of a portion of his property which she had a right to form at their marriage. A *prima facie* case arises in her favor. It is attempted to overturn it with the claim that the greater portion of the husband's property came by the second wife; but, while it appears that she derived some property from her mother, yet the amount of it is not even approximately shown, and is a matter of conjecture. The husband, within a comparatively short time after his marriage to the appellant, and without her knowledge, gave to his children by his former marriages between thirty and forty thousand dollars. What he so gave, together with his estate remaining at his death, amounts to about \$16,000. Allowing for reasonable advancements to the children, the wife was, in our opinion, entitled to \$10,000 as her distributable portion of the estate. This, it seems to us, is the equity of the case. The gifts made to the children subsequent to her marriage must, under the circumstances, be regarded as having been made in fraud of her marital rights; and the amount of them, together with the estate of the husband remaining at his death, less what would have been reasonable advances to the children, must be estimated in determining her rights. The chancellor will allow, as of the date of his decree, the sum above named. Any equities which may exist between the other parties to this action remain open for future settlement, not being now presented for determination. The judgment below, and which allowed the appellant as her distributable portion but one-third of the estate in her husband's possession at the time of his death, is reversed, and the cause is remanded for further proceedings consistent with this opinion.

FREEMAN v. FREEMAN.

(Court of Appeals of Kentucky. March 13, 1890.)

DIVORCE—PLEADING—EXCESSIVE ALIMONY.

1. Under Gen. St. Ky. 728, providing that "no petition for divorce shall be taken for confessed, or be sustained by the admissions of the defendant alone, but must be supported by other proof," an answer in a suit for alimony, which avers that plaintiff's former husband is still alive, and that she is not, therefore, the wife of defendant, and which asks that the contract of marriage be annulled, cannot be taken as true by the fact that it is not put in issue by a reply or otherwise.

2. A prayer for alimony is, in effect, a prayer for a decree of separation.

3. Where defendant, in a suit for alimony, is worth no more than \$3,000, and is able to do but little work by reason of old age, an allowance for alimony of \$410 a year is unreasonable and excessive.

Appeal from circuit court, Washington county.

"Not to be officially reported."

J. W. S. Clements and T. C. Bell, for appellant. *C. C. McChord and John W. Lewis*, for appellee.

HOLT, J. The appellant, S. W. Freeman, and the appellee, Laura Freeman, intermarried on September 26, 1887. He was then about 60 and she about 26 years old. Their honey-moon was of short duration. They separated on November 29, 1887. December 5, 1887, the appellant conveyed to his sister-in-law, a woman without means, and then about 50 years old, his land and all his property; the recited consideration being that she should pay his debts, care for him during life, and bury him decently at his death. December 19, 1887, the wife brought this action for alimony. Her petition avers that the appellant, during the short time they lived together, had abused and assaulted her, and then driven her from his home. Other conduct improper in a husband is alleged, but it need not be mentioned. She had been twice married before her marriage to the appellant. In 1879 she married one Baldwin. After a short time he abandoned her. They had no children. In 1882 she married one Hays. He died in about a year. By him she had one child, that is yet living. After her first husband left her, she heard nothing of him, save that it was rumored he was dead, and she was informed by one person that a man of his description, habits, and occupation had died at a certain time and place. Upon the other hand, there is testimony tending to show that he was still alive when she married the appellant. The evidence upon this point is conflicting, and so much so that the judgment of the chancellor will not be disturbed upon this ground.

It is urged, however, that upon the pleadings the wife was not entitled to any relief; and, if so, the judgment must yet be reversed, because it afforded more than was asked. The statute provides that habitual behaving by the husband towards the wife, for not less than six months, in such a cruel and inhuman manner as to indicate a settled aversion to her, or to destroy permanently her peace and happiness, shall be ground for a divorce. Another ground is: "Such cruel beating or injury, or attempt at injury, of the wife by the husband, as indicates an outrageous temper in him, or probable danger to her life, or great bodily injury, from her remaining with him." Gen. St. 728. These are grounds for an absolute divorce, and, conceding that the averments of the petition in this case did not set forth sufficiently either ground, yet the suit is only for alimony, and our statute provides: "Judgment for separation, or divorce from bed and board, may also be rendered for any of the causes which allow divorce, or for such other cause as the court in its discretion may deem sufficient." Id. 730. The discretion thus given is not, of course, arbitrary or unlimited; but must be a sound legal one, and only to be exercised

upon such grounds as the chancellor may deem sufficient, having regard to the legal rights and obligations of the parties. It is plain, however, from the language of the statute, that he is not restricted to the statutory grounds which authorize an absolute divorce. Before the adoption of our statutes, the law gave to the wife, upon sufficient grounds, the right to a decree of separation and alimony, although no legal cause for divorce existed. The statute recognizes this right. *Shrock v. Shrock*, 4 Bush, 682. In our opinion, the averments of the petition were sufficient in this respect. The evidence as to the conduct of the appellant towards his wife is, as is usual in such cases, somewhat conflicting. It is sufficient in our opinion, however, to support the finding of the court below, which was that his behavior towards her had been of such a character as to entitle her to a support from his estate.

The answer averred, however, that her former husband, Baldwin, was still alive, and that she was not, therefore, the wife of the appellant. It therefore asked that the contract of marriage be annulled. It is now contended that, as this averment was not put in issue by a reply or otherwise, it must be taken as true, and relief, therefore, be denied to the wife. While not so in name, yet this part of the answer must be regarded as in the nature of a cross-pleading by the husband seeking a cancellation of the marriage contract. Our statute provides: "No petition for divorce shall be taken for confessed, or be sustained by the admissions of the defendant alone, but must be supported by other proof." Gen. St. 728. This averment cannot, therefore, be taken as true, and the wife, therefore, denied relief.

It is manifest the conveyance by the husband must be regarded as having been made in fraud of the rights of the wife. The circumstances so mark it unmistakably. In fact, it does not appear to be otherwise contended by counsel for the appellant. It is said, however, that the judgment must be reversed because it decrees a separation between the parties when no divorce *a mensa et thoro* was asked. It, however, sought alimony, and this was, in effect, a prayer for a decree of separation. Such relief cannot be granted, unless the parties be separated. The wife is not entitled to alimony, unless she be separated from the bed and board of the husband. The court allowed the appellee \$75 as a fee for her attorneys, and \$30 a month, or \$410 a year, for the support of herself and her child by her former husband. The child is not named in her pleadings, and she only asks alimony for herself to the extent of \$20 a month. We know of no right the chancellor has to charge the husband with the support of a child by a former husband, when the wife and child are not living with him. No rule, either legal or equitable, authorizes it.

The evidence in this case does not clearly show the amount of the appellant's estate.

He is comparatively a poor man, however. He is now, by reason of old age, able to do but little work. His farm, upon the appellee's own statement, is not worth over \$2,500, and this is presumably a high valuation. He is probably worth, in all, from two to three thousand dollars. The amount to be allowed for alimony is governed by no fixed rule. It must necessarily depend upon a variety of circumstances. The worth of the husband, his age and ability to labor, the needs and situation of the respective parties, and all the attending circumstances enter into the question. Thus viewing this case, we regard the allowance to the wife as unreasonable and excessive. It is more than the husband by any reasonable estimate can make or derive from his limited estate. The allowance to the wife's attorneys will remain as fixed by the judgment, but, in our opinion, under all the circumstances, \$125 a year to her for her support would be reasonable, and it is so fixed. The judgment is reversed, with directions to render one in conformity with this opinion.

LOUISVILLE & N. R. Co. v. SHEETS.

(Court of Appeals of Kentucky. March 13, 1890.)

FELLOW-SERVANTS.

A railroad yard switchman and a locomotive engineer are not fellow-servants.

Appeal from court of common pleas, Franklin county.

"Not to be officially reported."

Ira Julian, for appellant. *Thos. H. Hines*, *A. Duvall*, and *Scott & Violet*, for appellees.

PRYOR, J. The appellee, Lee Sheets, instituted this action below to recover for a personal injury resulting in the loss of one of his hands, caused, as is alleged, by the negligence of the employees of the appellant in charge of its engine. The appellee had been in the employ of the appellant, the Louisville & Nashville Railroad Company, for a number of years, engaged at its switch-yard in Frankfort, in switching and shifting cars. George Wilder was the yard-master, Ed. Grant the engineer, and Sanders the fireman. Cars were standing on the side track, and the appellee, who was the switchman, was ordered by the yard-master to couple the cars, so as to bring them out. The ground of recovery was that the engineer, although signaled, failed to check the speed of the engine, but moved up with such rapidity and force as to catch the hand of the appellee between the bumpers before he had time to finish the coupling and leave the cars. There was evidence conducing to show that the engineer failed to reverse the engine, and also to show that the engine was moving faster than was usual in such cases. While the engineer testifies that he did reverse the engine, and there is testimony showing that the engine was moving at the usual speed, the testimony for the plaintiff shows a different state of facts, and it was with the jury, and not with

this court, to determine the effect and weight of the testimony. John Loyd, another switchman, says that the engine was not reversed, and was moving at the rate of three or four miles an hour, and that from one to one and a half miles an hour was fast enough. Sanders says that he saw the signal, and repeated it to the engineer, and they were moving up slowly at the time; that the signal was not given until they were almost a car-length from the still cars. The engineer states that he did not see Sheets when he went in to couple the cars, or when he was injured, and was obeying signals from the fireman, and did not check the engine until it was very close to the still cars. The appellee had been ordered to couple the cars. The yard-master, engineer, and fireman were present for that purpose; and that the sudden and rapid movement of the train or engine against the still cars caused the injury is a fact believed by the jury, and upon which they based their verdict. We cannot disturb the finding on the facts. The engineer is required to have superior skill in his employment to that of the mere brakeman or switchman, who may be a common laborer, and still suited to the employment; as it requires but little, if any, skill to discharge such a duty. The yard-master and engineer would be both responsible for the movements of the train in many instances, and each is superior to the brakeman, and to such an extent as to make the company responsible for the injury to the brakeman caused by the gross neglect of either the one or the other. The cases of *Railroad Co. v. Collins*, 2 Duv. 114; *Same v. Robinson*, 4 Bush, 507; *Same v. Filbern*, 6 Bush, 574; *Same v. Moore*, 83 Ky. 675,—are decisive of the right of recovery by the switchman, where the injury results from the neglect of the engineer or conductor. The instruction given by the court below, defining "gross negligence," is taken from the opinion of this court in the case of *Railroad Co. v. McCoy*, 81 Ky. 403, and, if not a correct definition, was more favorable to the defendant than to the plaintiff. The jury was told that it is the failure to exercise such skill as one of careful habits would observe, to avoid danger, under similar circumstances. Gross neglect is the absence of ordinary care, and if the jury believed the testimony of the appellant's witnesses in this case, and this they seem to have done, the verdict was proper. There was no instruction asked by the defense on the question of contributory neglect, and for the reason that no such neglect appears. The jury was told that "the plaintiff accepted the employment, assuming all the risks usually incident to the discharge of his duties; that the railroad was not an insurer of plaintiff against accidents or injuries suffered by reason of the hazardous nature of his duties in the ordinary course of his employment." This instruction covered the entire ground of the defense, and the jury could not have failed to understand its meaning. While the verdict is for a considerable

sum, we are not disposed to adjudge that the loss of a hand, under such circumstances, is more than compensated by such a verdict. Numerous affidavits were filed for a new trial, all of which were deemed insufficient by the court below, and in this we concur. The only question for the defense in this case arises from the fact of the appellees being an employe in the same service with the engineer, and, while counsel has referred us to many authorities outside of the state sustaining such a character of defense, the point is now so well settled by this court as scarcely to admit of discussion. Judgment affirmed.

PADUCAH LUMBER CO. v. PADUCAH WATER SUPPLY CO.

(Court of Appeals of Kentucky. March 18, 1890.)

WATER COMPANIES—BREACH OF CONTRACT—PRINCIPAL AND AGENT.

A contract between a city and a water company, by which the latter, for a valuable consideration to be raised by taxation, agrees to keep the city supplied with a certain quantity of water, to protect its inhabitants from loss by fire, does not create between the city and the water company the relation of principal and agent, and the doctrine of *respondent superior* cannot be invoked to relieve the water company of liability to a citizen for loss by reason of its failure to keep up such supply.

Petition for rehearing. For former report, see 12 S. W. Rep. 554.

"Not to be officially reported."

Husbands & Husbands and Gilbert & Reed, for appellant. *Burnett & Dallam*, for appellee.

LEWIS, O. J. It is not necessary to even consider whether a municipal corporation can be made liable for destruction by fire of property of its individual inhabitants, because that question is not before us. But, even assuming no action could be maintained in that case, still the doctrine of *respondent superior* would not, as contended, avail to relieve appellee of its own liability, because the relation of principal and agent does not exist in any sense between the city of Paducah and it. On the contrary, they entered into a contract by which, for a valuable consideration to be paid by taxation and by rents for private use of hydrants, appellees agreed, among other things, to keep a specified quantity of water in its stand-pipe at all times, except on particular occasions mentioned, none of which existed when appellant's property was burned. It is too plain for discussion that the city of Paducah had the power and did make the contract for benefit of its inhabitants, and consequently each one of them has a right to sue and recover for an injury caused to him by breach of it. Appellee did not covenant to prevent occurrence of fires, nor that the quantity of water agreed to be furnished would be a certain and effectual protection against every fire, and consequently does not in any sense occupy the attitude of an insurer. But it did undertake to perform the plain

and simple duty of keeping water up to a designated height in the stand-pipe; and if it failed or refused to comply with that undertaking, and such breach was the proximate cause of destruction of appellant's property, which involves questions of fact for determination of the jury, there exists no reason for its escape from answering in damages that would not equally avail in case of any other breach of contract. Petition for rehearing overruled.

HALL et al. v. SCOTT'S ADM'R.

(Court of Appeals of Kentucky. March 18, 1890.)

VENDOR AND VENDEE—INTEREST.

1. Where a vendor's legal title to land by adverse possession becomes perfect during the pendency of a suit for the purchase price, that fact may be set up by an amended pleading, and the vendee will be compelled to accept such title.

2. Where a note bears interest payable semi-annually, each semi-annual installment of interest, at its maturity, becomes a debt due, and bears interest from its maturity, the same as any other interest-bearing debt, until paid.

Appeal from chancery court, Kenton county.

"To be officially reported."

L. E. Baker, for appellants. *Collins & Finley*, for appellee.

BENNETT, J. The appellee, as administrator of J. S. Scott, sued the appellant Mary A. Hall and her husband on a promissory note executed by them to said Scott as a part of the price of the land in controversy. The deed to said land was executed to the appellant Mary A. Hall, by said Scott and J. G. Carlisle, on the 31st of October, 1870. Said Scott had no title to said property, nor did he pretend to have any; but, doubtless, being entitled, by some arrangement with J. G. Carlisle, the real vendor, to the purchase price of said land, he joined in the deed of conveyance. This was according to the agreement between the parties, which they had the right to make; and the appellants cannot avoid the payment of the note upon the ground alone that said Scott had no title to the land.

But the appellants say that Carlisle had no title; that the title was in Andrew and Jemima Ernst,—and therefore they should not be compelled to pay for said land. It appears that, in a suit to foreclose a mortgage on the land executed prior to the purchase of the same by Andrew and Jemima Ernst, said persons were not parties to the same, and Walker, the assignee of the judgment foreclosing said mortgage, purchased said land at the sale under said judgment in 1854, and in the same year, after he had received a deed, he sold said land by deed to J. G. Carlisle. The latter person sold the same in 1870 by deed, said Scott joining therein, to the appellant Mary A. Hall. She and her husband immediately entered upon said land, and have held the actual, adverse possession of the same ever since. Andrew and Jemima Ernst not having been made parties to the suit

to foreclose, they, of course, were not divested of their title by said judgment and sale. All that the purchaser acquired, so far as they were concerned, was a lien on said land older and prior to their legal title. It follows that Carlisle acquired no greater right than his vendor acquired at said sale, which was only a prior lien, as to Andrew and Jemima Ernst's legal title; and the appellants are entitled to a rescission, unless time has ripened their possession as claimants under Carlisle's deed into a legal title. It is alleged that Walker, Carlisle, and the appellants entered upon said land, and held the adverse possession of it,—each of the first two, during the time that he claimed to own the same; the latter two, from the time of their purchase until now. The said possession of either Walker or Carlisle is denied, but that of the appellants is admitted. Have the appellants held the adverse possession under the Carlisle deed long enough to perfect their title? We think they have. The suit was commenced in 1884,—not quite 15 years from the time of the appellants' entry upon said land. But in 1887 the appellee set up, by amended petition, the foregoing allegations in reference to adverse possession, which was only partially denied, as aforesaid. During all of these 17 years the said Ernsts or their heirs could have brought suit for the recovery of said land, but they did not. Now, it is well settled that if, at the time of the commencement of the vendor's suit concerning the land conveyed, he had no title to it, or a defective title, and he acquires title, or his defective title is cured, during the pendency of the suit, he may by an amended pleading set such title up, and the chancellor will compel the vendee to accept it. Fifteen years' adverse possession of land, the real owners of it having a right to sue for it all of that time, gives such possessor a legal title to it. The title thus acquired is as perfect and absolute as a perfect paper title. If, during the pendency of the suit involving the title, the vendor, by an amended pleading, says: "It is true, at the commencement of the suit I had no title to the land; but since then I have acquired a perfect paper title. Here it is, take it,"—the chancellor, if such proffered title is perfect, will compel the vendee to take it. Instead of a perfect paper title, a perfect legal title by adverse possession is tendered. Such title having ripened during the pendency of the suit, there is no good reason why the chancellor should not permit that fact to be set up by an amendment, and compel the vendee to accept such title. Said Scott's injunction, in his life-time, against Morison, enjoining him from proceeding to collect the purchase money of said property arising from the sale of it under a judgment in his favor foreclosing a mortgage thereon, was abandoned after said Scott's death by his administrator and heirs. Consequently Morison had the right to come into this case by cross-petition, and assert his lien, etc.

The notes sued on by the appellee, administra-

tor of Scott, bears date the ——— of ———, 1870, and fell due on the ——— of ———, 1873, with interest payable semi-annually. Upon the maturity of each semi-annual payment of interest, it became a debt due; and it was from that time forward placed upon the same footing as any other debt due and payable at a certain time. Therefore, it bore interest from its maturity, the same as any other interest-bearing debt, and said interest should run until it was paid. But said semi-annual interest should be counted until the maturity of the note, and it should then cease, and the interest on the whole note should commence and be computed in the ordinary way; but the interest on each preceding installment, unpaid, should run until paid. It is true that interest runs on an interest-bearing debt, after its maturity, as a matter of legal right; and the same principle applies to interest on installments of interest after their maturity. But the agreement to pay interest by installments, before the maturity of the debt itself, is a special contract, by which the creditor is more benefited than by contracts bearing interest in the ordinary way. Therefore, it should be presumed, unless the contrary appears, that the parties contracted for the payment of semi-annual interest for and during the time that the paper was, by the contract, to run, *i. e.*, until its maturity. We understand that the judgment adopts the foregoing basis as to said interest, and in that view it will be enforced. We also understand that so much of the administrator's debt against Hall is to be applied to the payment of Morison's debt as will satisfy the same, cost, etc.; but, if there be an excess of the Morison debt, the land is not to be sold to satisfy the excess. The judgment upon original and cross appeals is affirmed.

WILLIAMS' EX'R *et al.* v. WILLIAMS *et al.*
(Court of Appeals of Kentucky. March 18, 1890.)

WILLS—CAPACITY TO MAKE—WITNESS—INSTRUCTIONS—APPEAL.

1. In Kentucky, the rule that, where the evidence is conflicting, the verdict will not be disturbed on appeal, applies as well in cases involving the validity of a will as in any other civil cause.

2. There is no statute in Kentucky requiring that, on an appeal to the circuit court from an order of the county court admitting a will to probate, a formal transcript of the proceedings, and copy of the judgment, of the latter be filed; and a statement filed in the circuit court, showing the parties, and who appeals, and that a judgment was rendered by the county court at a certain time, from which an appeal is taken, is sufficient.

3. Civil Code Ky. § 606, providing that "no person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by * * * one who is * * * dead when the testimony is offered to be given, except for the purpose and to the extent of affecting one who is living," does not prevent the testaments of a will from testifying as to the conduct, conversation, and character of the testator.

4. In a contest by testator's heirs over his will, by which he devised his estate to a church, it being claimed by contestants that he was a religious monomaniac, an instruction to the jury to find the will valid if they find that testator was not at the time of its execution "dominated by some unnat-

ural and irrational bias of mind, so as to overrule and control his own rational will-power," is erroneous, in that it is too broad, and leaves it for the jury to determine what constitutes such bias.

Appeal from circuit court, Owen county.
"To be officially reported."

Alvin Duvall, A. P. Humphrey, J. H. Dorman, and T. J. Hardin, for appellants. *Wm. Lindsay, Lindsay & Botts, and E. E. Settle*, for appellees.

HOLT, J. This is a contest between the devisees of Joseph F. Williams upon the one side, and his heirs upon the other, over his will. It was executed on May 11, 1881, and he died in 1887. It having been admitted to probate in the county court, his heirs took an appeal to the circuit court, where it was rejected, and of this his executor and the devisees are now complaining. Under our present statute, the same effect is to be given in this court to the verdict of a jury in a will case as in any other civil cause. Where, however, an attack upon a will is altogether unsustained by any evidence, this court will, by its mandate, direct the circuit court to remand the case to the probate court, with directions to admit it to record. We are therefore now asked to do so in this instance by the propounders of the will. As the case must return for another trial, it would be improper to enter upon a discussion of the evidence *pro et con*, and it is sufficient to say that many witnesses have testified upon each side, and their evidence is very conflicting. The request will not, therefore, be granted. Nor can it be said that the verdict was flagrantly against the evidence; and, unless this be so, the finding of a properly instructed jury upon the facts will not be disturbed any more in a case of this character than in any other civil action.

A motion was made in the circuit court by the propounders to dismiss the appeal taken by the contestants from the order of the county court admitting the will to record, the ground being that no transcript of the proceedings in the latter court, or copy of its judgment, had been filed as a part of the appeal papers in the circuit court. The contestants had, when the appeal was taken, filed in the circuit court a statement setting forth the names of the parties, appellants and appellees; the decease of the testator; the names of his heirs at law; the probate by the county court at a time therein named of a writing purporting to be, but which they deny is, his will; and that an appeal was thereby taken from its action. It is not suggested that the statement is defective; but it is urged that an appeal could not be taken by the filing of it alone, and that, as the appeal is from the judgment below, a copy of it must be filed. Our statute does not say how an appeal from the county court to the circuit court in a will case shall be taken. It merely gives the right to it. In *Jones v. Jones*, 3 Metc. (Ky.) 266, it does not appear from the report of the case that any transcript of the

county court proceedings was filed. It was there said: "It was only necessary for the parties who desired to take an appeal to the circuit court to have filed a transcript of the proceedings in the county court with the clerk of the circuit court, with the names of the appellants and appellees, and to have had process issued and served on the appellees." In that case, however, as in this one, the appellants filed a petition, which this court treated as a statement, and it was held sufficient to maintain the appeal. We see no reason to rule otherwise. The statement in this case sets forth every fact necessary to give the circuit court jurisdiction, and upon it summons was issued. There was therefore nothing substantial in the objection.

Upon the trial, in the absence of admission in any way, the production of the county court judgment would be necessary; but while, as was said in the case above cited, and as was decided in *Pryor v. Mizner*, 79 Ky. 232, an appeal may be taken by filing a transcript of the county court proceedings with the circuit court clerk, and suing out summons, yet the latter case does not decide that such a mode is exclusive. The *Jones* Case, in fact, decides otherwise, and the other case above cited is not in conflict with it. As the statute does not prescribe what shall be done to take the appeal, it is sufficient if it be made to appear, by the filing of either a transcript or a statement, who the parties appellant and appellee are, and that a certain judgment was rendered by the county court at a certain time, from which the appellants desire to appeal. Technical strictness should not be required. Form is only to be observed so far as it is necessary to the desired end. The motion to dismiss the appeal was properly overruled.

As there must be another trial, it is proper to notice a question of evidence. Several of the contestants were introduced as witnesses upon that side. They testify to the conduct, conversation, and character of the testator. Their evidence is not, however, confined altogether to transactions with him, or those done or not done by him, or to his conversation. There appears to have been no objection, save upon the score of their competency as witnesses. The objection was not directed to particular portions of their testimony, but looked to their entire exclusion as witnesses. It was proper, therefore, to overrule it, even if their evidence in the respects mentioned had been incompetent. It was not, however. Section 606 of our Civil Code makes every person of understanding competent to testify, saving some exceptions mentioned in the succeeding section, and which says: "No person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by, an infant under fourteen years of age, or one who is of unsound mind or dead when the testimony is offered to be given, except for the purpose and to the extent of affecting one who is living, and who, when over four-

teen years of age and of sound mind, heard such statement, or was present when such transaction took place, or when such act was done or omitted."

While this statute greatly enlarged the competency of persons as witnesses, yet it intended to put them all upon an equal footing. This is not an action, however, to establish a claim against a decedent, and thus reach his estate. In such a case the claimant cannot testify to any statement of the deceased, or transaction with him. If permitted to do so, there would be no equality. In such a case the one who would be the litigant if alive, being silent in death, the other in fairness is required by the law to be silent also. In a case like this one, however, all the litigants may testify. They are upon an equal footing, and to exclude them from doing so would restrict the operation of a remedial statute to an extent not intended by the law-making power. This is shown by the fact that this court has repeatedly so decided, and the statute has in this respect remained unchanged. *Milton v. Hunter*, 18 Bush, 163; *Cave's Devises v. Cave's Heirs*, Id. 452; *Flood v. Pragoff*, 79 Ky. 607; *Phillips' Ex'r v. Phillips' Adm'r*, 81 Ky. 328.

The decedent was a bachelor, and had been a member of the Baptist Church for many years. He had accumulated an estate of about \$25,000. He gave it all, with the exception of four or five thousand dollars, to that church and its institutions. The will is assailed upon the ground that he was a monomaniac upon religion. There is no question of undue influence. It is solely whether he was of unsound mind when the will was executed. The court below properly refused the instructions asked by the propounders, but the two given *sua sponte* by it were also objectionable. The one is substantially the counter or negative of the other. It is therefore unnecessary to recite both of them. The first one, after in its first clauses properly instructing the jury in reference to the execution of the paper offered as the will, says: "And that at the time and in the act of executing said paper he had sufficient capacity and strength of mind and memory to take a comprehensive survey of his estate, and to know of what it consisted, and to remember and know who were the natural objects of his bounty, and that at the time and in the act of executing said paper he had sufficient will-power of his own to dispose of his estate with a fixed purpose and will of his own, and was not at the time and in the act of executing said paper dominated by some unnatural or irrational bias of mind, so as to overrule and control his own rational will-power, you will write on said paper your verdict, thus: 'We, the jury, find this to be the true last will of Joseph F. Williams.'" This instruction, and the counter one, were calculated to mislead the jury. A testator, if mentally competent, and acting from his own will, may exercise his choice as to the objects of his bounty, and the fact that he

may have "a bias" in doing so does not invalidate his will. It is true the instruction says that it must have been such an unnatural and irrational bias as to dominate and control the rational will-power of the testator, but this qualification does not render it unobjectionable. The jury may have found against the paper in contest upon the ground that the religious bias or convictions of the testator were, in their opinion, unnatural or irrational, and that they controlled him in the disposition of his estate. The instruction is too sweeping. It left the varying, and often unreasonable, notions of the jurymen, as to what constitutes an unreasonable or irrational bias in will-making, to govern. It gave the jury more latitude than the law authorizes, and was therefore calculated to mislead them, or it at least did not, in language calculated to be understood by them, confine their consideration of the case within proper limit. The only issue was whether the testator was at the making of his will of sound or unsound mind. If he was then a monomaniac upon religion, then he was of unsound mind. This issue should have been submitted to them in as plain and simple language as possible. The law of the case would have been embraced by the instruction, if there had been omitted from it the portion to which we have alluded as objectionable, and which we have italicized. Experience teaches us that, especially in cases of this character, are jurymen apt to be controlled by their prejudices and preconceived notions, if latitude for their play be afforded. It is therefore highly important that they should be guided in their deliberations by instructions not calculated to mislead them. We are satisfied that this may, and probably did, occur in this instance; and the judgment is therefore reversed, and cause remanded for a new trial in conformity with this opinion.

PRATER *et al.* v. STROTHER, Judge.

(Court of Appeals of Kentucky. March 18, 1890.)
COUNTY OFFICERS—POWER TO APPOINT DEPUTIES.

The tax collector appointed under Act Ky. Jan. 30, 1878, entitled "An act authorizing the county of Carter, and those parts of the counties of Boyd and Elliott taken from Carter county, to compromise and settle with the holders of the bonds * * * executed by Carter county in its subscription to the capital stock of the Lexington & Big Sandy Railroad Company, and to levy and collect a tax for that purpose," has the power to appoint deputies to assist him, under section 4 of the act, which provides that he shall have the same power to collect the taxes as sheriffs have to collect the state revenue: sheriffs, though not expressly empowered by law to appoint deputies, having an implied authority to do so.

Appeal from circuit court, Carter county.

"Not to be officially reported."

E. B. Wilhoit, for appellants. T. W. Mitchell, R. C. Burns, and J. D. Jones, for appellee.

LEWIS, C. J. This action was brought by appellant Prater—appellants Nethercutt and

Brown being also plaintiffs—against appellee, Strother, judge of the Carter county court. It is stated in the petition, a general demurrer to which was sustained, that, at the February term, 1889, of the Carter, county court appellant Prater was appointed collector of taxes under an act of the general assembly passed January 30, 1878, entitled, "An act authorizing the county of Carter, and those parts of the counties of Boyd and Elliott taken from Carter county, to compromise and settle with the holders of the bonds and coupons of interest executed by Carter county in its subscription to the capital stock of the Lexington & Big Sandy Railroad Company, and to levy and collect a tax for that purpose;" that he executed bond, and took the oath of office required; that as such collector he did, in July, 1889, appoint Moses Nethercutt and Peter Brown his deputies, who are qualified to act as such, and in open court moved the judge thereof to approve said appointment, which he refused to do, or to permit them to qualify as such deputies. The relief prayed for is a writ of *mandamus* requiring the defendant, as judge of the county court, to approve the appointment of Nethercutt and Brown, and such others as he may appoint deputies.

Whether Prater, as collector, has the power to appoint deputies, and whether it is the duty of Carter county court to cause an order made approving such appointment of persons qualified, depends upon the construction of section 4 of the act, which is as follows: "The county court of Carter county may appoint a collector of said taxes authorized to be levied by this act. * * * Said collector shall have the same powers to collect said taxes in Carter county, and those parts of Boyd and Elliott counties taken from Carter county, as sheriffs now have by law in collection of state revenue. He shall receive the same compensation. And the laws now in force in this state in relation to the state revenue shall govern said collector in the collection of said taxes. He shall execute in the county court of Carter county, at the time of his appointment, a bond," etc. By section 1, art. 8, c. 92, the sheriff, by virtue of his office, shall be collector of the revenue; but, as collector, he is required to give a bond distinct from his official bond, and to perform duties different from those imposed upon him as sheriff. Yet, although he is not in express terms empowered to appoint deputy-collectors of the revenue, the implied authority to do so is so manifest, and has been so long and generally exercised, it is not now questioned. Such being the case, we do not see how the collector of the taxes in question can be denied service of deputies, having, in the language of the act, "the same powers to collect said taxes * * * as sheriffs now have by law in collection of state revenue," and being governed in such collection by laws in force in relation to the state revenue. It seems to have been always the policy of the law of this state to give to ministerial

officers whose powers and duties pertain to a whole county the power to appoint deputies; and therefore sheriffs, assessors, surveyors, jailers, circuit and county court clerks, are each invested by statute with such power. For without aid of deputies the duties of such officers could not generally be performed; and no one more needs assistance of deputies than a collector of taxes, and especially where, as in this case, they have to be collected by the principal officer, not in one county only, but in parts of two others. It seems to us, to deny appellant Prater the right to appoint deputies would not only be contrary to the reason of the statute, but an unwarranted restriction on the language used. As, therefore, in our opinion, the lower court erred in sustaining the demurrer, judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

ECHOLS v. TATE.

(Supreme Court of Arkansas. March 1, 1890.)

REMOVAL OF PERSONS FROM INDIAN RESERVATION.

Rev. St. U. S. §§ 2128, 2129, (Treaty 1866, Choctaws and Chickasaws, art. 43,) provide that no white person has a right to go into the Indian country, except officers, agents, and employees of the government, and of any internal improvement company, or persons traveling or temporarily sojourning in said nations; also persons temporarily employed as teachers, mechanics, or as being skilled in agriculture. Section 2147 provides that all persons improperly in the Indian country shall be removed. Section 2058 provides that the United States Indian agents shall manage the affairs of the agency, including the intercourse of the whites with the Indians, and perform such regulations as may be prescribed. There is a regulation that the agency shall not be used for the concealment of persons or property against creditors. *Held*, that a licensed trader, who had sold out his business and abandoned his post, and was avoiding his creditors, was properly ousted from the agency, with his property.

Appeal from circuit court, Sebastian county; JOHN S. LITTLE, Judge.

Sanders & Watkins, for appellant.

SANDELS, J. This is an appeal from the Sebastian circuit court for the Fort Smith district, involving the validity of the levy of an attachment sued out by appellant, Echols, upon the property of Tate. The facts are as follows: Echols was a wholesale merchant at Fort Smith. Tate was, in 1887, a citizen of the United States, licensed to trade with the Choctaw tribe of Indians at "James Ferrill's Old Place," in the Choctaw Nation. Tate became indebted to Echols for goods in the sum of \$435.25, and, without notice to him, sold out his business, and left the point at which he was licensed to trade, and with wagons, cattle, etc., began to move westward, into the Indian country, and stopped at McAllister's ranch. Echols learned of this; went before the United States Indian agent at Muskogee; filed his affidavit, stating these facts; prayed that defendant and his property be removed from the Indian

country to the state, where some court could give judgment respecting their contention. Echols also gave bond, in double the amount of his claim, to pay Tate all damages which he might sustain by reason of the removal, if the order was therefor wrongfully obtained. Upon presentation of this petition, the United States Indian agent granted the order for the removal of Tate and his property from the territory, and advising him by letter that that agency could not be used as an asylum for the concealment of persons or property, as against creditors. Tate refused to settle. The United States Indian policeman took his property from his camp, and put him and property into the state of Arkansas, where Echols attached the property. Defendant, Tate, files an answer, which it is difficult to understand, but by liberal construction amounts to this: That plaintiff's charges are correct; that the credits are not correct, without specifying in what; that when credits are corrected defendant will settle; that the property of defendant was unlawfully, fraudulently, and with malice and aforethought, and by fraud, brought within the jurisdiction by instrumentalities employed by plaintiff; and claims the value of his property, \$450, actual damages, \$1,000, and pecuniary damages, \$500. An amended motion to dissolve the attachment, stating the same ground, except the damages, was filed; and upon the hearing the foregoing facts, with these additional, were introduced. E. C. Boudinot testified that he was an Indian by birth, and a lawyer by profession, practicing at Fort Smith; that at this time no courts existed in the Indian country, except for the trial of issues between citizens of the several nations; and that there was no process for the collection of debts between citizens of the United States in that territory. D. M. Wisdom testified that he was chief clerk at the Union agency, Robert L. Owen being agent for the five civilized tribes, viz., Cherokees, Choctaws, Creeks, Chickasaws, and Seminoles; that it was the practice of that agency to cause removals of the character described herein, through the United States Indian police; that their acts in this regard were based upon the orders of the secretary of the interior and the commissioner of Indian affairs.

These facts present to this court, for the first time, the question of the power of the president of the United States to remove white men from the Indian country legally. If the removal was legal, the attachment of plaintiff Echols was legal also. No white person has a right to go into the Indian country, except officers, agents, and employees of the government, and of any internal improvement company, or persons traveling through or temporarily sojourning in said nations; also persons temporarily employed as teachers, mechanics, or as being skilled in agriculture. Article 43, Treaty 1866, Choctaws and Chickasaws, (Rev. St. U. S. §§ 2128, 2129.) The president is charged with

the duty of maintaining the treaty stipulations, as the chief executive. *Kendall v. U. S.*, 12 Pet. 524. All persons improperly in the Indian country shall be removed. Rev. St. U. S. § 2147; *U. S. v. Payne*, 8 Fed. Rep. 883. The president acts through his heads of departments and their subordinates. Rev. St. U. S. § 158; *Wolsey v. Chapman*, 101 U. S. 755; *Wilcox v. Jackson*, 13 Pet. 498. The several departments shall make rules and regulations for the transaction of business within their limits. Rev. St. U. S. § 161. The United States Indian agents are to manage and superintend all the affairs of the agency, including the intercourse of the whites with the Indians, and perform such regulations as may be prescribed by the president, the secretary of the interior, and the commissioner of Indian affairs or the superintendent. Rev. St. U. S. § 2058. A licensed trader at the point designated in his license, and wherever else his business as trader may require him to go, is protected by the law; but, where he sells out his business and abandons his post, he is, except for the purpose of leaving, a white man in the Indian country without license, and a person improperly there. The Indians, by treaty, are guaranteed that white men, except those mentioned above, shall not come into their country. Any man who attempts to settle there, or to mark the boundaries of a habitation, shall be fined \$1,000. Rev. St. U. S. § 2118. The president shall remove them. *Id.* The orders received by the United States Indian agent, as testified to by Chief Clerk Wisdom, show that the president does not purpose violating treaty stipulations and statutory enactments, in order to protect debtors who abscond with their property to that country, and beyond the reach of legal process. The president is charged with the duty of putting unauthorized persons out of that country, and, when he determines that the exigency has arisen requiring his action, there is no power to review the correctness of his conclusions. *Martin v. Mott*, 12 Wheat. 19. It follows that the removal of Tate was not an unauthorized removal, and that, he and his property having been legally ousted from the Indian country, the attachment of plaintiff was not predicated upon fraud, etc., and the motion to quash the levy should have been overruled. Reversed and remanded.

ST. LOUIS, I. M. & S. RY. CO. v. WORTHEN
et al.

(Supreme Court of Arkansas. Feb. 15, 1890.)

CONSTITUTIONAL LAW—TAXATION—RAILROAD COMPANIES.

1. Mansf. Dig. Ark. § 5647 *et seq.*, provides that the governor, secretary of state, and auditor shall constitute a board of railroad commissioners; that all railroads doing business in the state shall make and file with the secretary of state a schedule showing the miles of track used by them, and the value of all their improvements, station-houses, railroad track, etc., on their right of way; that, for the purpose of taxation, all such property shall

be classed as real estate, and shall be assessed annually; that the board of commissioners shall appraise the railroad track, etc., and certify to the assessor of each county the value of that portion lying in the county, and the assessor shall list and assess the same. *Held* that, under Const. Ark. 1874, art. 16, § 5, providing that the value of property assessed for taxation shall be ascertained in such manner as the general assembly shall direct, but shall be equal and uniform throughout the state, such statute is not unconstitutional on the ground that it employs a different instrumentality for the assessment of railroad property from that employed to assess other property.

3. It is competent for the legislature to provide that such property shall be assessed annually, while ordinary real estate is assessed but once in two years; the fact that it is denominated "real estate" not changing its true character.

3. And, since the statute fixes the time at which the board of commissioners shall meet to appraise the value of such property, it is not necessary that the railway companies should be notified of such meeting.

4. Nor does the failure to provide for an appeal from the valuation of the board render the statute unconstitutional.

Appeal from Pulaski chancery court; D. W. CARROLL, Chancellor.

This was a bill for injunction brought by the St. Louis, Iron Mountain & Southern Railway Company against R. W. Worthen, as collector of taxes for Pulaski county, and others, to restrain the collection of certain taxes on plaintiff's property. The statutes of Arkansas (Mansf. Dig. § 5647 et seq.) relating to the taxation of railroad property provide as follows: (1) A sworn schedule or statement of such property is required to be filed annually with the secretary of state by every person, company or corporation owning or operating a railroad in this state. (2) The board, consisting of the governor, secretary of state, and auditor of public accounts, at a time and place fixed by law, are required annually to examine such lists or schedules, and to appraise the value of such property. (3) There is no provision in the law requiring the giving of any notice to the railroads, nor for any formal public hearing, contest, or review of the board's action; nor is any appeal to any revisory board or court provided. In short, the board's finding or assessment is final and conclusive. The law provides that all property other than railroad rolling stock and tracks shall be assessed by the county assessor,—real estate, biennially; and personalty, annually. The statute makes railroad tracks realty, and rolling stock personalty. Plaintiff's bill alleges that all of plaintiff's property was duly assessed for the year 1885; that plaintiff duly made its report to the commissioners, as required by law, in March, 1886, of all its property, giving its value, etc., as required; that the commissioners proceeded thereafter to appraise plaintiff's property, and raised said appraisement and assessment greatly in excess of the value as appraised in 1885, the year before. The bill then charges: "(1) That the meeting of the board of railroad commissioners was without notice to plaintiff. (2) That, regardless of the fact that it had appraised

and assessed plaintiff's railroad tracks, classed by the revenue law as real estate, in April, 1885, it did on April 1, 1886, arbitrarily, unjustly, and illegally, assess the railroad tracks, denominated 'real estate,' for the year 1886, by doubling the values upon said property.

(3) That the law authorizing the appraisement of plaintiff's railroad tracks, denominated 'real estate,' every year, was in violation of section 21, art. 2, of the constitution of Arkansas, and of the fifth and fourteenth amendments to the constitution of the United States. (4) That the law under which the assessment was made was void, because it deprived plaintiff of all right of appeal." The bill, after tendering and offering to pay into court the taxes upon its personal property, amounting to about \$50,000, prayed for a temporary injunction restraining the said several collectors from attempting to collect the tax so made under said illegal assessment, and, upon final hearing, that a perpetual injunction be granted. The defendants filed a demurrer upon the ground that there was no equity in the bill. After argument, the court sustained the demurrer; and, plaintiff declining to amend, the bill was dismissed. All proper exceptions were saved, and plaintiff appealed.

Dodge & Johnson, for appellant. *W. B. Atkinson*, Atty. Gen., for appellee.

COCKRILL, C. J. This appeal raises the question of the constitutionality of the provisions of the revenue act of 1883, creating the state board of railroad commissioners for the assessment of railway property for taxation. Section 5647 et seq., Mansf. Dig. It is an attempt to enjoin the collection of the taxes on account of the alleged invalidity or nullity of the assessment. The legality of the proceedings of the board in assessing railway property was affirmed by this court in the case of *Railway Co. v. Worthen*, 46 Ark. 312, and by the supreme court of the United States in *Huntington v. Worthen*, 120 U. S. 97, 7 Sup. Ct. Rep. 469; and thus the constitutionality of the act creating the board was impliedly recognized by both tribunals. But the question was not argued in either case, and we are now asked to overthrow the act because (1) it authorizes the assessment of railways by a different instrumentality from that employed to assess other property; because (2) it authorizes the assessment of "railway tracks"—a term which includes the right of way—annually, whereas other real estate is assessed biennially; because (3) it is said the board meets without notice to the railway; and because (4) no appeal is provided from the assessment of the board, whereas that privilege is accorded to the owners of all other property. Similar statutory provisions exist in many states of the Union; and numerous decisions are reported from various states, and from the supreme court of the United States, affirming the validity of the acts, in some one of which every question here raised has been pressed upon the atten-

tion of the court; but no case is cited denying their legality. The constitution of this state provides that the value of property for taxation shall be ascertained in such manner as the general assembly shall direct, making the same equal and uniform. Section 5, art. 16. There is nothing in this or any other provision of the constitution which either expressly, or by necessary implication, denies the legislature the power to classify property for the purpose of taxation, (Railway Co. v. Worthen, 46 Ark. 330, supra;) and that classification is not prohibited by the federal constitution, so long as the law operates equally and uniformly upon all property of like kind, is definitely settled by the supreme court of the United States, (State Railroad Tax Cases, 92 U. S. 601; Cummings v. Bank, 101 U. S. 153; Kentucky Railroad Tax Cases, 115 U. S. 321, 6 Sup. Ct. Rep. 57.) From the peculiar nature of railroad property, its dissimilarity in use and value from the mass of other property, and its continuous extent through different localities, it is commonly regarded by the states that it cannot, in justice to the owners, be as fairly and uniformly valued by the numerous local instrumentalities provided for assessing other property as by a state board created for the purpose. The industry of the attorney general has furnished us references to the statutes of a large number of states showing that the practice of assessment of railroads as units by state boards is almost universal. In considering a statute of the state of Kentucky which pursued this system, the supreme court of the United States, in the case cited, says: "There is nothing in the constitution of Kentucky that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislative power; and there is nothing to forbid the classification of property for purposes of taxation, and the valuation of different classes by different methods. The rule of equality in respect to the subject only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made, as between railroad companies and other corporations, in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect which the discretion of the legislature has seen fit to impose." In a like case in California it was said: "The constitution of the state requires all property to be assessed at its actual value. We are unable to see how the fact that the value of one kind of property is to be ascertained by one officer or board, and the value of another kind of property by another officer or board,—each clothed with the duty and responsibility of ascertaining the actual value,—can be held to operate a deprivation of legal protection to the owners

of either kind of property. The state board in the one case, the assessors and county boards in the other, are but different instrumentalities through which the same result is reached,—the fair and just valuation by reference to the same standard,—and therefore the equal and uniform valuation of property for purposes of taxation." Railroad Co. v. State Board, 60 Cal. 12. Authorities might be multiplied to the same effect.

The objection of the railways to being placed in a class to be dealt with separately by the legislature is thus seen to be without foundation in reason or authority. But the power thus to classify makes it competent for the legislature to provide the periods for the assessment of each class as well as the mode. It is competent to provide that one kind of property shall be assessed every year, while the requirement reaches another only once in two years. Such a distinction between real and personal property is made without objection; but the difference between a railway, with its equipments and real estate, is perhaps not greater than that between real estate and some species of personalty. The fact that this statute denominates railway tracks as "real estate" does not obliterate the differences between them and ordinary farm lands any more than it would in fact convert railroads into personalty to call them so, as was done for the purpose of taxation, by the acts of 1871 and 1879, (Acts 1871, p. 135; Acts 1879, p. 40.) The nature of the property justifies classification and separation from the body of the real estate upon the grounds that justify the separate classification of realty and personalty. The requirement of an annual assessment of railways affords, therefore, no greater cause for complaint than does the like requirement for personal property; and the complaint of discrimination is groundless. Railroad Co. v. Board, 67 Iowa, 199, 25 N. W. Rep. 128.

More baseless than either of these objections is the argument that the company's property is taken without due process of law because no notice is given the company, and no opportunity to be heard, before the assessment becomes fixed. The time and place for the meeting of the board is fixed by the statute; and notice by statute is practically sufficient, and all that can be required in such proceedings. Pulaski Equalization Board Cases, 49 Ark. 518, 6 S. W. Rep. 1. As was said in the State Railroad Tax Cases, 92 U. S., supra: "This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked."

The objection urged here to the failure to provide for an appeal from the valuation fixed by the state board was disposed of in the Kentucky Railroad Tax Cases, cited above; and what is there said of the relative rights of the owners of railways and of the

owners of other property, and of the power of the tribunals which fix the values of the several classes of property for taxation, is so nearly applicable, under the laws of this state, that we quote the language as disposing of the question: "The final point of objection seems to be reduced to this: In the case of ordinary real estate, it is said, when the assessor has made his valuation, it is submitted to a board of supervisors, who may change the valuation, but not so as to increase it, without notice to the tax-payer, and an opportunity for a formal hearing, upon testimony to be adduced under oath, and with a right of appeal on his part, first, to a county judge, and, again, if the amount of the tax is equal to \$50, to the circuit court. This is contrasted with the proceeding in the case of railroad property before the board of railroad commissioners, in which it is alleged there is no notice of an intended change in the valuation returned by the company, and no appeal allowed if it is increased. The discrimination, however, is apparent rather than real. An examination of the statutes shows that the original valuation of the assessor, in case of ordinary real estate, is conclusive upon the tax-payer, no matter how unsatisfactory; and the appeal allowed is only from the action of the board of supervisors, in case they undertake to increase the valuation made by the assessor. But in the case of railroad property no board has authority to increase the original assessment made by the railroad commissioners, and there is therefore no case for an appeal similar to that of the owner of ordinary real estate." But, were it otherwise, the objection would not be tenable. We have already decided that the mode of valuing railroad property for taxation under this statute is due process of law. That being so, the provision securing the equal protection of the laws does not require, in any case, an appeal, although it may be allowed in respect to other persons, differently situated. This was expressly decided by this court in the case of *Missouri v. Lewis*, 101 U. S. 22, 30. It was there said by Mr. Justice BRADLEY, delivering the opinion of the court, and speaking to this point, that "the last restriction, as to the legal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of the decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress." The right to classify railroad property, as a separate class, for purposes of taxation, grows out of the inherent nature of the property; and the discretion vested by the constitution of the state in its legislature necessarily involves the right on its part to devise and carry into effect a distinct scheme, with different tribunals, in the proceeding to value it. If such a scheme is due process of law, the details in which it differs from the mode of valuing other descriptions and class-

es of property cannot be considered as a denial of the "equal protection of the laws."

The provision contained in the Kentucky act for the enforcement of the tax by proceeding in an ordinary court of justice does not alter the case as to the questions presented; for in such proceedings the valuation fixed by the board is conclusive, in the absence of a statutory provision authorizing inquiry into their finding, and it could not be assailed unless for fraud, or want of jurisdiction, (*Railway Co. v. People*, 119 Ill. 182, 10 N. E. Rep. 397,) grounds upon which the court of equity could have acted in this case as readily as could the Kentucky tribunal in the case instanced, (*Railway Co. v. Donoghue*, 127 Ill. 27, 18 N. E. Rep. 827; *Railway Co. v. People*, 127 Ill. 627, 21 N. E. Rep. 348.)

Much complaint is made in the abstract and brief of appellant over the fact that, having the same mileage in 1885 and 1886, the board nearly doubled the assessment of the former year in the latter. No fraud is charged; and it is notable in this case, as in those of the individuals who complained in the cases reported in 49 Ark. 518, 6 S. W. Rep. 1, that the board of equalization had greatly increased their assessment, that there is not even a charge of overvaluation of property. The only inference to be deduced from the increase in the assessment, standing alone, as was said in the case of *Railway Co. v. People*, 127 Ill., 21 N. E. Rep., *supra*, would be that the assessment for the first year was too low, or that the property had since increased in value, or that both facts existed. A mere discrepancy in judgment, however, between the members of the board and the chancellor to whom the application may be made for injunction, would not warrant interference on the part of the latter. The chancellor was right in declining to interfere with the collection of the taxes, and the decree is affirmed.

MEXICAN NAT. CONSTRUCTION CO. *et al.* v. MIDDLEGGE.

(*Supreme Court of Texas*. Jan. 21, 1890.)

ACTION EX DELICTO—PARTIES—MISJOINDER.

In an action for injury to plaintiff's land by defendant's taking sand from its adjoining land, a supplemental petition alleging that a third person had bought defendant's land, and had continued taking sand therefrom, thereby adding to the injury to plaintiff's land; that at the time of filing the supplemental petition both defendant and the third person were engaged in taking away such sand; and that the third person had ratified the wrongs of defendant, and was, in fact, the nominal successor of defendant in controlling the excavation of sand; and praying that such third person be made a defendant,—is demurrable for misjoinder of defendants.

Error from district court, Harris county. *Thos. W. Dodd and Waul & Walker*, for plaintiffs in error. *S. S. Hanscom and J. R. Burnett*, for defendant in error.

STAYTON, C. J. Appellee alleges that he owns and resides upon land on Galveston

island, distant from the Gulf about 1,000 yards, and that between his property and the Gulf the Mexican National Construction Company owned, at the time this action was brought, 80 or 90 acres of land, from which it had taken sand, and transported the same to the city of Galveston for sale; that in taking sand from its own land defendant had made deep excavations, which filled with stagnant water and filth, and thereby rendered his home unhealthy. He further alleged that on the border of the Gulf were sand hills formed by natural causes, which operated as a barrier to the waters of the Gulf, and that these had been removed by defendant, since which, during storms, waters from the Gulf came across defendant's lands, and injured his property, as waters aforetime, during such storms, did not. It is not claimed, however, that, during ordinary tides, waters from the Gulf reach plaintiff's property. There is great conflict in the evidence whether plaintiff suffers injury from the cause alleged, and much evidence tending to show that plaintiff's property would suffer such injury if no sand had been removed from defendant's property. The action was commenced on May 17, 1886. On September 12, 1888, plaintiff filed a supplemental petition, in which he alleged that the Galveston & Western Railway Company, a corporation chartered under the laws of this state, on February 29, 1888, purchased defendant's narrow-gauge railroad, known as the "Texas Mexican Railroad," and received some kind of a transfer from defendant for the lots from which sand had been taken, and that since that time the Galveston & Western Railway Company had continued to take sand from the lots, thereby daily adding to the injury done to his property. He further alleges that, at the time the supplemental petition was filed, both corporations were engaged in excavating and hauling sand from near the sea-shore, thus increasing the danger to his property. There was a prayer that the Galveston & Western Railway Company be made a defendant, "and that on hearing he have judgment against it jointly with the defendant for all damages sustained by him by reason of the premises." There were the further averments that the last-named corporation had "fully ratified the previous acts and wrongs of defendant in reference to damaging plaintiff's premises by said excavations," and that in fact that corporation was but "the nominal successor of defendant, as the controller and owner of said railroad, and as the controller and manager of said work of excavating and hauling sand from said premises, which constitutes its principal business." There was a demurrer to the joinder of the Galveston & Western Railway Company, which was overruled, and on trial there was a judgment against the defendant for \$1,000, and another against the Galveston & Western Railway Company for \$500, from which both corporations appeal. The charge of the court made the liability of each corporation to de-

pend on the fact whether its act had subjected plaintiff's land to damage from overflows or liability thereto; made each corporation liable only for injury resulting from its own act; and directed the jury to apportion the damages.

It is too clear that this is not a case in which the Galveston & Western Railway Company, under the averments of plaintiff's pleadings, could become liable by ratification of any act done by the Mexican National Construction Company; nor could it become liable for the acts of the latter company simply from the fact it may have acquired the franchise and property of that company, and thus, in a sense, became its successor. If, after the Galveston & Western Railway Company purchased the railway and land, the two corporations acted together in the commission of any unlawful act injurious to plaintiff, in so far they might have been joined as defendants; but we do not see on what theory it was proper to join them as defendants in reference to matters which occurred before the Galveston & Western Railway Company had any connection with the acts on which it is evident plaintiff's action is mainly based. There is an inconsistency in the charge of the court, and in the ruling on the demurrer, which set up the misjoinder of parties. The charge made each corporation liable only for its own acts, which, if proper, presents just such a case as would deny the right to join both corporations in an action. It may be, however, that it was thought the pleadings authorized the joinder, but that the court was of the opinion that the evidence did not show any joint liability. We are of the opinion that neither the pleadings nor evidence authorized the joinder of the two corporations, and that the demurrer ought to have been sustained; and this is true, even if a cause of action arose after February 29, 1888, in which both corporations might properly have been joined. As the case was presented, it would have been impossible for the jury to have determined what injury, if any, resulted to appellee from the act of each corporation. The ruling of the court below, on the demurrer of the Galveston & Western Railway Company, will require a reversal of the judgment, and for this reason it will be unnecessary to consider other assignments of error. We deem it proper, however, to say that the petition sets up a cause of action, in so far as it alleges a nuisance caused by improper or negligent use of its own property by the Mexican National Construction Company, from which injury results to plaintiff. There is a question in the case, however, which has not been directly presented or argued, that may become of vital importance in the final disposition of the cause, in reference to which we do not now deem it proper to express any opinion. If, as alleged, all the acts of the Mexican National Construction Company were done on its own land, then, if done in a lawful manner, is it liable for any injury resulting to

plaintiff from overflows caused by storms, whether usual or unusual? The general rule is that liability does not arise from the mere exercise of a legal right, though hurt may result from it, if this could not have been avoided except by abandoning the right. Has plaintiff the right to have the land between his own and the Gulf remain in its natural state in order to protect his own, though its most valuable use may be that to which defendant is alleged to have applied it? Without passing on these questions, the judgment of the court below will be reversed for the ruling before referred to, and the cause remanded. It is so ordered.

HEFFRON v. CUNNINGHAM *et al.*

(Supreme Court of Texas. Feb. 25, 1890.)

VENDOR AND VENDEE—CONDITIONAL SALE.

1. After a deed of land, and notes and trust-deed for part of the purchase price, had been delivered, the vendor's agent agreed in writing "to hold the notes and deed of trust for 90 days, within which time title is to be made clear" by suit. Held, that such agreement did not make the sale conditional on the title being cleared within 90 days.

2. In an action on such notes by a *bona fide* indorsee after the title has been cleared by a decree obtained in the name of the vendee, and never repudiated by him, the latter cannot set up in defense that the decree was obtained without his authority.

3. In such an action, parole evidence is inadmissible to show that the sale was a conditional one.

Appeal from district court, Galveston county.

Howard Finley, for appellant. *Wheeler & Rhodes* and *Davidson & Minor*, for appellees.

STAYTON, C. J. On May 4, 1885, appellant executed to Mrs. Mary A. Wicks three negotiable promissory notes, each for \$916.66, and due in one, two, and three years from date; the notes, however, bearing date March 31, 1885. Those notes were given for the purchase money of a lot in this city sold by Mrs. Wicks to appellant, and before their maturity were indorsed to E. H. Cunningham in part payment of advances made to Mrs. Wicks. At the time Cunningham acquired the notes, he had no notice whatever of claim, or fact which would give rise to claim, that they were not justly due to Mrs. Wicks. The sale of the property was made through H. M. Trueheart & Co., representing Mrs. Wicks; and, to evidence the terms of sale, before deed and notes were delivered, that firm executed a paper which is as follows: "Earnest receipt. \$200.00. Galveston, February 26, 1885. Received from Isaac Heffron, two hundred dollars, earnest, to close sale to him of lot 105, in section No. 1, Galveston Island, and improvements, at total price of \$3,250.00. Terms of payment:

Cash, including this earnest	\$500 00
One year, and 8 per cent. interest	916 66
Two years, and 8 per cent. interest	916 67
Three years, and 8 per cent. interest	916 67

Total \$3,250 00

—Title to be perfect, or to be made perfect, or this earnest to be refunded. Deed at expense of seller. Abstract of title at expense of seller, and all taxes to and including 1884. Deed of trust at expense of buyer, and taxes of 1885. Possession at once. Notes to bear interest from March 1st, 1885, and payable sooner at buyer's option. [Signed] H. M. TRUEHEART & Co., Agents for Mrs. M. A. Wicks." On May 4, 1885, Heffron paid the further sum of \$300,—which completed the cash payment,—executed the notes, gave a trust-deed to secure their payment, and received a deed from Mrs. Wicks; whereon the following was indorsed on the paper above set out: "We agree to hold the notes and deed of trust for ninety days from this date, within which time title is to be made clear by necessary actions through court. May 4th, 1885. [Signed] H. M. TRUEHEART & Co." It appears from the evidence that the title to the property was examined by an attorney employed by Heffron, and that, while facts were claimed and believed to exist that made it the separate estate of Mrs. Wicks, then a widow, the deed was made to her during the life of her husband, and it was feared that, on this account, claim that it was community property might at some time be set up by their children, then minors. To remove this seeming cloud on the title, it was agreed that Heffron, holding deed from Mrs. Wicks, should institute a suit against her and her children to clear the title; and it was in contemplation of this that the last statement above, that title was to be perfected, was made. The evidence further shows that the agreement made by Trueheart & Co. to hold the notes for 90 days was made for the purpose of preventing the circulation of the notes until the contemplated suit should be decided, which all parties supposed could be done within 90 days from the time this last agreement was made. Heffron, however, contends, and stated on the stand, that it was expressly agreed when he executed the notes that, if the title was not cleared within 90 days from that date, the trade was to be considered at an end, and the money advanced to be repaid. It is contended by Mrs. Wicks and by Trueheart & Co. that there was no such understanding, but that, on the contrary, the agreement was that the notes should remain in possession of Trueheart & Co. until the title was clear, but that the trade should stand whether the title was cleared within 90 days or not. The district court of Galveston county began its next term after May 4, 1885, on the first Monday in June, and the term next following the June term began the first Monday in October, 1885. Owing to difficulty in fixing locality of the proposed defendants in the suit to be brought by Heffron, his attorney filed suit, not to the June term, but to the October term; the suit being filed September 8, 1885. That suit was No. 12,652; the plaintiff being Isaac Heffron, and the defendants being the four minor Wicks children, who answered through their mother, the

guardian of their estates,—having so been appointed by the county court of Galveston county. On October 10, 1885, in that cause a trial was had, evidence was heard, and the judgment of the court was rendered, divesting the title to the property out of the defendants, and vesting it in Heffron, subject only to the payment by him of the purchase-money notes made by him in favor of Mrs. Wicks, which are the same sued upon in the case at bar. Mrs. Wicks also filed an answer in her own right. The following declaration is found in that judgment: "And, it appearing to the court that the minor defendants, Adeline Wicks, Celeste Wicks, Edward Wicks, and Louis Wicks, had been personally served with process as required by law, and the said minor defendants having answered through their duly and legally appointed guardian, Mary A. Wicks, who answered for herself and in her own right, as well as for said minors, and the court having heard the evidence in this cause," etc. The judgment further declares that Heffron was "represented by his counsel." It was shown that Mrs. Wicks was the duly-qualified guardian of the estates of her minor children.

It is urged that appellee was not a *bona fide* holder of the notes sued on, and that he held them subject to any equities existing between appellant and Mrs. Wicks. This is upon the assumption that appellee received them in payment of an existing debt due to him by Mrs. Wicks. The evidence does not justify the claim that the notes were received by appellee in payment of an existing debt. After stating that he acquired the notes without notice of any claim that consideration for them had in any respect failed, or that they were not justly due, appellee stated that his "object was to furnish my sister [Mrs. Wicks] with means to purchase a home in Sewanee, Tennessee. When the notes were transferred to me, I was at my plantation in Fort Bend county, Tex. * * * I advanced to my sister considerably more than the amount of the notes, and the notes were taken in payment of said advances. They were transferred to me by H. M. Trueheart & Co., agents of Mrs. Mary A. Wicks, on her order, in the usual course of business." This is the evidence bearing on the question, and the inference from it is that the money was advanced or paid in part on the faith of the notes. If, however, the notes had been received in payment of a past indebtedness, appellee would be a *bona fide* holder. While there is some conflict of authority on this question, it must be considered as settled in this state that one who, in good faith, takes by indorsement, before maturity, a negotiable promissory note in payment of an existing debt, is a *bona fide* holder. *Greneaux v. Wheeler*, 6 Tex. 528; *Blum v. Loggins*, 53 Tex. 136. This is the rule recognized by the great weight of authority, and the grounds on which it stands have been too often stated to justify repetition. *Daniel*, Neg. Inst. §§ 184, 331, 332; 2 Rand. Com. Paper, §§ 463, 464, 995.

Tied. Com. Paper, § 294. It is contended that the indorsement made on memorandum of sale on May 4, 1885, evidences a contract that the sale was to be canceled if the title was not cleared within 90 days from that date. Such is not the fair interpretation of the language; and, when read in the light of the facts existing, and construed in connection with the instruments executed at the same time, to so hold would do violence to the manifest intent of the parties. At the time that indorsement was made, appellant executed the notes and deed of trust to secure the purchase money, and received a deed from Mrs. Wicks. These were all delivered; and none of them evidenced other than a completed contract whereby, without condition, appellant promised to pay the purchase money, and Mrs. Wicks conveyed the property. The deed was delivered to appellant, and there can be no claim that he held it as an escrow, to take effect on condition not expressed in its face, as might have been shown to be the case, had it been delivered to a stranger. Having been delivered to appellant, the grantee, it became an absolute conveyance, on which could not be ingrafted, by parol evidence, any condition inconsistent with its terms.

In absence of fraud or mistake, it cannot be shown by parol evidence that the contract evidenced by it was not to have effect in case the title was not cleared within 90 days. The notes and deed of trust are in same condition. If no writing existed other than the memorandum of February 25, 1885, and a subsequent agreement that title should be cleared within 90 days, a different case would be presented, under the parol evidence.

The indorsement, having been made at the same time the other papers were executed, must be construed in connection with them; and, if that had contained a clear declaration that the deed should be canceled, and the notes surrendered, if the title was not cleared within 90 days, then full effect should be given that part of the agreement; but an agreement to that effect cannot be implied, in the face of the legal effect of the other instruments, from the simple fact that it was agreed that the notes should be withheld from circulation for the time specified within which the title was to be cleared. At the time the several instruments were executed, the parties contemplated that a suit would be brought to clear the title; and, as Mrs. Wicks then conveyed to appellant, it could not have been understood that the suit should be brought by her, or in her name. The evidence shows beyond controversy that, when the original agreement was made, it was understood that the deed and notes should be executed, and the balance of the cash payment made, and that appellant would bring suit against the nine children of Mrs. Wicks; but there was some delay in the execution of the deed, caused by the absence of Mrs. Wicks from the state. The agreement was express that the suit should be prosecuted by

and in the name of appellant, through his own attorney, and at his own expense, except court costs, which were to be paid by Mrs. Wicks. Under this state of facts, the reasonable construction of the language contained in the instrument is that appellant would cause the suit to be prosecuted to termination within 90 days after May 4, 1885, and that during that time the notes should not be put in circulation. If the parties had intended otherwise, it is difficult to understand why the notes and trust-deed were delivered, and the deed received. If the trade was to be annulled on the contingency that the title was not cleared within 90 days, why consummate it at all until the title was cleared? The notes were not put in circulation until after the judgment clearing the title had been rendered; and the evidence shows that the attorney who represented Mrs. Wicks in the entire transaction agreed that they should not be, even if it required more than 90 days to obtain the decree. In the transactions both parties were represented by attorneys, though Trueheart & Co. were the agents of Mrs. Wicks authorized to make the contract to sell. At the time the indorsement was made, it is evident that both parties believed that the title could be cleared within 90 days; and, had it been understood that this was necessary to preserve the rights of the parties as they stood under the papers executed, this, most probably, would have been accomplished, unless appellant had obstructed. Appellant, being the proper person to bring the suit after the property was conveyed to him, and having agreed to do so, could not take advantage of his own delay to avoid his obligation. He brought no suit until after the 90 days had expired, and now claims that it was brought, without his knowledge or consent, by an attorney who is clearly shown to have been employed by him to institute and prosecute it. The decree was rendered in his favor, and, so long as he permits it to stand, and takes no steps to set it aside, he cannot be heard to deny that it was prosecuted for him, and by counsel employed by him. There may have been irregularities in the proceedings through which the title was cleared, but, if so, he is responsible for them; and, under the declarations contained in the decree, he cannot be heard, in this collateral action, to allege that the court did not have jurisdiction over all parties to it, and full power to render the judgment clearing the title. The court admitted the evidence of appellant to the effect that the agreement was that the trade should be canceled if title was not cleared within 90 days, as well as the opposing evidence, which showed that no such agreement was made, or understood to be made, by the parties; and it is urged that the evidence offered by appellees on that point should not have been received because in conflict with the indorsement. If, for reasons before given, appellant was not precluded from showing that the absolute deed received by him was sub-

ject to be annulled for non-compliance with a condition not contained in it, it would have been proper for the court to have heard the parol evidence offered by both parties, and to have submitted to the jury whether such agreement as that alleged by appellant was made, with a view to the adjustment of rights between himself and the defendants other than Cunningham, but, for the reasons before given, such testimony should have been excluded; and the court did not err in instructing the jury to find for Cunningham, and the parties other than appellant. There is no error in the judgment, and it will be affirmed.

YELLOW PINE LUMBER CO. v. CARROLL.

(Supreme Court of Texas. Feb. 25, 1890.)

EQUITY PLEADINGS—MULTIFARIOUSNESS—PRINCIPAL AND AGENT—LACHES—EJECTMENT—DAMAGES—INTEREST.

1. Plaintiff brought suit for the title and possession of two tracts of land. His petition alleged that he was sole owner of one tract, and joint owner with one of the defendants of the other, and prayed for the possession of both tracts, and partition of the latter one. His co-owner answered, joining in the prayer and allegations of the petition. Another defendant—who was in possession of both tracts, claiming title—pleaded not guilty; and the rest of the defendants disclaimed. *Held*, that the petition was not multifarious; the issues being the same as to both tracts.

2. The owner of land executed a power of attorney authorizing the attorney to convey his land to a certain vendee on payment of a named price. The attorney purchased from the vendee a half interest in his contract, and then executed a deed to him. Ten years after the vendor's death, and 18 years after the attorney's purchase had been recorded, the vendor's heirs conveyed the land to a third person. *Held*, that such person acquired no title; the right to repudiate the attorney's act being lost by the lapse of time.

3. In ejectment, evidence that plaintiff's grantor, before conveying to plaintiff, had transferred to a third person an equitable right to a conveyance of the land sued for, is not sufficient to sustain the defense of outstanding title.

4. In a suit for the recovery of land, and for damages thereto, where it is admitted that the damages amounted to a certain sum, and the plaintiff recovers the land, it is proper to allow the plaintiff interest on the agreed amount of damages.

Commissioners' decision. Appeal from district court, Tyler county; J. F. LANIER, Judge.

This suit was instituted on the 12th day of December, 1887, by D. R. Carroll, C. T. Hurlbert, and J. H. Kirby, against D. H. Fleming, W. S. Peters, E. P. Cowen, the Yellow Pine Lumber Company, and the heirs of A. M. Box, for the title and possession of two tracts of land, parts of the west half of the Gavino Arango five-league grant, situated in Tyler county, and for damages. It was alleged that Carroll was the sole owner of one tract of 1,280 acres; and he sued all of the defendants, except the Box heirs, for that tract, and for damages for cutting timber thereon. The other tract, of about 3,000 acres, it was alleged, was owned by plaintiffs and the Box heirs in separate but undivided

interests; and plaintiff sued the Box heirs for partition, and the other defendants for the land and damages,—each plaintiff claiming separate interests and damages. The Box heirs joined in the allegations and prayer of plaintiffs as to the 3,000-acre tract. The Yellow Pine Lumber Company, which was in possession of and claiming both tracts, specially excepted to the petition for misjoinder of causes of action, and pleaded not guilty and limitation. The other defendants disclaimed. The trial was by the court without a jury, and resulted in judgment for the defendant for the 3,000-acre tract, and in favor of plaintiff Carroll for the 1,280-acre tract, and against the Yellow Pine Lumber Company for \$6,777.20 damages for timber cut on the 1280-acre tract. The Yellow Pine Lumber Company alone appealed.

West & Chester, T. W. Ford, and J. R. Burnett, for appellant. S. B. Cooper and Nicks & Kirby, for appellee.

ACKER, J., (after stating the facts as above.) The first assignment of error relates to the action of the court in overruling the special exception to the petition on the ground of multifariousness. The issues were the same as to both tracts of land, and as to all parties to the suit. We think the petition was not obnoxious to the objection made by the special exception. On March 19, 1858, Cook and Curtis, of the state of New York, executed a power of attorney to Thomas Rock, empowering Rock to give to Henry De Veuve, or to his order, quitclaim titles to any or all of the lands of Cook and Curtis in the state of Texas, whenever he shall receive from De Veuve, or his order, the sum of 50 cents per acre for all such lands to which quitclaim title may be given. This instrument was filed for record March 17, 1859. On the 19th day of November, 1858, Cook and Curtis, who were the admitted common source of title, executed an instrument reciting that they had entered into a contract with Henry De Veuve, of Galveston, Tex., by which they agreed to sell him their lands in Texas at the rate of 50 cents per acre; "and, whereas there may be some doubt as to his power, now, therefore, * * * we have made, constituted, &c., by these presents, Henry De Veuve our true and lawful attorney, for us and in our names, &c., to settle with all claimants to our lands, to bring suits in law or equity that may be necessary, and to make any compromise he may think best: provided, always, that he pays to our agent fifty cents per acre for all lands he may thus sell or arrange for, before he can obtain from our agent our quitclaim titles to the same." This instrument was filed for record November 19, 1859. On the 5th day of March, 1859, Henry De Veuve executed the following instrument: "State of Texas, county of Galveston. Know all men by these presents, that I, Henry De Veuve, of the state and county above written, for and in consideration of legal services as attorney at law, and as agent

and attorney in fact for the said De Veuve, rendered and to be rendered by Thomas Rock, a citizen of said state, and county of Tyler, in relation to certain lands in the state of Texas, to-wit, instituting suits, and prosecuting them to judgment, selling said lands, and making titles thereto to purchasers as the same may be sold or disposed of, and also the protection of said land from any interference, damage, or harm by any one hereafter, by all proper legal means, have this day granted and assigned to said Rock, his heirs and assigns, forever, one-half of all beneficial results, whether in money, notes, or otherwise, which may arise to said De Veuve or his legal representative under a certain contract with Messrs. George Curtis and Edward A. Cook, of the city of New York, dated May 1, 1855, and renewed and confirmed by a power of attorney from said Cook and Curtis to said De Veuve, bearing date at the city of New York, November 19, 1858, in connection with which reference is also made to a power of attorney from said Cook and Curtis to said Rock, dated at New York, November 19, 1858; it being understood that said Rock is to pay one-half the purchase money due from De Veuve to said Cook and Curtis before he can obtain a title to the same, and said De Veuve obligates himself to give the requisite order by which said titles can be made by said Rock as is expressed in the power of attorney above referred to. All expenses in and about the premises to be borne by said Rock, all other expenses, as surveys and such like, to be borne jointly by the two parties hereto. In case of the death of either party hereto, this business to be carried out by the survivor for the benefit of himself and the heirs of the deceased party, provided that the heirs of said Rock furnish the same consideration for this contract as is herein expressed." This was filed for record May 11, 1859. On the 3d day of August, 1859, Thomas Rock, as attorney in fact for Cook and Curtis, conveyed to Henry De Veuve the 1,280-acre tract in controversy. This deed was filed for record October 10, 1859. On the 20th day of February, 1860, De Veuve conveyed the 1,280 acres to appellee, Carroll; and it was on this title that the judgment in his favor was rendered. Cook and Curtis died in 1862 or 1863; and appellant proved title from their heirs by deeds executed in 1883 and 1885, under which it held possession at the time of trial.

It is urged by appellant that, Rock having acquired an interest in the lands by the transfer from De Veuve, his position became inconsistent with his duties to his principals, Cook and Curtis, and his power to act for them, and convey the lands, was thereby determined. Rock was only empowered by Cook and Curtis to convey the lands to De Veuve, or his order, and receive therefor the sum of fifty cents per acre. The price and terms of sale were agreed upon between Cook and Curtis and De Veuve, and expressly stipulated in the contract between them, and set

forth explicitly in the power of attorney from Cook and Curtis to Rock. Rock could exercise no discretion as to terms of sale, nor execute titles to any one except De Veuve or his transferee. We think the transfer from De Veuve to Rock did not have the effect to revoke Rock's power from Cook and Curtis, and thereby render void the conveyance from Rock to De Veuve for the land in controversy. Rock's conveyance to De Veuve, under which appellee recovered, we think, was only voidable at the election of Cook and Curtis, within a reasonable time after notice. The transfer from De Veuve to Rock was filed for record May 11, 1859; and the deed from Cook and Curtis by Rock, attorney in fact, to De Veuve, was filed for record October 10, 1859. It appears that Cook and Curtis died in 1862 or 1863, and the deeds from their heirs, under which appellant claims, were not executed until 1883 and 1885. About 3 years elapsed after legal notice of the transactions before the deaths of Cook and Curtis, and about 13 years after their heirs might have brought suit; and no act was performed indicating a purpose to repudiate the conveyance, or steps taken to avoid it; nor was any attempt made on the trial to account for the great delay on the part of Cook and Curtis and their heirs in repudiating the conveyance by Rock to De Veuve. We think the delay was unreasonable, and the right to avoid the conveyance was thereby lost.

On the 22d day of January, 1859, De Veuve transferred to one Butler his right to purchase the two and a half leagues of land, of which the land in controversy formed a part; and this transfer was introduced in evidence by appellant to prove an outstanding title. We deem it only necessary to say that the transfer did not convey title. Butler acquired thereby, at most, only an equity; and the instrument did not sustain the defense of outstanding title.

Under the fourth and last assignment of error, it is urged that the court erred in rendering judgment against appellant for interest on the damages agreed upon for the timber cut from the land, and appropriated by appellant. The agreement as to damages was as follows: "It was admitted by the Yellow Pine Lumber Company that it took possession of the lands sued for, and, within two years prior to the filing of plaintiffs' suit, had cut and appropriated timber on said lands sued for to the amount and value of four and 50-100 dollars per acre; and it was agreed by the plaintiffs and said company that said company was liable to damages for said timber to the amount of four dollars and a half for each acre of land, if any, recovered by plaintiffs in this suit." We think the court correctly construed the agreement. It was an admission of liability to the extent named, which plaintiff was entitled to have paid to him when the suit was instituted. We find no error, and think the judgment of the court below should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

STATE *ex rel.* TAYLOR *et al.* v. EIDSON *et al.*

(Supreme Court of Texas. Feb. 25, 1890.)

SCHOOL-DISTRICT—INCORPORATION.

Under Sayles' Ann. St. Tex. art. 541a, which authorizes "towns and villages" to incorporate for school purposes only, a tract of land containing 28 square miles, not more than two of which is covered by a town, cannot be incorporated as a town for school purposes only.

Appeal from district court, Hamilton county.

J. P. Estis and G. R. Freeman, for relators. G. H. Goodson and J. A. Eidson, for appellees.

GAINES, J. On the 20th day of April, 1889, a petition was presented to the county judge of Hamilton county, praying him to order an election under the act of April 6, 1881, to determine whether a certain district embracing the town of Hamilton, and fully described in the petition, should be incorporated as a town for the purpose only of establishing and maintaining a free school therein. Sayles, Ann. St. art. 541a. The petition purported to be signed by 39 residents of the proposed town. The county judge determined that the petitioners were residents of the territory described in the petition, and that it embraced within its limits the requisite number of inhabitants, and ordered that the election be held. The election was held, and the returns having been made, he declared that the proposition had carried, and that the town was incorporated for free school purposes only; and ordered an election for five trustees for the town. At an election held in pursuance of the latter order, the appellees were duly elected. They qualified and entered upon the discharge of their duties as such trustees, and have ever since continued to act in that capacity. Upon the relation of three tax-payers residing in the alleged town, the district attorney of the Twenty-Ninth judicial district, by leave of the district judge, filed in the name of the state an information in the nature of a *quo warranto*, to declare the act of incorporation void, and to oust the appellees from the exercise of the function of trustees under such alleged corporation. Upon the trial the court gave judgment in favor of the respondents, and from that judgment the state appeals.

Among other things, the information alleged, in substance, that the alleged corporation was not confined to the limits of the town of Hamilton; and, in words, that "in fact the pretended limits of the same, as defined by them, extended far beyond the true limits of the real town of Hamilton as the same is well known, and for several miles into the country outside of said town, so as to include many farms, ranches, and unoccupied surveys of land, in extent many times as

large as said town, and constituting no part of it or of any town." Upon the trial "it was admitted that the district of country described in the field-notes in the said orders [meaning the order of the county judge for the election for the incorporation and that declaring the result] is on an average seven miles long and four miles wide, and embraces many surveys of unoccupied land, and numerous stock ranches and farms." One of the relators testified that he resided in the town of Hamilton, and that he knew the extent and limits of the town, and that "it does not extend from its central point more than three-fourths of a mile, and would be entirely embraced by a circle whose radius is three-fourths of a mile in length." This testimony is wholly uncontradicted, and the facts testified to must be taken as established. If they were not true, witnesses could easily have been found to disprove them.

It therefore appears that at the time the election was ordered the real town of Hamilton embraced an area of not more than two square miles, and the question arises whether the statute authorizing the incorporation of towns and villages was intended to confer upon the inhabitants of any district of country including a town the power to incorporate with limits embracing many square miles of rural territory. If it be held that this power does not exist, then the attempted incorporation under consideration is void, and it is unnecessary to determine any other question in the case. In determining whether the power exists or not, we must not lose sight of the purpose of the statute under which it is sought to be exercised, nor of other statutes upon similar subjects. It is not the object of the statute in question to confer the power upon the inhabitants of any district in a county to vote a tax upon themselves for the support of the public schools, in addition to the state tax which is levied for that purpose. That power is conferred upon the inhabitants of the school-districts by the act of February 6, 1884. Sayles, Ann. St. art. 3733. The statute which authorizes towns and villages to establish by a vote a corporation for school purposes only, is by its terms made of part of that chapter of the Revised Statutes which provides a mode for the incorporation of such municipalities. It is only "towns and villages authorized to incorporate under" that chapter which are authorized to incorporate for school purposes only. Id. art. 541a. The Revised Statutes authorize towns to establish a corporation by an election, provided they contain more than 200 and less than 10,000 inhabitants. Article 506. No definition of the word "town" is given, and it follows that we must take the word on its ordinary signification,—a collection of inhabited houses. The term carries with it the idea of a considerable aggregation of people living in close proximity. A town population is distinguished from a rural population, which is understood to signify a people scattered over the country, and en-

gaged in agricultural pursuits, or some similar avocations, requiring a considerable area of territory for its support. A section of country so inhabited cannot be called a town, nor treated as part of a town, without doing violence to the meaning ordinarily attached to that word. It follows, from this, that the legislature did not intend to confer the power of incorporating by election upon a district of country inhabited by people living in residences widely disseminated over its area. The power is conferred only upon towns and villages, and is confined to the actual residents of such localities; and does not carry with it, and confer upon a town, authority to extend the boundaries of the corporation beyond its own actual limits. This ruling is in accordance with the policy of other statutes of a like character. A city already incorporated cannot extend its limits by any one election further than a half of a mile. *City of East Dallas v. State*, 73 Tex. 370, 11 S. W. Rep. 1030. The object of the limitation is to prevent a city from extending its limits, so as to take in a population purely rural; and the policy of the limitation is founded upon the idea that it is unjust to subject a people to the burdens of a municipal government who share none of its benefits. We are aware that in the application of the rule here laid down difficulties are likely to arise. In many instances it may be no easy task, without giving to the town a most irregular shape, so to define its limits as to embrace all its residents, and to exclude at the same time all the rural population living in the vicinity. What should be done in such cases, when a few people not properly belonging to the town have been included, we need not now determine. This case presents no question of difficulty of that character. Here the attempt was to establish a municipal corporation, extending over 28 square miles of territory, not more than 2 of which were covered by the town. We think this cannot be done, and that the attempted act of incorporation was without authority of law, and is void. The judgment of the district court is therefore reversed, and a judgment here rendered declaring the attempted act of incorporation void, and ousting the respondents from the exercise of the functions of trustees of the alleged town. The respondents are also adjudged to pay all costs, both in this court and the court below.

CITY OF HOUSTON v. EMERY *et al.*

(Supreme Court of Texas. Feb. 25, 1890.)

REVIVAL OF JUDGMENT — JOINDER OF ACTIONS — PLEADING — WRITS.

1. Under Rev. St. Tex. art. 3210, which provides that judgments may be revived by *scire facias*, a proceeding to revive a judgment against a city may be joined with an application for a *mandamus* to enforce its collection.

2. In such a proceeding, where the prayer for relief is that the judgment be revived by *scire facias*, if necessary, and that plaintiff have all the relief necessary to make valid said judgment, and there is no general prayer for relief, it is

error to enter judgment as in an action of debt upon the former judgment, though the petition states facts entitling plaintiff to such a judgment.

3. In such a proceeding, where the petition names the "mayor, aldermen, and inhabitants of the city of H." as the defendant, and alleges that the business of the corporation is managed by a mayor and board of aldermen, naming them, the fact that the citation commands the mayor and aldermen to be summoned, as well as the corporation, does not vitiate the citation.

4. A return showing that such citation was served on S., "mayor of the city of H.," will support a judgment by default against the city.

Error from district court, Harris county.

H. F. Ring, for plaintiff in error. *B. F. Chew*, for defendants in error.

STAYTON, C. J. Defendants in error, having recovered two judgments against plaintiff in error, a municipal corporation, brought this action to compel the city, through its officers, to satisfy them. These judgments were alleged to have been obtained on coupons for interest on bonds issued by the city. The petition, after setting out the rendition of the judgments, and showing, as an exhibit, the authority under which the bonds were issued, alleges that the judgments are still unsatisfied, and that by the terms of its charter the property of the defendant is not subject to execution. Plaintiffs further allege that, through the default of the officers and agents of the defendant corporation, a large amount of back taxes, levied by the corporation for previous years, remain uncollected, and pray that a writ of *mandamus* issue to the corporation, commanding it forthwith to collect the uncollected taxes, and pay the judgments, with interest and costs, and that, if the amount of taxes collected shall not be sufficient to pay the judgments, then the corporation be required to levy and collect a special tax sufficient to make such payment in full. Plaintiffs further pray that, as no executions appear of record to have been issued upon the judgments since their rendition, the same be revived by writ of *scire facias*, if necessary, and that they have all relief necessary to make valid said judgments. The petition was duly indorsed by the judge, ordering the defendant to show cause at the next term of court why the writ of *mandamus* should not be granted as prayed for. The petition gave the names of the mayor and aldermen, and citation issued which commanded the corporation, the mayor, and each of the aldermen, whose names were given in the citation as in the petition, to be summoned to appear at the next term of the court, "then and there to answer the petition of Thomas Emery's Sons, a firm composed of John J. Emery and Thomas J. Emery, plaintiffs, filed in this court September 19, 1888, and is No. 13,005 on the docket of said court exhibited against said mayor, aldermen, etc., wherein plaintiffs sue and pray," etc. The return was: "Received this writ 22d day of September, 1888, at 10 o'clock A. M., and executed September 25, 1888, by delivering to D. C. Smith, mayor of the city of Houston, M. C. House, J.

F. Meyer, B. A. Reisner, H. Koch, H. Hamilton, G. Underwood, J. Kennedy, H. Freund, J. H. Pruitt, and J. T. Brown, aldermen, the within-named defendants, each in person, a true copy of this writ. GEORGE ELLIS, Sheriff of Harris Co. By A. R. ANDERSON, Deputy." There was no appearance for the corporation, and judgment was entered as in an action of debt; the mandate going to the corporation, "its officers, agents, and common council."

It is urged that the citation and return are insufficient to authorize a judgment by default. The petition names the "mayor, aldermen, and inhabitants of the city of Houston" as the defendant, and alleges that "the business of said corporation is managed by a mayor and a board of aldermen, who have charge of, and control, its financial affairs, cause its taxes to be collected, and whose duty it is to provide for the payment of all judgments against it." It then states who were mayor and aldermen. If the citation had only commanded the corporation to be summoned by service on the mayor, this would have been sufficient; and the fact that it commanded the corporation, and also the named mayor and aldermen, to be summoned, did not vitiate it.

Such citation would seem proper in all cases in which the officers of a municipal corporation are sought to be required to do some official act; for then on failure to comply with the command, no question could arise as to their liability for contempt. The return shows that the citation was served on "D. C. Smith, mayor of the city of Houston," as well as on the several aldermen. The delivery of copy of citation to the person alleged to be the mayor of the municipal corporation known as the "Mayor, Aldermen, and Inhabitants of the City of Houston," the writ commanding that corporation to be summoned, was sufficient service, although the return did not declare that D. C. Smith was the mayor of the corporation, so styled, but did declare that he was "mayor of the city of Houston." The petition informs the clerk to whom the citation should be issued, and the citation gives like information to the sheriff, who performs his duty when he delivers a copy of the citation to the person named, and states that fact in his return.

It is claimed that it was not proper to entertain a proceeding for the purpose of reviving former judgments, and at same time enforcing payment through *mandamus*; that this was fatal misjoinder. This was practice to be commended, and a resort to two actions would have been as improper as unnecessary. The writ which issues in *mandamus* is but process to compel the payment of the judgment. *Voorhies v. Mayor*, etc., 70 Tex. 333, 7 S. W. Rep. 679. The statute provides that "a judgment in any court of record within this state, where execution has not issued within twelve months after the rendition of the judgment, may be revived by *scire facias*, or an action of debt,

brought thereon within ten years after the date of such judgment, and not after." Rev. St. art. 8210.

The petition in this case alleged all the facts necessary in an action of debt on judgments, but there was no specific prayer for such judgment as it would be proper to render in such a cause; the prayer being that the judgments "be revived by *scire facias*, if necessary, and that they have all the relief necessary to make valid said judgments." The court entered judgment for a sum equal to principal, interest, and costs due on both judgments; and this is assigned as error. There is no general prayer for relief; and, while the facts pleaded were such as would entitle appellants to the judgment rendered, yet, under the express terms of the statute, requiring a plaintiff "to state the nature of the relief which he requests of the court," we are of the opinion that the court should not have entered the judgment found in the record. As said in *Hogan v. Kellum*, 13 Tex. 399, "though mere matter of form is not regarded, yet, where the plaintiff, by the prayer of the petition, asks a particular recovery or specific relief which is consistent with the case stated, and there is no prayer for general relief, the special prayer must be regarded as evidencing the nature and object of the suit, and, in this respect, as giving character to it, and the plaintiff will not, in general, be entitled to a different judgment from that which he asked; for the presumption is that the plaintiff best knows the nature of his case, and the injury he has sustained." *Denison v. League*, 16 Tex. 399; *Hipp v. Huchett*, 4 Tex. 20; *Mann v. Falcon*, 25 Tex. 271; *Edgar v. Galveston*, 21 Tex. 302. For the error in entering judgment, as in an action of debt would have been proper, it will be reversed, with instruction to the court below to enter judgment reviving the judgments described in the petition, and in all other respects to grant the specific relief prayed for as was done in the judgment now before us. It is so ordered.

CITY OF HOUSTON v. EMERY et al.

(Supreme Court of Texas. Feb. 25, 1890.)

Error from district court, Harris county.

H. F. Ring, for plaintiff in error. *F. F. Chew*, for defendants in error.

STATTON, C. J. This action was brought by appellees against appellant, a municipal corporation, to recover a sum due on coupons evidencing interest due on bonds issued by the city. The petition, after describing the coupons, and the bonds to which they were originally attached, and setting out as an exhibit a copy of the bonds, and the ordinance under which they were issued, alleges that the coupons are due and unpaid, and that the business of the defendant corporation is managed by a mayor and board of aldermen, who have charge of and control its financial affairs, cause its taxes to be levied and collected, and whose duty it is to provide for the payment of all its indebtedness; that the corporation is fully authorized, by the constitution and laws of the state, to levy and collect a tax of sufficient amount to pay said indebtedness, and that such taxes have been actually levied for

several years named, but that said corporation has appropriated the money collected on such tax to the payment of other indebtedness, and its current expenses; and that, through the default of its officers and agents, a large amount of the tax remains uncollected. Plaintiffs further represent that, by the terms of the charter, no execution can issue against the property of said defendant corporation. Plaintiffs therefore pray for process, and for judgment for their debt, and interest and costs, and for a writ of *mandamus* to issue to the corporation, commanding it forthwith to collect the uncollected taxes to pay the judgment to be rendered, and, in case the taxes, or such portion of them as can be collected, shall not be sufficient to pay the same, then that it forthwith levy and collect a tax sufficient to pay it. The petition was filed August 28, 1888. On the same day the judge granted an alternative writ of *mandamus*, as prayed for, which was indorsed on the citation. The defendant not appearing, on the 10th day of November, 1888, judgment was rendered by default for the amount of the debt, interest, and costs, and a peremptory writ of *mandamus* was ordered to issue to the defendants, mayor, aldermen, and inhabitants of the city of Houston, its officers, agents, and common council, in accordance with the prayer of plaintiff's petition. The defendants the mayor, aldermen, and inhabitants of the city of Houston bring the case to this court on writ of error.

The petition stated that David C. Smith was mayor, and George R. Bringham secretary and treasurer, of the defendant municipal corporation, but it did not give the names of the aldermen. The citation directed the corporation to be summoned, stated who were the mayor and aldermen, and directed them also to be summoned. The return of the sheriff on the citation shows that it was served by delivering to the person alleged in the petition and citation to be the mayor of the corporation a true copy of the citation, and it further showed that he had in same manner summoned each of the persons stated in the citation to be aldermen. The same objections to the citation and return are made in this case that were made in a cause between the same parties, ante, 264, (this day decided;) and, for the reasons therein given, we are of opinion the citation and return were sufficient to authorize the judgment rendered. The municipal corporation, as was necessary in this case, was before the court, which thus obtained power to render judgment for the sum due, and to award the necessary process to enforce its judgment. That the aldermen were named in the writ and served, although not made parties, nor named in the petition, is a matter of no importance. The writ which the judgment directs to issue will be obligatory on the municipal board—city council, composed of mayor and aldermen—in office when the judgment was rendered, and on their successors. If, for failure to comply with the command of the writ directed to issue, it shall become necessary to proceed against the individuals composing the city council, the court below will have ample means to ascertain who they are, and power to take such steps as may be necessary to enforce its judgment. *Maddox v. Graham*, 2 Metc. (Ky.) 71; *Mayor v. Lord*, 9 Wall. 409; *State v. Common Council*, 15 Wis. 41; *Commissioners v. Bryson*, 18 Fla. 286; *People v. Common Council*, 43 N. Y. 86; *High*, Extr. Rem. §§ 337, 442, 443. There is no error in the judgment, and it will be affirmed.

CITY OF HOUSTON v. FEIZER.

(Supreme Court of Texas. Feb. 28, 1890.)

TAXATION—VOLUNTARY PAYMENT.

Where a person pays an illegal tax which he believes to be unjust, and the legality of which he is not averse to testing, when no process has issued for its collection, the payment is voluntary, and he cannot recover the amount paid.

Appeal from district court, Harris county; **JAMES MASTERSON**, Judge.

H. F. Ring, for appellant. *Gustave Cook* and *A. C. Allen*, for appellee.

STAYTON, C. J. This was a suit brought by appellee against the city of Houston, to recover amount of certain license taxes paid by appellee, as claimed by him, for the privilege of carrying on the business of a butcher in the city. This tax amounted to the sum of \$15 a month, and the evidence showed that this sum had been paid by the appellee for a period of several years previous to the institution of this suit. Judgment was rendered in appellee's favor for the sum of \$277.50, the same being the full amount of plaintiff's claim, except that portion of it barred by the statute of limitations, which was pleaded. There is no assignment of error raising the question whether the city was empowered by its charter to collect such a tax, nor is there any claim made that the tax was legal. The first assignment urges that the court erred in assuming that the license tax was unreasonable, and in charging the jury to that effect. The record does not show that any charge containing such assumption was given; but, on the contrary, throughout the charge assumes that the tax was illegal, without reference to its reasonableness or unreasonableness. The only question about which there could be any controversy, that was submitted, was whether the tax was voluntarily paid. The charge which informed the jury what would or would not be a voluntary payment is not complained of; but it is urged that the court erred in refusing to grant a new trial, asked on the ground that the evidence was not sufficient to sustain the verdict. Whether payments were voluntarily made was the only question of fact about which there was controversy. To show that payments made by appellee were involuntary, an ordinance of the city was introduced in evidence which declared it unlawful for persons to sell fresh meats at other places than the market-house and such other places as might be established by the city council; but this seems to have been restricted to hours and days prescribed by the ordinance, which is not fully set out. Another article of the ordinance provided for renting the stalls in the market-house, and fixed the price of these at \$20 per month; and it contained the further provision: "Ward market butchers, \$15 per month; \$10 rent; \$5 repairs." This would indicate an intention to fix a rental on property owned by the city, and occupied by persons designated "ward market butchers;" but not an intent to impose a license tax on "ward market butchers" who did business on their own property, as did appellee. Another ordinance provided that "any person found guilty, before the mayor, of violating or evading any of the provisions of this chapter, shall be fined in a sum not exceeding one hundred dollars, and not less than five dollars and costs of prosecution;" and it was made the duty of officers named to see that the ordinance was enforced. From the parts

of the ordinances found in the record we do not see that any penalty was imposed on appellee for pursuing the business of butcher on his own premises, without the payment of a license tax, and it is not shown that his place was not one established by the city council as a market place.

Appellee stated that, before he commenced business, he inquired what the tax would be, and was informed by the market-master that the tax on such butchers was \$15 per month, to be paid in advance, and that if he pursued the business, and did not pay it, under the laws and regulations of the city, he would be arrested and fined. He then stated that he made inquiry of other butchers, who told him they had been paying, and if he did business, and did not, they would enforce the law against him; that he then commenced business, and paid license tax at the rate of \$15 per month, until June 1, 1889, when, the rate demanded being raised, he refused further to pay, when he was arrested, but at the end of litigation found not liable to any punishment for failure to pay the tax. He further stated that he was told by officers that he would be fined, and his business closed, if he did not pay the tax; that he believed this to be true, and otherwise would not have paid; that he had heard that two other butchers had been arrested and fined for failure to pay, and believed he would be, but he seems to have regarded the tax as unjust, and to have been not unwilling to test its validity, and still continued to pay, and add an increased price to the meat sold by him sufficient to meet the tax. The taxes were paid in advance, and seem to have been collected from about 1867 until July, 1889, from all butchers, but appellee commenced business in 1884. This is the strongest case against voluntary payment the evidence makes, and is it sufficient to sustain the verdict? That a tax voluntarily paid cannot be recovered, though it had not the semblance of legality, is well settled; and, as said by an elementary writer, "every man is supposed to know the law, and, if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as the reason why the state should furnish him with legal remedies to recover it back. * * * Mistake of fact can scarcely exist in such a case, except in connection with negligence; as the illegalities which render such a demand a nullity must appear from the records, and the tax-payer is just as much bound to inform himself what the records show or do not show as are the public authorities. The rule of law is a rule of sound public policy also. It is a rule of quiet as well as of good faith, and precludes the courts being occupied in undoing the arrangements of parties which they have voluntarily made, and into which they have not been drawn by fraud or accident, or by any excusable ignorance of their legal rights and liabilities." Cooley, Tax'n, 809. There was no law requiring appellee to pay the tax which he

seeks to recover. No process, civil or criminal, had issued, or could legally issue, under which his person or property could be seized. He believed the tax unjust, and was not averse to testing its legality, and yet paid in advance for each month, because he was told the city demanded it, and believed an opportunity to test the legality of the demand would be afforded him, if he refused to pay. We are of opinion that a tax so paid was voluntarily paid. The will which determined to pay was not thus moved to act by anything which can be held to have been coercion. *Railroad Co. v. Commissioners*, 98 U. S. 541; *Navigation Co. v. Tappan*, 16 Blatchf. 296; *Taylor v. Board, etc.*, 31 Pa. St. 74; *Bank v. Chalfant*, 52 Cal. 170; *Merrill v. Austin*, 53 Cal. 879; *Town of Edinburg v. Hackney*, 54 Ind. 88; *Galveston Co. v. Galveston*, 56 Tex. 494; *Taylor v. Hall*, 71 Tex. 216, 9 S. W. Rep. 141. According to appellee's own testimony, the taxes which he seeks to recover were actually paid by those who bought meats from him; for he states that, on account of the tax, he increased the price sufficiently to raise the sum to pay it from time to time, and thus made his fair profit, and cast the burden of taxation on the people who purchased from him. He now asks that these people, in part at least, be compelled to pay to him that which they have once paid; for if he recovers the judgment which he asks, the people must be taxed to pay it. There is no equity in such a claim. We are of opinion that the evidence does not show an involuntary payment, and that a new trial should have been granted; and for the ruling of the court on that question its judgment will be reversed, and cause remanded.

CAWTHORN v. PERRY.

(Supreme Court of Texas. March 4, 1890.)

LIFE INSURANCE—ASSIGNMENT OF POLICY.

A creditor to whom his debtor transfers a life insurance policy by bill of sale absolute on its face, acquires no greater interest in the policy than such sum as will pay his debt and interest, and premiums paid by him and interest.

Appeal from district court, Galveston county; WILLIAM H. STEWART, Judge.

Hutcheson, Carrington & Sears, for appellant. *Willie, Mott & Ballinger*, for appellee.

HENRY, J. In the year 1878 the Equitable Life Assurance Society of the United States issued to Augustin H. Perry a policy of insurance upon his life for the sum of \$10,000. In the year 1887, Perry having kept the policy alive up to that time, and being then indebted to appellant in the sum of \$900, he sold and delivered the policy by a written bill of sale reading as follows: "For one dollar to me in hand paid, and for a valuable consideration, the receipt of which is hereby acknowledged, I hereby assign, transfer, and set over all my right, title, and interest in

policy No. 84,000, on the life of A. H. Perry, issued by the Equitable Life Assurance Society of the United States, and all money which may be payable under the same to James E. Cawthorn, of Lampasas, Texas, and for the consideration above expressed, I also, for myself, my executors, and administrators, guaranty the validity and sufficiency of the foregoing assignment to the above named assignee, his executors, administrators, and assigns, and their title to the said policy will forever warrant and defend. In witness whereof, I have hereunto set my hand and seal this eighth day of June, 1887. [Signed] A. H. PERRY." Cawthorn paid all premiums accruing between the date of the transfer and the death of Perry, amounting to the sum of \$369.60. Perry died in November, 1888; and his administrators instituted this suit against both the insurance company and Cawthorn to recover the amount of the policy. The insurance company answered, admitting its indebtedness to the owner of the policy, and, by agreement of the other parties, deposited the amount due upon it—\$3,894.40—in bank "to await final judgment in the cause." Defendant Cawthorn answered, asserting his ownership of the policy by virtue of its transfer to him by Perry, and praying for judgment against the insurance company for the amount of the policy. The cause was tried by the court without a jury. The court filed its conclusions of law in the following language: "A creditor, by the transfer to him of a policy on the life of his debtor, can acquire no greater interest in the policy than such sum as will pay his debt and interest, and premiums paid by him and interest. The instrument of transfer to a creditor, no matter what form it assumes, must be construed either as a mortgage to secure his debt and interest, and premiums paid by him and interest, or construed as a transfer of such part of the insurance money as will pay him his debt and interest, and the premiums paid by him and interest. A construction of the instrument of transfer which would give the creditor any more would be against public policy, in that it would make him interested in the speedy termination of the life of the assured, and at the same time would be a mere speculation on the chances of life." Judgment was rendered in accordance with these conclusions, to reverse which the defendant Cawthorn sued out a writ of error.

The assignments of error call in question the correctness of the court's conclusions of law, and of its ruling in excluding a letter offered in evidence by the defendant Cawthorn. We think the letter was properly excluded because it was immaterial. In their application to this case, we approve the court's conclusions of law. *Price v. Knights of Honor*, 68 Tex. 361, 4 S. W. Rep. 633; *Schonfeld v. Turner*, 12 S. W. Rep. 626, (Tyler term, 1889); *Society v. Hazlewood*, Id. 621, (Tyler term, 1889.) The judgment is affirmed.

CITY OF HOUSTON v. JANKOWSKIE.

(Supreme Court of Texas. Feb. 28, 1890.)

LIMITATION OF ACTIONS—ACKNOWLEDGMENT—MUNICIPAL CORPORATIONS.

1. A declaration made by the secretary of a city, in his annual statement to the council, that there is a certain amount of interest due on certain city bonds, is not an acknowledgment of the debt, within the meaning of the statute of limitations, when it does not appear that the secretary had authority to bind the city by his statement, or that such statement was approved by the council.

2. The fact that a city levied and collected taxes to pay interest on its debts is not an acknowledgment of any particular debt.

Appeal from district court, Harris county.

Action by Anne Jankowskie against the mayor, aldermen, and inhabitants of the city of Houston. Judgment for plaintiff. Defendant appeals.

H. F. Ring, for appellant. *J. W. Walker*, for appellee.

STAYTON, C. J. Appellee brought this action against appellant to recover a sum claimed to be due on bonds issued by the latter which matured on November 1, 1879. The action was not brought until November 23, 1888, and defendant pleaded in bar the statutes of limitation. For the purpose of avoiding the bar of the statutes of limitation, the plaintiff introduced in evidence the annual statements of the secretary of the city of Houston for the year 1885, in which the following item appears under the head of liabilities: "M. Reichman, past-due bonds, \$2,600.00." It was admitted that the bonds on which suit was brought were a portion of the \$2,600 worth of bonds described in the annual statement as "M. Reichman, past-due bonds." Plaintiff also introduced the ordinance prescribing the taxes and licenses to be assessed and collected by the city of Houston for the year 1881, and each year thereafter; and it was admitted that the taxes collected by virtue of this ordinance were applied for the purposes mentioned in the same, including the payment of the city debt. The ordinance referred to levied a tax of 1 per cent. annually on property within the city limits, which, "when collected, shall constitute a fund to be set apart and held for the payment of the interest on the various issues of city bonds heretofore issued under and by virtue of the ordinances and resolutions of this and former city councils, in the order as may be lawfully determined, and also for the creation of a sinking fund for the redemption of the said bonds." The court below held that these facts took the claim out of the bar of the statute, and entered judgment for principal and interest as they appeared from the bonds. It is claimed that this was error.

In an amended petition filed on April 24, 1889, it was averred "that all of said bonds have been recognized, and the justice of the same has been acknowledged in writing, and signed by the proper and legal officers of the said defendant, within the last four years." If it be conceded that this action is based on

a new promise, or acknowledgment from which a promise may be implied, do the facts proved constitute such acknowledgment or promise? The full entry in the annual statement made by the secretary, having any bearing on the question before us, is, under the heading, "Bonded Debt:" " * * * M. Reichman, past-due bonds, \$2,600.00," and, under the heading, "Approximate Estimate of Accrued Interest on Bonds:" " * * * On \$2,600.00 Reichman bonds, 6 years, at 10 per cent, \$1,560.00." This statement was no doubt made for the information of the city council, but there is no evidence that the secretary had any authority to make any acknowledgment or promise that would bind the city; nor is there any evidence that the city council approved it, or in any way acknowledged the existence of the debt. The declaration of the secretary, at most, shows that, in his opinion, bonds issued to M. Reichman for \$2,600 were past due, and that interest on them to time report was made amounted to \$1,560; but the city cannot be bound by his opinions, even if expressed to the creditor, and, when only contained in report to city council, they are wanting in all the elements necessary to an acknowledgment or promise by which the city can be bound. An acknowledgment from which a promise is to be implied must be made by the debtor in writing, or by some person authorized to make it; and it must be made to the person holding the claim, or to some person acting for him. No acknowledgment of a debt not made to some person will interrupt the running of the statute, and a statement made by an agent to his principal cannot operate as an acknowledgment. It has been held that the acknowledgments in writing signed by the debtor, but never delivered to the creditor, or to any one for him, cannot interrupt the running of the statute, or remove the bar completed by lapse of time. *Allen v. Collier*, 70 Mo. 138; *Merriam v. Leonard*, 6 Cush. 153. A promise or acknowledgment made to a stranger is not sufficient. *Fort Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. Rep. 56; *McKinney v. Snyder*, 78 Pa. St. 497; *Cape Girardeau Co. v. Harbison*, 58 Mo. 90; *Kirby v. Mills*, 78 N. C. 124; *Parker v. Shuford*, 76 N. C. 219; *Carroll v. Forsyth*, 69 Ill. 127; *Wachter v. Albee*, 80 Ill. 47; *Ringo v. Brooks*, 26 Ark. 543. In *Fort Scott v. Hickman* it appeared that a committee of a city council appointed to consider the city indebtedness made a report showing the assets and liabilities of the city, which included as a liability a named issue of bonds. The report proposed a plan for compromise with holders of city bonds, proposition to holders to be made through circular which the committee recommended, which was to be sent to persons holding city bonds other than the named issue, as to which the committee made no report, further than to include them in statement of liabilities. The city council adopted the report of committee, and ordered the circular to be sent to holders

of bonds other than the issue named, which was done. On this state of facts, it was held that neither the report of committee, its adoption, nor the circular letter, was such acknowledgment of the debt evidenced by the named issue of bonds as to take them out of the bar of the statutes of limitation. Acknowledgment of a debt such as will justify the raising of an implied promise to pay it certainly ought to be made to the other party to the contract, or to some person representing him. The mere fact that the city levied and collected taxes to meet interest due, and create a sinking fund, cannot operate as an acknowledgment of or promise to pay any particular bond or issue of bonds. No fact is shown by the evidence which defeats the bar of the statute pleaded; and, as the cause was tried without a jury, the judgment will be reversed, and here rendered in favor of appellant. It is so ordered.

FORT WORTH & R. G. RY. CO. v. JENNINGS.

(Supreme Court of Texas. March 4, 1890.)

RAILROAD COMPANIES—EMINENT DOMAIN—INJUNCTION—PLEADING.

1. Under Const. Tex. 1876, art. 1, § 17, providing that no person's property shall be taken or damaged for public use without just compensation being made, a railroad company cannot convey to another company part of the interest in land which it has acquired by purchase of a right of way, so as to enable the latter company to build and operate an additional road over such right of way, without the consent of the owner of the fee, unless by condemnation proceedings.

2. Where such a sale is made, the owner of the fee may enjoin the second company from building its road until compensation has been made to him.

3. Where a petition states a good cause of action, an objection that part of the damages claimed are too remote to be recoverable cannot be reached by a general demurrer.

Commissioners' decision. Appeal from district court, Tarrant county.

Action by Sarah G. Jennings against the Fort Worth & Rio Grande Railway Company to restrain the defendant from building its road on land over which she had granted a right of way to the Texas & Pacific Railway Company. Plaintiff obtained judgment. Defendant appeals.

N. A. Stedman, for appellant. *John D. Templeton* and *Hyde Jennings*, for appellee.

COLLARD, J. The conveyance of plaintiff to the Texas & Pacific Railway Company of a right of way through her land in the city of Fort Worth vested in the company a perpetual easement for the purposes of right of way for its road. *Pierce, R. R. 130*. The fee was not conveyed, but remained in the vendor. This company, having constructed its road on the right of way designated, and operating the same, transferred a part of its right of way, between its track and adjacent lots, to appellant, the Fort Worth & Rio Grande Railway Company; and the latter company has taken steps to build its road on this strip without compensation to Mrs. Jennings, whose adjacent lots will be injured or dam-

aged by depreciation in value, if the road is built. Can this be done? The direct question has not been decided in this state; but kindred questions have been decided and discussed by the supreme court, a brief review of which will greatly aid us in deciding the question before us.

In the case of *Railroad Co. v. Odum*, 53 Tex. 353, Justice GOULD, delivering the opinion, says: "The use of a street by a railroad, however, is not ordinarily inconsistent with its continued use for the common purpose of a street. The authorities are numerous and conclusive that such an addition to the uses of a street, the fee being in the public, if authorized by the legislature, gives the lot-owner no right to compensation, although his easement in the street be thereby partially impaired, and his lots rendered less valuable. The regulation or enlargement of the use of the street—the property of the state—by the legislature is not a taking of property, within the meaning of the constitution of 1869, although the lot-owner may thereby suffer incidental or consequential inconvenience or injury." The constitution of 1869 provided that "no person's property shall be taken or applied to public use without just compensation being made, unless by the consent of such person." Const. 1869, art. 1, § 14; 2 Pasch. Dig. 1101. The owner's rights in property are better guarded under the constitution of 1876. It declares that "no person's property shall be taken, damaged, or destroyed for, or applied to, public use without adequate compensation being made, unless by consent of such person." Const. 1876, art. 1, § 17. Construing this language, it has been held that the term "property" as here used, means "not only the tangible thing owned, but also every right which accompanies ownership, and is its incident," and that, where the construction of a railroad inflicts an injury to such property not common to all other property in the same community by reason of the general fact of the existence of the railway, then such property may be said to be damaged, for which there must be compensation to the owner. *Railway Co. v. Fuller*, 63 Tex. 467. The court affirmed a judgment for damages in favor of the owner of lots and improvements on a street in which, by legislative authority, a railway company had built its road. In another, later case, decided at the Galveston term, 1889, Justice GAINES, commenting upon the language of the constitution, says: "Under the provisions of other constitutions, which merely provided compensation to the owner for property taken for public use, it had been a question whether or not one whose property was immediately and directly damaged by a public improvement, though no part of it was appropriated, could recover for such damages. * * * The insertion of the words 'damaged or destroyed' in the section [of the constitution] quoted was doubtless intended to obviate this question, and to afford protection to the owner of property by allowing him compensation

when, by the construction of a public work, his property was directly damaged or destroyed, although no part of it was actually appropriated." *Railway Co. v. Meadows*, 73 Tex. 34, 11 S. W. Rep. 145.

It will now be seen that it is the law of this state that there need be no taking or actual appropriation of property to entitle the owner to damages on account of the construction of a railroad, or other public works adjacent thereto, but that it is sufficient if the property be thereby directly and specially damaged, —depreciated in value,—as a result not common to all such property in the same community; and it will also be seen that, where land has once been dedicated to the public as a highway, it cannot, even upon authority of the legislature, be appropriated to other public uses, so as to impose additional burdens upon other adjacent property, without adequate compensation to the owner. *Wood, Ry. Law*, 721 et seq.; *Pierce, R. R.* 232. The rights acquired by condemnation of land for public purposes are similar to those ordinarily acquired by contract, unless otherwise stipulated in the deed. *Mills, Em. Dom.* §§ 110, 111; *Pierce, R. R.* 132. The use of a street for a horse-car railway is not deemed a different use from that intended in its original dedication as a street. *Texas & P. Ry. Co. v. Rosedale St. Ry. Co.*, 64 Tex. 80.

The appellant contends, in this case, that a transfer of a part of its right of way by the *Texas & Pacific Railway Company* to the appellant did not contemplate a use different from that intended in the deed conveying to it the right of way, and consequently there could be no additional burden upon plaintiff's land by the building and running of defendant's road thereon. We cannot agree to this proposition. The deed of the right of way was to the *Texas & Pacific Railway Company*, granting it the right to use the same perpetually in operating its road. There is no doubt that a legal sale of the franchise and road would carry everything appurtenant thereto,—the right of way as well as the right to operate the road, and take tolls for freight and passengers; but it may be doubted that it can sever a part of the easement—an incident of the franchise—from the franchise itself, and convey the same to another company. It has been held by the supreme court of the United States that "the right of way could not be sold, on execution or otherwise, to a purchaser who did not own the franchise." *Railway Co. v. Doe*, 114 U. S. 341, 5 Sup. Ct. Rep. 869. The same doctrine is maintained in *Ohio, Platt v. Pennsylvania Co.*, 1 N. E. Rep. 420. But, where one company sold its entire right of way to another authorized to build and maintain a road between the same points, it was held that the owner of the fee was not injured or affected by the transfer, and that he could not call in question the capacity of the one company to sell, nor the other to purchase. *Crolley v. Railway Co.*, 16 N. W. Rep. 422. A railway company pledged its road and appurtenances to the state. The road was sold

to satisfy the pledge, and Lane purchased one section of the road. Without deciding whether his purchase included any of the corporate franchises in conjunction with other purchases, it was held that a sale by him to the Junction Company passed title to the right of way, provided it constructed the road as required by the first corporation. *Railway Co. v. Ruggles*, 7 Ohio St. 1. Where depot grounds were deeded to a railway company, and, under sanction of the legislature, the property became vested in another company, it was held that the conditions of the original sale, to the use of the first company, was not violated. *Southard v. Railway Co.*, 26 N. J. Law, 18. A railway company made an assignment of its road and effects, which was adjudged valid by the courts. It was held that purchasers at the trustee's sale, who afterwards incorporated, acquired all rights of the old company under deed to the right of way. *Pollard v. Maddox*, 28 Ala. 321. It has been held that the interest in land acquired by deed to the right of way, within the designated route, may be transferred to another railroad company, into which the original shall merge or consolidate with others by legislative authority. *Railway Co. v. Van Syckle*, 37 N. J. Law, 496; *Pierce, R. R.* 180, 132, 133, 496, 497. The foregoing four cases are cited in *Pierce on Railroads* in support of the doctrine as stated in the text, "that a railway company * * * may convey, under authority of law, to another corporation, the interest in land which it has acquired by purchase for a right of way, to be used by the purchaser for the same purpose." And we find that none of the cases supports the proposition that a railway company can sell a part of its right of way to another company, so as to enable both companies to build and operate two roads on the same right of way. These authorities only go to the extent of holding that, where there is a legal sale of the road, its corporate rights, or when there is a merger of roads, or where one road is abandoned, and another company is authorized to construct the road on the same line, the right of way may pass by sale.

It may not be necessary, in the case before us, to decide whether a railway company owning the right of way may or may not, with the consent of all interested parties, sell a part of it without at the same time conveying its franchise. It may be only necessary for us to inquire if this can be done without the consent of adjoining land-owners, without compensation, by purchase or condemnation, where their lands are damaged specially, and not in common with the general public. Appellant cites the case of *Hatch v. Railroad Co.*, 18 Ohio St. 118, as sustaining its right to take the strip conveyed to it by the *Texas & Pacific Railway Company*, and construct its road thereon, without compensation to plaintiff for additional damages to her land. The land of plaintiff, in the case cited, was appropriated, under the right of eminent domain, for the purposes of a canal. The canal

was made, and used for many years. A railway company, by amicable agreement, had the canal company's interest in the right of way condemned for its use as a railway without the consent of, or compensation to, the owner of adjoining land. The canal was abandoned, and the railroad constructed on the line. It was held that the easement was not abandoned by the canal company to the extent that it reverted to the original owner of the land; but it was also held that the owner was entitled "to recover the value of lands taken, not formerly taken by the original condemnation, and also a fair compensation for additional burdens and inconveniences, not common to the general public, as accrued to him, and his entire tract on which the easement was imposed, by reason of the change of uses." We do not see in what respect this case supports the position of appellant; but, if it is supposed to do so, it was overruled in the later case of *Platt v. Pennsylvania Co.*, decided in 1885 by the same court, which is a case almost exactly in point with the one now under consideration. The Lake Shore Railroad Company had appropriated by condemnation a strip of ground 100 feet wide by 1,200 feet in length, and constructed its road on the western half, along which the road was operated. For a consideration of \$7,500, the company agreed with another railroad corporation to let it have 25 feet wide of the unused half upon which to construct and operate another road, and to so hold the same in perpetuity. The second road was built and operated on the surplus 25 feet, but no consideration was paid to the original owner, whose lot was thereby damaged. It was held that the land-owner, by the first appropriation, (where more land was appropriated than was necessary, an easement, and not a fee, having passed,) could not be subjected to the occupancy and burden upon such surplus of another common carrier. It was also held that the original owner could not have recovered the surplus from the first company, but had the right, after its sale, to treat it as abandoned by the first company for its own uses, and that he was entitled to damages as upon an appropriation by the second company. It was also noted by the court that this holding was not in conflict with the recognized right of a railway company to sell or lease its road with its franchises. 1 N. E. Rep. 420. The court also declared that plaintiff's case was supported by the cases of *Railway Co. v. Ruggles* and *Hatch v. Railroad Co.* There was a dissenting opinion, holding that there was no change in the use of the easement, and therefore no additional servitude upon the owner's land; but we think the reasoning of the majority of the court is conclusive and just. It cannot be doubted that a right of way to one railroad is less onerous than when the same is granted to two, and it must be held that a grant of way to one does not authorize it to operate its road, and to convey a portion of the unused way to an-

other company for the same purpose, without the consent of the owner of adjacent land damaged thereby, and without compensation to him for the damage so caused.

We think injunction to restrain the building of the road by defendant until the plaintiff was compensated, or until the way was properly appropriated under the law, was the proper remedy. *Pierce, R. R.*, 167, 168, 230.

Appellant contends that the court "erred in overruling its general demurrer to plaintiff's petition, because so much of said petition as alleges damage on account of the contemplated construction and operation of defendant's railway across Hill, Ochiltree, Ballinger, and Center streets, to property not abutting on the right of way of the Texas & Pacific Railway Company, sets up a claim for damages too remote to furnish a basis for an action; and the injury, if any, is not special to plaintiff." If there was error in this part of plaintiff's petition, it being good in other respects, a general demurrer would not reach the defect.

The judgment of the court restrained defendant from building its road on the part of Texas & Pacific Railway Company's right of way running through any portion of blocks 12, 13, 25, and 29 of Jennings' south addition to the city of Fort Worth, and also that portion of the right of way occupying Hill and Center streets, at the intersection of said streets, between the center of said railway track and said block 29. The judgment awards and fixes no damages, but prohibits the building of the road without the consent of the plaintiff, his heirs or assigns, first had and obtained, or without proper appropriation of the same under the laws of the state. Hill and Center streets intersect at the corner of block 29, where the right of way cuts off a corner of the block. The block abuts on the side of the right of way on which defendant proposes to build its road. We cannot say that there would be no damage to plaintiff by the construction of the road at this point, so causing additional obstruction in these streets. The question of the amount of damage must be settled by the parties, if they consent, or in the proceedings of condemnation, if defendant resort to that method of appropriation, as allowed by the judgment. Our conclusion is, the judgment of the court ought to be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

FICKLIN et al. v. STROKLAND.

(Supreme Court of Texas. March 7, 1890.)

APPEAL—RECORD.

A transcript of certain papers and proceedings and written admissions not embodied in a formal statement of facts signed and approved by the trial judge constitutes no part of the record, and cannot be considered on appeal.

Appeal from district court, Wharton county.

Kennon & Mansfield, for appellants. *Wm. H. Burkhart*, for appellee.

GAINES, J. This suit appears to have been instituted in a justice court of Wharton county, and to have been appealed to the district court, where judgment was rendered against the defendants. The appellant assigns only that "the court erred in rendering judgment against these defendants because the bond sued on is a bond for the trial of the right of property in a suit filed in a justice court of Colorado county, and afterwards appealed to the county court of said county, and afterwards withdrawn from the office of the clerk of said county, and an original suit brought thereon in Wharton county, being a filed paper in a separate and distinct suit brought by plaintiff in another county, and the judgment being one which could not properly be rendered in any state of facts,—all of which appears upon the face of the papers." The facts recited in the assignment are not supported by the record before us. The only statement of the cause of action appears in the docket entry of the justice before whom the suit was brought, as it is shown by the transcript filed in the district court. That entry is: "Suit upon damages for \$75, of date 16th day of November, 1882." There is no statement of facts in the record. The transcript purports to show the evidence offered under the name of a statement of facts. It consists of transcripts of certain papers and proceedings in some suits in a justice court of Colorado county, and in the county court of the same county, and certain written admissions of counsel, etc. They were never embodied in any formal statement of facts, and made authentic as such by the approval and signature of the trial judge. They constitute no part of the record, and cannot be looked to for any purpose. From the imperfect record before us, we do not see that there is any error in the judgment. The contention seems to be that a suit at common law cannot be brought upon a claimant's bond, and that the court erred in admitting in evidence the bond because it was a filed paper in another court. The record not showing that the action was upon a bond, the first question is not presented. If it should be held that the ruling upon the evidence is erroneous, we do not see, from the record, how it has operated to appellant's prejudice. We are inclined to think, however, that, if the record presented the questions suggested by the assignment, we should hold that the law is against appellants upon both these propositions. The judgment is affirmed.

FENN et al. v. GULF, C. & S. F. RY. CO.

(*Supreme Court of Texas*. March 4, 1890.)

NEW TRIAL—TERMS.

Rev. St. Tex. art. 1363, provides that new trials may be granted "on such terms and conditions as the court shall direct." An order granting a new trial directed the party to whom it was

granted to pay witness fees "as a condition upon which" such new trial was granted. *Held*, that the payment of the fees was the "terms" on which the order was made, and not a condition on performance of which it should take effect.

Appeal from district court, Fort Bend county.

Mitchell & Mitchell, for appellants. *J. W. Terry*, for appellee.

GAINES, J. This suit was brought, by the appellants against appellee, in the district court of Fort Bend county, and at the spring term, 1889, was tried by the court without a jury, and resulted in a judgment for appellants. Appellee filed a motion for a new trial at the same term; and, upon hearing the motion, the court entered the following judgment: "And now, on this 17th day of April, A. D. 1889, came on to be heard the defendant's motion for a new trial. Both parties appeared by their attorneys; and, upon argument had, and the law in the case, the court is of the opinion that a new trial should be granted. It is therefore ordered, adjudged, and decreed by the court that defendant's motion for a new trial be, and the same is hereby, granted, and judgment vacated. It is further ordered by the court, adjudged, and decreed, that defendant pay all costs of witnesses in attendance at this term who testified in this cause already had, as a condition upon which the *venire facias de novo* is awarded." At the next term the plaintiffs asked the court to strike the cause from the docket, and to award them an execution on the judgment rendered in their favor at the former term. The court overruled the motion, and, plaintiffs declining to prosecute the cause further, dismissed the suit for the want of prosecution. From the judgment overruling the motion and dismissing the cause this appeal is taken.

That an order granting a motion for a new trial must be absolute is well settled. *Secrest v. Best*, 6 Tex. 199; *Gorman v. McFarland*, 13 Tex. 237. If, therefore, the order in question in this case was conditional,—that is to say, was to take effect and become final upon the contingency of the defendant's paying the costs adjudged against it,—it was a nullity, and the court should have granted the motion, made at the next term, to strike the case from the docket. But we do not so construe it. If the word "condition" had no other meaning except that in which it is used in the law of conveyancing, we might be constrained to hold that the order granting the new trial was to take effect only upon the contingency that the defendant should pay the costs. But such is not the fact. Among other definitions, *Worcester* gives its meaning as "something to be done;" and, in that sense, when plural, it is synonymous with "terms." *Webst. Dict.* It is evidently employed in this sense in the statute, which provides that new trials may be granted. Article 1368 of the Revised Statutes reads as follows: "New trials may be granted, and judgments may be set aside or arrested, on

motion, for good cause, on such terms and conditions as the court shall direct." The statute in force when *Secrest v. Best*, supra, was decided, contained the same language; and that decision holds, in effect, that the use of the word "conditions" did not warrant the granting of a new trial which was to take effect or be defeated by the happening of a future event. This is sufficient to show that the word "condition," in the order under consideration, was not used in its technical sense. It should rather be inferred that the court used the word in its statutory meaning, since it was exercising the authority conferred by the statute, and may be presumed to have had the statute before it.

In the order we are considering, it is announced that the court is of the opinion that the "new trial should be granted." This is unconditional. The judgment is "that defendant's motion for a new trial be, and the same is hereby, granted, and judgment vacated." This is absolute, and we think the subsequent entry meant no more than if it had read: "As the terms upon which the new trial is granted, it is adjudged that the defendant pay the costs of the witnesses in attendance at this term." The word "terms," as signifying propositions or stipulations,—or the conditions upon which an order of court is granted,—is not used in the singular; and the fact that there was but one thing which was required to be done by the order suggests the reason why the word "condition" was used. We are clearly of opinion that it was not intended to make the grant of the new trial conditional, and that the court did not err in so holding. The judgment is affirmed.

CHESNUTT v. GANN.

(Supreme Court of Texas. March 4, 1890.)

TRUST-DEED—SUBSTITUTION OF TRUSTEE.

Where a trust-deed gives the power to appoint a substituted trustee in case the original trustee refuses or fails to act, the appointment of a substituted trustee while the original trustee is advertising the property for sale under the trust-deed confers no title on the substituted trustee.

Commissioners' decision. Appeal from district court, Angelina county; L. B. HIGHTOWER, Judge.

W. J. Townsend and E. B. Wheeler, for appellant. J. D. Gann, pro se.

ACKER, J. J. D. Gann sued in trespass to try title to recover 160 acres of land. The defendant, Alfred Chesnutt, pleaded not guilty. The trial was by a jury, and resulted in verdict and judgment for plaintiff. Both parties claim under A. J. Spears, through sales made on the 4th day of October, 1887, under a deed of trust from Spears to Muller and Clarke. The plaintiff claims under a deed executed to him by Du Bose, the original trustee named in the deed of trust; and the defendant claims through a deed executed to him by one Borden, appointed by defendant as substituted trustee in the deed of trust.

The deeds were both dated October 4, 1887, and purported to have been executed in pursuance of sales made under the deed of trust. The indebtedness of Spears, for which he executed the deed of trust, amounted to \$205.50, and had been transferred to defendant on the 22d day of August, 1885, as appears from indorsement thereon. Muller died, and the probate court, at the February term, 1887, set apart the Spears debt to pay the allowance made by the court for the support of his minor child; his estate being insolvent. By the terms of the deed of trust, the power to appoint a substitute trustee was dependent upon the refusal or failure of the original trustee to execute the trust. Defendant testified that he owned an interest in the Spears debt of \$162.50, and that Muller's estate owned the balance; that, in part payment of a fee of \$300, Muller gave to him a vendor's lien note on S. A. Bagby for \$162.50, which Bagby had given him for the Stotham place; that Bagby conveyed the Stotham place to him in payment of the note; that, on the day the conveyance was made to him by Bagby, the place was levied on by Muller's creditors, and Muller then agreed with him that, if the Stotham place could not be held, Muller would make it good to him; that he had to give up the Stotham place, and Muller delivered the Spears debt and deed of trust to him to get the \$162.50 out of, and he filled out the transfer by writing his name and the date in it; that he stated to the administrator of Muller's estate that he was holding the Spears debt to secure him against the loss of the Stotham place; that he called on Du Bose, the trustee named in the deed of trust, to foreclose it and pay him his indebtedness, and the trustee refused to sell the property, stating that, if he sold it, he would sell it to pay Muller's child, and would not apply the proceeds of the sale to defendant's benefit; that, by reason of the failure of said trustee to sell the land and apply the proceeds to his debt, he appointed Borden substitute trustee, after he saw the notices of sale posted by Du Bose, the original trustee, dated September 7, 1887, and dated his appointment of Borden back to September 1st.

From this testimony of appellant, it certainly appears that he appointed the substitute trustee with full notice that the original trustee was at that time proceeding to execute the trust. Until he refused to act in the performance of his duties as trustee, there was no power in any one to appoint a substitute; and defendant's appointment of Borden conferred no power on him to make the sale, even if defendant had been the exclusive owner of the debt to secure the payment of which the deed of trust was given. It is not denied that the sale of the land by Du Bose was made in compliance with the terms and requirements of the deed of trust. From what we have said, it follows that appellant acquired no interest in the land by the conveyance from Borden, and that appellee

acquired the title under the sale and conveyance by Du Bose, the original trustee.

We deem it unnecessary to discuss the numerous assignments of error presented by appellant, and thereby needlessly increase the costs with which he must be taxed; for no other judgment could lawfully have been rendered than that which was rendered, and we are therefore of opinion that it should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

LOUISVILLE & N. R. Co. v. HURT.

(Court of Appeals of Kentucky. March 18, 1890.)

RAILROAD COMPANIES—INJURIES—TRESPASSERS—EVIDENCE.

1. A boy of 11 years, who climbs upon freight-cars standing on a side track at a railroad depot, is a trespasser; and the railroad company, not knowing of his presence, is not liable for injuries sustained by him in being thrown from the car by the concussion caused by attaching a train thereto.

2. In an action for such injuries, evidence that there was no railing between the depot and the side track; that persons were in the habit of crossing such track; and that no signal was given before backing the train up,—is incompetent.

Appeal from circuit court, Taylor county.
"Not to be officially reported."

John McChord, H. W. Bruce, and Wm. Lindsay, for appellant. Chas. Patteson, for appellee.

PRYOR, J. This appeal is prosecuted to reverse a judgment based upon a verdict of \$4,000 returned against the appellant for the neglect of its employes in running its trains, resulting in injuring one of the legs of the appellee to such an extent as required the limb to be amputated. After the testimony of the appellee was all in, the appellant, by counsel, moved for a peremptory instruction. This the court overruled, and is one of the grounds for reversal. It is also insisted that the instructions given were erroneous, and that instructions offered by the appellant were improperly refused.

The boy injured was about 11 years of age; and the accident occurred at the depot of the appellant, at Campbellsville, in Taylor county. The train reaching Campbellsville that evening was a mixed passenger and freight train, and when arriving at the depot the freight cars were uncoupled, and carried to a switch, to be coupled with other cars that had been on the switch during the day. The engine, with the cars, moved on the switch, and pushed the cars to which it was attached, north, to a coal-car, and in front of this coal-car were two other cars. The night was bright, and the moon shining at the time. The only eye-witnesses of the accident were the boy injured, (colored,) and two white boys, all of whom testify,—the two white boys testifying for the defendant. The little boy states that at the invitation of the two white boys, who were then in the coal-car,

he climbed in with them, and stood watching the people who were getting off the passenger train; that the cars, when on the switch, were backed up against the coal-car, where he was standing, and, before they struck, the white boys called to him to "Look out! The train is going to strike the car." He then grabbed the brake, to hold on, but the cars came together so hard, and with such a shock, that he fell off; the wheels of the car running over his leg, and mashing it below the knee. On cross-examination he stated that he knew it was dangerous to get on cars while in motion, and knew it was dangerous to be around them. This is, in substance, the testimony of the little fellow, and all the testimony heard on the issue, except as to the extent of the injury, about which there is no controversy. Some testimony was introduced showing that no railing was between the depot or the ground bordering on the switch and the switch itself, and that persons were in the habit of crossing this switch, and that no bell was rung or whistle blown by those in charge of the train.

All of this testimony was irrelevant and incompetent, as it could shed no light on the neglect of the boy in going on the car, or the neglect, if any, of the employes causing his injury. If he had been on the track, and out of the car, there might be great reason for permitting such testimony to go to the jury; but, when entering the car of the appellant without the knowledge or consent of the employes, and injured while on the car, without their knowledge, however great the concussion resulting from the act of coupling the cars, there is no ground for a recovery. The employes had no reason to anticipate the presence of boys in their freight-cars, either during the day or night; nor were they required to examine for the purpose of ascertaining whether the boys were on any part of the train. If they saw the boys, it was their duty to make them leave the car, and to exercise that degree of caution as would prevent their being injured; but the fact that they might have seen them constitutes no neglect on their part, as it was not incumbent on them to know who had climbed into their cars, or whether any one was in them before moving them. The boys were not employed to load the cars, or in the service of the appellant in any manner. They were all trespassers; and, the injury resulting from the boy's own neglect, the peremptory instruction should have been given. Besides, when the two white boys were examined by the defense, they both state that the plaintiff climbed into the car while it was in motion, and ran to the brake as if to stop the car, and, when the car they were on struck the car in front of it, the plaintiff fell, and was injured. The testimony to the effect that the boy was in the habit of jumping onto moving trains was incompetent. He might have been guilty of such neglect, and still it was the duty of the employes to avoid injuring him, when apprised of his danger. There is no pretense

here that the employes, or any of them, saw the danger he was in; and therefore the testimony on each side fails to show any want of diligence on the part of the employes, or that the injury is to be attributed to their neglect. The instructions asked by defendant should have been given, which are, in substance, that if the plaintiff went upon defendant's car without the knowledge or consent of the defendant, or any of the employes, and was injured, they should find for the defendant, unless the employes, or some of them, knew the perilous position of the plaintiff, and failed to use the means within their power to prevent the injury.

This is unlike a case of running over a small boy on the track of its road at its depot, or in a town, where they had the right to suppose children or others would likely attempt to cross their track. They should then give warning of the approach of the train, and use such diligence as within their power to prevent accidents to those upon or crossing their track. In this case the boys knew of the approach of the train, or, if ignorant of that fact, they were in a position where the employes had no right to anticipate they would be, whether old or young; and, the injury resulting from the neglect of the plaintiff, the defendant should not be made to respond in damages. It results, therefore, that the instructions asked by the plaintiff, and those given by the court, were all erroneous, when applied to the facts of this case. In the case of *Railroad Co. v. Gastineau*, 83 Ky. 119, a boy 15 years of age was killed while trying to uncouple a car in the company's yard. It was held, after determining that the boy was at a place where he had no right to be, that the company was not compelled to anticipate his presence, and, in case of injury, no cause of action existed, unless, after the discovery of the boy's peril, they failed to exercise a proper degree of care in order to prevent the injury. Judgment reversed, and remanded for a new trial in conformity with this opinion.

CHRISTIAN COUNTY COURT v. SMITH *et al.*

(Court of Appeals of Kentucky. March 20, 1890.)

MUNICIPAL AID TO RAILROADS — ELECTION — REPEAL OF STATUTES.

1. Under Act Ky. March 17, 1870, prohibiting the submission of more than one question of taxation at any one election, and declaring that, if more than one such question is voted on at any one election, such tax shall be void, an election upon county subscriptions to the capital stock of two different railroad companies, at the same time, is void.

2. Said act is not repealed, as to companies previously in existence, by Gen. St. Ky. art. 17, c. 28, § 2, providing for the manner in which a proposition to take stock in a company is to be submitted, as such statute, by its terms, has no retrospective operation.

3. The fact that the election on the subscription to one of the roads is void, does not validate the subscription to the other.

On rehearing. For former report, see 12 S. W. Rep. 134.

"Not to be officially reported."

Landes & Clarke, Hunter Wood, Arthur Carey, E. P. Campbell, and Brown, Humphrey & Davis, for appellant. *Henry J. Stites, John Feland, and Joseph McCarrol*, for appellees.

PRYOR, J. A rehearing was granted in this case on the petition of the appellant, and, after a careful consideration of the views of counsel presented at the last hearing, we are still of the opinion that the judgment below was proper; some members of the court being of the opinion that the direction to the county judge in section 2, art. 17, c. 28, Gen. St., under the title of "Courts," requiring the county judge to associate with him the justices of the county in the levy of tax and issuing of bonds payable by the county, is not properly legislating on the subject of how the vote of a county may be cast upon such propositions; that neither the title nor the subject-matter embraces such legislation,—the one title controlling or regulating the action of the courts, and the act under which it is held that this election or vote was illegal, being entitled "An act in relation to submitting questions of taxation to the vote of the people." This last act applies as well to incorporated companies as to county courts and justices of the peace, and one would scarcely look under the title of "Courts" to find legislation repealing the act of March 17, 1870. So, under any aspect of the case, the election was a nullity; and besides, if the voters of the county want this road, it is but little expense and trouble to order another election. Much better do this than to establish a precedent by which the voter is placed under an influence that compels him to vote for a proposition that he does not favor, in order that he may succeed with his own favored enterprise. Opinion adhered to, and now filed as the judgment of the court.

BRYAN *et al.* v. BOARD OF EDUCATION OF THE KENTUCKY ANNUAL CONFERENCE OF THE M. E. CHURCH SOUTH.

(Court of Appeals of Kentucky. March 15, 1890.)

COLLEGES—CORPORATIONS—STOCKHOLDERS—OBLIGATION OF CONTRACTS—TITLES OF LAWS.

1. Stockholders in an incorporated institution of learning under control of a church conference, who have accepted the plan of a board of education appointed by the conference, by contracting with it, cannot object to the validity of an act incorporating such board of education for the purpose of carrying out its plan.

2. As the object of the act incorporating the board of education was to effectuate the contract between it and the stockholders, though the power to amend or repeal is reserved, the legislature cannot exercise that power to the prejudice of vested rights.

3. Section 2, Act Ky. Sept. 17, 1861, amending the act incorporating the board of education, which provides that "nothing contained in the act incorporating said board * * * shall be construed so as to prevent or hinder said board or their successors from moving the seat of their college," is not unconstitutional as being declaratory of the meaning of the former act, and thus in its nat-

ure judicial, but gives the power of removal, where that power was not expressly given by that act.

4. The institution, as at first projected, was intended to be a local seminary, established and sustained by citizens of the locality; and the charter provided that, in case the corporation was dissolved, or its charter was amended or repealed, its property should vest in its stockholders. Afterwards the plan was changed so as to endow and support a first-class college, under control of the annual conference of the church. The original stock was voluntarily commuted for scholarships therein. Scholarships were sold to, and donations made by, persons residing elsewhere; and the original property passed to the board of education as part of the endowment fund. There was no express condition, either in the contract between the stockholders and the board of education, or in the act incorporating the latter, that the college should not be removed. *Held*, that there was no contract that the college should not be removed, and therefore section 2 of the act of 1861, conferring the power of removal, could not be assailed, after 25 years acquiescence therein, on the ground that it impaired the obligation of a contract.

5. Section 11, Act Ky. Jan. 12, 1860, entitled "An act to incorporate the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church South," which repeals Act Feb. 16, 1858, incorporating the "Millersburg Male and Female Collegiate Institute," conflicts with Const. Ky. art. 2, § 37, as its object is not expressed in the title of the act.

Appeal from circuit court, Bourbon county.
"To be officially reported."

Hargis & Bastin, Thos. H. Hines, and Lockhart & Lyng, for appellants. *B. F. Buckner, D. L. Thornton, and W. A. Sud-duth*, for appellees.

LEWIS, C. J. This action was brought by G. W. Bryan and seven associates, for themselves and other shareholders in the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church South, and in the Millersburg Male and Female Collegiate Institute, against said board, for an injunction, that was granted, temporarily restraining defendant from selling or disposing of a certain lot of land and buildings of the Kentucky Wesleyan College, or removing its capital or property from Millersburg to Winchester, or using any of such capital or fund for any other purpose, or at any other place, than proper conduct and management of the college at Millersburg.

It appears that in January, 1858, a meeting of citizens of Millersburg was held to devise means to purchase land and erect buildings for an institution of learning and boarding-house to cost about \$15,000, and to be under the supervision of some denomination. At that meeting a resolution was adopted pledging the members for the amounts respectively subscribed, in order to secure a male and female collegiate institution: "(1) That it be an institute for the Covington district, Kentucky Conference, and under the control of the Methodist Episcopal Church South; (2) that the trustees and building committee be appointed by the quarterly conference of the Millersburg station, the former to be subject to approval of the conference; (3) that it be upon the joint-stock principle, the shares \$25 each, subject to sale and trans-

fer; (4) that in case said church fail to sustain the institution, and it from any cause be discontinued, the property to revert to the stockholders *pro rata*." To carry out the enterprise thus started, "An act to incorporate the Millersburg Male and Female Collegiate Institute" was passed February 16, 1858; the preamble thereof being as follows: "Whereas, divers citizens in and near the town of Millersburg, in the county of Bourbon, have subscribed a considerable sum of money for the purpose of erecting in or near said town a seminary of learning to be under control and supervision of the Kentucky Annual Conference of the Methodist Episcopal Church South." By provisions of the act, William Nunn and others were constituted a body corporate, by name of "Trustees of the Millersburg Male and Female Collegiate Institute," with power to receive additional subscriptions and donations in aid of the institute, and to establish rules for its government. But the quarterly conference of the Millersburg station was empowered to appoint trustees subject to approval of the annual conference. Section 4 is as follows: "All persons who shall subscribe \$25 or more in aid of said institute shall be stockholders therein; said sum to constitute a share. And if said Methodist Church shall ever relinquish or surrender, or cease to exercise, control over said institute, then and in that case its control and management shall revert to and vest in said stockholders, who may, at a meeting for that purpose called, proceed to elect a board of trustees; and if said corporation shall cease to exist, or be dissolved, or its charter surrendered or repealed, all its property of every kind or description shall vest in said stockholders in proportion to their respective shares." By section 5 the right to amend or repeal the act was reserved to the legislature. September, 1858, the trustees presented to the annual conference, in session at Millersburg, a written memorial, stating that the charter had been secured, subscriptions of stock amounting to \$7,500 obtained, a suitable lot of land purchased, and steps taken to erect necessary buildings, and requesting conference to accept the subscriptions, land, etc., upon the terms set forth in the charter, which was done; and conference, at the same time, resolved to raise an additional sum of \$10,000, to be subscribed as its stock in the institute, and to constitute its educational fund. But it was subsequently, though during the same session of conference, agreed between it and the original stockholders for the charter to be so amended as to make it a male instead of mixed school, and that each party would raise an additional subscription of \$10,000. However, September 30, 1858, the board of education appointed by conference, though not then made by statute a corporation, at a meeting of its members, desired a different and enlarged plan, which involved founding a first-class college, having an endowment fund of \$200,000, one-half of which it was designed to

raise by issue and sale of scholarships. But, according to that scheme, no part of the capital raised for the educational fund was to be appropriated to pay salaries of professors, nor any other expenses; only \$10,000 thereof, as already pledged by conference, to be used for erecting college buildings. And at the same time, as part of the plan, the following proposition was made: "That, if the original stockholders of the Millersburg Male and Female Collegiate Institute will raise in Bourbon county, and that portion of Nicholas lying in the vicinity of Millersburg, \$10,000, in addition to \$10,000 already pledged by them, the entire amount of \$20,000 thus raised to be invested in the erection of the buildings, we will issue scholarships for said \$20,000 on the same terms as to others: provided, their amount of stock in that case be surrendered, in lieu of said issue of scholarships, to the Kentucky Annual Conference of the Methodist Episcopal Church South, to be held by said conference as part of the educational fund." The plan of the board of education having, October 1, 1858, been submitted to the original stockholders assembled in Millersburg, was, without dissent, accepted by those present; and we think it sufficiently established that, either at that time, or soon after, it was agreed to, and scholarships received in lieu of their stock by all of them.

September, 1859, the plan proposed by the board of education, and acceptance by the original stockholders, were reported to and approved by the annual conference held in Georgetown; and by direction of that body an act was applied for, and January 12, 1860, passed by the legislature, entitled "An act to incorporate the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church South;" the preamble thereof being as follows: "Whereas, the Kentucky Conference of the Methodist Episcopal Church South has resolved to form an educational fund, and establish a college for the promotion of literature, science, morality, and religion within the limits of said conference, and having in fact secured the sum of \$57,000 in cash and reliable notes, and located an institution at Millersburg, Bourbon county, which is now ready for occupancy, in order to give full legal effect thereto." By provisions of the act, certain persons were constituted a corporate body, by the name of the "Board of Education of the Kentucky Conference of the Methodist Episcopal Church South," and invested with authority to carry out the purposes set out in the preamble, subject, however, to control of the annual conference. Section 11 is as follows: "That an act to incorporate the Millersburg Male and Female Collegiate Institute, approved February 16, 1858, be, and the same is hereby, repealed." And by section 12 the legislature reserved the right to amend or repeal the act. September 17, 1861, the board of education procured the passage of an act amending the one of January 12, 1860, section 1 thereof being as follows: "That it shall be

lawful for the trustees of the Millersburg Male and Female Collegiate Institute who were in office January 12, 1860, when the act incorporating said institute was repealed, or their successors, to convey, by deed, to the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church South, the property held by said trustees in or near the town of Millersburg, for the purpose of carrying into effect any contract made by said trustees, as stockholders of said institute, with said board; and their conveyance, recorded in the proper office, shall be effectual to pass title of said property to said board, and their successors." By section 2, it is provided that "nothing contained in the act incorporating said board, approved January 12, 1860, shall be construed so as to prevent or hinder said board or their successors from removing the seat of their college from Millersburg to any other place in the bounds of the Kentucky Annual Conference." The action of the board of education was duly reported to the annual conference held in Paris, September 25, 1861, and the act mentioned was by it accepted; and in November, 1861, the trustees of Millersburg Male and Female Collegiate Institute, by deed recorded in the Bourbon county court clerk's office, conveyed the lot in question to the board of education. In September, 1886, the annual conference held in Winchester adopted a resolution for appointment of a committee of 20, including members of the board of education, to receive and pass upon "any proposal looking to continuance in Millersburg, or removal, of Kentucky Wesleyan College;" their action to be binding and final. And September, 1887, that committee reported to the annual conference held in Covington acceptance by it of a proposition made by citizens of Winchester to give five acres of land on which to erect buildings, and \$35,000, upon condition the college be removed from Millersburg to that place; and thereupon conference approved the committee's action, and directed the removal made, but it has been so far prevented by the injunction mentioned.

It seems to us the original stockholders of the Millersburg Male and Female Collegiate Institute are not in a position to question either the efficacy or validity, except as to section 11, of the act of January, 1860; for it is not only in strict pursuance of, and entirely consistent with, but was indispensable to carry out, the plan of the board of education, which they accepted without, so far as this record shows, any dissent, and have had the benefit and enjoyment of ever since. Section 11 is in conflict with section 37, art. 2, of the state constitution, and therefore void, because repeal of the charter of February 16, 1858, which was sought to be accomplished by it, does not relate to, nor is embraced by, the subject expressed in the title of the act of January, 1860. But repeal of that charter was not actually necessary, because the corporation created by it practically ceased to exist after the contract made be-

tween the original stockholders and board of education, whereby the latter acquired, for use of the Kentucky Wesleyan College, possession of, and equitable title to, all property of the Millersburg Male and Female Collegiate Institute, and the trustees thereof were deprived of their function, and divested of every right except the naked legal title; and as section 1 of the act of September 17, 1861, merely empowered those trustees to convey that property to the board of education, which they might have, without being coerced to do by a court of equity, no injury resulted from it.

It thus results that the decisive question in this case is whether section 2 of the last-named act is valid. Counsel for appellant contends it is unconstitutional because being declaratory of the meaning of the act of 1860, already passed, and not enactment of what should thereafter be law in that regard. It is in its nature judicial, and not legislative. "But, in any case, the substance of the legislative action should be regarded, rather than the form; and, if it appear to be the intention to establish by declaratory statute a rule of conduct for the future, the courts should accept and act upon it without too nicely inquiring whether the mode by which the new rule is established is or is not the best." Cooley, Const. Lim. 115. And as, therefore, the power of removal had not been expressly granted by the act of 1860, incorporating the board of education, and could not have been exercised without, section 2 of the act of 1861 may fairly, and should, be regarded as intended to then give it.

Counsel for appellee contends that, in virtue of the reservation contained in section 12 of the act of 1860, the legislature had the unqualified right to enact section 2 of the act of 1861 as an amendment. But it seems to us, in view of the purpose of the act of 1860, which was to effectuate the contract previously made between the original stockholders and board of education, the power to amend reserved by the legislature could not have been exercised in the prejudice of vested rights, if such existed. And at last the inquiry arises whether the section in question is, in the meaning of the United States constitution, a law impairing the obligation of a contract. The Male and Female Collegiate Institute projected in January, 1858, was evidently intended to be local in character, established and sustained principally, if not wholly, by citizens of Millersburg and vicinity; and although, by the act of February, 1858, the quarterly conference of Millersburg station was empowered to appoint trustees, and the control and supervision of the institute was given to the annual conference, still, at the time the memorial heretofore mentioned was presented to that body, no stock had been subscribed except by citizens of Millersburg and vicinity, nor did they, in virtue of contract or otherwise, have a right to, or reasonable expectation of, as-

sistance from others. It was therefore, then, necessary, in order to protect their rights, and in the power of the original stockholders, to provide, as was done in section 4 of that act, that, in case the corporation thereby created ceased to exist, and was dissolved, or its charter was amended or repealed, all its property should vest in the stockholders in proportion to their respective shares. But, by the plan subsequently adopted, what was at first intended to be, and in the preamble to the act of February, 1858, called, a "seminary," was changed to a first-class college, for the endowment and support of which aid of the annual conference was pledged. The stock subscribed originally with the single object of buying a lot, and erecting buildings suitable for a seminary, was voluntarily commuted by the owners for scholarships in the college. An endowment fund of \$200,000 was contemplated, of which nearly \$100,000 was agreed to be paid for scholarships sold to persons residing in different parts of the conference bounds; and the title and possession of all the property passed to the board of education, to constitute part of the endowment fund, where it remained, without dispute or protest, from 1860 to the institution of this action. Neither the contract between the original stockholders and board of education, nor act of 1860, contains an express condition that the title of the property, which became part of the endowment fund, was to be held upon condition that the college be forever conducted and maintained at Millersburg, and nowhere else within the territorial limits of the annual conference; and such condition exists, if at all, by implication only. But the law does not presume a party entitled to a right or benefit of reservation claimed under contract, in the absence of an express stipulation, except such as reason and justice dictate. Not only those residing elsewhere, but as well residents of Millersburg and vicinity, must be presumed to have regarded the establishment and successful maintenance of a first-class college, under the patronage and control of the annual conference, as the first and main consideration for the outlay of money made, and the particular locality as of secondary importance; and, therefore, all that can be fairly and reasonably implied in behalf of the citizens of Millersburg is that they expected and believed successful operation of the institution would prove compatible with continuance of it at that place. To now imply anything else or more would not only involve the absurdity of hazarding or sacrificing an institution of learning, the successful and useful operation of which, within the bounds of conference, was clearly the main inducement for the great outlay already made, but be in disregard of the rights and interests of those residing elsewhere than at Millersburg, who have contributed, either by purchasing scholarships or donations, very much more than has been raised at that place.

There is mention made in the act of 1860, and also in the certificates of scholarships, of the college being established at Millersburg; but the language used does not import an agreement that it shall permanently remain there. On the contrary, we think it should, as can fairly be done, be interpreted as merely descriptive of the institution.

In our opinion, therefore, there exists no contract or undertaking, express or implied, for continuance of the institution at Millersburg any longer than its useful and successful operation requires; and, as the power of removal was conferred by the act of 1861, which all parties interested must, manifestly, have been aware of, and which was accepted and acquiesced in for more than a quarter of a century, it is now too late to call it in question. And, in the absence of fraud, the board of education, controlled by the annual conference, must be presumed to have acted in good faith, and under belief that success of the college required the removal from Millersburg to Winchester. Consequently, we need not inquire whether they are or not pursuing the wisest policy, especially as the evidence shows the college has so far been a failure at its present location.

Judgment affirmed.

ARKANSAS M. R. CO. v. CANMAN.

(Supreme Court of Arkansas. March 1, 1890.)

RAILROAD COMPANIES—APPLIANCE—INSTRUCTIONS.
—VERDICT.

1. The word "satisfy" should not be used in instructions on the evidence in civil cases, as the verdict should be given on preponderance of evidence.

2. In an action against a railroad company for personal injuries caused by the derailment of a car, it is error to instruct that, "if the jury find from the evidence that there was a spread or bent rail at the time and place of derailment, the jury may infer negligence from that fact, and the burden of disproving it is on the defendant," as it assumes that any spread or bend in a rail is negligence, without regard to its sufficiency to cause the derailment, or in some manner impair the safety, of the train.

3. If the business of a railroad does not warrant the running of separate trains for freight and passengers, it will not be required to do so; but if the business is sufficiently large and profitable to warrant it, and the safety of passengers is endangered by having passenger-coaches mixed in the same train with freight-cars, it is the duty of the company to run separate trains.

4. Mansf. Dig. Ark. § 5477, provides that, in the formation of mixed trains, the baggage and freight cars shall be placed in front of the passenger-coaches. Held that, where it was permissible for a road to use mixed trains, the law would not require bell-pulls and air-brakes to be used on such trains if it was impracticable to do so; but it would require them if it was practicable, and they were necessary to the security of the passengers.

5. Mansf. Dig. Ark. §§ 5142, 5143, provide that the court may require the jury, "in any case in which they render a general verdict, to find specially upon particular questions of facts, to be stated in writing;" and that, "when the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly." Held that, if the verdict is sustained by any one of two

or more interpretations of the evidence, it is not necessary that the jury should concur in a special finding; but if they must necessarily agree on the answer to some particular question before they can find the verdict, and their answer shows that they cannot agree, the general verdict should be disregarded.

Appeal from circuit court, Phillips county; M. T. SANDERS, Judge.

John J. & E. C. Horner, for appellant.
Stephenson & Trieber and E. W. Kimball, for appellee.

BATTLE, J. The Arkansas Midland Railroad Company is a corporation owning and operating a railroad between Helena and Clarendon, in this state, for the carriage of passengers and freight to and from its termini and intervening points. It has never run trains, exclusively, for transporting passengers, but the trains on which it has carried them were composed of passenger and freight cars, and carried freight. On the 12th of January, 1888, for a valuable consideration, it undertook to carry O. G. Canman, as a passenger, on a train composed of two box-cars, a baggage-car, and two passenger-coaches, from Helena to Clarendon. The box and baggage cars were placed in front of the coaches. The train was not provided with air-brakes nor with bell-pulls, but was furnished with hand-brakes and two brakemen. Canman took a seat in one of the coaches. The train moved out, and was running at the rate of about eight miles an hour, and had gone a short distance, when the coach in which Canman was seated left the track, turned over, and severely injured him. For the damages he suffered in consequence of the injuries received he brought this action, and alleged that they were caused by the negligence of the railroad company.

The foregoing facts were proven on the trial. It was also proved that the road-bed of the defendant was ballasted with dirt; and evidence was adduced tending to prove that it was impracticable to use a bell-rope and air-brakes on a train composed of freight and passenger cars; that the coach that was overturned was derailed at a point where a rail in the track, on the east side, was slightly bent out of line, and "a spike seemed to be pushed towards the east;" and that, in leaving the track, the wheels on the east side of the coach went between the rails, and the others on the outside and west of the track.

Among other instructions, the court gave the following, over the objections of the defendant, to the jury:

"(1) Where a passenger for hire, being carried on the train of a railroad company, is injured without fault of his own; the law presumes that the railroad company has been guilty of negligence, which presumption the railroad must remove by evidence; and if the jury find that plaintiff, while a passenger as aforesaid on defendant's train, was injured without any fault of his own, and the defendant has failed to satisfy you by the ev-

idence introduced that it was not through its fault that the accident occurred, or that it was caused by plaintiff's own or contributory negligence, the verdict must be for the plaintiff.

"(2) If the jury find from the evidence that there was a spread or bent rail at the time and place of derailment, the jury may infer negligence from that fact, and the burden of disproving it is on the defendant."

The defendant asked, and the court refused to give, the following instruction: "If the jury find from the testimony that the train on which plaintiff was a passenger at the time he was injured was a mixed train for carrying passengers and freight, and that such train at the time when such injury was received was not provided with air-brakes or a bell-cord, and if they further find from the testimony that it is not practicable to use air-brakes and bell-cord on such trains, then the jury are instructed that the want of such appliances was not negligence in defendant."

The defendant asked for further instructions as to the degree of diligence, care, skill, and prudence it was bound to exercise in the construction, maintenance, and operation of its railroad, which the court refused to give.

The result of the trial was a verdict and judgment in favor of plaintiff, and an appeal by the defendant to this court.

The first instruction, construed in connection with the other instructions given, contained no errors. More appropriate words, however, and words adapted to express the idea intended, should have been used instead of the word "satisfy." In order to overcome the presumption of negligence, it was not necessary for the defendant to introduce evidence sufficient to convince the jury, beyond a reasonable doubt, that it had not been negligent. "It is never necessary," says the court in *Shinn v. Tucker*, 37 Ark. 589, "in a civil case, that a jury should be satisfied of the truth of their verdict, in the sense of resting upon it confidently. That principle belongs to criminal law. Civil verdicts should be given on preponderance alone for the party whose evidence, considered altogether, outweighs that of the other as to the facts in issue, or against the one having the *onus*, if, on the whole, the weight seems balanced."

The second instruction given was erroneous. It assumes that any spread or bend in a rail is negligence, without regard to its sufficiency to cause the derailment of a car, or in some manner impair the safety of the train. It is true that the court instructed the jury that, if they found that the accident to the train was occasioned by a defect in the road-bed or track, and that "defendant had taken all the means which would have been taken by a cautious and prudent person in the exercise of the utmost prudence to prepare and maintain its road-bed and track where the car was derailed," the defendant would not be liable; but at the same time it

told the jury, in effect, that, if they found that there was a spread or bent rail at the time and place of derailment, they might infer that the defendant had not used such means and prudence, and was guilty of negligence.

Railroad companies "are bound to the most exact care and diligence, not only in the management of trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of passengers." While the law demands the utmost care for the safety of the passenger, it does not require railroad companies to exercise all the care, skill, and diligence of which the human mind can conceive, nor such as will free the transportation of passengers from all possible peril. They are not required, for the purpose of making their roads perfectly safe, to incur such expenses as would make their business wholly impracticable, and drive prudent men from it. They are, however, independently of their pecuniary ability to do so, required to provide all things necessary to the security of the passenger, reasonably consistent with their business, "and appropriate to the means of conveyance employed by them," and to adopt the highest degree of practical care, diligence, and skill that is consistent with the operating of their roads, and that will not render their use impracticable or inefficient for the intended purposes of the same. *Railroad Co. v. Derby*, 14 How. 486; *Simmons v. Steam-Boat Co.*, 97 Mass. 361; *Railroad Co. v. Thompson*, 56 Ill. 138; *Pershing v. Railroad Co.*, 32 N. W. Rep. 488; 2 Wood, Ry. Law, § 801, pp. 1074, 1079, and cases cited; *Hutch. Carr.* §§ 502, 529, and cases cited; *Patt. Ry. Acc. Law*, § 247.

In *Railroad Co. v. Horst*, 93 U. S. 291, which was an action against a railroad company for injuries received by the plaintiff while riding on a cattle train, the court, after saying, "The highest degree of carefulness and diligence is expressly exacted" of railway companies, said: "The terms in question do not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from any possible peril, nor such as would drive the carrier from his business. It does not, for instance, require, with respect to either passenger or freight trains, steel rails and iron or granite cross-ties, because such ties are less liable to decay, and hence safer than those of wood; nor upon freight trains air-brakes, bell-pulls, and a brakeman upon every car; but it does emphatically require everything necessary to the security of the passenger upon either, and reasonably consistent with the business of the carrier, and the means of conveyance employed."

Was appellant required to run separate passenger trains on its road? All carriers are not required to adopt like expensive provisions for the safety of passengers. The business of a road might render it unsafe to

use a single track, and necessary to the safety of passengers to use a double one. It would, unquestionably, be safer for all railroads to have two tracks, and run all trains going in the same direction over the same track. But this does not make it the duty of all railroads to have double tracks. The provisions required to be adopted by passenger carriers for the safety of their passengers vary as the exigencies of the traffic and its remunerative character demand and justify. A railway constructed through a thinly settled country, moving but little freight and few passengers, and running its trains at a slow rate of speed, cannot be expected to be equipped and operated in the same manner as is necessary in the case of a railway running through a densely populated territory, and moving a large volume of traffic. So the line of a railroad may be so short, and the business done by it so small, as to make it unreasonable to require it to run separate trains for freight and passengers. If the business done does not warrant it, it would be unreasonable and oppressive to demand it, and it would not be required. But, on the other hand, if the business was sufficiently large and profitable to warrant it, and the safety of the passengers was endangered or diminished by having the passenger-coaches mixed in the same train with freight-cars, it would clearly be the duty of the railway company to run separate trains.

If it was not the duty of appellant to run separate passenger trains, then, under the statutes of this state, it was its duty, in forming its trains, to place the baggage and freight cars in front of the passenger-coaches. *Mansf. Dig. § 5477*. Under such circumstances, the law would not require bell-pulls and air-brakes to be used on such trains, if it was impracticable to do so. But, on the other hand, if the rule as to care and diligence already laid down required them to be used, it was the duty of appellant to have done so.

Another question is presented for our consideration. The statutes of this state provide that the court may require the jury, "in any case in which they render a general verdict, to find specially upon particular questions of facts to be stated in writing," and that, "when the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly." *Id. §§ 5142, 5143*. In pursuance of these statutes, the court propounded interrogatories, and gave instructions to the jury, on motion of the appellant, as follows:

"(1) Was the derailment of the coach in which plaintiff was a passenger caused by the insufficient skill and care of defendant in constructing its road-bed?

"(2) Was the derailment of the coach in which plaintiff was a passenger caused by the want of skill and prudence of defendant in maintaining its road-bed?

"(3) Was such derailment caused by the defect in the rolling stock in defendant's train, or any of its appliances?

"(4) Was such derailment caused by any negligence in operating such train?

"(5) If the jury find negligence in either case, they will state in what said negligence consisted.

"(6) If the jury find that after the derailment of the car the track was torn up, and the ties broken, they will state whether the tearing up of the track and the breaking of the ties contributed to the injury of the plaintiff, and, if so, in what way and to what extent."

And, against the objection of the defendant, instructed the jury as follows:

"If the jury find negligence, and cannot agree what the particular negligence was which caused the derailment of the car, they may so state.

"If the jury find that the derailment was caused by a bent rail or spreading of the track, say so."

To each of the interrogatories the jury responded: "We fail to agree;" and further said: "We find negligence on the part of the defendant, but fail to agree as to what particular neglect caused the derailment of the train."

It is contended by the appellant that the court erred in instructing the jury that, if they found that the appellant had been guilty of negligence, and could not agree as to what the negligence which caused the derailment was, they might so state; and insists that, before a verdict could have been legally returned against it, there must have been an agreement of the minds of the 12 jurors as to the existence of some particular fact constituting negligence, and that they must have agreed on an affirmative answer to one of the interrogatories. The correctness of this contention depends on the evidence. It is not necessary that a jury, in order to find a verdict, should, in all cases, concur in a single view of a transaction or occurrence disclosed by the evidence. If the verdict is sustained by any one of two or more interpretations of the evidence, it cannot be impeached by showing that a part of the jury proceeded upon one interpretation, and a part upon the others. *Murray v. Insurance Co.*, 96 N. Y. 614; *Railway Co. v. Dunleavy*, 22 N. E. Rep. 15. But, if they must necessarily agree upon the answer to any particular question before they can find a verdict, they would be guilty of a violation of duty, if they returned a general verdict without doing so. *Ebersole v. Railroad Co.*, 23 Hun, 114. If they should reply to such a question to the effect they cannot agree, the court ought not to receive their verdict, as the reply and verdict, in that case, would be in irreconcilable conflict. As to the consistency of the verdict, and the answers of the jury to the interrogatories in this case, we express no opinion.

Reversed.

HARRIS v. TOWNSEND.

(Supreme Court of Arkansas. Jan. 18, 1890.)

RES ADJUDICATA—FORMS OF ACTION.

In an action by a partner against his copartner for injury to partnership property, it appeared that plaintiff formerly brought suit in equity to restrain defendant from unlawfully interfering with such property, in which suit defendant filed a cross-complaint, asking for dissolution and settlement of the partnership, to which plaintiff set up a counter-claim for the damages alleged in the present action. *Held*, that a plea of *res adjudicata* was good, as the injury to the property was cognizable in equity in a suit for final settlement, and, if not, the difference between suits in equity and actions at law, in Arkansas, being in the mode of trial by the same court, the judgment rendered without objection was not void.

Appeal from circuit court, Clark county; B. D. HEARN, Judge.

Action by James S. Townsend, against S. S. Harris, defendant and appellant. The complaint alleges that "about the 6th day of March, 1887, the parties hereto entered into a partnership for the purpose of editing and publishing the Arkadelphia News, a weekly newspaper, defendant being publisher, and plaintiff editor. About the 20th day of July, 1887, being the day of publication, defendant, having possession of the only key to the office of publication, wickedly, maliciously, and with the intent to stop the publication of said paper, without consulting plaintiff, and against his will, locked the door of said printing-office, carried therefrom the joint lever of the press, without which it could not be run, and also took the half-printed paper for that week, and secreted them so that plaintiff was unable to get possession of the same, or to have them in the office, until an order of the chancery court commanded him to replace them; that by reason of said unbusiness-like conduct the newspaper was suspended for about two months, and many of its subscribers and advertising patrons were driven away, to the great damage of the appellee in the sum of two hundred dollars." Defendant set up a plea of *res adjudicata*, and a denial of the damage alleged, and an allegation that the property was taken by defendant in order to prevent the continuance of the partnership against his will: The plea of *res adjudicata* was heard by the court without a jury, and the following findings of fact and law made: "That previous to July 20, 1887, plaintiff and defendant were engaged as partners in running a newspaper in Arkadelphia, called the Arkadelphia News; that on the 25th day of July, 1887, plaintiff herein brought a chancery suit on the equity side of this court, numbered 859; that defendant herein was defendant in that suit; that plaintiff's complaint asked for a permanent injunction restraining the defendant from unlawfully interfering with the partnership property, alleging certain reckless and unbusiness-like conduct upon defendant's part; that on the 1st of August, 1887, this defendant in that suit filed an answer and cross-complaint asking that said partnership be dissolved, and for a settlement

of the same. On August 6, 1887, plaintiff in that suit filed his answer to the cross-complaint of this defendant, and in that answer one of the paragraphs set up a counter-claim for damages sustained by plaintiff herein, alleging the same cause of action set up in the complaint herein, and claiming the same amount of damages asked in the complaint by the plaintiff; that no objection appears to have been raised on the part of defendant to the counter-claim, and that it nowhere appears from the record in that cause that the said counter-claim was ever withdrawn by plaintiff; that defendant did not demur to said counter-claim, nor move to transfer it to the common-law docket; that plaintiff did not ask said chancery court to order the issue on this counter-claim to be tried by the jury; that the court, on the — day of December, 1887, made a final decree in said cause settling all the matter properly put in issue in said cause. The court finds that the acts complained of in the complaint herein were committed by one partner, to the partnership property, while the partnership existed. The court finds, as matter of law, that a court of equity had no jurisdiction in suits by one partner to obtain damages for the tortious acts of another partner to the partnership property while the partnership lasted, to award damages, and that the answer to the cross-complaint in the chancery suit herein raised no issue triable in a court of equity, even though defendant did not object to the trial of that issue in that case; that a court of equity cannot award damages for a tort by a partner to partnership property. The court therefore finds, as matter of law, that the decree of the Clark chancery court in the case of Townsend v. Harris, No. 859, on chancery docket, rendered on — day of December, 1887, does not bar this suit between the same parties, and consequently the cause of action set forth in plaintiff's complaint herein is not *res adjudicata*."

Crawford & Crawford, for appellant. *Murry & Kensworthy*, for appellee.

PER CURIAM. The authorities cited by the appellee are to the effect that an action by a partner against his copartner for injury done to the partnership property is cognizable in a court of law. None go to the extent of holding that the matter is not cognizable in a court of equity, in an action of account for final settlement. But, even if the issue was not properly cognizable in equity, can it be held that the judgment is void? Under the Code, a plaintiff is only required to make a plain statement of his case in his complaint. If the case stated would formerly have been an action at law, either party is entitled to a trial by jury after the manner of the common law; but, if the cause as stated would have been distinctly equitable under the old system, then it is triable according to the former chancery method. That is the substantial difference between law and equity under the new procedure. It does not recognize one

judge as presiding over separate tribunals, the clash of whose jurisdiction confounds the practitioner, and ruins the suitor. One court, endowed with the power to try all causes, administers the whole law. For its convenience, separate dockets are kept for the two classes of cases. If no objection is made to the form of trial,—that is, whether it shall be according to the common-law or chancery practice,—it is adjudged not to be error to try a common-law case according to equity practice, or an equitable case according to the practice of the common law. *Organ v. Railway Co.*, 51 Ark. 235, 11 S. W. Rep. 96. It follows that if objection is made, and the court applies the wrong form of trial to the case in hand, it commits only an error in the exercise of rightful jurisdiction, because the power to determine the cause, and the method by which it shall be tried, is devolved upon it. An erroneous judgment pronounced in such a case is not a nullity. On the finding of the court, its judgment should have been for the appellant upon his plea of *res adjudicata*, and such judgment will be rendered here.

LAMBERT v. ESTES.

(*Supreme Court of Missouri.* Feb. 24, 1890.)

COVENANTS OF TITLE—BREACH—EVIDENCE—MEASURE OF DAMAGES.

1. A grantee who is threatened with an action of ejectment may surrender possession and sue his grantor for breach of covenant without waiting to be evicted, but he assumes the risk of showing that the person to whom he surrendered possession had the paramount title.

2. The measure of damages in such case is the purchase price, with 6 per cent. interest from the time of surrendering possession.

3. Evidence as to whether the grantee paid the consideration expressed in the deed is admissible to show the amount of damages suffered.

4. The grantor cannot set up the insufficiency of the description in his deed to escape liability on his covenants, especially where the land could be and was actually located in accordance therewith by those familiar with the locality.

Appeal from circuit court, Cape Girardeau county.

W. H. Miller, for appellant. *Wilson Cramer*, for respondent.

SHERWOOD, J. Action for breach of the covenants of warranty in a deed of land, the covenants being the ordinary statutory ones. The land is situate in the counties of Bollinger and Cape Girardeau, and is described in the deed thus: "Commencing at a rock for a corner, marked thus, 'X,' about 90 yards up Big Whitewater, from the mill of Estes and Lambert,—said rock, or beginning corner, stands on the west bank of Big Whitewater; thence run up a drain, in a south-west course, to a stone for a corner, marked thus, 'X,' thence run a north-west course, so as to include the house and garden where the said Felix G. Lambert now lives, to a stone for a

corner, marked thus, 'X,' thence running east, to a stone for a corner, marked thus, 'X,' on the bank of Big Whitewater, so as to include the spring, to the beginning corner,—all of which is in sections 31 and 32, in township 33 north, of range 11 east, and containing about four acres." The answer was a general denial, and also collusion between plaintiff and Bollinger, who was shown by plaintiff upon the trial to have the paper title. The controversy is in regard to that portion of the land lying in Bollinger county. To overcome the paper title, the defendant attempted to show a title by limitation.

The plaintiff was not evicted by Bollinger, but was served by him with notices demanding possession, and was threatened with an action of ejectment, and thereupon yielded the possession to Bollinger, and brought his action as aforesaid. Plaintiff was not compelled to wait until his eviction occurred. He had a right to yield possession to the holder of the paramount title, taking upon himself, however, the risk of showing that Bollinger had that title. *Hall v. Bray*, 51 Mo. 288; *Morgan v. Railway Co.*, 63 Mo. 129; *Ward v. Ashbrook*, 78 Mo. 515, and cases cited. And the measure of his damages is the purchase money, with 6 per cent. interest from the time of yielding possession. *Hutchins v. Roundtree*, 77 Mo. 500. Instructions were given in behalf of plaintiff in conformity to the foregoing views, and instructions were also given in behalf of the defendant as to the effect of 10 years' adverse possession on the part of defendant and those under whom he claimed. The jury found for the plaintiff, giving him a certain amount of damages.

There was error in the refusal of the court to permit the defendant to testify whether the plaintiff had paid the consideration expressed in the deed. This question went to the very heart of the plaintiff's cause of action, because, if he paid no consideration, it stands to reason he had suffered no damage, and was not entitled to recover what he had not paid. The effect of the testimony offered on this point was not to overthrow the deed as a conveyance, but merely to show just what was the amount paid, if any, or that none at all was paid. *Rawle*, Cov. (5th. Ed.) §§ 173, 174, and cases cited; 1 Sedg. Dam. (7th. Ed.) 342, and cases cited; 8 Washb. Real Prop. (5th Ed.) 401, 402; *Bobb v. Bobb*, 89 Mo. 411, 4 S. W. Rep. 511, and cases cited.

Now, in relation to the description in the deed, it is certainly very peculiar; but it seems it was capable of being located, and was located, by those familiar with the *locus in quo*. Apart from this, the defendant would be estopped from asserting that his deed, owing to a faulty description, conveyed nothing, and therefore he could escape a judgment on his covenants. For the error aforesaid the judgment will be reversed, and the cause remanded. All concur.

STATE *ex rel.* RADCLIFF *et al.* v. RADCLIFF *et al.*

(Supreme Court of Missouri. Feb. 24, 1890.)

GUARDIAN AND WARD.

A guardian who had received various amounts of rent for land devised to his wards, and had sold it under order of court, was directed, on approval of the sale, to execute deeds to the purchasers on their severally executing mortgages to secure the deferred payments. After receiving the first payments and additional rent, he, together with his wife and oldest ward, delivered quitclaim deeds to the purchasers. No guardian's deed was executed, nor did the purchasers execute mortgages for the deferred payments, or ever pay any of it. The will under which the wards claimed the land was subsequently set aside, and, in a suit for partition between the heirs, including the guardian, he was charged with converting the rents, and answered, setting up the sale, and praying that it be offset against his share of the estate. The decree directed payment of other claims out of his share. It did not appear how the balance thereof was decreed to be distributed, but there was evidence that it was paid out on sundry accounts, and that the purchasers, who had again purchased at the partition sale, were reimbursed out of the guardian's share to an unknown extent. The probate court afterwards discharged the guardian on his statement that since his appointment he had received no money or other property of his wards. *Held*, that the facts failed to show that the guardian had received any money belonging to his wards.

Appeal from circuit court, Cass county.

Railley & Burney, and *George Bird*, for appellants. *A. Comingo*, for respondents.

BRACE, J. This is an action on a guardian's bond. George Radcliff, the principal in the bond, made default, and the case was dismissed as to him, and tried before the court, without a jury, upon the answer of the other two defendants, Elijah Davis and Thomas Courtney, his sureties. The issues were found, and judgment rendered for said defendants, and the relators appealed. Benjamin Radcliff died in the state of Ohio, in the year 1869, seised of a large landed estate in Pickaway county, in that state, leaving surviving him a number of children, of whom the said George Radcliff was one, and several grandchildren, his only heirs at law. By an instrument in writing purporting to be his last will and testament, there was devised to the relators, children of the said George, certain tracts of his said land therein described. This instrument was proven as the will of the said Benjamin in the probate court of Pickaway county, in said state, on the 28th of June, 1869. At that time the said George, with his family, was residing in Cass county, Mo., where he continued to reside until the commencement of this suit. On the 16th of August, 1870, a suit was instituted in the common pleas court of said county to set aside said instrument of writing by some of the heirs at law of the said Benjamin, to which all the other heirs at law, including the said George, and the relators, as devisees under instrument, were made parties. It seems that some of the real estate devised to George's children was rented at the time of Benjamin's death, and that during the year 1870 the said George received, either from the ten-

ants directly, or through the attorneys he had employed to represent him in the will contest, according to his evidence introduced by the plaintiff, sums amounting to \$210. On the 15th of March, 1871, the said George was by the probate court of Cass county appointed curator of the estate of his children, the relators herein, and executed the bond sued on, with said defendants Davis and Courtney as his sureties, conditioned that he, the said George, should faithfully discharge his duties as curator of the estate of said children left them by their grandfather, the said Benjamin, and account for, pay, and deliver all money and property of said estate as required by law, etc.; and, according to his testimony, in the years 1872 and 1873 he received further sums for rent amounting to \$531.33. On the 18th of February, 1874, the said George, through his attorneys, procured an order to be made by the probate court of Pickaway county authorizing him, as guardian of his said children, to sell their real estate in said county at private sale,—one-third cash, one-third to be paid in two, and one-third in three, years; deferred payments to bear 6 per cent., and to be secured by mortgage on the premises sold. On the 16th of March, 1874, a report of sales under said order of court was made to said court through the attorneys of the said George, of the several tracts so devised to different parties; and thereupon the sales were approved by said court, and said guardian was ordered to execute deeds to the purchasers upon their severally executing mortgages upon the premises purchased to secure the deferred payments.

The evidence tends to show that the attorneys collected from the purchasers the first payment on these sales, and about the 1st of May, 1874, paid the same over to George. The amount which he testifies he received from these payments and additional rents on account of the supposed estate of his children about this time was \$1,576. On the 12th of May, 1874, he and his wife, and his oldest daughter executed a quitclaim deed to each of three of these purchasers for the tracts of land that each had purchased. These deeds were delivered to these purchasers. No guardian's deed was ever delivered to any of them; nor did they ever execute mortgages to secure the remainder of the purchase money, or did they ever pay any of it. On the 22d of June, 1874, the will suit coming on for trial in the common pleas court of Pickaway county, the said instrument of writing, purporting to be the last will and testament of Benjamin Radcliff, was, by the verdict of a jury, and the judgment of said court, set aside and for naught held; and thereafter, on the 27th of June, 1874, a suit was instituted in said court by some of the heirs at law of the said Benjamin against the others, in which the said George was made a party defendant, for partition among such heirs of all the real estate of which said intestate died seised, including the lands purporting to have been devised by said instru-

ment of writing to the relators, in which suit, in the answer of the guardian of one of the minor defendants, it was charged that the said George had, since the death of said intestate, received and converted to his own use \$2,000 of the rents and profits of said last mentioned lands; and it was prayed that, in the partition of the real estate sought to be divided, he be compelled to account for the same; and the said George, in his answer, set out that after the probate of the instrument of writing aforesaid, and before it was annulled, he, as guardian of his children, by a proceeding in the probate court of Pickaway county, had sold the land thereby devised to his children to third persons, who are innocent purchasers, and prayed that said tracts be included and set off to him in his portion of the real estate of his father sought to be devised. In the decree of the partition, the interest of the said George was found to be an undivided eighth of all the lands of which his father died seised, and, upon report of the commissioners appointed to make partition, said lands having been found not susceptible of division in kind, were ordered to be sold, were sold, and on the 12th of May, 1875, the proceeds other than the share of George were ordered to be distributed among the other heirs at law, parties to the suit, which was accordingly done, and deeds made to the purchasers. Out of the share of George Radcliff the court ordered payment of certain judgment liens created by him in favor of other parties to the suit, reserved the question of the further distribution of his share, ordered that the parties who had purchased of him as guardian be made parties defendant, and granted them leave to file answers and cross-petitions, which was done. The record fails to show these petitions and answers, or what, if any, action was had by the court upon them. It seems that the purchasers from George were in possession of the lands purchased from him, and again became purchasers of the same lands at the partition sale, and, after an order, subsequently made, allowing one of them for improvements made before the latter sale, and releasing him from rent, the partition suit, after several continuances, went off the docket. The net share of George Radcliff in the proceeds of the partition sales amounted to \$5,370. The judgment liens ordered to be paid out of it amounted to \$2,947. The balance seems to have been paid out by the sheriff and attorneys, as appears by a balance sheet filed as an exhibit with the deposition of one of the lawyers, to divers persons, on sundry accounts,—some of it to George Radcliff; but what amount, if any, went to reimburse those purchasers who made the first payment to him on the sales made by him as guardian, does not appear. Two of these purchasers, however, admit that they received something back out of his share. At the August term, 1880, of the probate court of Cass county, the said George Radcliff, as curator of the estate of the relators, filed a writ-

ten statement that since his appointment no money, property, or effects, real or personal, belonging to said minors, or either of them, had come to his knowledge or possession, and praying that said curatorship be discontinued; and it was accordingly so ordered by said court.

On the 10th of June, 1886, this suit was commenced; the breach assigned, in substance, being that the said George Radcliff, as curator of the relators, came into the possession of the sum of \$2,317.23 from the estate of the said Benjamin Radcliff, deceased, belonging to the said relators, which he failed to leave out for their use, but appropriated to his own use, and has failed, neglected, and refused, and still doth refuse, to account for, and pay the same to relators. The circuit court failed to discover in the foregoing facts that the said curator had received from the estate of Benjamin Radcliff, or from any other source, any sum of money belonging to the said relators; and we confess our inability in those facts to make such a discovery. The defendants, the sureties of said curator, bound themselves that he should account to them for all moneys that might come into his possession from that estate belonging to them; but they did not bind themselves that he should account to them for any moneys that might come into his hands from any source that did not belong to them. The fact that he may have received moneys from that estate, or from other persons, which did not belong to him, and which he may have converted to his own use, and which the persons to whom it did belong may not be able to recover from him, cannot have the effect of rendering these defendants liable on their bond. The evidence fails to show that the relators ever had any estate for the preservation of which this bond was given. As there was nothing to preserve, there was nothing to waste; and, if nothing was wasted, the sureties are liable for nothing. The judgment of the circuit court is affirmed. All concur.

HUGHES v. BROWN *et al.*

(Supreme Court of Tennessee. Feb. 27, 1890.)

LIMITATION OF ACTIONS—EQUITY.

1. Code Tenn. § 2755, provides that when a suit is commenced in time, and a decree is rendered against the complainant on any ground not concluding his right of action, a new suit may be brought within one year. Complainant brought suit to subject a trust-estate to the payment of a claim. The trust was for B. for life, remainder to her children. B. and her husband and D., as trustee, were made defendants; but it appeared that D. had been discharged from his trusteeship, and the suit was dismissed because the remainder-men were not made defendants. *Held*, that this suit could not be connected with a suit commenced within a year thereafter, against the proper defendants, so as to save the bar of the statute of limitations.

2. Complainant, as executor of a will which created a trust, made certain advances to the trustee for the purchase of property for the *cestui que trust*, which were supposed to be the amount of the interest of the *cestui que trust* under the will. But, to protect himself in case it should turn out

on final settlement of the executor's accounts that he had advanced too much, complainant took back a bond from the trustee, conditioned to refund to him any sum in excess of the true share of the *cestui que trust*. It being found that the advance had been too large, complainant took judgment against the trustee and his sureties for the excess, but the trustee and his sureties were insolvent. After this judgment was barred by limitation, complainant brought suit to subject the trust-estate to the payment of the excessive advance. *Held*, that his equitable remedy was barred, as well as his legal remedy.

Appeal from chancery court, Williamson county; ANDREW ALLISON, Chancellor.

Jesse G. Wallace, for appellant. N. N. Cox, for appellees.

LURTON, J. Complainant's bill is filed for the purpose of enforcing out of the trust-estate payment of a debt created by the trustee for the benefit of the trust. The property which he seeks to charge is a tract of land, with the improvements, held in trust for the support and maintenance of the defendant, Mrs. Virginia Brown, and her children, remainder at death of Mrs. Brown to her children then living and the representatives of such as are dead. In default of such issue, then the remainder is devised to the surviving sisters of Mrs. Brown, and on the death of such survivors to the issue of such. This land was purchased by the trustee at a chancery sale had for the purpose of enforcing a vendor's lien in favor of complainant as the executor of the will of Mrs. Brown's father. The bid of Davis, as trustee, was, upon application of Mrs. Brown, credited with what was then supposed to be the interest of Davis' *cestui que trust* under the will of complainant's testator. To protect complainant in event it should turn out that this credit was in excess of the share of his *cestui que trust*, Davis was required to execute a refunding bond, with two sureties, conditioned, upon final settlement of complainant's account as executor, to refund to him any sum in excess of the true share of the *cestui que trust* by reason of this credit. Upon execution of this bond, title was vested in T. H. Davis as trustee, no lien being retained by reason of the circumstances under which the purchase money was paid. Upon the final settlement of the executor's accounts in the chancery court, it was ascertained that the interest of Mrs. Brown had been largely overpaid, and on October 24, 1870, summary judgment was rendered on the refunding bond theretofore executed against Davis as trustee and his sureties on the bond, and execution was awarded. The children of Mrs. Brown were not parties to any of the consolidated causes in which the proceedings just recited were had, though their mother and the trustee Davis were. A part of this decree of October, 1870, has been paid off. Davis, as trustee, received no fund whatever, and the entire trust fund is represented by the lands so purchased by him. He and his sureties are insolvent, so that nothing has been or can be made off of them. This bill is

filed against all of the *cestuis que trustent* for the purpose of collecting the balance due on the decree as a charge upon the trust-estate. The first defense to be considered is that the necessary parties are not before the court. Davis, the trustee, in 1874 passed his accounts in the original case in which he had been appointed, and tendered his resignation. This was accepted, and by the same decree B. F. Brown, the husband of Virginia Brown, was appointed in his room and place, and required to execute a bond as such. This it appears that he has never done. He is now sued as trustee. By answer, he now disclaims having accepted the appointment. After so long a lapse of time, even in the absence of proof indicating an acceptance, he might, but for this disclaimer, be presumed to have accepted. The disclaimer, however, must be taken to relate back to the time of appointment. *Goss v. Singleton*, 2 Head, 79; *Hill, Trustees*, 206-219.

The objection that the legal title was not vested in him formally by decree would be unimportant if he had accepted the appointment, for by implication vestiture of title would have resulted from his appointment without formal words. *Wooldrige v. Bank*, 1 Sneed, 296. The decree denuding Davis of his trust probably operated to divest him of the legal title, and the refusal of Brown to accept the trust leaves the title in abeyance. It is clearly a case of a vacancy in the trusteeship. The property is within the jurisdiction of the court, and all of the *cestuis que trustent* are parties defendant. There being no trustee, the court has the power to make a decree binding the property. 2 Perry, *Trusts*, § 878.

A much more serious defense is that of the statute of limitations. The decree on the refunding bond was rendered October 24, 1870. This bill was filed May 21, 1887, nearly 17 years after the cause of action accrued. Manifestly, upon the facts stated, the complainant would have been entitled to the relief he seeks if the bill had been filed in time. To meet this defense the complainant first relies on the fact that in 1879, and within the time limited for action on judgments and decrees, he filed a bill in equity seeking the same relief, and this case was a pending suit until December, 1886, when it was dismissed by this court without prejudice. Within one year thereafter, this bill was filed, and he now insists that the case falls under section 2755 of the Code, which provides that when a suit is commenced in time, and a decree is rendered against the complainant on any ground not concluding his right of action, a new suit may be brought within one year. This is a good answer to the plea of the statute, provided that suit and this are substantially for the same cause, and the parties in each suit are identical. The defendants to the former suit were Brown and wife and F. H. Davis. The remainder-men were not parties, and for this very reason that cause was dismissed. Davis was sued as trustee

in the former case. He did not answer, and no *pro confesso* seems to have been taken against him. It now appears that when that suit was begun Davis was not the trustee. Though B. F. Brown was a defendant in that case, yet, as we have seen, he was not the trustee, and was not sued as such. Thus we have a case where it was sought to reach and fasten a charge upon that property, when only one of a number of *cestuis que trustent* were before the court, and where there was no trustee. There are cases where the trustee may stand for and be treated as a representative of his *cestui que trust*, but the general rule is that all the *cestuis que trustent*, and the trustee, if there be one, should be made parties to a suit affecting the trust estate. 2 Perry, Trusts, §§ 873, 874. The fact that there was no trustee before the court, and only one of the *cestuis que trustent* was a party, ought not and cannot have the effect of suspending the statute of limitations. Neither can that suit have an effect, as against Mrs. Brown, for the reason that neither in that nor in this was it sought to reach and subject any particular interest that she had to the satisfaction of this debt. In that case and in this the effort is to subject the trust property as an entirety to the satisfaction of a demand against it, and not to subject the interest of Mrs. Brown to a debt for which she was personally bound. Neither has Mrs. Brown any such separate interest as can be distinguished from that of her children without injury to them and their interest. The trust is for the support of Mrs. Brown and her children, and so long as they constitute a part of her family their interest in the trust cannot be affected by assuming that the mother has a life-estate, which can be taken from her without injury to them. Hix v. Gosling, 1 Lea, 568. This suit is therefore not against the same parties who were defendants to the former suit, and the two suits cannot be so connected as to save the bar of the statute.

The learned counsel for the complainant very earnestly insists that the statutes of limitation do not operate upon claims and demands purely equitable, and for which there is no adequate remedy at law, and the demand which he represents is one exclusively cognizable in a court of equity. This presents a question of great interest to the profession, for it is important to know whether there are cases other than express trusts which are unaffected by the legislation limiting the time within which suits may be brought. This question has been a matter of controversy from the earliest history of equity, and, while we have much *dicta*, there are no reported cases in this state which are controlling in the determination of the point. The earlier English and American statutes of limitations alike operated in terms in the form of action. Thus our act of 1715, which continued in force in this state until the codification of our statute law in 1858, prescribed that all actions of trespass, detinue, trover,

and replevin, all actions of account, and upon the case, all actions of debt for arrearages of rent, actions of assault, menace, and battery, should be brought within the time therein specified. These were actions at law, and hence it was said the statute was not in terms applicable to bills in equity, that form of suit not being mentioned. The conclusions to be drawn from the precedents of controlling influence as to the applicability of the statutes of limitations to courts of equity before the change made by the Code of 1858, whereby they were made to apply to the cause rather than to the form of action, are these:

1. That courts of equity, having at all times discouraged laches, did after the legislature had prescribed a bar to legal actions, and upon the maxim, *equitas sequitur legem*, adopt the time prescribed in such statutes as barring a suit in equity upon any cause of action on which an action at law might have been maintained. Elmendorf v. Taylor, 10 Wheat. 168; Smith v. Clay, 3 Brown, Ch. 640; Hovenden v. Annesley, 2 Schoales & L. 632; Porter's Lessee v. Cocke, Peck, (Tenn.) 43; Shelby v. Shelby, Cooke, 184; Armstrong v. Campbell, 3 Yerg. 232; Hickman v. Gaither, 2 Yerg. 200.

2. The application of the statutes in equity was determined by the cause of action, rather than the nature of the equitable relief sought. The fact that the legal action was inadequate to obtain the relief which a court of equity could administer did not take the case out of the bar prescribed for the legal action on the same cause. "In all cases," said Lord CAMDEN in Smith v. Clay, "when the legal right has been barred by parliament, the equitable right to the same thing has been concluded by the same bar." Or, as stated by Chancellor KENT: "When the same subject-matter of the demand in equity can also be made the subject of an action at law, the rule of analogy applies in all its force; as Lord REDSDALE observed in Bond v. Hopkins, 1 Schoales & L. 413, * * * the statute of limitations does not apply in terms to proceedings in courts of equity, but equitable titles are affected by analogy to it. If the equitable title be not sued upon within the time within which a legal title of the same nature ought to be sued upon to prevent the bar of the statute, the court, acting by analogy to the statute, will not relieve." Kane v. Bloodgood, 7 Johns. Ch. 120. So this court, speaking through OVERTON, J., said that it had been argued that the statute did not apply "unless the relief sought in this court is of the same nature of that which would be obtained at law. This position is not supported by any of the books. Compensation in damages would have been the relief administered at law, but in this court a decree in specie may be obtained. This difference in the mode of redress has no effect upon the statute of limitations; it is pleadable in this court as well as at law. * * * In every case where an action could have been sus-

tained at law, and to which the statute might have been made to apply, so it would apply in equity if relief were sought there. Nor is it material whether that relief be of one kind or another. It is the nature of the cause of action that must determine the application of the statute, and not the nature of the relief which can be afforded." *Shelby v. Shelby, Cooke, 184.*

3. The statute does not operate as between the trustee and *cestui que trust* in that class of direct and peculiar trusts cognizable alone in courts of equity. This is so for the reason that the possession of one is the possession of the other, and, until the trust relation has ceased by repudiation with notice, there can be no such thing as an adverse holding. The principle upon which the doctrine rests is precisely the same as that which prevents the statute from running at common law as between tenants in common and landlord and tenant. The legal rule in regard to legal relations, so like the relations between trustee and *cestui que trust* in equity, is the very foundation of what is so often mistaken for an exception peculiar to courts of equity concerning the application of the statute. To quote the observation of Lord REDFORD, which very clearly states this principle: "In the case of a strict trustee, it was his duty to take care of the interest of his *cestui que trust*, and he was not permitted to do anything adverse to it. A tenant also had a duty to preserve the interests of his landlord, and many acts, therefore, of a trustee and a tenant, which, if done by a stranger, would be acts of adverse possession, would not be so in them from its being their duty to abstain from them." *Cholmondeley v. Clinton, 2 Jac. & W. 1, 190; Armstrong v. Campbell, 3 Yerg. 201.*

4. But when the trust was not a direct, technical trust, springing out of contract, but was imposed on the conscience of the party by operation of equitable principles, and, as some of the judges put it, dependent upon evidence, then, in all such cases, the statute did operate as a bar, notwithstanding such constructive and implied trusts were creations of a court of equity, and the remedy for their enforcement exclusively equitable. *Coke v. McGinnis, Mart. & Y. 861*, and other authorities. The reason for the distinction between the effect of the statute upon express and implied trusts lies in the fact that in the latter kind of trust the trust element of trust and confidence is absent. The relation of trustee and *cestui que trust* does not in fact exist, and the holding of an implied or constructive trustee is for himself, and therefore at all times adverse. *Beckford v. Wade, 17 Ves. 98; Hickman v. Gaither, 2 Yerg. 200.*

From the foregoing principles it manifestly follows that, in all that large class of express trusts where the remedy at law is concurrent, the statute which operates to bar the concurrent legal remedy will likewise

bar equitable suit. It would be intolerable that equity should maintain a suit when the legal right was barred. In the early and well-considered case of *Coke v. McGinnis*, Judge CATRON for this court said: "The history of English jurisprudence, it is believed, furnishes not an instance where it was held that the relation of *cestui que trust* and trustee prevents the statute from creating a bar in a case where an action at law can be sustained. In every case where an action of *assumpsit* will lie, there even courts of chancery, having concurrent jurisdiction with courts of law, will apply the statute. This has been the settled rule of decision in the English courts for a century."

We very lately had occasion to review our own decisions on this question, and to repeat and apply the rule so clearly announced in the case last cited to the suit of the distributees against an administrator for an account, and to recover their distributive shares. The action at law being barred, the equitable suit was held likewise barred. *Alvis v. Oglesby, 3 Pickle, 172, 10 S. W. Rep. 313*, and other cases.

Now, in view of the well-settled principles concerning the operation of the statute upon bills in equity, is there any foundation for the proposition that because the remedy of complainant, as against this trust-estate, is purely equitable, therefore, his suit is not subject to the bar of the statute? The rule which we deduce from a consideration of the English and Tennessee cases is that, with the exception of suits between trustees and *cestuis que trustent*, concerning those direct technical trusts cognizable alone in equity, the statute which would bar the demand, if it were the subject of a legal action, will likewise bar the equitable remedy. There is no more reason for holding that a bill to charge the payment of an equitable claim upon a trust-estate should be taken out of the statute which bars all suits upon contracts within six years than there was for holding that a suit upon an equitable title, or to declare and enforce a constructive or implied trust, was without the statute. In both the cases last put the remedies were purely equitable, and yet it was held that the statute applied. Cases cited. The cases cited by complainant's counsel to support his proposition are not in point. They are all cases of suits between trustee and *cestui que trust*, and upon demands at that time cognizable only in equity. Cases cited. The only authority to which we have been referred that seems to support the proposition that a purely equitable demand is not within the bar of the statute is the statement of Mr. Perry that suits against the separate estate of a married woman, "the remedy being wholly equitable," are not barred by the statute. *Perry, Trusts, § 663.* To support this brief statement he cites two Irish chancery cases, and the case of *Norton v. Turvill, 2 P. Wms. 144.* The

first two cases are not accessible, and would not, at best, be of any controlling effect. The case of Norton v. Turvill was a decision by the master of the roll, who, in reply to the defense of the statute, said: "But in this case, all the separate estate of the *feme covert* was a trust-estate for payment of debts, and a trust is not within the statute of limitations."

Now, if it be conceded that the separate estate was a separate estate for the payment of debts, and complainant was one of the creditors thereby provided for, then the decision that the statute did not apply was right. A separate estate may be, however, as between the *feme covert* and her trustee, a trust-estate, and the statute have no application, as between the *cestui que trust* and the trustee; but precisely how the creditor of the married woman becomes a *cestui que trust* is not explained by the decision. As to strangers to the trust, the statute manifestly must apply. The exception is in favor of the *cestuis que trustent* and upon the ground that the possession of the trustee is their possession. A married woman's contract does not bind her personally, and only operates to charge her separate estate. This charge may have been regarded as constituting the separate estate a trust-estate for the payment of such engagements. However that may be as to a separate estate, the doctrine is not applicable to a trust of the character of that before us. It was not a trust for payment of debts. Whatever doubt might have existed as to the application of the statute to a purely equitable demand would seem to be removed by the change made in our statutes by the Code. These statutes no longer apply to legal actions in terms, or address themselves to the form of suit. They apply directly to all civil actions; and to the cause of action, and not the form of the remedy. The cause of action here is a contract between the trustee and complainant. All actions upon contract are barred in six years. This contract was put in judgment. Actions upon judgments and decrees are barred in ten years. Assuming that the implied lien of complainant as a vendor was not lost by his taking bond with personal security, then his implied lien was barred in seven years. *Sheratz v. Nicodemus*, 7 Yerg. 12. But upon another ground the suit of complainant is barred. To secure himself against overpaying the legacy to Mrs. Brown and her children, he took a refunding bond, with two personal sureties. His remedy upon this bond against the trustee and the sureties at law was clear. Indeed, he obtained a summary judgment thereon and was awarded the legal writ of *fieri facias*. The insolvency of the sureties alone defeated its satisfaction. The remedy at law proving inadequate, he now resorts to a court of equity to reach property not subject to execution. If he had filed his bill in time, his relief was easy. He has delayed until his bond is barred, and the de-

cree thereon is barred likewise. That the remedy in equity is in kind different from that afforded at law is no reason why the statute which barred his legal remedy shall not likewise bar the equitable relief. Affirm the decree, with costs.

MOORE v. GIESECKE.

(Supreme Court of Texas. March 14, 1890.)

PAROL EVIDENCE—RESCISSION OF SALE.

1. An instrument reciting that plaintiff had sold to defendant a tract of land for a certain price, part cash, and "the balance in seven payments of \$200 each," payable at stated times, with interest, and that plaintiff was to make defendant a deed as soon as the land was surveyed, is plain and unambiguous; and parol evidence that it was intended that notes should be given for such deferred payments, a vendor's lien reserved, and the giving of the notes, made a condition precedent to the delivery of the deed, is not made admissible by plaintiff's allegation that the parties were ignorant of the form and effect of legal documents, and supposed the terms of the one in question had the effect sought to be shown.

2. In an action for the rescission of a contract for the sale of land, whereby the plaintiff agreed to make a deed to defendant as soon as a survey of the land was made, for default in the payment of purchase money, where the petition shows that plaintiff has not executed such deed, he is not entitled to a rescission without an allowance to defendant of the excess of the purchase money already paid, and permanent improvements put on the land, over the value of the use and occupation of the land while he was in possession of it.

Appeal from district court, Washington county.

Bassett, Muse & Muse, for appellant. *Ed-dins & Ewing*, for appellee.

HENRY, J. This suit was brought by appellee to rescind a contract made by him with the defendant for the sale of land. The contract is set out in plaintiff's petition, and reads as follows: "Know all men by these presents, that I, F. Giesecke, of said state and county, have this day sold to J. A. Moore two certain tracts of land [describing them] for the sum of one thousand five hundred dollars, one hundred dollars in cash, and the balance in seven payments of two hundred dollars each, payable, consecutively, on Jan. 1st, 1884, 1885, 1886, 1887, 1888, 1889, and 1890, with interest on each from Jan. 1st, 1883, at 10 per cent. per annum,—interest to be paid annually; and I hereby agree to make said J. A. Moore a warranty deed to said land as soon as it is surveyed." The petition charges that two instruments containing said agreement were signed,—one by each party; that it was contemplated by said written agreement that defendant was to execute and deliver to plaintiff, to secure the balance of the purchase money of said land, seven promissory notes, each for the sum of \$200, to be due and payable as set out in said written agreement, and retaining a vendor's lien; that it was also stipulated in said writings that, when said notes were executed and delivered, plaintiff should then execute and deliver to defendant a deed, with a clause of

general warranty, which should reserve a vendor's lien upon said land to secure the payment of said notes; that plaintiff has had the land surveyed, and has been ever ready and willing to execute to defendant said deeds, (and has often so informed him) upon defendant's executing said promissory notes, but that defendant has always refused to execute said notes, or in any manner to comply with said agreement; that defendant took possession of the land about the — day of January, 1883, and unlawfully withheld it from plaintiff; that plaintiff and defendant are ignorant of the manner and form of drawing up legal documents, and said writings were drawn by a person not accustomed to drawing such documents; that plaintiff and defendant, at the time they signed said instruments, did so with the understanding and belief that they carried with them the meaning and legal effect that is attributed to them in plaintiff's petition, and, if they have a meaning different from that so alleged, it resulted from a mutual mistake between plaintiff and defendant, it being intended to make them express the agreements alleged in the said petition. Defendant excepted to the petition in so much as it sought to vary the instrument set out by allegations of the intent of the parties, and answered by a general denial, and a special plea; that at different times he had made payments to plaintiff amounting, in the aggregate, to \$374.30, and that during his occupancy of the premises he had placed on them permanent and valuable improvements, whereby their value had been enhanced in the sum of \$1,000, specifying in what such improvements consisted. The defendant prayed for the allowance of said payments and improvements in the adjustment of the equities between them, in the event of plaintiff's having a decree for the recovery of the land. The plaintiff excepted to these defenses. The court overruled defendant's exception, and sustained plaintiff's, and rendered judgment in favor of plaintiff for the recovery of the land. The pleading on which plaintiff went to trial was an original amended petition, filed on the 25th day of October, 1888, in which it is stated that the original petition was filed on the 27th day of August, 1888. The payments made by defendant are specified in his answer as follows:

January 1, 1888.....	\$100 00
September 24, 1885.....	50 58
September 11, 1886.....	48 85
September 19, 1886.....	37 30
September 15, 1887.....	40 50
December 9, 1887.....	103 17

The defendant pleaded the statute of limitations of four years to the payment that matured on the 1st day of January, 1884.

We think the court erred in overruling defendant's exceptions to the amended petition. The contract copied into the petition is plain and unambiguous in its terms. Neither the contract itself, nor the allegations to the effect that it failed to express what the parties to it intended it should provide for, and the

reasons why it failed to do so, present grounds for departing from or adding to it in any particular. The petition fails to state a case for reforming the contract on account of a mistake made in drawing it up. It tends to show that, for want of the necessary legal learning and skill, the parties neither knew what character of contract they desired to make, nor how to draw it up; but it does not show that any clause or provision agreed to and intended to be inserted in it was omitted by mistake or accident. In the case of Railroad Co. v. Shirley, it is said: "It is * * * a well-established, elementary principle that he who seeks to rectify an instrument on the ground of mistake must be able to prove, not only that there has been a mistake, but must be able to show exactly and precisely the form to which the deed ought to be brought, in order that it may be set right according to what was really intended, and must be able to establish, in the clearest and most satisfactory manner, that the alleged intention of the parties to which he desires to make it conformable continued, concurrently, in the minds of all parties down to the time of its execution." 45 Tex. 377.

The contract now in controversy is an executory one. By its terms, the first things required to be done were for the vendor to have a survey of the land made, and then to execute to the vendee a warranty deed for it. The plaintiff's petition shows that he caused the land to be surveyed, but it fails to show that he has made to the defendant a deed as he bound himself to do. The vendor being in default by his failure to deliver a deed according to the terms of the contract, he was not in a situation to enforce a rescission of the contract without regard to such equities as his vendee might have on account of so much of the purchase money as he had paid, and such permanent and valuable improvements as he had placed on the land. It may be that it is not altogether clear, under former decisions of this court, when the vendee in an executory contract for the sale of land, on being sued by his vendor for possession, will be allowed to recover for improvements and partial payments, and when such relief will be denied him. In some cases, it seems to have been denied when the vendor, instead of alleging the facts of the transaction, and praying for a rescission of the contract, brought strictly an action of trespass to try the title, and for possession. In the case of Clay v. Hart, 49 Tex. 433, MOORE, J., said: "Nor can we see that the fact of appellant's abandoning the contract, and bringing an action for the recovery of land upon his superior legal title, of itself merely, warrants his [the vendee] claiming all the equities which he might if appellant was invoking the aid of a court of equity, instead of seeking to enforce a mere legal title." In the case of Thomas v. Beaton, 25 Tex. Supp. 318, it is said: "He [the vendor] did not rely for a recovery on the strength of his legal title, but but * * * invokes the aid of equity to

rescind the sale, * * * and reinvest himself with the equitable title; * * * and the maxim applies in its full force that 'he who seeks equity must do equity.' * * * He has failed to show that, in equity and good conscience, the sale ought to be rescinded." In the case of *Patrick v. Roach*, 21 Tex. 253, this court said: "In suits for the rescission of sales of land, the parties should set up their respective equities for rents and profits on the one hand, and for the value of improvements, interest of purchase money, if paid, etc., on the other. Where the purchase money is paid, and there has been no manifest injustice or fraud by either party, and the vendor is unable to make title, the rule is to restore the land to the vendor without profits, and the purchase money to the vendee without interest. * * * But if, in such case, the vendee had made valuable improvements, there should be an allowance for such improvements. * * * A vendee is entitled, on rescission, to pay for lasting and beneficial improvements. * * * In suits for rescission, the right to the value of improvements, and the measure of its allowance, depend on principles of equity, and not on the provisions of the statute regulating the actions of trespass to try title. * * * A purchaser should be allowed for all substantial improvements and repairs." In the case of *Coddington v. Wells*, 59 Tex. 49, the following language occurs in the opinion of the court: "The petition of plaintiffs is not in the ordinary form of trespass to try title, but sets forth all the facts of the sale and conveyance of the land, the payment of \$6,000 in cash, the suit and judgment on the one \$10,000 note, and asks a recovery on the ground that the judgment had never been paid. * * * We think that, under the circumstances of this case, where a large amount of the purchase money has been paid in cash, a note for a considerable sum not accounted for, leaving thereby the inference that it has also been paid or transferred, and a judgment upon the remaining note has been obtained, with foreclosure of lien on the land, and no reason is shown why that judgment has not been enforced, and where no offer has been made to return the amount of purchase money already received by the vendor, nor any opportunity given the defendants to pay the balance due, and perfect their title, the plaintiff should not be allowed to rescind the contract, and recover the land." In the case of *Tom v. Wollhofer*, 61 Tex. 281, it is said: "The vendor's remedy by rescission is a harsh and stringent one, especially when a part of the consideration has been paid, and it is sought to forfeit the payment, and recover or resell the land. Hence, slight circumstances are seized upon to protect the vendee against the forfeiture of the amount paid, or compel the vendor to seek redress by a suit for the balance due upon the purchase money. He must not delay too long in insisting upon payment of the money as it falls due, or he will be considered as

having waived the default. * * * He must not treat the contract as still subsisting, or do any act which may be construed into its affirmance." In the case of *Hamblen v. Folts*, 70 Tex. 134, 7 S. W. Rep. 834, it is said: "It is true that where the vendee is willing to perform the contract, and the vendor has received a part of the consideration, or has delayed for an unreasonable time to ask for a rescission, so that the vendee would have the right to conclude that strict performance on his part would not be insisted upon, and under that apprehension has made valuable improvements on the land, or when, for any reason, it would be inequitable for the vendor to recover possession of the land, a court of equity will not permit him to do so. And the question, at last, in every case, must be, is a rescission inequitable under the rules laid down by the courts; or has the vendee forfeited all right to perform the contract, and obtain the land?" In the case of *McCarty v. Mooror*, 50 Tex. 287, Chief Justice MOORE said: "The appellees, unquestionably, held the superior title to the land sued for, after appellant's failure to comply with the terms of the contract for its purchase. But it does not follow that they were entitled to dispossess appellant without regard to the equities which appellant was entitled to by reason of his partial performance of the contract, and valuable improvements placed on the land. The failure on the part of appellant to comply with the contract warranted the appellee's demanding the land; but it is equally clear that the court may deny the possession of it until they satisfy all the equities growing out of the contract in favor of appellant. * * * The court, we think, correctly held appellant entitled to pay for his improvements in excess of the value of the use of the land." In the case of *Allen v. Mitchell*, 13 Tex. 373, it is said: "It is clear that a party cannot claim such compensation [for valuable improvements] where, without showing that there is in truth any defect in the title of his vendor, he elects to be dispossessed rather than pay the purchase money." In the case of *Hollis v. Smith*, 64 Tex. 280, it was said by this court: "Cases may arise calling for an adjustment of equities growing out of improvements made by a person holding under executory contract, as between himself and his vendor, where the former is not in default, and there is failure of title in the latter. It is not, however, believed that in any case one holding under executory contract can recover compensation for improvements made, upon the annulment of the contract, on the sole ground that the vendor in such a contract has refused or failed to pay for the land as he agreed to do." In the case of *McPherson v. Johnson*, 69 Tex. 487, 6 S. W. Rep. 798, it was said: "If, after such default as justifies the vendor in rescinding the sale, he proceeds for the price, he loses his right of rescission, provided the vendee avail himself of his privilege to pay the debt. But the contract still

remains executory, and the latter cannot, by pleading limitation, defeat the action for the debt, and still claim the land under a contract with which he has refused to comply."

We understand every decision on the subject to recognize the right of the vendee to assert his equities whenever the suit of the vendor is for a rescission of the contract. On the other hand, we do not understand that it was intended to decide, in the cases where the vendor brought suit simply to try the title, and for possession, that equities in favor of the vendee of a nature entitling him to relief would not be heard. We think, rather, that in these cases it was intended to decide that the facts pleaded by the vendee did not show a case entitling the party to affirmative, equitable relief. We can see no good reason why the right of the vendee to equitable relief, when he is sued for the purchase money, or for the land itself, should at all depend upon the character or the form of the plaintiff's suit. Whether or not he is entitled to any equitable relief will be a proper subject of inquiry in every case. When the circumstances of the transaction show him to deserve it, it should be administered; and when they do not, it should be denied. The rule has been repeatedly, distinctly asserted, and is left by this decision in unimpaired force, that, where the vendor has done nothing to waive that right, he may, in every case of an executory sale of land, where the vendee makes default in paying the purchase money, maintain a suit for the recovery back of the land. We can see no good reason why, in every case in which the vendor sues to recover back the land contracted to be sold, the original vendee, or any purchaser under him, may not only show, if the facts warrant it, that a recovery or rescission should not be allowed, and, if that remedy is maintainable, also the existence of any facts entitling him in equity to have compensation for permanent and valuable improvements, and to be compensated for partial payments previously made. We repeat what has already been said when we say that, when the vendor's suit is predicated upon the mere refusal of the vendee to pay the whole consideration contracted for, the facts that the vendee has paid part of the consideration, and made permanent and valuable improvements, coupled with possession of the property, unaided by some other sufficient equity, will not entitle him to recover for such purchase money or improvements. In such cases, when the vendor has neither waived his legal rights, nor committed any default, he cannot be involuntarily taxed with improvements made upon his property without his consent, or be made to pay a price for recovering it back. The remedy by rescission is not favored, and, as has been said, slight circumstances, when they may be properly treated as indicative of a purpose upon the part of the vendor not to insist on that remedy, may be treated as a waiver of the right to rescind, unless its maintenance becomes necessary to enable the

vendor to enforce his payment of the consideration for which he contracted to sell the land; and, when a suit for the recovery back of the land has been brought, where any portion of the purchase money has been paid, or where valuable and permanent improvements have been placed upon the land by the vendee, or by purchasers under him, and the defendant, when sued, brings into court, and offers to pay, the balance of the purchase money, with costs of suit, unless there exist strong countervailing equities, the money ought to be received, and a recovery of the land denied. On the other hand, when the vendee does not seek to perform the contract, and the vendor shows himself entitled to recover back the land, then, before he should be compelled, as a condition of its reacquisition, to pay for improvements, or refund purchase money, equitable right to such relief should be shown by the vendee. It should appear that it will not be unjust to the vendor to so charge him.

In this case, it appears from plaintiff's pleadings that, by reason of his own default with regard to the deed, he has no right to a decree rescinding the contract, if the defendant resists it, and tenders performance of it upon plaintiff's tender of performance on his part. The defendant's pleadings, however, do not resist a rescission. If he proposes to perform the contract, his plea of the statute of limitations must be withdrawn. If he proposes to submit to a decree for a rescission of the contract, his plea of the statute of limitations is inapplicable. The delay of the vendor in enforcing the payment of the purchase money as the installments thereof became due, and his acceptance of considerable payments during a long period of time, were acts calculated to induce the vendee to believe that his right to rescind was waived, and to induce him to make other payments, and place upon the land permanent improvements. It may be that he has become unable to complete the promised payments. If, under such circumstances, he does not offer to perform the contract, but unites in the prayer for its rescission, the value of the use and occupation of the land, as well as the interest upon payments made by him, will be proper subjects of adjustment, if a rescission is decreed. It is not clear that the answer was not so defective in these particulars as to be subject to demurrer. The judgment is reversed, and the cause is remanded.

WRIGHT v. McCAMPBELL et al.

(Supreme Court of Texas. Jan. 24, 1890.)

ACTION BY SURVIVING PARTNERS—PLEADING—EXPERT EVIDENCE—APPEAL.

1. Where a petition alleges that plaintiffs sue as "successors and assigns," instead of as surviving partners, of the law firm by which the services sued for were rendered, that fact sufficiently appears from the allegation that, at the time of the death of the member for whose services the firm was employed, they were his only partners; and its defect in failing to allege that the partner is

dead, is cured where that fact distinctly appears in the answer.

2. Where the judgment limits the recovery of compensation to the services which had been rendered before the death of such partner, the admission of evidence that the surviving partners rendered services after they had been notified of their discharge is harmless error.

3. The question of plaintiffs' right to recover under the allegation that they held the claim for such services as assignees is immaterial, as they are entitled to sue by reason of their relation of surviving partners.

4. Nor is the evidence material that they were purchasers for value of the interest of their deceased partner's heir in the claim.

5. The testimony of the presiding judge, who was called as an expert on the value of plaintiff's services, cannot be objected to for the first time on appeal.

6. An entry of judgment for plaintiffs in their firm name without giving their full names is faulty, and will be reformed.

Appeal from district court, Nueces county. *G. R. Scott & Bro.*, for appellant. *Stanley Welch* and *D. McNeill Turner*, for appellees.

HENRY, J. Appellees instituted this suit to recover from appellant the sum of \$1,217 charged to be due them for professional services rendered in a suit against appellant in the district court of Nueces county by "the firm of McCampbell & Givens, and by plaintiffs as the successors and assignees of said firm." The petition charges that John S. McCampbell and E. A. McCampbell compose the law firm and partnership of McCampbell & Son, and that they are "the lawful successors and assigns of the law firm of McCampbell & Givens, doing business from 1879, and many years prior thereto, up to January, 1887, under said firm name, and composed of John S. McCampbell, John S. Givens, and E. A. McCampbell." The petition charges that "on or about the 25th day of May, 1885, while the said partnership of McCampbell & Givens was continuing, a suit against defendant for land was filed in the district court of Nueces county, numbered 1,592, and entitled 'Frierson et als. versus M. A. Rogers et als.,' and defendant employed said firm, through one of its active members, John S. Givens, to defend and represent his rights therein; and that said firm accepted said employment, whereby defendant promised and became liable to pay them the fair and reasonable value of their services therein; that said firm of McCampbell & Givens, and plaintiffs as the successors and assignees of said firm, did, for a period of more than three years, at each term of said court, appear and defend the interests of said defendant in said cause, and yield and give much time, experience, legal knowledge, skill, labor, study, and care to the said defense, and to the successful end that judgment was rendered in favor of the said defendant at the spring term of said court in the year 1888; that the above-named sum is a fair and reasonable compensation for said services." The case was tried without a jury, and judgment rendered for plaintiffs. The defendant answered by general and special exceptions, and, among other defenses, pleaded that he "employed the said

Givens to defend the suit, and that he was informed that he appeared and defended said cause for defendant up to the — day of January, 1887, when he (the said Givens) departed this life, and that he never at any time employed plaintiffs to represent him, but after the death of Givens he notified them that he did not want their services."

The court filed conclusions of law and fact substantially as follows: That previous to the 20th January, 1887, the firm of McCampbell & Givens was composed of John S. McCampbell, John S. Givens, and E. A. McCampbell, and that it was dissolved on said date by the death of John S. Givens; that plaintiffs in this suit, as surviving partners, under the firm name of McCampbell & Son, assumed all the liabilities and carried out all of the partly-performed contracts, of the old firm of McCampbell & Givens; that McCampbell & Son, by purchase and payment of a valuable consideration, became the owners of the interest of their deceased partner in all the unperformed contracts of the old firm. Also, that in said cause 1,592, of *Frierson et al. vs. Rogers et al.*, the defendant Wright employed the said firm of McCampbell & Givens to represent and defend his interest therein, and that said firm did so defend and represent him, "yielding fully two years' service in the examination of old Spanish titles, investigating mesne conveyances and cumbersome records of genealogical descents, and that said defense was nearly completed at the time of the death of said John S. Givens." Also, that McCampbell & Son, as the lawful successors and assigns of the firm of McCampbell & Givens, believed themselves entitled to carry out the partly-performed contracts of the old firm after the death of said Givens, and that they continued to represent the said Wright, and filed a complete answer in said cause, and continued their services therein to its successful termination by judgment rendered in August, 1888. Also, that some time in the year 1887, and after the death of Givens, they were informed by G. R. Scott, who represented himself to be the attorney of the defendant Wright, that he (Wright) required their services no longer, but that they did not consider themselves discharged by such notice. Also, that defendant Wright owned 4,067 acres of the land that was in controversy in said suit, and that it was not worth less than \$3 per acre; that a reasonable compensation for the services performed in said suit by plaintiffs' firms would be anywhere from 10 to 25 per cent. of the value of the land in controversy. Also, that the statement of Wright's desire to discontinue their employment, made to plaintiffs in 1887, was sufficient to put them on notice. The conclusions of law are: "(1) That plaintiffs cannot recover for their services after the notice was given, in 1887, and the death of Givens. (2) That they should recover, as surviving partners of McCampbell & Givens, and the lawful assigns of the deceased John S. Givens, for their

services up to the time of his decease and said notice. (8) That, as said defense had been virtually and fully prepared in the lifetime of said John S. Givens, plaintiffs are entitled to a fair proportion of the amount sued for by them up to the time of the decease of said Givens, and the notice of the discontinuance of their services by said Wright, which I judge to be three-quarters of the amount claimed in their petition, amounting to the sum of \$912.75, to bear interest at the rate of 8 per cent. per annum from the 1st day of January, 1889." The judgment was entered in favor of plaintiffs in their firm name of McCampbell & Son, without the full names of plaintiffs in any way appearing. The defendant reserved a bill of exceptions to the conclusions of fact and law filed by the judge.

A great number of errors are assigned which we think it unnecessary to discuss in detail. The larger number of them relate to the action of the court in overruling the exceptions of defendant to plaintiff's petition, the admission of certain evidence, and the sufficiency of the evidence to support, in a number of particulars, the judge's conclusions of fact.

The exceptions to the petition are predicated upon the proposition that the general statement in the petition that plaintiffs sue as the "successors and assigns" of the firm of McCampbell & Givens, by which firm part of the services that they claim compensation for, and for which they recovered, were performed, does not set forth a state of facts authorizing a recovery. The court only rendered judgment in favor of plaintiffs for such services as had been rendered by the firm of McCampbell & Givens. Plaintiffs' petition, while it styles them "successors," instead of surviving partners, of said firm, by alleging that they were the only partners of Givens at the date of his death, states the facts that would upon his death make them the surviving members of that partnership. The petition is defective in this particular, in not alleging that Givens was dead; but the answer of defendant contained that allegation distinctly, and cured the omission. The pleadings of both parties, considered together, showed that the facts existed that entitled plaintiffs to sue, as surviving partners of the firm of McCampbell & Givens, for the fee earned by that firm, and their being styled "successors" instead of "surviving partners" was properly held not to be good cause for exception.

The pleadings and the evidence show that the employment of the firm of McCampbell & Givens was induced by the confidence reposed by defendant in the professional skill and fidelity of Givens, but that fact did not affect the interest of plaintiffs in the fee earned by him as a member of the firm, or impair their right to maintain an action, as surviving partners, for so much of it as had been earned at the time of his death. The death of Givens dissolved the partnership, and terminated the employment. *McGill v. McGill*, 2 Metc. (Ky.)

260. If the surviving members of the firm chose to perform the unfinished work, and the defendant had consented or acquiesced in their doing so, he would have thereby become bound to pay them, as surviving partners and in their own right, such compensation as the services were reasonably worth. He had, however, the right to discontinue the employment of the surviving members of the firm after the death of Givens, and they had no right to insist on continuing their services because they had not been paid for previous services, nor for any other reason contrary to the wishes of the defendant. Evidence was admitted of the performance of services by appellant after they had been notified of their discharge; but, as the court limited its judgment to compensation for such services as had been previously rendered, the evidence did not prejudice appellant, and the error of its admission was rendered immaterial.

As plaintiffs' relation of surviving partners was sufficient authority for them to maintain this action, the question of their right to recover under their allegation that they held the claim as assignees, and their proof that they were purchasers for value of the interest of the only heir of their deceased partner in the claim, became immaterial. If the issue had been material, we find no error in the rulings upon it that the defendant in this suit can properly complain of.

The presiding judge was sworn, as an expert, as to the value of appellees' services. It seems that no other witness was called on that issue, and no objection was made to his testifying, or to his evidence. Such objection comes too late when taken for the first time in this court.

The conclusions of fact and law are taken up in detail, and exhaustively, by the numerous assignments of error, and objected to,—the conclusions of fact, because not sustained by the evidence; and the conclusions of law, because not supported by the conclusions of fact. The record contains a statement of facts which we look to, as in every other case, only to see whether there is evidence sufficient to sustain the conclusions of fact. We think that all of the material facts found are sufficiently sustained by the evidence, and we approve the conclusions of law deduced from them.

The judgment entry, not containing the full names of plaintiffs, fails in that particular to conform to the rule. The judgment will be reformed in this one respect, and affirmed, at appellant's costs.

SAN ANTONIO & A. P. RY. CO. v. MOORE.
(*Supreme Court of Texas*. Jan. 24, 1890.)

RECORD ON APPEAL—STATEMENT—EXTENSION OF TIME.

Under Rev. St. Tex. art. 1879, which provides that the court may, by an order entered of record during a term of court, authorize a statement of facts to be perfected in vacation, at any time not exceeding 10 days after adjournment of the term, a statement of facts, which was not filed

until 7 days after adjournment, cannot be considered on appeal, where the transcript discloses no order allowing 10 days after adjournment for filing the same.

Appeal from district court, Fayette county.

Action by T. C. Moore against the San Antonio & Aransas Pass Railway Company, for damages occasioned by the construction and operation of a railroad across plaintiff's land. Rev. St. Tex. c. 18, art. 1379, provides that "the court may, by an order entered upon the record during the term, authorize the statement of facts to be made up, and signed and filed, in vacation, at any time not exceeding ten days after the adjournment of the term." Verdict for plaintiff, and from the judgment thereon defendant appeals.

R. H. Phelps and J. Lane, for appellant. Moore & Duncan, for appellee.

GAINES, J. The appellant having constructed and operated a railroad across the land of appellee, he brought suit to recover, not only compensation for the land taken, but also damages resulting to the remainder of the lands from the construction and operation of the road. The case was tried by a jury, and resulted in a verdict for appellee. The appellant complains only of the amount of the verdict, which it insists should be set aside—*First*, on account of the language of counsel for appellee used in the argument of the cause; and, *second*, for errors in giving and refusing instructions. We find, by an inspection of the record, that the term of the court at which the case was tried was adjourned on the 22d day of December, 1888, and that the statement of facts was not filed until the 29th day of that month. The transcript discloses no order allowing 10 days after the adjournment for the filing of the statement of facts. What purports to be a statement of facts found in the record cannot be considered as such. Without knowing what the evidence in the case was, it is impossible for this court to say whether or not appellant was prejudiced by the rulings of the court in giving or refusing instructions. Whether or not a verdict should be set aside on account of improper remarks of counsel must also depend largely upon the evidence in the case. All the assignments are such as cannot be considered in the absence of a statement of facts, and the judgment is therefore affirmed.

SIMON v. ALLEN et al.

(Supreme Court of Texas. March 7, 1890.)

MASTER AND SERVANT—WRONGFUL DISCHARGE.

A clerk in a store employed by the month, who is unjustly discharged before the end of the month, is not obliged, in order to recover for the breach of the contract, to immediately seek for employment of a different character, but has a right to seek, for a reasonable time, the same character of employment that he had when discharged.

Appeal from district court, Polk county.

J. A. McCardell and T. T. Crosson, for appellant. James E. Hill, for appellees.

HENRY, J. Appellant was employed by appellee by the month, as a clerk in their store, at a salary of \$55 per month. He was discharged from said employment on the 4th day of February, and he commenced this suit in a justice's court to recover his salary for the whole of that month. It appears that defendants tendered "in the justice's court" to plaintiff the sum of \$7.35, which they claim was all that was due him, that being for the four days that he served in February. The evidence as to whether the defendant had proper cause to discharge plaintiff was conflicting. The defendant's testimony showed that he had sufficient cause therefor, which the plaintiff denied. On cross-examination, plaintiff testified that, after he was discharged, he sought employment, as a clerk, at a number of places in the state named by him, without procuring it. He testified that he did not try to get "work at a saw-mill, nor on a farm, nor at rail-splitting, nor at piling brush;" that he was a good-sized man, and in good health, but had never done such work; that he did not try to get business as a porter at a depot until after he failed to get employment as a clerk at the places named by him; that on the 1st day of March he was given the position of porter at a railroad depot, where he still works. At the request of the defendants, the court gave the jury the following charge: "In case you find from the evidence that the defendants discharged the plaintiff (if they did) without reasonable cause, then you are instructed that it was the duty of plaintiff to seek employment at any work he could find to do, regardless of what he before that time had been doing. He must have sought and should have taken any honest employment he could get, and that even at a less price than he had been receiving before." We think it was error to give this charge. Plaintiff had the right to seek for a reasonable time, the same character of employment that he had when he was discharged. If, after a reasonable time, it became evident that he could not procure employment as a clerk, it would have become his duty, in so far as it concerned his relations with his late employers, to seek other employment, for which he was fitted. In view of his evidence on the subject, we think that the charge was calculated to mislead the jury. In view of another trial, it is proper to suggest, as to the time of the tender, that if it was not made before the institution of the suit in the justice's court it was error to adjudge the costs against plaintiff. The judgment is reversed, and the cause is remanded.

RODRIGUEZ et al. v. HAYES et al.

(Supreme Court of Texas. Feb. 4, 1890.)

MORTGAGES—ALTERATIONS—LIMITATION OF ACTIONS—EVIDENCE—REGISTRY OF DECREES.

1. A mortgage, in which the character "&" and a word or name following the name of the mortgagee are erased, recited that "the first-named parties" had made a "loan to the third party," the mortgagor. Below the signatures of the grantor

and officer, and above that of the witnesses, there was an erasure of what appeared to be two names, apparently of witnesses. *Held*, that the mortgage was valid, as against the heirs of the mortgagor suing for the land.

2. Though alienation, within six years, of land acquired under the colonization law of Texas of March 26, 1825, was prohibited, the heirs of a mortgagor cannot recover the land without payment of the debt, where the mortgagee or those claiming under him are in possession.

3. Where possession is taken and retained under a mortgage in accordance with its terms, the heirs of the mortgagor cannot recover the land without payment of the debt, though barred by the statute of limitations.

4. The mortgagee, and those claiming under him, being in possession, as authorized by the mortgage, it is not necessary to show that notice of their claim was had by the mortgagor's heirs.

5. Where the documents of title are referred to as accompanying the mortgage, and describe the land, the mortgage need not describe it.

6. Conveyance by a mortgagee in possession passes his interest in the mortgage without an assignment.

7. Though Rev. St. Tex. art. 4389, required that decrees of probate courts, when offered as evidence of title, must have been recorded in the county where the land lies, such decrees, showing distribution of land among heirs of one through whom title is claimed, are admissible to show acts of ownership, though not so recorded.

8. A statement by a witness that "the undisputed fact is that said land has been and is the property of [defendant] for the past 45 or 46 years" will not cause a reversal, where the case was tried by the court, and the evidence, without this statement, was conclusive as to ownership.

9. After execution of a mortgage in 1883, the grantor went to Mexico, and one intimate with him testified that he stated that he owned no land in Texas, and there was also evidence that he executed a deed to the mortgagee's administrator. Afterwards his widow and heirs resided in Texas, but made no claim to the land until shortly before suit. The mortgagee took possession, as authorized by the mortgage, and he, and those claiming under him, paid the taxes, except for about six years, and held possession themselves or by tenants the greater part of the time. The mortgagee's heirs sold in 1870 to one who in 1880 sold to defendants, who took and held possession till time of trial. *Held*, that judgment was properly rendered for defendants.

Commissioners' decision. Appeal from district court, Jackson county; W. H. BURKHART, Judge.

Francis M. White and J. D. Owen, for appellants. *John Ireland*, for appellees.

HOBBS, J. Appellants, Narciso, Jesus, Narciso A., and Trinidad Rodriguez, and Jesus Lafuente, in their own behalf, and the last named, as next friend for Simon, Delina, Adela, and Miguella Lafuente, minors, brought this action of trespass to try title, on the 23d day of March, 1887, to recover the land described in the petition, as the league granted to Narciso Rodriguez as a colonist of De Leon's colony on March 25, 1833. The plaintiffs sought a recovery upon the alleged ground that the grantee, Rodriguez, died owning said land, and that they were his heirs. There was no controversy as to the fact that Narciso Rodriguez was the original grantee,—his title having issued on March 26, 1833, under the colonization law of March 26, 1825; and there was proof by plaintiffs of heirship. The defendants pleaded not guilty; the three, five, and ten years' stat-

utes of limitation; and set up, specially, title under a conditional deed or mortgage,—an authentic act made by the grantee, Narciso Rodriguez, to Phillip Dimmitt, on the 30th day September, 1833, in consideration of \$5,000 advanced to Rodriguez, payable in six years, with 10 per cent. interest. Defendants also set up a title from said Rodriguez to W. E. Jones, administrator of the estate of said Dimmitt, made subsequent to the maturity of the conditional deed or mortgage. They pleaded also stale demand. John Ireland made himself a party defendant, as the warrantor of John V. Hayes. No issue appears to have been made on his plea, and, the judgment being for defendant, no further notice was taken of his appearance. The cause was tried by the court at the November term, 1887, without a jury, and judgment was rendered that plaintiffs take nothing by their suit, from which this appeal is taken.

The errors assigned raise, first, the question of the admissibility of the mortgage introduced in evidence by the defendants, and its validity as a title. The propositions of appellants, in support of their assignment assailing this mortgage, may be considered together. They are: That the mortgage was inadmissible on account of unexplained erasures; it was never assigned to the defendants, nor was the debt on which it was based; it constituted no evidence of title; it was null and void, because in contravention of the law in force when executed; it was barred by limitation, and was no evidence of notice of defendants' claim. Such are the objections urged to this instrument, which was an original Spanish mortgage, executed on the 30th day of September by Narciso Rodriguez before the office with assisting witnesses. It conveyed to Phillip Dimmitt, as security for \$5,000 loaned to Rodriguez by the former, the league of land granted the latter under the colonization law of March 25, 1825, in case of the failure to pay that amount, with 10 per cent. interest, within six years; which land, it recited, possession of had been given Rodriguez under the law, and the documents of which grant were delivered as a proof of the good faith of the mortgagor. The mortgagee was required to pay the state dues on the grant, and he was authorized to take possession. Attached to the original, which accompanied the transcript in this case by order of the court below, is a copy, which it is agreed was correctly translated by the Spanish translator in the general land-office.

The erasures referred to consist of a blot over what appears to be the character "&" and a word or name which in the original follows immediately after the name "Felipe Dimmitt." The language of the instrument would indicate that "Felipe Dimmitt," "&" some other person, appeared before the officer with Rodriguez, and made the loan to him. They are referred to as the "first-named parties," who "had made a loan to the third party" (Rodriguez) of five thousand dollars. Again, referring to the title issued to Rod-

riguez as a colonist under the law of March 24, 1825, it recites: "The documents of which grant, as a proof of the good faith which he acts, he herewith delivers; the first named parties obligating themselves to pay the state dues," etc. At the foot of the instrument, and having no connection with it, below the signatures of the grantor and the officer, and above those of the assisting witnesses, is the second erasure, consisting also of a blot over what appears to be two words or names, probably intended for assisting witnesses, but blotted out. The general rules are well settled and familiar, that on the production of an instrument, if it appears to have been altered, it is incumbent on the party offering it in evidence to explain this appearance. If nothing appears to the contrary, the alteration, it is said, will be presumed to be contemporaneous with the execution of the instrument. "If any ground of suspicion is apparent upon the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done, as well as that of the person by whom and the intent with which the alteration was made, as matters of fact, to be ultimately found by the jury upon proofs to be adduced by the party offering the instrument," etc. 1 Gr-enl. Ev. § 564. These principles are recognized in *Park v. Glover*, 28 Tex. 472. Although there is not perfect harmony in the cases on the subject, it is generally agreed that, as fraud is not presumed, therefore, if no peculiar circumstances of suspicion attach to an altered instrument, the alteration is presumed to be innocent, or to have been made prior to its execution. 1 Greenl. Ev. § 564, and note 1. In the case of *Park v. Glover*, supra, plaintiff offered in evidence a bond from Jonas Dixon to John Glover, and a transfer or assignment of the bond by Glover, and a certified copy from the records of the county of the bond and assignment which was written on it. The bond was read. To the reading of the assignment which was written on the bond, defendants objected on the ground that it showed on its face that it had been altered. It was as follows: "For value received, I transfer all my right," etc., "to the above bond, to W. A. Park. July 16, 1844. JOHN GLOVER. Signed and sealed in presence of us. ALBERT MARTIN GLOVER. S. C. CROSS." The word "W. A. Park," and the words, "signed and sealed in presence of us," appeared to have been written in black, while the other words were in blue, ink. The certified copy from the county records, which was offered along with the original, showed that the alteration was made after the instrument had been recorded.

The facts in the present case are altogether unlike those reported in the case cited. Applying the rule mentioned to the mortgage before us, the presumption would arise that the erasures were made contemporaneously with its execution. The officer's certificate to the original instrument which was made after

the condition was broken, or default in the payment of the loan, strongly supports this view. It was made on February 12, 1840, more than 40 years before the trial, and recited that Iridio Venavides, one of the assisting witnesses, who participated in the execution of the instrument, appeared before the county clerk of Victoria county, and declared under oath that "Rodriguez had executed it," and that he was one of the witnesses. It was recorded in Victoria county on February 25, 1840, and possession and the payment of taxes was shown from that time to the trial, with unimportant intervals. Conceding the erasure to be as claimed by appellants, the mortgage evidently conveyed Rodriguez's interest to the grantees, and, the title having passed out of him, his heirs could not recover in this action by virtue of an alleged title in their ancestor, which, according to their own theory with respect to the erasures, was probably vested in Dimmitt and some other person. It would be, in this suit, wholly immaterial to Rodriguez's heirs, who the joint mortgagee may have been, with Dimmitt, if any. Constituting, as it would, an outstanding title in a third party, it would as effectually prevent a recovery by plaintiffs, whether that party be Dimmitt alone, or Dimmitt and another. Under the rule that if there had been any ground for suspicion the law would presume nothing, leaving the question of the time, intent, etc., in making the erasure, to the jury, the court trying the cause, in admitting the instrument, passed upon the good faith of the alteration or erasure.

The mortgage is dated September 30, 1833. It is argued by appellants, however, that it was executed in February, 1833, and therefore null, because in violation of the law prohibiting at that time the alienation of lands acquired under the law of March, 1825, prior to the issuance of final title. Final title having, as we have seen, issued to Rodriguez on March 25, 1833, the recital in the mortgage of the delivery of the final title itself to the mortgagee is a sufficient reply to this contention, that it was executed before that title was extended. In answer to the position that if it was executed in September, 1833, the alienation was equally in contravention of the law inhibiting it, within less than six years from the issuance of final title, it is only necessary to say that, if the mortgage or pledge be such an alienation as was contemplated by the law, it has been in several cases in this state held that, although a contract cannot be enforced for the reason assigned by appellants, that is, because it was made in violation of law, the heirs of the grantee cannot recover upon their legal title, against parties claiming under such contract as heirs, without refunding the consideration received by their ancestor. *Ledyard v. Brown*, 27 Tex. 404, and cases cited. The evidence showed that possession was taken under the mortgage by Dimmitt, and those holding under him, and, such being

the case, they could not be dispossessed until the debt was paid, and this right was wholly unaffected by the lapse of time or limitation.

In *Hannay v. Thompson*, 14 Tex. 144, it was held that where the mortgagee, as in this case, was placed in possession under the mortgage, and by its terms entitled to retain it, the mortgagor could not recover possession, after condition broken, without discharging the debt for which it was given. There was no occasion for notice to appellants of defendants' claim to the land, and the objection that the mortgage was no notice of such claim is without merit. The appellants claim as heirs. If notice was essential, the possession authorized by the mortgage followed by actual continued occupancy of Dimmitt's heirs, and those claiming under them, was sufficient.

To the objections that the land was not described, nor was there any assignment of the mortgage, the answer is that the authentic act or mortgage made no attempt to describe it. The title itself accompanied it, and was referred to and contained the description. "If the mortgagee be in possession, his conveyance of the mortgaged property * * * is regarded as passing his mortgage interest, although no mention in terms be made of the debt." 1 Jones, Mortg. § 808.

The objection to the partition decrees of the probate courts of Guadalupe and Victoria counties, because not recorded in Jackson county, where the land is situated, were properly overruled. These decrees were made by the probate courts referred to, at different times, between the years 1845 and 1850, and during the administration of the estate of Phillip Dimmitt; and they show a distribution and division of the land among his heirs, and that it was inventoried by his administrator, W. E. Jones, who was also guardian of some of the heirs, as the property of the estate, and that it was managed and controlled by him as such administrator. They were not offered as showing in themselves title to the land under which the defendants claim, but as indicating acts of ownership under the title from Rodriguez. The statute, (article 4389, Rev. St.,) requiring substantially that, when such decrees are offered as evidence of title, they must have been recorded in the county where the land is, has no application to decrees offered as these were.

It is assigned as error that the witness Texas Dimmitt testified "that the undisputed fact is that said land has been and is the property of said Dimmitt for the past 45 or 46 years," and that this evidence should have been excluded. If it was error it would furnish no ground for reversal, as the cause was tried by the court, and the evidence, excluding this, was so full and satisfactory upon the issue of the ownership of and claim to the land by Dimmitt, and those claiming under him, for that length of time, that no other decree could have been entered by the

court than was rendered. The expression objected to was preceded by a lengthy statement of this witness, showing possession, acts of control and ownership over the land by the Dimmitt heirs for many years, and that he, although 43 years old at the time of trial, had never heard of any claim asserted adversely, until a short time before suit was brought. This testimony was substantially the same as other witnesses testifying upon this issue.

We have replied to the most important assignments, and the others, we think, do not require discussion, as none require, in our opinion, a reversal of the judgment. The facts in this case are, substantially, that the original grantee, Rodriguez, after the Texas revolution, went to Mexico, and there resided until about 1842 or 1843. It appears from the testimony of Col. Seguin, who was intimate with him, that he told him he owned no land in Texas. His widow returned to San Antonio, and died there, just after "the Rebellion." The heirs, with the exception of one perhaps, have all lived in Texas, in San Antonio, Austin, Ellis, and Grimes counties. None of them rendered the land for taxes, or claimed it, until a short time before this suit. Judge White, who resided in Victoria county since 1831, had never heard of any claim adverse to Dimmitt's title. He was agent for Ireland, who purchased from Dimmitt's heirs, and the only defect in his title was that some of the deeds were not recorded in Jackson county. Ireland took possession by tenant in 1880, and actual possession was taken by the defendants, who have held it up to the trial. Ireland purchased in 1870. Texas P. Dimmitt, who was 48 years old in September, 1887, testified that, as far back as he could remember, the Dimmitts owned, controlled, and claimed the league. He, as agent for the other Dimmitt heirs, was in possession from 1866 to 1870. It was controlled by W. E. Jones, Dimmitt's administrator, and the guardian of his children, as shown by the probate records referred to, claimed it as belonging to the Dimmitt estate from about 1845 to 1850. It was in the possession of J. H. Wood for Dimmitt, who placed Wood in possession, and so held by him from 1841 to 1845. Terrell purchased Wood's improvements, and took possession of it as the property of the Dimmitt heirs. The comptroller's statement shows the payment of taxes on the land from 1846 by Dimmitt, and those claiming under him, with the exception of about six years. The original mortgage, as stated, was recorded in 1840, and authorized the mortgagee, Dimmitt, to take possession. In addition to these facts, the evidence showed that a title had been executed by Narciso Rodriguez to W. E. Jones, the administrator of Dimmitt's estate, which was in the handwriting of A. H. Phillips. This deed was last seen in the hands of A. H. Phillips. Among the papers of the estate of Dimmitt, found in the possession of the administrator's (W. E. Jones') son, was a package upon

which was indorsed by J. T. Thornton, the attorney for the estate, the following: "See A. H. Phillips, and get deed of Rodriguez left by Jones." These facts, we think, authorize the finding of the court, which was, in substance, that such a title had existed. The proper judgment was rendered by the court in this case, and a further consideration of the assignments would be useless. The judgment should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment affirmed.

ROBERTSON v. DU BOSE.

(Supreme Court of Texas. Feb. 4, 1890.)

DEEDS—EXECUTION—SALE OF LOCATED LAND—EQUITABLE INTEREST—LACHES.

1. Where an affidavit is filed attacking a deed offered in evidence as a forgery, its execution must be proven before it is received, but, if no evidence is introduced by the impeaching party, its genuineness is established by the testimony of the subscribing witnesses as to its execution.

2. In the absence of evidence casting doubt on the identity of a grantor in a deed, it is sufficient to show the identity of his name with that of the grantee in the preceding conveyance in the chain of title.

3. H., having a headright claim for land under the constitution of the republic of Texas, before securing title to a certificate, sold to W. certain land which he had located, reciting in the contract that it was not patented, but that he would make further title as soon as W. obtained a title in his (H.'s) name. H. was unable to obtain title to this land, but afterwards acquired other land under his right. *Held*, that W. had an equitable title in the land so acquired, as the contract showed an intention to convey whatever land the certificate was applied to.

4. In 1840, H. sold to W. the equitable title to certain land. H. did not obtain legal title until 1873, and in 1887 he conveyed the land to plaintiff for a nominal sum by warranty deed, taking back a contract that he should not be bound by his warranty. Prior to that time he had made no claim to the land. In 1867, W. devised the land to parties under whom defendant claims, and by them the taxes were paid. No one was in actual possession. *Held*, in trespass to try title, that defendant was not estopped by laches from asserting his equitable title, as his right to equitable relief depended, not on the date of his claim, but on the lapse of time after it was disputed.

5. W. devised an undivided interest in the land to defendant's grantor, and the will was probated before the conveyance of the interest to defendant. *Held*, that defendant's interest was sufficient to defeat recovery of any part of the land by plaintiff.

6. The parties to the action stipulated that the patent to H., issued in 1873, was common source of title. *Held*, that the contract by which H. sold the equitable title to W., in 1840, was admissible to show who owned the land held by the patent.

7. It was further stipulated that either party might use as evidence original deeds and certified copies without being required to account for the loss or destruction of the original, and without the notice of filing required by law. *Held*, that this did not take away the right to object to a deed because not duly registered, or otherwise properly proved.

8. Plaintiff, for the purpose of showing the identity of his grantor and the patentee, offered a certificate of the state comptroller, showing that one H. was a volunteer in the Texas army, the places of his residence at different dates thereaft-

er, and that he was drawing a pension from the state. *Held*, that it would have been inadmissible, even if the question of identity had been at issue.

Appeal from district court, Angelina county; L. B. HIGHTOWER, Judge.

W. J. Townsend and Robertson & Williams, for appellant. J. D. Gann, for appellee.

HENRY, J. This was an action of trespass to try title, instituted by appellant to recover one-third of a league of land patented to Caleb Holloway. The defendant pleaded "not guilty." Appellee filed an affidavit charging that a deed for the land from Caleb Holloway to appellant was a forgery. Appellant, by a supplemental petition, pleaded that defendant's equitable title was a stale claim. A certificate was issued in favor of Caleb Holloway by the district court of San Augustine county on the 22d day of October, 1842. It was located on the land in controversy, which was patented to Caleb Holloway on the 3d day of May, 1873. On the 5th day of July, 1887, said Holloway conveyed the land to James H. Robertson, the appellant. Appellee claimed the land under conveyances to him by the executors and heirs of Jesse Walling; to whom, he contends, the equitable title to the land certificate was conveyed by the following instrument, which we copy from the brief of appellant: "Republic of Texas, county of Nacogdoches, this, the 4th day of February, 1840. Be it none [known] that I, Caleb Holloway, has this day sold to Jesse Walling all of the one-third of a league of land which was located by said Walling in the year thirty-five, in my one [own] name, now ling [lying] and being in Harris county, about ten miles from the lake, and joins a location made at the same time for Daniel Holloway and other, corners branded C. H.; & the sale is for and in consideration of the sum of five thousand dollars, the receipt of which is hereby acknowledged, and declared to be good and valid to said Walling, his heirs and assigns, forever, from myself and heirs, executors, & forever, in fee-simple, & the said land not being patented by this government, I will, if necessary, make further title as soon as said Walling obtains a patent in my name for said land. Said Walling is to pay all expenses to the government, & is to have full possession of the land and premises for the time being, & all of which is agreed to before signing and delivering these presents, day and date first written." Signed, "CALEB HOLLOWAY," and proved for record by one of its two subscribing witnesses. It is indorsed: "Filed, in G. L. O., Dec. 13-59. Replied, Oct. 24-70." Plaintiff proved the execution of the deed of Caleb Holloway to him by the depositions of the subscribing witnesses. No evidence in support of his plea of *non est factum* was offered by defendant. No evidence was offered tending to show that the Caleb Holloway who conveyed the land to plaintiff was not the identical person to whom it was patented.

Upon this branch of the case the court charged the jury as follows: "The defendant, Du Bose, attacks the genuineness of said deed, purporting to be the act and deed of said Caleb Holloway, as a forgery, which throws the burden of proof upon the plaintiff to establish said deed as the genuine act and deed of the Caleb Holloway to whom said land was patented; and, unless the plaintiff has so shown the said deed to be the act and deed of the identical Caleb Holloway in whose name the patent to the land in dispute issued, he cannot recover in this suit. He must, if he recovers at all, recover upon the strength of his own title to the land in question." In another part of the charge, upon the same issue, the court used the language: "If you believe that the deed purporting to be the act of Caleb Holloway, conveying the land sued for to James H. Robertson, is the genuine act and deed of Caleb Holloway, the same person in whose name the patent to said land issued, then the plaintiff has established a legal title," etc.

Under this state of the case, it is contended that the court erred in submitting at all the question of forgery to the jury, and also in charging as if any question of identity existed. We think both objections are well taken, and that they require a reversal of the case. In the case of *Chamblee v. Tarbox*, 27 Tex. 144, this court said that similarity of name alone "is ordinarily sufficient evidence of identity of a purchaser in a chain of conveyance." In the absence of evidence casting doubt upon the identity of a party to a conveyance of land, we think it ought to be held sufficient in every case, and the jury, if instructed upon the subject at all, ought to be told so. In the case of *Cox v. Cock*, 59 Tex. 524, speaking of the effect of such an affidavit as the one filed by defendant in this case, this court said: "When the proper affidavit is filed * * * attacking the deed offered in evidence as a forgery, such a deed cannot be received in evidence without the usual proof of its execution; but when such proper proof is made, * * * it is not error to allow the deed to go to the jury as *prima facie* a genuine instrument. The impeaching affidavit has served its purpose. It has compelled the party claiming under the deed to prove its execution in accordance with the rules of evidence, and thus remove the suspicion cast on it by the affidavit of forgery. It throws upon the shoulders of the party offering the deed the burden of proving its execution in accordance with the rules of common law. * * * If the party impeaching the deed desires to do so, he is at liberty to proceed to sustain, by any lawful testimony, his plea of *non est factum*. If he introduces no proof whatever, (the affidavit not being evidence,) and the opposing party proves the making of the deed in accordance with some one of the modes prescribed by the common law, the genuineness of the deed is established. The jury, in the absence of

all proof sustaining the plea of *non est factum*, could not find otherwise." In this case they should have been so instructed.

In view of another trial, it is proper for us to dispose of a number of other questions presented by appellant's assignments of error. It is urged that the court erred in permitting the defendant to read in evidence a copy of the above-described conveyance from Caleb Holloway to Jesse Walling. The original instrument was filed in the general land-office on the 18th day of December, 1859, already properly authenticated as a deed by one of the subscribing witnesses. On that point no question is made. A copy of the instrument, and its authentication, duly certified by the commissioner of the general land-office, was recorded in the deed records of Angelina county on the 22d day of October, 1883. It is contended that said paper is not a duly-recorded instrument; that it does not relate to the land in controversy, but purports to convey by metes and bounds an entirely different tract of land, situated in a different county, and not shown to be connected with the land in controversy; that on February 4, 1840, when said instrument was executed, Holloway did not have a right, under the law, to obtain the certificate by virtue of which the land in controversy was located, and such instrument could not relate to or convey a right which did not exist; and that if said instrument did relate to the land in controversy it could at best convey but an equitable interest in the land; and, as the certificate by virtue of which the land was located was not issued until two years after the date of the instrument, said equitable interest had become stale and barred by the lapse of time; and plaintiff having pleaded limitation and stale demand, and defendant having failed to excuse his delay of over 40 years in asserting any rights under said deed, it was not admissible in evidence. It is evident that the right of Caleb Holloway to a grant of a third of a league of land had its origin in the constitution of the republic of Texas. It is not unlikely, from what the record discloses, that he had a recognized right to acquire the same quantity of land under the colonial government, and that land had been surveyed for him, but that the title was not acquired because of its not having been perfected before the change of government, and by his not taking afterwards such steps as were required to enable him to acquire title to the particular survey. On the 14th day of February, 1840, he had a right given by the constitution to select and own one-third of a league of land, but did not then have a certificate as the evidence of that right or a lawful survey anywhere. Was this right capable of being sold on that date? The question is affirmatively answered by the case of *Johnson v. Newman*, 43 Tex. 639. In that case it is said: "Though at the date of this contract Mitchell had neither a title to the

land in controversy, nor to the certificate under which it has been acquired, still there was, undoubtedly, guaranteed to him by the constitution the right to this amount of land on his complying with the requirements to be prescribed by law. This right, though neither real nor personal property *in esse*, was nevertheless an inchoate right to get that quantity of land out of some part of the public domain at the time and in the manner to be afterwards provided and determined by the government. It was a right or interest of such character as to be the subject of a contract."

Caleb Holloway held a property in the right to acquire land that he could sell. Did he convey it by the deed made by him to Jesse Walling? This question is argued as if it depended upon the correct answer to two other questions, the first one being, did the instrument convey the land that Holloway's certificate was then located on? and, if it did, then, did the sale of the land to Walling carry with it the title to the land certificate, when the title to that location failed, because the land had been previously appropriated, and the certificate was floated and located on the land in controversy,—an entirely different survey? We think it is clear, and well settled, that under such circumstances a sale of the land would include a sale of the certificate, and that the title to the certificate would remain good, and follow it to whatever land it might be subsequently applied. In the case of *Hines v. Thorn*, 57 Tex. 102, this court said: "A legal sale of the land, by which it had been appropriated, would pass title to the claim or certificate by which it was thus appropriated." See *Hearne v. Gillett*, 62 Tex. 23.

A contention exists in this case over the fact whether the land referred to in the conveyance from Holloway to Walling was situated in Harris or in Harrison county. The evidence indicates that land that Holloway had caused to be surveyed under his colonial claim was situated in Harrison, and not in Harris, county, and that the land certificate, when issued, was first applied to that survey in Harrison county, and was subsequently floated from that, because it was in conflict to the land in controversy. Appellee contended that the instrument was intended to convey the Harrison county survey, and not a different tract, lying in Harris county; and in support of his contention introduced such items of evidence as a copy of the Harrison county field-notes, made in the year 1835, and a copy of an affidavit made by three persons in 1838, which seems to have been indorsed on a land-office copy of said field-notes, in which they say that they "were personally present when the survey of which the annexed is a certified copy from the general land-office of the republic, for the land granted to Caleb Holloway as a settler or colonist, was surveyed by virtue of an order of survey issued by the commissioner, George

W. Smythe, for one-third of a *sitio* of land; and they further swear that the said survey was made according to law, and prior to the closing of the land-office by the consultation, in the year eighteen hundred and thirty-five;" and also copies of memorandums, appearing to be indorsements, made on the files of papers in the land-office, among other things containing mention of Harrison county, but none of Harris county. All of these copies of papers and of memorandums were duly certified to by the commissioner of the general land-office. The evidence was objected to by appellant.

We think that, for the purposes of this case, the question as to whether the land referred to in the conveyance was in Harris or Harrison county, or where it was actually or was believed to be situated, or where it was described by the conveyance to be situated, is immaterial. No title to land anywhere was conveyed, and would not have been, however certain the description. The only effect that could be given to a conveyance of the land described would be to settle, or to help determine, by the relation that the land described bore to the certificate in question, whether the conveyance of the land carried with it, as an incident, the title to the certificate. If there existed no means of showing whether the certificate was conveyed, but by the description or identity of the land conveyed, then the question, what land was conveyed? would be important; but, even then, important only for the purpose of determining whether the certificate was included. If it is evident, from the conveyance, that it is intended to convey whatever land the certificate is applied to, that is all that is required. Upon this issue we find no difficulty in the case before us. The one certain thing in the instrument, so far as the subject-matter of the conveyance is concerned, is that it is his own headright claim for one-third of a league of land that Caleb Holloway is selling and conveying. Whatever imperfections of description of the subject-matter of the conveyance may exist in other respects, there is no doubt about it in this, the only essential, particular.

The objection that this instrument was not admissible in evidence, because it was a copy and not recorded, is not tenable. The original, as we have said, had been filed in the general land-office, and was a proper record of that office. Rev. St. art. 3959. It was the land-office copy itself, duly certified to by the commissioner, that was introduced in evidence. It is made evidence by article 2252 of the Revised Statutes. The land-office copy of the original instrument, including its authentication for record, was authorized to be recorded in the deed records of Angelina county by article 4330 of the Revised Statutes. We think that there was no error committed in allowing this instrument to be admitted in evidence, and that it would have been proper for the court to have instructed

the jury that it had the effect of conveying Caleb Holloway's right to acquire from the republic a third of a league of land, to be applied to the land wherever it might subsequently be or was then located.

The objection that the claim of defendant was stale was not a good ground for excluding the instrument from the jury as evidence. The same objection was more appropriately raised by the pleadings, and by charges requested by appellant and refused by the court. In the case of *Hodges v. Johnson*, 15 Tex. 574, speaking of the doctrine of stale demand, it is said: "The date of the agreement is not a material circumstance." The rule, as stated in the case of *McKin v. Williams*, 48 Tex. 92, is that the right to equitable relief is "dependent, not upon the date of the contract, but upon the lapse of time after the cause of action accrued." In the case of *Reed v. West*, 47 Tex. 240, Reed had contracted, in 1836, to locate the claim of West in consideration of one-half of the land. The land was patented in 1855 to West. In 1868 the administrator of Reed sued the heirs of West for one-half of the land. Discussing the question of stale claim, Justice GOULD said: "When patent issued, the legal title vested in West or his heirs, in trust for the holder of the title-bond, to the extent of the locative interest. * * * If * * * West had then repudiated the trust by selling the entire tract, or by holding possession, claiming for himself alone, then limitation would have commenced to run against the plaintiff's claim for equitable relief. * * * Until some act indicative of an intention to hold adversely, limitations would not commence to run." See *Gibbons v. Bell*, 45 Tex. 418.

When the patent in this case issued to Caleb Holloway in the year 1878, he was invested with the legal title in trust and for the benefit of his vendee, Jesse Walling. He did nothing to repudiate the trust, or that was inconsistent with the rights of Walling, until he sold the land to appellant, in the year 1887. Neither party was in actual possession, but the land was claimed by Walling, and specially devised by his will in 1866, and taxes upon it were paid; and it was claimed and conveyed by his executors and heirs without the assertion of any claim to it by Holloway, until the year 1887, when he sold and conveyed it to appellant for the comparatively trifling consideration of \$150. And, while he went through the form of warranting the title that he was conveying, he declined to do that until he received from the agent of the vendee his written promise that the warranty was to be of no effect, and from one of the subscribing witnesses his opinion that the promise would neutralize the warranty. There being no repudiation of the trust until this sale, we think the doctrine of laches or stale claim had no application until then, and, even then, the nature of the transaction was not such as to address itself to the favorable consideration of a court of equity,

to which the pleading and charges under consideration are addressed.

The record shows that Jesse Walling died testate, and that his will was duly probated. Ann Walling, A. J. Walling, and C. M. Wilson were named executors in the will, without bond. It was an independent will. The record contains no affirmative evidence of the qualifications of the executors, or of the return by them of an inventory of the estate. The will was probated in 1867. It contained express mention of the Caleb Holloway tract as being then unpatented, and contained a clause devising (after the payment of the testator's debts, of which there is no evidence of the existence of any) "all of my [his] unpatented lands, to be equally divided between J. T. Walling, Isom C. Walling, A. J. Walling, L. C. Walling, and Amelia A. Wilson, wife of C. M. Wilson." The defendant, over the objections of plaintiff, read in evidence a deed, purporting to be signed by the executors, conveying to A. J. Walling an undivided interest in 393½ acres in the Caleb Holloway survey, and reciting that the land was conveyed to him by them as executors, "as his separate share of the land of said estate in Angelina county in the name of Caleb Holloway." This deed was acknowledged for record only by C. M. Wilson and A. J. Walling, and the certificate of acknowledgment recites that they executed the deed "for themselves, and for Ann Walling, at her request." The record shows a power of attorney from A. J. Walling to William E. Rogers, authorizing him to sell and convey this land; and a deed from said Walling, through his said attorneys, to the defendant, A. H. Du Bose, for the same land. No objection was made to the introduction of the two last-named instruments in evidence. The deed from the executors to A. J. Walling was objected to, and it is now insisted that there was error in allowing it to be read in evidence, for reasons that we do not deem it necessary to consider, as they cannot affect the decision of this appeal, or become of importance upon another trial of this cause in the court below. The will of Jesse Walling unquestionably gives A. J. Walling an undivided interest in the Caleb Holloway survey. It only required the probate of the will to fix and confirm that right. It was within the power of the executors, when they had properly qualified, to partition to him his exact interest. If it was done by deed, in order for the deed to have effect as a deed it would have to be properly executed, and before it could be properly recorded it would have to be authenticated as the law directed. As the will itself invested him with an undivided interest in the land, he owned that, when the will had been probated, and when he conveyed to the defendant, even if it be true that the executors never qualified, and never, from any cause, made a partition or a conveyance to him. Under any circumstances, we see no reason why the attempt to make the partition, even if it was

ineffectual from any cause whatever, should not, after the long acquiescence in it by the parties interested in it, and, especially when objection does not come from them, be held valid and binding. It is clear that the defendant acquired an undivided interest in the land by his purchase from A. J. Walling, under the equitable title to it conveyed by the deed from Caleb Holloway to Jesse Walling. This equitable title is superior to plaintiff's legal title. If defendant does not own the whole of the equitable right, such interest as he does not own is still outstanding in others. It has been held by this court, in a number of cases, that the defendant, in an action of trespass to try title, cannot defeat a recovery by the plaintiff by proof of an outstanding equitable title with which he has no connection. That doctrine has no application to this case. The equitable title conveyed to Walling, relating to the whole land, and the defendant owning an undivided interest in it, he is so connected with the title that he is entitled to the full protection of it, and to defeat a recovery of any part of the land by plaintiff. This view of the law makes it unnecessary for us to pass upon the objections to this and other deeds introduced in evidence by the defendant, or to review the refusal of charges upon the same subject. We are of the opinion that the court did not commit error, as complained of, in refusing to give charges requested by the plaintiff. Under the pleadings in this cause, we think the only proper form of judgment, as between plaintiff and the defendant, Du Bose, was that the plaintiff take nothing by his suit, and an affirmative judgment, in favor of defendant for the recovery of the land and for being quieted in his possession thereof, as the judgment was entered, was not authorized, and should not have been rendered. This is an error, however, for which we would not reverse this cause.

The record contains the following agreement between the attorneys of the parties: "It is agreed by plaintiff and defendant herein that the patent from the state of Texas to Caleb Holloway herein filed is common source of title, and may be used by either party to this suit. It is further agreed that either party in said suit may use as evidence on the trial of said cause original deeds, and certified copies of deeds, by filing the same in the papers in the case, without being required to account for the loss or destruction of the original deeds, and without the notice of filing required by law, so the deeds and copies are filed three days before the trial of said cause, subject to all other legal objections." We think the court correctly decided that this stipulation did not preclude defendant from proving the conveyance from Caleb Holloway to Jesse Walling, nor from showing his connection with that title. Any evidence tending to show who owns the land held by that patent, and by a right not conflicting with it, was proper. As to the admission in evi-

dence of title-papers, we think the only effect of the agreement was to relieve the party offering them from the requirement to give notice of their filing, and from proving the loss of the originals, when certified copies were used; giving to their deeds so filed the effect they would have had if the notice had been given, and affidavit made of the loss of originals, and none other. The right remained to both parties to object to any deed because not duly registered or otherwise properly proved.

The plaintiff, on the issue of the identity of his grantor and the patentee, offered as evidence a certificate of the state comptroller, showing that one Caleb Holloway was a volunteer in the Texas army in 1835, and the places of his residence at different dates subsequent thereto, and that he was when it was given a resident of Mitchell county, drawing a pension from the state. If the issue of identity was in question, we do not think that such a certificate could be properly received as evidence. It was correctly excluded. The judgment is reversed, and the cause is remanded.

LEWY *et al.* v. GILLARD *et al.*

(Supreme Court of Texas. March 4, 1890.)

LIFE INSURANCE—ASSIGNMENT TO CREDITOR.

An absolute assignment of a life insurance policy to a creditor only gives him title to enough of the proceeds to satisfy his debt and disbursements, with interest.

Appeal from district court, Galveston county; WILLIAM H. STEWART, Judge.

Scott & Levi, for appellants. *W. B. Denson*, for appellees.

HENRY, J. Appellees filed suit against appellants to recover the balance of proceeds of a policy of insurance on the life of John Cavanaugh, after deducting a debt due by Cavanaugh to appellants, and the premiums paid on the policy by appellants, and expenses of collecting the insurance money. Trial was before the court without a jury. There was a judgment in favor of appellees for the amount sued for, and this appeal is to reverse the judgment. Appellants were merchants doing business in Galveston, and for years had a running account with Cavanaugh, of dimensions varying from \$500 to \$2,500. Cavanaugh was in Galveston in October, 1888, and appellants called in a life insurance agent to effect insurance on his life for \$5,000 in favor of appellants. The agent informed them (appellants and Cavanaugh) that his company only wrote policies in favor of blood relations of the insured, but that their purpose could be accomplished by taking the policy payable to Cavanaugh, and then by his assigning it to appellants. This form of proceeding being acceptable, the agent took the application, and at the same time Cavanaugh signed and delivered to the agent duplicate assignments to appellants of the policy, which might be issued on the ap-

plication. These assignments were complete, except in respect of their date and the number of the policy, which were to be filled in by the agent after the policy was issued, and when its number could be known. The agent subsequently did this, giving the assignments a date subsequent to that of the policy, and carried the policy, with the assignments thereof duly filled, as above stated, to appellants, who paid the premiums, at the same time taking the policy and assignments together from the agent. The policy was by its terms payable to John M. Cavanaugh, his executors and administrators. After receiving the policy, appellants and Cavanaugh entered into a written agreement reciting and stipulating the manner, purpose, and terms of the insurance as between them, viz.: That the application for insurance and the policy were made and obtained at the instance, and for exclusive account and benefit, of appellants, as creditors of Cavanaugh; that, notwithstanding the form of the policy, appellants were, at their own proper cost and expense, to pay all premiums, which were to be in no wise charged to or against Cavanaugh; that Cavanaugh had assigned, and thereby assigned all interest he might have in the policy or its proceeds on account of the form of the policy or application, or of any facts connected therewith, and, for himself, his executors and administrators, guaranteed to appellants the sufficiency and validity of the assignment, and warranted the title of appellants to the policy and proceeds; that the purpose of this assignment was to evidence the facts attending the obtaining of the policy; and that, in form as well as in substance, it was intended to be solely for the benefit of appellants, and not for Cavanaugh, who had no interest in the policy, or in the premiums paid therefor. This agreement, and the assignments of the policy, were pleaded and proven, both as showing the exclusive interest of appellant in the policy and proceeds, and as a warranty binding on appellees. Cavanaugh died January 31, 1889. Appellant forwarded proof of death to the insurance company, and collected the policy, \$5,000, March 18, 1889.

Appellants contend that "the judgment of the court below is against the law and the evidence in this, that the proof showed that at the date of the death of John M. Cavanaugh the policy of insurance in question was, and had been since its delivery by the insurance company, the sole and exclusive property of appellants, and by them purchased at their own expense and risk, and for their own exclusive use and benefit, and that the deceased, John M. Cavanaugh, had no interest therein at any time, and was not liable for the payment of premiums thereon, nor had he any interest in such premiums," and that "the judgment of the court below is contrary to the law and evidence, in that, in and by the covenant and warranty of the said John M. Cavanaugh, pleaded and proven, the plaintiffs were and are estopped from

claiming the proceeds of said policy, and no matter sufficient in law was pleaded or proven to avoid the force and effect of said warranty." We think that all of the questions presented in this case have been decided by this court. The policy in question was issued to Cavanaugh. By an agreement made before its issuance, it was assigned, subsequent to its issuance, to appellants, who were his creditors. By an agreement as binding and expressive as language could make it, Cavanaugh was released from the obligation of paying for the insurance, and was bound to surrender and release all of its benefits to appellants in consideration of his indebtedness to them, and of their paying the premiums required to keep it in force. This contract was observed by both parties, and in its fulfillment the insurance money was paid to appellants, who now seek a literal enforcement of the contract. The policy of the law forbids such enforcement of it. The law treats such a contract, between a debtor who takes out such a policy and assigns it to his creditor, as a security only for the debt, advances to keep the policy in force, and expenses of its collection, with interest on such disbursements. Such is the relief administered by the judgment in this case, and it is affirmed.

WHEELER v. WHEELER.

(Supreme Court of Texas. March 12, 1890.)

DISTRICT COURTS—PLACE OF HOLDING.

Act Tex. Feb. 27, 1889, (Laws 1889, p. 152,) divides the county of Dallas into two judicial districts by the line of a given railroad, deviating therefrom only in one place, for the purpose of running the line through the court-house. The act further directs that the court of each district shall be held "therein," and the courts of the northern and southern districts were accordingly held, respectively, in rooms north and south of the line running through the court-house. The court-house was burned, and the county commissioners furnished temporarily, in its stead, a building situated wholly south of the line, and assigned a room therein as the place of holding the district court for the northern district. Held, that under this act such court may lawfully sit at the place designated, as all other laws relating to district courts, whose jurisdiction in any event extends over the whole county, contemplate that they shall be held at the court-house of the county, which, under Rev. St. art. 705, is to be provided by the commissioners of the county.

Appeal from district court, Dallas county. *Bassett & Muse and John W. Bookhout*, for appellant. *J. D. Thomas and M. L. Crawford*, for appellee.

HENRY, J. At its last session the legislature divided Dallas county into two judicial districts, making the Texas & Pacific Railroad their dividing line, deviating from said line only in the city of Dallas, and there only to the extent necessary to pass through the center of the county court-house, by passing along certain streets and the court-house square. The plaintiff brought this suit in the district court of Dallas county to recover of the defendant, who is her lawful husband, a divorce from the bonds of matrimony. The

petition, which was filed December 3, 1888, was in due form, and sufficient to authorize the judgment. By proper action of the clerk, the cause was duly assigned and placed on the docket of the district court of the fourteenth judicial district. The defendant answered by a general denial. The case was properly pending for trial in said court on the 7th day of February, 1890, at which time the court-house of Dallas county was destroyed by fire. Afterwards, on the 10th day of February, 1890, the county commissioners' court of Dallas county rented a building in the city of Dallas, known as the "Farmers' Alliance Building," for the use of said county, and, by proper proceedings, declared the same to be the court-house of said county, and assigned and set apart a suitable room therein in which to hold the sessions of said district court of the fourteenth judicial district. Said building is wholly situated south of the dividing line between the fourteenth and forty-fourth judicial districts, as defined in the first section of the act of February 27, 1889, (Laws 1889, p. 152;) and no part of said building, or of the room assigned and set apart for the holding of said court, lies north of said line, and the same is not within the territorial limits of said fourteenth judicial district. It is conceded that no suitable building can be found in the city of Dallas within which to hold said two district courts, having suitable rooms for that purpose, one of which shall lie north and the other south of said dividing line, and none such can be procured or erected by the county commissioners' court within a reasonable time, say within 12 months. The judge of said court duly opened his court in the room so assigned and set apart for that purpose, and proceeded with the call of the docket thereof; and this cause being duly called, and the plaintiff, by her counsel, having announced herself ready for trial, the defendant, by his counsel, objected to the trial thereof, on the ground that the court had no power or authority to hold its sessions or to hear and determine said cause in said building and room, for the reason that the same were situated without the territorial limits of said fourteenth judicial district; but his said objection was overruled, and the court proceeded to hear and determine the cause; to all of which the defendant duly excepted. No other cause had been previously heard by said court in said building or room. Upon the trial the plaintiff introduced evidence sufficient to support the judgment. The defendant offered no evidence. Judgment was thereupon rendered for the plaintiff, to which the defendant duly excepted, and in open court gave notice of appeal. No other question is involved in this appeal, except that relating to the power and authority of the court to hold its sessions, and to hear and determine causes, over objection, in said building and room.

It is insisted by the appellant that the law plainly directs that the court shall be held

within the district by the use of the word "therein," and that, when the legislative intent can be arrived at from the words used in the statute, courts can not speculate beyond the reasonable import of the language used; that the spirit of the act must be gathered from the words employed, and not from conjecture *altunde*; and that it is not to be assumed that the legislature has used words without intending to convey an idea, or has misconceived the meaning of the words it has selected; that when the language of a law is explicit, and involved in no obscurity, there is no room for construction, and hence no occasion to look beyond the letter of the law itself for its meaning and purpose. We concur in the correctness of these propositions. The fact that the line dividing the two districts was made to deflect for a short distance from its general and well-marked course, for the purpose alone of passing through the center of the court-house, adds force to the argument furnished by the language of the act, that it was its purpose to require each court to be holden within the territorial boundaries of its own district. It also furnishes the argument that it is the unmistakable purpose of the act that the courts of both districts shall be held in the same house. But other things must be considered. The act in question fails to express, in a number of particulars, everything that is essential to be done and observed to make lawful the terms of the courts to be held in the two districts. It was enacted with reference to the provisions and regulations of the general law on the same subject, and in construing it it is important to keep them in view. Some of these provisions are as follows: Article 705 of the Revised Statutes makes it "the duty of the county commissioners' court of each county * * * to provide a court-house * * * for the county." A number of important acts are commanded to be performed at the court-house of the county, and cannot be lawfully transacted elsewhere. The whole body of the law contemplates that each county shall have one court-house, and not a number of them. It is not essential that the whole of it should be under the same roof. For the purpose of making execution sales, article 2310 of the Revised Statutes defines the "court-house door" to be the principal entrance to the house provided by law for the holding of the district court. This provision shows, even if it did not otherwise sufficiently appear, that the district court is one of the courts that the commissioners' court is charged with the duty of providing a "court-house" for. The sessions of the commissioners' courts are expressly directed to be held "at the court-house of their respective counties." Rev. St. art. 1525. The commissioners' court is authorized, "when necessary, to provide buildings, rooms, or apartments at the county-seats, other than the court-house, for holding the sessions of the county courts." Id. art. 1521. The commissioners' court being

positively charged with the duty of providing "a court-house for the county," and express authority being given empowering it to provide a place, other than the court-house, for one of the courts to sit, without mentioning the others, it comes fairly within a well-known rule of construction to hold that there exists no authority to authorize either of the others to be held anywhere except at the court-house provided for that purpose, when the one provided is suitable and sufficient. The intention of the act in question, if the construction is limited to its own terms, to require the courts for each district to be held within its own boundaries, is not more evident than is the purpose that both courts shall be held in the same building, the county court-house. There are, to say the least, as many reasons, and they are quite as strong, for not disregarding the last-mentioned purpose, as there are for giving effect to the direction that the courts shall be held within the boundaries of their respective districts. Conceding that the act creating the district equally imposes the two purposes, the relative weight of the one relating to the house is greatly increased by the other laws relating to the subject. None of the other laws have any regard to boundaries except those of the county itself, but, on the other hand, they are all unambiguous and emphatic in the requirement that all district courts for the county shall be held in the county court-house, at one place established for that purpose by the commissioners' court. In the case of *Russell v. Farquhar*, 55 Tex. 359, this court said: "While it is for the legislature to make the law, it is the duty of the courts to 'try out the right intendment' of statutes upon which they are called to pass, and by their proper construction to ascertain and enforce them according to their true intent; for it is this intent which constitutes and is in fact the law, and not the mere verbiage used by inadvertence or otherwise by the legislature to express its intent, and to follow which would pervert that intent. * * * If its mere perusal should not enable the court to satisfactorily interpret it, then it becomes the duty of the court to look diligently for the intention of the legislature, keeping in view at all times the old law, the evil, and the remedy." The final title of the Revised Statutes directs that the "provisions thereof shall be liberally construed, with a view to effect their objects and to promote justice." In the case of *Sevier v. Teal*, 16 Tex. 372, the validity of a judgment rendered by a court held away from the county-seat was in question. Chief Justice HEMPHILL said: "It will not admit of question that, by law, courts of probate were required to be holden at the court-houses of the respective counties. * * * The injunction to hold the courts at the county-seats has reference only to the ordinary circumstances in times of peace, and cannot be construed to prohibit the holding of courts altogether, in times of war, for the reason that under pressure of

hostilities it has become impossible or unsafe to hold them at the county-seats." The requirement to hold the courts in the county court-house, and at the same time each in its own district, was possible and convenient when the law was enacted. By a contingency then unexpected and unprovided for, it has become impossible to do both at present. In arriving at the intention of the legislature, the changed conditions ought to be kept in view, and the laws on the subject ought to be given such interpretation as will give effect to the intention of the legislature, as applied to the change. There is no constitutional restriction upon the power of the legislature to authorize both courts to be held in the same district. No jurisdictional question relating to the powers of the courts can arise, as they have concurrent jurisdiction, in every respect, throughout the county. The convenience of the people, which is the great object in view in prescribing a place for holding the courts, will be promoted by holding both in the same place. By establishing both at the same place, laws on all other subjects, dependent upon, or having relation to, the place of holding the courts, can have their full and literal application, without confusion or uncertainty, which would not be so certainly the case if two places for holding district courts should be established in the same county. The necessity is a temporary one, and to meet it we think the county court had authority to provide the building in which the court was held from which this appeal was taken as the county court-house, and that all district courts for the county may be lawfully held in said building until another one shall be provided. The judgment is affirmed.

GUADALUPE & SAN ANTONIO RIVERS STOCK ASS'N v. WEST.

(Supreme Court of Texas. March 11, 1890.)

SECONDARY EVIDENCE — ASSIGNMENTS OF ERROR.

1. Under Rev. St. Tex. art. 586, which requires corporations to keep a record of all business transactions, and article 801, which makes such records, or copies thereof, authenticated by the signatures of the president and secretary under the seal of the corporation, competent evidence in any action or proceeding to which such corporation may be a party, the best evidence of an assessment made by authority of an order of the board of directors of a corporation is the record of the order or resolution of the board, which must be produced in an action by the corporation to collect the assessment, unless some sufficient reason is shown why it cannot be produced.

2. An assignment that "the court erred in refusing a new trial to plaintiff as asked for in its motion and amended motion for new trial, filed herein on the 7th and 10th of August, 1889," is too general to entitle it to consideration.

Commissioners' decision. Appeal from district court, Lavaca county.

S. F. Grimes and *R. A. Pleasants*, for appellant. *A. P. Bagby* and *Ellis & Patton*, for appellee.

ACKER, J. The *Guadalupe & San Antonio Rivers Stock Association*, a corporation,

brought this suit against George W. West, one of its members, to collect an assessment alleged to have been made by plaintiff by authority of its charter. The trial was without a jury, and resulted in judgment for defendant, from which this appeal is prosecuted.

On the trial, plaintiff offered to prove by the deposition of Mugge that the assessment was made by authority of an order of the board of directors made at a meeting of the board on the 26th day of August, 1884. The evidence was objected to upon the ground that it was "secondary, and not the best, evidence." The objection was sustained, and this ruling is assigned as error. Article 586 of the Revised Statutes requires corporations to keep a record of all business transactions; and article 601 makes such records, or copies thereof, authenticated by the signatures of the president and secretary, under the seal of the corporation, competent evidence in any action or proceeding to which such corporation may be a party. To fix defendant's liability, plaintiff must have shown that the assessment was made, the best evidence of which was the record of the order or resolution of the board of directors. It is a familiar rule governing the production of evidence that the best evidence of which the case, in its nature, is susceptible, must be produced, and none other can be received, if objected to, until the non-production of the best is accounted for. There was no attempt to show that the records of the corporation had been destroyed, or to explain in any other way the non-production of the primary evidence as a predicate for the introduction of the secondary evidence offered; and we think the court did not err in excluding it.

The only other assignment of error presented is: "The court erred in refusing a new trial to plaintiff as asked for in its motion and amended motion for new trial, filed herein on the 7th and 10th of August, 1889." Under numerous decisions of this court, we must hold that this assignment is too general to entitle it to consideration. *Blum v. Whitworth*, 66 Tex. 350, 1 S. W. Rep. 108; *Cannon v. Cannon*, 66 Tex. 682, 3 S. W. Rep. 36; *O'Neil v. Bank*, 67 Tex. 40, 2 S. W. Rep. 754; *Jackson v. Cassidy*, 68 Tex. 282, 4 S. W. Rep. 541; *Bumpass v. Morrison*, 70 Tex. 758, 8 S. W. Rep. 596. We think the judgment of the court below should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment affirmed.

WARD *et al.* v. BILLUPS, Sheriff, *et al.*
(Supreme Court of Texas. March 11, 1890.)

INJUNCTION—VIOLATION.

Where the enforcement of an order of sale on foreclosure of a trust-deed has been enjoined on plaintiffs' petition claiming the land as their homestead, its sale under execution, issued on the judg-

ment of foreclosure, while the injunction is still in force, is a contempt of court, and passes no title.

Commissioners' decision. Appeal from district court, Galveston county.

Action by Minnie F. Ward and her husband, L. E. Ward, against J. E. Billups, sheriff, and others, for a cancellation of a sheriff's deed of certain property as a cloud upon their title, and for a perpetuation of an injunction against the sale of the property. Verdict for defendants, and from judgment thereon, and an order denying a new trial, plaintiffs appeal.

A. B. Petricolas and J. D. Owen, for appellants. Davidson & Minor, for appellees.

COLLARD, J. Plaintiffs' petition claimed the property as their homestead, and that it was such at the time and before the deed of trust was executed, and on this account they asked to be protected therein, and prayed that defendants be restrained in the enforcement of the order of sale issued under the judgment of Wallis, Landes & Co., foreclosing the deed of trust. The district judge, by his fiat in chambers, ordered the clerk to issue the writ prayed for. The clerk issued the writ, commanding defendants to desist from selling, or causing to be sold, the lot claimed by plaintiffs as a part of their homestead, until further order of the district court. Plaintiffs' injunction was still pending when the execution was issued, and the property was sold thereunder to Wallis, Landes & Co., defendants enjoined. The sale under the execution was in violation of the letter and spirit of the injunction. The order of sale could not have effect as an execution until the sale of the specific property therein described was made, nor could an ordinary execution issue thereunder until the injunction restraining the execution of the order of sale was disposed of. The judgment foreclosing the deed of trust was by its terms to be enforced by an order of sale, and, where the property ordered sold was exhausted, if the judgment was not satisfied execution was to be issued, and the unpaid portion of the debt was to be made in the ordinary method by levy and sale. The object of plaintiffs' suit was to stop proceedings to sell the property until the question of homestead was adjudicated, and the object and purpose of the suit was to prevent the sale of the lot by any process of the court under the judgment until the court decided the homestead issue. Defendants attempted to defeat these purposes of the suit and the writ, by suing out execution, and causing sale to be made, before any adjudication of the homestead question, and while the injunction was still in force. This was a contempt of the court's order enjoining the sale; no title could pass by such proceeding. *Seligson v. Collins*, 64 Tex. 815; 2 High, Inj. § 1434; *Id.* § 1447; *Rap. Contempts*, § 51; *Morris v. Bradford*, 19 Ga. 527; *Farnsworth v. Fowler*, 1 Swan, 1. It was error to overrule the exceptions of plaintiffs to that portion of de-

defendants' answer setting up the title acquired under the execution sale, and error not to exclude the evidence of such sale, for which we think the judgment of the lower court should be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeal examined, their opinion adopted, and judgment reversed, and the cause remanded.

WILLS POINT BANK v. BATES *et al.*

(Supreme Court of Texas. Feb. 7, 1890.)

RELIEF AGAINST EXECUTION—JOINDER OF PARTIES—INTERVENTION IN ATTACHMENT.

1. In injunction to restrain executions on judgments, the objection that the judgments were rendered more than a year before the filing of the petition is not good where the petition was filed within a year from the affirmance on appeal of one judgment, and the others were made to depend on that by stipulation of parties.

2. Defendants obtained separate judgments against C., and attached property thereon. In actions by defendants against plaintiff, to whom the property had been transferred by C., to try title to the property, all the actions were made to depend on the result of one, and judgments were entered against plaintiff for the value of the property attached, which was, in each instance, in excess of the judgment against C. *Held*, that defendants were properly joined in one action to restrain the executions on the ground of this excess.

3. Where property which has been attached is claimed by one not a party to the writ, and a trial is had of the right to the property, it is provided by Rev. St. Tex. art. 4841, that, in case the value of the property is greater than the amount claimed in the writ by virtue of which it was levied on, the damages shall be assessed "on the amount claimed under said writ." Article 4848 provides that, when the claimant of the property shall fail to establish his right thereto, judgment shall be rendered against him for the value of the property, with interest. This is amended by Laws of 1887, by adding that such judgment shall be rendered in favor of the plaintiff in the writ, and shall fix the amount of the plaintiff's claim, and, in case the judgment shall not be satisfied by a return of the property, then execution shall issue thereon in the name of the plaintiff for the amount of his claim, provided the amount of such judgment exceed such claim; and in such case the excess of the judgment shall inure to the benefit of any person who shall show superior right to the property claimed as against the claimant. *Held*, that where the plaintiff in the writ issues execution for the full amount of his judgment against the claimant, instead of the amount of his claim with interest and damages, the latter was entitled to relief, and that, the illegal proceedings being subsequent to judgment, injunction was the proper remedy.

4. In injunction to restrain execution on judgments on the ground that the judgment creditors had released one of the judgment debtors, the answer should be sworn to on the issue of release by the defendants in person before it can be considered on motion to dissolve.

Error from district court, Van Zant county; JOHN L. SHEPPARD, Judge.

J. C. Kearby and Russell & Tantis, for plaintiff in error. J. G. Kearby, Kilgore & Lively, and Crawford & Crawford, for defendants in error.

HENRY, J. The Wills Point Bank was the name of a partnership composed of H. Fuller, W. A. Williams, J. M. Lybrand, and J. W. Fuller. J. A. Guegenheim & Co. were in-

solvent merchants who owed debts to Wills Point Bank and to eight other firms, all of which are appellees in this cause. Guegenheim & Co. conveyed their property to Wills Point Bank. Seven of the other creditors sued out and caused attachments to be levied on the property, and the eighth one caused a distress warrant to be levied on it. The Wills Point Bank proceeded to try the right of property in each case with separate bonds and affidavits. Agreements were made in all of the other cases that they should abide the result of the litigation in the Bates, Reed & Cooley Case. That suit was litigated to a final judgment in favor of Bates, Reed & Cooley, and was affirmed by this court at its Tyler term, 1888. 10 S. W. Rep. 348. In pursuance of the agreements, judgments were entered in each of the cases, in the district court, against the Wills Point Bank; and executions were sued out in all of the cases, and levied upon the property of the said H. Fuller. H. Fuller, J. M. Lybrand, and J. W. Fuller instituted this suit, making all of the plaintiffs in said judgments, and said W. A. Williams and the sheriff of Van Zant county, defendants. The petition charges that on the 12th day of October, 1887, the plaintiffs in said attachment suits had judgments therein against the said J. A. Guegenheim & Co. for the following amounts, respectively: Bates, Reed & Cooley for \$685.65, with interest at 8 per cent. per annum from 20th September, 1883; Adler, Goldman & Co. for \$684.36, with 10 per cent. interest from April 9, 1884; Clark Bros. for \$308, with 8 per cent. from 9th April, 1884; Wolf Bros. & Bath for \$468.85, with 8 per cent. from 9th April, 1884; M. Schneider & Bro. for \$551.45, with 8 per cent. from 9th April, 1884; Lonchein Bros. for \$659.30, with 8 per cent. from April 9, 1884; Levinson & Co. for \$672, with 8 per cent. from April 9, 1884. The petition charges that on said date, the 12th day of October, 1887, said judgment creditors recovered judgments in the trial of right of property cases against the Wills Point Bank as follows:

Bates, Reed & Cooley for.....	\$1,424 41
Clark Bros. for	947 28
M. Schneider & Bro. for.....	1,214 77
Adler, Goldman & Co. for.....	1,118 46
Lonchein Bros. for.....	1,801 15
L. Levinson & Co. for.....	1,417 53
Wolf Bros. & Bath for.....	1,026 66

The petition charges that K. Mandel & Co. discontinued their suit against J. A. Guegenheim & Co. without taking any judgment against them, but on said date (12th October, 1887,) a judgment was rendered in their favor, in their trial of right of property case, against the Wills Point Bank, for the sum of \$862. The petition charges that the amounts of the judgments in the trial of the right of property cases were arrived at by taking in each case the value of the property on which the distress warrant and various writs of attachment were levied, as assessed by the officer who levied the process, and adding

thereto interest on said value from date of bonds, and 10 per cent. damages. Plaintiffs charge that, while the aggregate amount of the judgments against said J. A. Guegenheim & Co. did not exceed \$5,619.09, the aggregate amount of the judgments rendered against the Wills Point Bank was \$9,312.80. While the aggregates stated in the pleading may not be mathematically correct, they are approximately so, and serve to illustrate the question at issue. The petition for injunction, in addition to the foregoing matters, alleges that, at the time of the rendition of said judgments against the Wills Point Bank, and prior and subsequent thereto, the aforesaid W. A. Williams fraudulently conspired and confederated with all of the plaintiffs in said judgments, with the purpose of injuring and defrauding petitioners, to testify, in favor of said judgment plaintiffs, that petitioners had admitted to him that the sale from Guegenheim & Co. to the Wills Point Bank was intended as a mortgage only, and that said Guegenheim retained an interest in the property transferred. All of which, they allege, was false. It is alleged that, in furtherance of said fraudulent purpose and agreement, said Williams gave said testimony as a witness in the trial of said cause of Bates, Reed & Cooley against the Wills Point Bank. The petition charges that, in consideration of said services, said judgment plaintiffs agreed and contracted with the said W. A. Williams that they would acquit, release, and discharge him from any and all liability from any of the aforesaid judgments, and that, in pursuance of said design, said creditors have acquitted, released, and discharged the said Williams from any and all liability connected with, incident to, or growing out of, said judgments; that said release, discharge, and acquittance of said Williams is in writing; that said Williams was the partner in business of petitioners, and in the purchase from said Guegenheim & Co., and by the terms of their partnership he was liable for the payment of one-third part of said judgment debts. The petition charges that plaintiffs did not know until after said judgments were rendered that said Williams had been discharged and released from said judgments. The petition charges that said judgments were not only rendered for excessive amounts, but that they, and especially the one in favor of K. Mandel & Co., were irregular and illegal in other particulars. The petition prays for the writ of injunction restraining the sale of the property levied upon, and forbidding further proceedings to enforce the judgments against the Wills Point Bank; and, if not found entitled to that relief, plaintiffs ask that no more be allowed to be collected under said judgments than the amounts of the judgments against Guegenheim & Co. A temporary injunction was issued as prayed for. Defendants appeared and filed exceptions to the petition on the following grounds: "(1) Because the petition shows on its face that each execution sought to be enjoined

was issued on a judgment rendered more than one year before the filing of said petition; (2) because it appears that the judgments sought to be enjoined are separate and distinct causes of action, and that there was no community of interest between defendants authorizing all of said judgments to be joined in the same suit; (3) because the petition shows no equity; (4) because it is sought to review and correct the judgments mentioned by injunction, instead of by appeal." The defendants also filed an answer. The court sustained the exceptions, and dismissed the petition, awarding 10 per cent. damages to the defendants who were judgment creditors, but saving to plaintiffs such rights as they may have against K. Mandel & Co.

The objection that more than 12 months had elapsed between the rendition of the judgments and the grant of the writ of injunction is not applicable to this case. If it was otherwise, still the fact that the injunction was granted within 12 months from the affirmance of the Bates, Reed & Cooley Case, and that all of the judgments were made to depend upon that, would be a sufficient answer to the objection.

Nor do we think that the exception on the ground that the petition was multifarious, because the interests of the defendants were separate and distinct from each other, ought to have been sustained. In the case of Clegg v. Varnell, 18 Tex. 304, this court, referring to Story's Equity Pleadings, said: "There is not any positive, inflexible rule as to what constitutes multifariousness which is fatal to the suit on demurrer. The courts have always exercised a sound discretion in determining whether the subject-matters of the suit are properly joined * * * or not. * * * The substance of the rules on this subject appears to be that each case must be governed by its own circumstances; and whether it be multifarious or not must be left, in a great measure, to the sound discretion of the court. Defendants ought not to be put to inconvenience and expense in litigating matters in which they have no interest; and, on the other hand, unnecessary litigation, and multiplicity of suits, should be avoided. While defendants are protected, plaintiffs must not be put to the necessity of bringing two suits instead of one." We think this doctrine applies with peculiar force to the case before us. The judgments against plaintiffs originated in the same transaction. The questions with regard to their validity and interpretation are the same. The executions were levied upon the same property, and the question upon which it is sought to restrain them was common to all the cases, and substantially affect them all alike; and, in addition to that, the litigation has heretofore been conducted as if the different proceedings were but one cause.

The exception to the plaintiffs' seeking relief from the judgments against them as members of the Wills Point Bank firm by injunction, instead of by appeal or writ of er-

ror to revise the judgments, and correct them, if found erroneous, has no proper application to this case. When an error occurs in the proceedings leading to a judgment, or in the judgment itself, it is undoubtedly true that the error can be corrected only by proceedings taken in the case, either in the nature of a motion or proceeding for a new trial or review, or by appellate proceedings. When the error does not rest in the proceedings leading to the judgment, or in the judgment itself, but in unlawful proceedings occurring subsequently with regard to the levy and collection of process issuing out of the judgment, the remedy by injunction is appropriate. Plaintiffs in the attachment suits, by prevailing in the trial of right of property cases, acquired thereby the right either to have the attached property of Guegenheim & Co. returned to them, so that they could collect out of that their judgments against Guegenheim & Co., including costs and interest, or to have execution for their debts against the claimants and their sureties. They were, in any event, entitled to collect from the Wills Point Bank, as unsuccessful claimant of the property, 10 per cent. damages upon the amounts of their respective judgments against Guegenheim & Co. If the attached property was not returned, while the remedy was changed, the amounts of their demands were not thereby enlarged. In that state of case, they became entitled to executions to enforce collections from the Wills Point Bank, and the sureties on claimants' bonds, of the amounts of their judgments against Guegenheim & Co., with 10 per cent. damages thereon, costs and interest on the judgments against Guegenheim & Co. until they were collected. These judgment creditors, when enjoined, were, without authority of law, undertaking to enforce through executions the collection of amounts greatly in excess of the amounts of the principal and interest of the judgments against Guegenheim & Co., including 10 per cent. damages thereon. The record shows that the value of the property attached was in every instance greater than the amount claimed in the writ by virtue of which it was levied upon. The law, in that state of case, required the damages to be assessed "on the amount claimed under said writs." Rev. St. art. 4841.

Until the law was amended by the act of April 2, 1887, the judgment to be rendered in trial of right of property cases was provided for by article 4843 of the Revised Statutes, reading as follows: "In all cases where any claimant of property under the provisions of this title shall fail to establish his right thereto, judgment shall be rendered against him and his sureties for the value of the property, with legal interest thereon from the date of such bond." The petition shows that the judgments rendered against the Wills Point Bank on the 12th day of October, 1887, were entered strictly in pursuance of this statute; and, as the assessed value of the

property was in each instance much larger than the debt, and as interest and damages were calculated on the value of the property instead of upon the debts, it followed that the judgments were for a sum greater than the creditors had under the law a right to collect. As long as the judgments were in the terms of the law, there existed no ground for setting them aside upon motion, or reversing them upon appeal. But while the judgments, being in the form prescribed or authorized by the statute, would be permitted to stand, it would still be necessary to give to them a construction consistent with the purpose of the law, and with the rights of the parties to them. In order that the judgments might have only the operation that the law intended to give to them, it was necessary for the executions issued upon them to be only for such amounts as were given by the judgments against Guegenheim & Co., including interest, and 10 per cent. damages thereon, and costs. By the amendment of 1887 the following language was added to the article, (4843;) what we have quoted from it still remaining as formerly: "Such judgment shall be rendered in favor of the plaintiff in the writ, or of the several plaintiffs, if more than one, and shall fix the amount of each plaintiff's claim; and, in case such judgment should not be satisfied by a return of the property as provided in article 4845, then execution shall issue thereon in the name of the plaintiff for the amount of his claim, or of all the plaintiffs for the sum of their several claims, provided the amount of such judgment exceed such claim or sum; and in such cases the excess of such judgment shall inure to the benefit of any person who shall show superior right or title to the property claimed as against the claimant; but, if such judgment be for a less amount than the sum of the several plaintiffs' claims, then the respective rights and priorities of the several plaintiffs shall be fixed and adjusted in the judgment." That part of the article last quoted had been quite recently enacted when the judgments now in controversy were rendered.

Before the amendment, we think that a judgment rendered in the terms of the statute should have been construed to have the same operation as the one provided for by the amendment. It was substantially so decided by this court in the case of *Elser v. Graber*, 69 Tex. 226, 227, 6 S. W. Rep. 560. As, until the amendment, such judgments as those in controversy were in literal compliance with the statute, in matter of form, and as, when they were rendered, the statute had been so recently changed, and still preserved the exact phraseology of the old law, leaving it, when applied to such judgments as those under consideration, still somewhat obscure, without changing the substantial rights under them from what they would have been as the article originally stood, we think the courts would not have been justified in refusing to grant relief against an unlawful use of them,

the same as would have been proper before the amendment was made. The plaintiffs in the attachment judgments, if no other objection to their enforcement exists, ought to be, upon this issue, enjoined from taking out executions upon their judgments for any amount in excess of the amounts of their judgments as rendered against Guegenheim & Co., including interest, with 10 per cent. damages on the amounts of said judgments on the 12th day of October, 1887, and costs of said suits. K. Mandel & Co., never having obtained any judgment against Guegenheim & Co., ought to be, on this issue alone, enjoined from enforcing their judgment in any manner. Appellees argue that plaintiffs' petition fails to show that the judgments against the claimants were excessive, because it does not allege what amounts of costs were recovered in the Guegenheim & Co. Cases. While in fact it does not, it is yet evident that the excessive amounts do not include the costs.

Other matters complained of in the proceedings leading to the judgments in the trial of the right of property cases will not be considered, because, if improper, the remedy is not by injunction.

The exception that the petition shows no equity raises a question of importance, in addition to those that we have discussed. It is whether the release of Williams discharged his partners. Counsel discuss this question in their briefs as if the answer of defendants is to be considered in disposing of it. As we have said, plaintiffs' petition was dismissed upon the consideration of defendants' exceptions, and not upon their answer, and hence the answer is not before us for consideration; but, in view of another trial, we will say that neither the petition nor the answer are sufficiently specific with regard to the discharge, and, while we might hold the petition sufficient in that particular on general demurrer, we would not hold the averments of the answer sufficiently certain and positive to dissolve the injunction, even if it could be held sufficient in other respects for that purpose. We are of the opinion that upon the issue of the release in this case the answer should be sworn to by the defendants in person, before it can be considered on motion to dissolve. As the issues are now presented by the pleadings with regard to the effect of releasing Williams, we deem it neither useful nor proper to do more than express ourselves in a general way, and only upon the effect of an unqualified release. The doctrine seems to be well established that such a release of one of a number of joint debtors discharges the others. *McIlhenny Co. v. Blum*, 68 Tex. 197, 4 S. W. Rep. 367; *Bridges v. Phillips*, 17 Tex. 128; 1 Pars. Cont. 28; *Elliott v. Holbrook*, 33 Ala. 667; *Vandever v. Clark*, 16 Ark. 335; *Tuckerman v. Newhall*, 17 Mass. 584; *Bonney v. Bonney*, 29 Iowa, 448; *Brown v. Marsh*, 7 Vt. 327; *Parmelee v. Lawrence*, 44 Ill. 405. The judgment is reversed, and the cause is remanded.

EVANS *et al.* v. OPPERMAN.

(Supreme Court of Texas. Feb. 25, 1890.)

WILLS—INSURANCE.

1. The title to an insurance policy on the life of a husband, payable to his wife, "her executors, administrators, or assigns," does not pass under a bequest by her to him of all her personal property in certain houses, and her interest in the community property acquired during the marriage.

2. In an insurance policy payable to the wife of the assured, and, in the event that she died before him, then to their children, the words "their children" mean the children common to the assured and his wife.

Appeal from district court, Galveston county; WILLIAM H. STEWART, Judge.

Action by John E. M. Opperman, by his guardian, against James W. Evans and others. Judgment was rendered for plaintiff, and defendants appealed.

Macmanus & Wilson, for appellants. *Wheeler & Rhoades* and *Davidson & Minor*, for appellee.

GAINES, J. The appellants are the children of Gustave Opperman by his first wife, and appellee is his only child by his second. During the life of his first wife, Mary A. Opperman, Gustave Opperman took out three policies of insurance upon his life,—one for \$10,000, one for \$5,000, and the third for \$4,520. The first and third were made payable, upon the death of the assured, to his wife Mary A. Opperman, and provided that, in the event that she died before her husband, the money should be paid to their children. The second policy was made payable, upon the death of the assured, to "Mary A. Opperman, her executors, administrators, or assigns." Mary A. Opperman died before her husband, having made a will in which she made to him certain bequests and devises, and also bequeathed and devised to him all her interest in their community property. Gustave Opperman then married a second time, and afterwards died, leaving a will by which he devised to his second wife certain specific property, and gave all the residue of his estate to his children by his first wife. The appellee was born after his death. The money due upon the three policies of insurance was paid to the children of the first marriage. This suit was brought by the child of the second marriage against his half brothers and sisters, claiming an equal interest with them in each of the policies of insurance, and seeking to recover that interest.

There was a demurrer interposed to the petition, and it was overruled by the court. This action of the court presents a question we have found it difficult to determine. From the face of the petition, it would seem that the ground of complaint is that the defendants had collected the whole of the insurance money, and that the plaintiff is entitled to an equal share, namely, one-tenth, of it. Admitting all this to be true, it is not clear that any injury has been done to the plaintiff. If he was entitled to a part of the money, the insurance companies still owe it to him, and

the action of the defendants have not deprived him of any right. If they had held the legal title to the money, and he had owned a beneficial interest in it, his right to sue them would have been clear. But, in the absence of any fiduciary relation, or any privity of contract, between the parties, and of the deprivation of any right which he had, it is difficult to see that he has a cause of action against them, according to the facts stated in the petition. It is alleged that they converted the policies, and the money due thereon, to their own use. This means, we presume, that they collected the money, and may be intended to mean that they delivered the policies to the companies that issued them. If the right of the parties had been to a specific fund or sum of money, and the defendants had appropriated the whole, the plaintiff being entitled to a part, he would have had a right of action against them. But the claim here was merely for debts owed by the insurance companies. We have examined many cases in which suits were brought for money had and received, and have found none that would warrant this action. Whether the conversion of the evidence of debt by one or more creditors will give a right of action to another creditor, having a common interest in a chose in action, we need not determine. We are of opinion that, under the facts disclosed by the testimony, the plaintiff has a right of action for a part of the money which he claims; and, since we have determined to reverse the case upon another ground, he will have an opportunity to amend his petition so, at least, as to obviate the present difficulty.

We deem it necessary to determine but one question presented by appellant's assignments of error. The decision of that question, in our opinion, requires a reversal of the judgment, and, so far as we can now see, will be a sufficient guide to enable the court below to make a correct disposition of the cause upon a new trial. The court held that by the will of Mary A. Opperman the title to the \$5,000 policy passed to her husband, and that upon his death the money accruing thereon belonged to his children; each taking an equal share. So much of that will as relates to this question is as follows: "I, Mary Ann Opperman, wife of Gustavus Opperman, of Galveston, being of lawful age, and of sound mind and memory, wishing that my husband may enjoy the property which he has acquired during our marriage, and also that which he has, out of affection for me, donated to me by deed, do make, ordain, and publish this, my last will and testament. *Item First.* I give and bequeath unto my said husband, Gustavus Opperman, the seven lots on which we now live, being lots one (1) to seven, (7,) both inclusive, in block 552, in the city of Galveston, the dwelling-house, and all other improvements on said seven lots, also all the personal property belonging to me by gift from him, or otherwise, in said dwelling-house, and in all other

buildings on said lots; also, I give and bequeath to my said husband" certain other real estate; "and also, I give and bequeath to my said husband all my interest in the community property acquired by us during our marriage, trusting to him to make proper provision for our children." We think it clear that the right of the testatrix to the policy did not pass by that clause which bequeathed to her husband all the personal property in the dwelling-house and other buildings on the lots devised. That, in our opinion, was intended to embrace only tangible property, and probably applied mainly to the household and kitchen furniture, and other articles used, in connection with the residence, for the comfort of the family. Did, then, the title to the policy of insurance pass by the bequest of the interest of the testatrix in the community property? If the policy was the common property of the husband and wife, it did; but, if it was the separate property of the wife, it did not. It is well settled that the husband may make a gift to the wife of the community property, so as to make it her separate estate. *Story v. Marshall*, 24 Tex. 305; *Reynolds v. Lansford*, 16 Tex. 286; *Smith v. Boquet*, 27 Tex. 507. In the case first cited, in speaking of a deed from the husband to the wife, Chief Justice WHEELER says: "In the absence of any evidence of intention outside of the deed, it must be taken as evidencing the intention which upon its face it imports; that is, to convey to the wife the estate of the husband in the property. * * * To deny it that effect would be to render the whole deed inoperative and void." We think it equally manifest that when a husband insures his life, and makes the policy payable to his wife, his intention is that the policy shall inure to her separate use and benefit. By the terms of the contract, the money is not payable until the husband is dead, and the marital relation has been dissolved. It is clear that the policy in question was the separate property of Mrs. Mary A. Opperman, and that it did not pass to the husband by that clause in her will which conveyed to him her interest in their community estate. The mention in the will of certain parcels of separate property, and of her interest in all the community property, excludes the idea that any separate property not mentioned was intended to be conveyed. The recitals in the will tend to show that it was the intention of the testatrix to devise and bequeath to her husband all her property which she had acquired through him. But we understand the rule to be that when the construction is doubtful the reasons given for a devise may be looked to in order to solve the doubt, but that, when the meaning of the language of the devise is clear, it cannot be controlled by the reason assigned for making it. It has been held that the reason "cannot warrant the rejection of words that are clear," (1 *Jarm. Wills*. 483;) and the same principle precludes us from adding to a bequest prop-

erty not embraced by unambiguous words of description, although the reason assigned for making the will may indicate that it was the intention that such property should be included. On the other hand, counsel for appellants go the length of insisting that Mrs. Opperman took only a life-estate in the policy, and that she had no power to convey it by will. We do not concur in that construction. The case cited by them does not support their position. *Bailey v. Insurance Co.*, 114 Mass. 177. It is there merely held that a policy payable to the executor or administrator of the assured, for the benefit of his wife, must be sued upon by such legal representatives. The words "her executors, administrators, or assigns," in the policy under consideration, are, as we think, descriptive of the estate taken by the beneficiary under the policy, and show that she took an absolute title to it. The court below held that upon the death of Mrs. Opperman the title to her policy passed to her husband, and that upon his death the money due upon it belonged to his children in equal portions, and, having found that the children of the first marriage had received the whole, gave judgment in favor of appellee, the child of the second wife, against each of them, for one-tenth of the sum so received by each. This, we think, was error.

It does not follow, however, that upon the facts proved the appellee was not entitled to recover something. Upon the death of the first wife, the policy descended to her heirs; that is to say, one-third descended to her husband, and the other two-thirds to her nine children, who are the appellants here. Rev. St. art. 1646. The husband made a will in which he made certain devises and bequests to his second wife, and devised and bequeathed the residue of his estate to his children by his first wife. The appellee, as his posthumous child, became entitled to such interest in his father's estate as he would have taken had no will been made. Id. art. 4867. The testimony showed, upon the trial, that administration was taken out upon the estate of Mrs. Mary A. Opperman, the first wife, and that the administrator collected the money due upon the policy, and paid it to her children. The evidence wholly fails to support the allegation of the petition that appellants converted the policy. They received what they were entitled to receive according to the letter of their father's will. Under the statute above cited, appellee succeeded to the portion of his father's estate he would have received had the father died intestate; and, to raise this portion, all the devisees and legatees were required to contribute proportionably out of the parts devised and bequeathed to them by the will. Id. art. 4867. The rights of the appellee in the policy of insurance under consideration grew out of the statute referred to, and must be enforced according to its provisions. What they may be as against appellants, must depend greatly upon the partition and

distribution that has been made of the other property belonging to his father's estate. If he has received his share of the remainder of the estate, and if each devisee has contributed his proportion to make up that share, and if the policy in question has not been accounted for in the settlement, should not his mother, as a devisee, contribute towards making up the amount due him out of this fund? But, not knowing what has been done with reference to the other property of the estate, it is needless to speculate upon such conjectures as may suggest themselves. Having shown that the uncontroverted evidence in the case discloses that his father had but a third interest in the policy for \$5,000, it is apparent that the judgment is excessive, and must be reversed. His remedy is to so amend his petition as to make it an action to recover against the legatees under his father's will the interest which the statute gives him as a posthumous child.

The appellee has filed cross-assignments of error, which we shall now proceed to consider. He complains the court should have allowed interest on the amount adjudged to him from the time the appellant received the money on the policy. With reference to this, we deem it sufficient to say that, if, upon another trial, appellee should be found entitled to recover any part of the money received by appellants on the policy, he should also recover interest from the time it was so received. Whatever judgment is rendered should be against each of appellants, separately, for the part of the money wrongfully received by him, and not against all, jointly, for the whole.

Appellee further insists that the court erred in holding that he was entitled to no part of the money received by appellants on the policies for \$10,000, and \$4,520, respectively. As before stated, these policies were payable to Mary A. Opperman, the wife of the assured, and, in the event she died before her husband, then to "their children." It is contended that "their children" meant not only the children common both to the insured and to his wife, but also the children of either of them, and that therefore appellee was included. We do not assent to the proposition. It may be that, by an inaccurate use of the words, they may be sometimes employed in the sense contended for by appellee, and that, under peculiar circumstances, as in the case of *Stigler v. Stigler*, 77 Va. 163, (to which counsel refer,) they were properly construed to have that meaning. We think, however, the obvious and more accurate meaning of the terms is the children of both the persons referred to. They could not have been intended to include any other children of the wife, because she could only have married again after the death of the husband, and after the policy had become her absolute property. If the husband had intended to embrace any child or children he may have had by a second wife, his meaning would have been clearly

and accurately conveyed by providing that if his wife died first the policy should be payable to his children. By the use of the term "their children," we think, was meant the children common to both husband and wife, and that, under the two policies now under consideration, appellee was entitled to take nothing. For the error of the court in giving judgment against the appellants under the petition and evidence, and because the judgment, in any event, is too large, the judgment is reversed, and the cause remanded.

TYNBERG et al. v. COHEN et al.

(Supreme Court of Texas. March 4, 1890.)

ABATEMENT—WRONGFUL ATTACHMENT—DAMAGES—PARTIES—EFFECT OF APPEAL.

1. When a plea in abatement has been tried and decided adversely to defendant, he has no right to have it tried again, though on appeal the judgment on the main issue, which was tried at the same time as the plea in abatement, be reversed on some ground not affecting such plea.

2. In an action for malicious attachment of part of a stock of goods, it appeared that the sheriff had possession of the goods only three hours, and that he did not interrupt the business of the store, or injure the goods. Held a verdict for \$150 actual damages was excessive, though the defendants in attachment testified that the levy interfered with their business, and caused them loss of credit.

3. In such an action, the facts that third persons refused to sell to defendants in attachment because they saw a newspaper statement that they had failed; that persons who had sold them goods which had not been paid for took them back; and that they were obliged to pay for other goods in order to keep them,—are immaterial, since the damages resulting therefrom are remote.

4. Such an action may be brought before termination of the attachment suit; the issues in the two cases being different.

5. In such an action, the plaintiff in attachment, and the sureties on the attachment bond, may be joined as defendants.

6. A judge may set aside a verdict as excessive even in a case where exemplary damages are recoverable.

7. Where, in a suit against several, judgment is rendered against all the defendants but one, and such judgment is reversed on appeal, on a second trial judgment may be rendered against all the defendants even though the appeal-bond was not payable to the successful defendant as well as to the plaintiff, when such defendant made no objection to such bond, since the judgment reversed was thereby wholly vacated.

Appeal from district court, Washington county; J. B. McFARLAND, Judge.

Action by Isaac and Herman Cohen against M. A. Tynberg & Co., Ed Newbower, and Charles Wenar, for malicious attachment. Plaintiffs obtained judgment. Defendants appeal.

Bassett, Muse & Muse, and *J. T. Swearingen*, for appellants. *Seth Shepard, F. Chas. Hume*, and *C. R. Breedlove*, for appellees.

STAYTON, C. J. This cause was before this court at a former term, and is reported in 67 Tex. 220, 2 S. W. Rep. 734, where will be found a statement of the case. On the trial from which that appeal was taken, a plea in abatement, based on the non-joinder

of Eliza Cohen, who was claimed to be a co-partner with Isaac and Herman Cohen, was filed, tried, and decided against appellants. It was then urged that the plea in abatement should have been tried before the cause was tried; but it was held that this was a matter within the discretion of the court, and, further, that her relation to Isaac and Herman Cohen was such as to make the judgment to be rendered in the cause binding on her.

On the last trial the court again submitted the plea in abatement with the main issue, and declined to require a separate finding on that. This is assigned as error. If, on the first trial, the plea in abatement had been tried before the cause was tried on its merits, and decided against appellants, it would not have been their right to have that tried again, unless on appeal some error had been found in that proceeding. That on the former trial the plea in abatement was submitted with the merits does not affect the question. When once tried, and decided adversely to a defendant, he is not entitled to have a plea in abatement tried again, though on appeal the judgment may be reversed on some ground not affecting the decision on the plea in abatement. The purpose of the plea in abatement was to have a decision whether the proper plaintiffs were before the court. It in no way affected the merits of the controversy; and a practice which would lead to a resubmission of a plea in abatement every time a new trial on the merits was granted, or every time a cause was tried after an appeal, and reversal on the merits, would lead to interminable confusion. We are of opinion that the court would not have erred, had it declined on the last trial to submit any issue on the plea in abatement, and the manner of its submission. It having been decided against appellants is an immaterial question.

There was a verdict for \$150 against principal and sureties on the attachment bond as actual damages, and also a verdict against the surety, who acted as agent in suing out the writ, for \$10,000 as exemplary damages. It is urged that both are excessive. The jury evidently found that the writ was wrongfully sued out, but that the principals and one of the sureties were not actuated by malice or evil motive in doing this. The question then, arises, whether the evidence justified a finding that appellees had suffered actual damages to the extent of \$150, for none other could be imposed for the mere wrongful use of the writ. The goods seized were a part of a stock of goods in the second floor of appellees' business house, valued by the sheriff at \$900, but by appellees at \$1,800. The business of appellees is not shown to have been in any manner interfered with by the sheriff, while engaged in making this levy upon but a small part of the stock of goods. The sheriff remained in possession of the goods about three hours. During the time, he was engaged in making an inventory, and packing the goods in trunks, at the expiration of

which they were replevied. The goods are not shown to have been injured in any respect, nor is there any evidence that a single sale was lost or interfered with by the sheriff's possession. The goods were not removed from the store. The actual damages resulting from these facts must have been very small. One of appellees testified, over objection, that the levy "interfered with our business, of course. We were all broke up. The levy affected us in this way: People who had dealt with us went somewhere else to trade after the levy, to the extent of fifty or sixty dollars per day from immediately after the levy until now." A levy upon an insignificant part of a merchant's goods could not be said to be the proximate cause of such a loss of trade; and, if the jury considered this, or the general expressions of the witness quoted, in making an estimate of the actual damages, they erred.

He further stated: "We had ordered nine hundred dollars' worth of shoes of Clafin & Thayer, Boston. One Harrison had agreed to take one-half of this bill. The order was not filled. * * * Harrison was to take half of the Clafin & Thayer bill. He was to pay cash, with 10 per cent. added to cost in the store. This sale had been made a week or more prior to the levy." Other evidence shows that Clafin & Thayer declined to ship those goods because they saw in a Boston paper an announcement of the failure of appellees, with the publication of which appellants are not shown to have had any connection, except in so far as the levy of attachment may have given ground for such a report. If it be conceded that the loss of this sale could be considered as actual damages, it would only amount to about \$45, with interest; but it would be difficult to hold that the levy was the proximate cause of this loss. Too many independent agencies intervened between the levy and loss. The casual connection was broken. Some person doubtless sent the report to Boston. Some person gave it to the publisher, and he published it; and, in doing this, some or all of them made a false statement, if there be any truth in the evidence found in the record. It cannot be presumed, in the absence of proof, that those things were done by appellees, or any of them. The evidence tends to show that Clafin & Thayer would have shipped the goods but for the announcement seen by them. He further stated: "We had given an order for goods to E. S. Jaffray & Co., New York. The goods were shipped, and arrived the day before the levy of attachment. Some of the goods had been disposed of to Ledner and Harry Hancock; and Jaffray & Co. heard of the attachment, and, through their agent here, * * * the goods, being already unpacked, were repacked and turned over to the agent of the house, on his demand. We had to pay the money back to get those goods that had been sold." The value of the goods thus returned is not shown, and those sold to Ledner and Han-

cock each amounted to about \$15. The goods had not been paid for, and it is not shown what damage resulted from the cancellation of the sale, nor that they might not have been paid for and retained. As to those goods, the question of proximate cause again arises. He further stated that "another bill, shipped to us by Anderson & Co., Troy, N. Y., came the same day; and, as we had sold some of these goods, we got the money, and paid their bill to their agent here." The amount of this bill is not shown; but, under the evidence, we are unable, as was the jury, to say that damage resulted from the fact that those goods were paid for. If their price was due, it ought to have been paid; and, if not due, further proof was necessary to show any damages, even if the use of the attachment could be said to be the proximate cause of any resulting injury. There was much evidence tending to show loss of credit, but it is well settled that such evidence cannot furnish a basis for actual damages. We have considered all the evidence claimed to have bearing on the amount of actual damages; and, while we are loth to set aside the verdict of a jury on a question of this kind, we feel constrained to hold that there was no evidence on which the jury was authorized to find that appellees sustained actual damages to the amount of \$150.

The testimony of the sheriff, uncontradicted, was that "the goods were not taken from the store at all. No one was interfered with, or interrupted in any way, as we were up-stairs, and the trading was going on down-stairs, as usual. The clothing levied on was appraised at \$900, and was in six or seven trunks, where they were left. In the evening the goods were released, upon replevy bond being given." The evidence of appellee, who testified in the case, was to the same effect. There was much evidence tending to show that the attachment was wrongfully sued out, and much tending to show that malice may have influenced the agent who sued it out, and much in rebuttal of this; which renders it likely that, in estimating actual damages, the jury considered evidence which could properly be considered only on questions of right to and amount of exemplary damages. On another trial the jury should be informed of the only purpose for which much of the evidence found in the record can be considered.

In view of the disposition that will be made of the case, it does not become necessary now to pass on the sufficiency of the evidence to sustain the verdict for exemplary damages. It is insisted, however, that there is a rule of law which requires that in such cases there be some fixed proportion between the actual and exemplary damages awarded. It has been said in some cases that exemplary damages should not be disproportioned to actual damages, but it was not meant by this that the one should be any exact or approximate ratio to the other. All that was meant was that the imposition of heavy exemplary dam-

ages, when the actual damages recoverable were small, was a fact which ought to be looked to, to determine whether passion rather than reason dictated the verdict. Whenever this appears, or is rendered highly probable, by contrasting the actual injury with the extent of punishment awarded, looking to all the circumstances of aggravation, new trials should be granted. A power such as may be exercised by juries in awarding exemplary damages is liable to great abuse,—may often lead to great oppression; and there is no class of cases in which the conservatism of the judge should more frequently find field for action. In cases based on facts which merit condemnation, or even punishment, though not by law constituting crime, juries, under commendable impulses, but with judgment warped by passion, no doubt often render excessive verdicts; and, if it be conceded that such verdicts are to stand because the matter was within the discretion of the jury, then we have an absolutism—a despotism—nowhere else found in our form of government. The matter is in the discretion of the jury in the first instance, but it is the duty of the judge to see that this discretion is not abused. The power to grant new trials, when verdicts are evidently excessive, as on other legal grounds, is one given firmly and fearlessly to be exercised, and it cannot be surrendered. Verdicts of juries are entitled to the highest consideration; but it must be remembered that they are not always right, and, if uncontrolled, will in some cases lead to oppression. The verdict for exemplary damages was large,—many times larger than the legislature has authorized to be imposed, by way of fine, for acts malicious and highly aggravating in character; and it will be well for the judge, should such another verdict be brought in, to carefully determine whether justice between the parties, or the welfare of society, demands the imposition of such a punishment.

Looking to the issues in the case, we are of opinion that the court did not err in admitting the evidence of Giddings, Sr. and Jr., E. L. Sally, W. H. Vinson, and H. Cohen, which was objected to. The sixth and eighth charges requested by appellants, and refused, were embraced in charges given, so far as they were correct; and for this reason the court did not err in refusing them.

It is urged that the action could not be maintained because commenced before the attachment suit was terminated. It has frequently been held that an action for malicious prosecution, in a criminal or civil action, will not lie until the prosecution has terminated favorably to the party prosecuted. The rule appealed to has no application, however, to this class of cases, although, in a sense, actions for malicious prosecution; for no issue whether the attachment was wrongfully or maliciously used could have been tried in the attachment suit. *Fortman v. Rotter*, 8

Ohio St. 550. The constant practice in this state has been to permit a defendant in attachment to reconvene for damages resulting from a wrongful or malicious use of the writ, and the trial of this proceeds with the main action. The plea in reconviction is essentially a separate action. Such a practice is at war with the theory that an attachment suit must have terminated before an action for malicious prosecution can be based on it. The rule only applies when the issue to be tried in the last action was necessarily involved in the first.

There was no misjoinder of parties or causes of action; for appellees sought to recover against all of appellants damages actual and exemplary, on account of an act in which they all participated.

On the former trial there was a judgment against all the defendants, except the defendant Wenar, but there was a judgment in his favor. The former appeal was prosecuted only by defendants against whom judgment was rendered, and it seems that the appeal-bond was not made payable to Wenar as well as to plaintiffs; but no question as to its sufficiency was raised, and the judgment was reversed. On the last trial, judgment for actual damages was entered against Wenar as well as the other defendants, and motion in arrest of judgment was made by him, on the ground that he was discharged by the former judgment, and that reversal of that did not vacate it as to him. Notice of appeal from the former judgment was given, and of that Wenar was bound to take notice. An appeal-bond was filed by the other defendants which may have been defective, because not made payable to him as well as the plaintiffs; but, if he desired to take advantage of this, he should have done so in proper time and manner. Notice of appeal given, and bond filed, clothed this court with jurisdiction over the entire judgment, and its reversal annulled it *in toto*. It stood after reversal as though it had never been rendered. The main purpose of a bond is to give security to the adverse party; and, if the bond filed be not such, in all respects, as the law requires for this purpose, this court will not consider the case over the objection of the party entitled to such protection, if objection be made in proper time and manner. There are expressions to be found in opinions from which it might be inferred that the giving of a bond strictly in accordance with the statute was essential to the jurisdiction of this court; but it must be understood that the constitution confers on this court what jurisdiction it has as to subject-matter, and that parties may waive irregularities as to matters intended solely for their benefit. The case stands, as to Wenar, as though a new trial had been granted after the former judgment was rendered. For the error before noticed, the judgment will be reversed, and the cause remanded.

NOEL v. DENMAN.

(Supreme Court of Texas. Feb. 26, 1890.)

JURY TRIAL—SEPARATION OF JURY—PLEADING—EVIDENCE.

1. Though both parties fail to demand a jury on appearance day, it is not error to grant a jury trial at a subsequent term.

2. Under Rev. St. Tex. arts. 1804-1806, which provide that the court may allow the jury to separate after admonishing them as to their duty, it is not error to allow them to separate after proper instructions, though one of the parties urges that they be kept together.

3. In an action on a due-bill, evidence of an admission by one not shown to be an agent of defendant, that he had told plaintiff before purchasing the due-bill that it was all right, is incompetent.

4. A plea to the jurisdiction, in a suit before a justice in A. county, that defendant "is now a *bona fide* citizen of precinct No. 2, C. county, Texas, and was so residing in said precinct No. 2, C. county, at and long before the institution of this suit, and claims the privilege of being sued in his own county, and that he has not waived the privilege of being sued in the county of his residence," and that he did not authorize suit to be brought against him in A. county, is defective in not alleging that defendant was not a resident of A. county.

Commissioners' decision. Appeal from district court, Angelina county; L. B. HIGHTOWER, Judge.

Action by W. C. Denman against J. M. Noel. Judgment was rendered for plaintiff, and defendant appealed.

W. J. Townsend, for appellant.

HOBBY, J. W. C. Denman sued J. M. Noel, W. Coy, and R. Lampley, originally in the justice's court of precinct No. —, of Angelina county, on the following instrument: "Lufkin, 4-23, 1888. Due Coy and Lampley, \$89.08. [Signed] J. M. NOEL." The following was indorsed on it: "E. O. E. We transfer this to W. C. Denman. [Signed] COY & LAMPLEY." The justice's transcript shows that the suit was brought on April 25, 1888; that defendant's plea to the jurisdiction over his person was overruled; that the cause was dismissed as to Coy & Lampley; and that judgment was rendered for the plaintiff for \$59.08. An appeal was prosecuted to the district court of the county, where a trial by jury at the January term, 1889, resulted in a verdict and judgment for plaintiff for \$89.08, from which this appeal is taken, upon the following assignments of error:

First, that the court erred in allowing plaintiff, W. C. Denman, the right of trial by a jury, after sounding the docket for that purpose on appearance day, and both parties refused a jury. The record shows that at the July term, 1888, when this cause was called on appearance day, both parties failed to demand a jury, and therefore it is claimed that the plaintiff was not entitled to a jury when demanded, and the law complied with, at the subsequent term, in January, 1889, without a reasonable excuse for the failure to demand one at the preceding term. We can perceive no error in the ruling of the court in the respect complained of, nor can we see how it

operated to the defendant's prejudice to grant plaintiff's demand for a jury.

The next error assigned is the action of the court in overruling defendant's plea to the jurisdiction. This plea averred "that the defendant J. M. Noel is now a *bona fide* citizen of precinct No. 2, Cherokee county, Texas, and was so residing in said precinct No. 2, Cherokee county, at and long before the institution of this suit, and claims the privilege of being sued in his own county, and that he had not waived the right of being sued in the county of his residence," etc., and, further, that he had not authorized suit to be brought against him in said Angelina county, etc. This plea to the jurisdiction of the person of defendant was verified by affidavit; but it was defective in not alleging, with that certainty which would have left no room for doubt, that the defendant was not a resident of Angelina county. Under the averments of this plea he might have resided in both counties. *Crawford v. Carothers*, 66 Tex. 199, and cases cited.

It is complained that the court permitted the jury trying the cause to separate. The bill of exception recites, substantially, that for want of time the court failed to get through with the trial of the cause on the day it was begun, and when night came the court dismissed the jury, and allowed them to go where they pleased. The defendant at the time urged the court to keep the jury together, which the court refused to do. The judge states that "the cause had been on trial all day, and it was then after dark. A portion of the jury had been up on a case the night before, and they were allowed to separate, after being appropriately instructed not to talk about the case, and not to permit any person to talk about it to them, or in their presence." We see nothing in the record to indicate that the presiding judge abused the discretion lodged in him by articles 1804-1806 of the Revised Statutes, which authorized him to allow the jury to separate, after being admonished by the court as to their duty. If they had been talked with or any communication made injurious to the appellant, there should have been at least some effort made on his part to show that fact.

There are only two other errors assigned necessary to be noticed. These relate to the admission of the evidence of the witness J. B. Herrington, to the effect that he heard William Noel say, after the institution of his suit, that he had told appellee, Denman, that the due-bill was all right, and would be paid; and the charge of the court on the question of the liability of appellant for the declarations of said William Noel. The testimony was incompetent. If its purpose was to show that William Noel was appellant's agent, this could not be established by the declarations of William Noel. If its object was to contradict or impeach the testimony of William Noel, it could not be done by evidence of his declarations as to an immaterial issue. The testimony was hearsay, and appellant was not

bound by it. The court instructed the jury, in substance, that, if William Noel was appellant's agent, and authorized as such to make these declarations, they would be binding on appellant, and that if Denman was induced by William Noel's statements to him to purchase the due-bill, and paid a valuable consideration therefor, appellant would be liable, although the due-bill may have been originally executed without consideration. It appears from the evidence that appellant was engaged in making ties some distance in the country from Lufkin. That he was also engaged in the mercantile business in that town. His son, William Noel, was his clerk in the store, and as such managed and controlled it. It was discovered after the execution of the due-bill that appellant was not indebted to Coy & Lampley in the supposed balance for which it was given. Coy & Lampley had transferred it to appellee, who testified that before purchasing it he went to see William Noel, who told him it was all right, and would be paid. Relying upon this he bought it. The evidence on the other hand was to the effect that William Noel had no authority to act as agent of appellant, except as a clerk in his store. The most the testimony can be said to have shown was that William Noel was the clerk or agent of appellant in his store, and as such had power to sell goods and manage the same; but we can see nothing in the facts tending to show that he was appellant's general agent, or that as such clerk he had authority to bind appellant by the declarations testified to. "Where one is appointed to an office or clerkship, one of whose customary duties is to execute and negotiate bills and notes in the name of the principal, the authority need not be expressly given; it will be implied. * * * But this power does not fall within the scope of authority of the ordinary clerks and salesmen." Tied. Com. Paper, § 78, note 1, § 77, p. 138.

For the errors mentioned, we think the judgment should be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

SAN ANTONIO & A. P. RY. CO. v. BENNETT.

(Supreme Court of Texas. March 4, 1890.)

DEATH BY WRONGFUL ACT—EVIDENCE—CONTRIBUTORY NEGLIGENCE—TRIAL.

1. In an action for death caused by negligence, it is proper to allow a witness to testify from mortality tables the number of years that the deceased would probably have lived.

2. Where contributory negligence is pleaded as a defense, it is proper to instruct the jury that, if plaintiff proves to their satisfaction that the death was caused by defendant's negligence, then the burden of proof is on defendant to establish the existence of contributory negligence.

3. Under Rev. St. Tex. art. 1804, which expressly authorizes a judge, in his discretion, to permit the jury in a civil action to separate during the trial, error cannot be predicated on the act of allowing a jury to separate for dinner, when it is

not clearly shown that the complaining party was injured thereby.

Commissioners' decision. Appeal from district court, Colorado county.

S. C. Patton, for appellant. Foard, Thompson & Townsend, for appellees.

ACKER, J. Katie J. Bennett brought this suit against the San Antonio & Aransas Pass Railway Company, to recover damages for the death of her husband, G. N. Bennett, who was killed by being run over by defendant's cars on the 11th day of August, 1887, while in the service of defendant as a brakeman. The petition alleged that the death was occasioned by the gross negligence of defendant, its employees and agents, in allowing a hole, ditch, or trench to be along its track, that caused the death; that defendant knew, or ought to have known, of said hole, ditch, or trench, and that deceased did not know, and could not have known, of its existence; that deceased did not in any manner contribute to his death. Trial by jury resulted in judgment for \$6,000, and defendant appealed.

Plaintiff introduced as a witness Dr. Harrison, who was permitted by the court to testify, over objection by defendant, from tables prepared by the American Legion of Honor, showing estimates of probable duration of lives of men at different ages, that the deceased would probably have lived for 29 years, being at the time of his death 88 years old. This ruling is assigned as error. The bill of exceptions does not state the ground of objection, as we think the better practice requires should be done. It is not claimed that the tables used by the witness were not approved or correct tables, nor is there anything to which our attention has been called which indicates that the ruling here complained of was prejudicial to defendant. The use of such tables was suggested by this court in the case of *Railway Co. v. Cowser*, 57 Tex. 304, as proper evidence to aid in determining the probable duration of life. Not that such tables establish the duration of a particular life, but that they may properly be used in connection with all other evidence, in reaching a conclusion as to the probable duration of the particular life. We think the court did not err in the ruling complained of by the first assignment of error.

The second assignment of error is: "The court erred in permitting the jury to separate and go about the town at their pleasure, unaccompanied by an officer, after they had received all the testimony in the case except the expert testimony of Drs. Harrison and Bowers, the defendant objecting." It appears that on adjournment for dinner, having instructed them that they should not discuss the case, or permit any one to talk to them about it, the court permitted the jury to separate. Such practice seems to be expressly authorized by article 1304 of the Revised Statutes, when, in the discretion of the court, it is thought proper, and the exercise

of that discretion will not be revised on appeal, unless it is clearly shown that the party complaining has been injured thereby. *Noel v. Denman*, ante, 318, (decided present term.) We think the second assignment is not well taken.

The third assignment of error is: "The court erred in its charge to the jury in the 3d, 8th, and 10th sections thereof, in instructing the jury, in effect, that to recover plaintiff had only to show that the injury and death of deceased resulted from negligence of defendant, and that she is relieved from the additional burden of showing that deceased was at the time exercising due care, and that the burden was then on defendant to show that the deceased was not exercising due care." The portions of the charge against which this assignment is directed are as follows: "(3) Under these issues presented to you the burden of the proof is on the plaintiff, and to entitle her to recover she must have shown to your satisfaction that her husband was injured substantially as alleged, and that such injury was sustained by reason of the negligence of defendant company, or its agents and employees. If this has been shown by evidence to your satisfaction, then the burden of proof shifts upon the defendant company, and it devolves upon the defendant to show that it is not liable for damages by reason of the deceased having contributed, by his negligence, as you are hereinafter instructed." "(8) If, however, you find that the plaintiff has shown to your satisfaction that the defendant company has failed to use such ordinary and reasonable care and diligence in the construction and keeping in proper repair its road-bed, and that the death of Bennett was caused by such defect, either directly or proximately, and that the deceased did not contribute to his injury by the want of any proper care, forethought, and prudence on his part, then you will find for plaintiff." "(10) If there was negligence on the part of defendant, then, whether the company is exempt from liability by reason of deceased having contributed by his negligence and want of proper care to his death, and whether such defect was the cause of the injury, are also for you to decide, under the evidence, under the law as to contributory negligence." At request of defendant the following special instructions were given: "*First*. That if the jury find from the evidence that G. N. Bennett, the deceased, was killed by a train of cars on defendant's road while in its employment, and that Katie J. Bennett, the plaintiff, was the wife of said Bennett, then the burden of proof rests on the plaintiff, Katie J. Bennett, to show that the death of G. N. Bennett, deceased, resulted from the negligence of defendant, and that the said G. N. Bennett was exercising due care, before she can recover. *Second*. If the jury find from the evidence that G. N. Bennett, the deceased, was killed while in the employ of defendant, as brakeman, by its cars, and that the plaintiff was his wife, the burden is upon

plaintiff, Katie J. Bennett, to show that the said G. N. Bennett did not, by his own negligence, contribute to his death, and, unless she has so done, on the evidence they must find for the defendant."

Appellant does not contend that the averments of the petition tend in any way to show that deceased was guilty of negligence that contributed to the injuries that caused his death. We think it now well settled that, unless the plaintiff's case discloses want of care on the part of the injured party, or exposes him to suspicion of negligence, and the defendant relies upon the defense of contributory negligence, it must be pleaded and proved. It is only when the averments of the petition show a *prima facie* case of negligence on the part of the injured party that it becomes necessary that the plaintiff should negative, by averment and proof, the existence of such negligence. When the case stated by plaintiff shows *prima facie* negligence of deceased, the defendant can avail itself of the defense of contributory negligence, under the averments of the petition; otherwise, such defense must be pleaded. *Murray v. Railroad Co.*, 73 Tex. 2, 11 S. W. Rep. 125, and authorities there cited. The petition in this case directly negatives the existence of contributory negligence, though it was not necessary to do so. *Railroad Co. v. Murphy*, 46 Tex. 363; *Railroad Co. v. Cowser*, 57 Tex. 302. The defendant pleaded contributory negligence, thereby indicating that it did not rely for that defense upon the averments of the petition showing such case as required plaintiff to negative the existence of such negligence. As the case is presented, we think it clear that the court correctly gave the law in the third section of the general charge complained of, and that it erred in that part of the general charge, and also in the special instructions given at request of defendant, which required the plaintiff to prove not only the negligence of defendant, but also that the deceased did not, by his own negligence, contribute to his death. These errors, however, being in favor of appellant, afford no grounds for reversal of the judgment.

It is urged by the remaining assignment of error that the verdict was against the preponderance of the evidence; but, on a careful consideration of the evidence, we are unable to say that the verdict is clearly wrong, and unless we can so say, under repeated decisions of this court, we cannot set it aside. We are of opinion that the judgment must be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

ELLIS v. GARVEY et al.

(Supreme Court of Texas. March 7, 1890.)

NEW TRIAL.

In an action by a banker to recover an alleged overdraft of defendant's account, plaintiff's

evidence was that defendant had deposited only \$509.65, while defendant's evidence was that he had deposited \$1,700. The books of the bank were introduced, which showed a credit in defendant's favor of \$509.65, and a debit of \$1,700. Held, that a new trial would not be granted because of the introduction in evidence of a letter written to defendant by the bank's book-keeper, who had been employed after the transaction had taken place, which stated that the books had not been kept correctly, and that money had been deposited which had not been credited; the only objection to its introduction being that the letter had been written a month after the new book-keeper had been in charge of the books, and just as he was leaving, and that it was in proof that he was short in his accounts, thereby waiving the objection that the letter was a declaration in his own favor by a third person, not a party to the suit.

Appeal from district court, Wharton county.

Brady & Ring, for appellant. *Parker & Pearson*, for appellees.

GAINES, J. On the 13th day of June, 1887, T. J. Garvey, then sheriff of Fort Bend county, caused appellant, a banker in Richmond, to transmit to Austin the sum of \$1,700. At the time of the transaction, Garvey's deputy deposited on his account a sum of money in appellant's bank, the amount of which is the subject of controversy in this suit. Appellant claimed in the court below that the sum deposited was only \$509.65, while, on the other hand, appellee contended that it was \$1,700, the entire amount to be transmitted. This was the question to be determined by the verdict of the jury. Dr. Weston testified that he had charge of the bank at the time of the transaction, and that the money was paid to him; that he counted part of the money, and his assistant counted the balance; that he did not recollect the amount from memory alone, but that the books of the bank showed that it was \$509.65, and that, if this had not been correct, he would have discovered the error when he counted the cash. His assistant testified that he counted the money when it was deposited, and that it amounted only to \$509.65. The deputy testified as positively that the amount of the deposit was \$1,700, and he was in some degree corroborated by another witness. About the 10th of October, 1887, Weston quit the bank, and one Hawks became book-keeper. Hawks remained until the 8th of November following. Appellant introduced testimony tending to show that during the time Weston had charge the deposits were correctly credited on the books. Garvey's account on the books showed a credit on the 13th of June, 1887, of \$509.65, and a debit of \$1,700 "remitted to Austin." Such being the state of the testimony, appellees were permitted to read to the jury, over the objections of appellant, a letter addressed by Hawks to appellant, of which the following is a copy: "Richmond, Texas, Nov. 4, 1889. Mr. Ellis: Replying to yours this A. M., relative to balance-sheet, I am glad you are coming up to-morrow, so I can explain why it has not been made out. To make out a balance-sheet that will be anywhere near cor-

rect is simply impossible. Money has been deposited, and no memorandum of it made anywhere on books. (Gathered this information from depositors' books.) Money has been paid out that was not duly charged. All this I will fully explain to you. I have been looking for you all the week, and suggest you come up prepared to spend a full day. * * * [Signed] HAWKS."

The grounds of objection, as they appear in the bill of exceptions, are as follows: "Because the letter was written nearly a month after he (Hawks) had been in charge of the books and employment of Ellis & Co., and just as he was leaving, and because it was in proof that Hawks was short \$1,338, and was calculated to mislead the jury, and make them believe that his predecessor was short." It was not urged that the evidence was inadmissible because it was the declaration of one not a party to the suit; and that question, if it be a question, was waived. We are of the opinion that the grounds of objection insisted on in the court below were not well taken. The bank was opened on the 23d of May, 1887, but a little more than five months before the letter was written. The statements contained in the letter tended to show that the books had not been correctly kept, and that money had been deposited which had not been credited. The fact that Hawks had been in the employment of the bank nearly a month rendered it only the more probable that he had discovered errors in the accounts of depositors. If it had been insisted that the letter should not be admitted because it did not appear that the statements were made with reference to the books at the time Weston had charge, the objection would have been entitled to grave consideration. It is probable, however, that, if this had been done, appellees would have proved by appellant himself that Weston's books were meant. If it had been urged that the evidence was inadmissible because they were the declarations of a third party, then the fact that it was not against Hawks' interest would have supported the objection. The ruling of the court upon the admission in testimony of the letter is the only question presented in the brief; and, there being no error in that ruling, the judgment is affirmed.

SUTOR v. WOOD.

(Supreme Court of Texas. March 4, 1890.)

MALICIOUS PROSECUTION—EVIDENCE—TRIAL—OPENING LETTERS.

1. In an action for malicious prosecution for unlawfully opening a letter addressed to defendant, evidence that defendant authorized plaintiff to open the letter is admissible in order to show malice and want of probable cause, though such authorization is not specially pleaded.

2. The certified copy of defendant's affidavit, charging plaintiff with having unlawfully opened his letters, is admissible in evidence, though the court had no jurisdiction of the prosecution, as the defendant is not thereby relieved from liability. Following 8 S. W. Rep. 51.

3. Evidence that plaintiff read the letter is immaterial, where his defense to the prosecution was

that he opened the letter with defendant's consent.

4. Evidence which merely tends to show that, at the time the alleged authority was given, defendant was not anxious to have the matter referred to in the letter immediately attended to, is immaterial.

5. It is not improper for plaintiff's counsel to say, in his closing argument, "I proved that defendant was down at the trial, and that plaintiff was acquitted, upon the ground that he had permission to open the letter," where such statement is a legitimate deduction from the testimony.

6. A reference in such argument to plaintiff's property, though objectionable, is not ground for reversal, where the judge promptly checks the counsel, and instructs the jury to disregard the remark, and the evidence amply sustains the verdict.

7. It is proper to refuse to charge that "no verbal authority to take defendant's letters from the post-office would authorize plaintiff to take any registered letter," since, if the letter was taken with the defendant's consent, the fact that it was registered would not justify the prosecution.

8. The verdict in the criminal prosecution is admissible to show that the prosecution had ended.

9. Evidence which merely contradicts what a witness has testified to on an immaterial point is inadmissible.

Appeal from district court, Harris county; JAMES MASTERSON, Judge.

Action by George W. Wood against John R. Sutor. Plaintiff obtained judgment. Defendant appeals. The seventh assignment of error is as follows: "The court erred in refusing to give special charge No. 3, asked by the defendant, as follows: 'The court instructed you that you have a right to inquire what was the understanding of each party in regard to what the plaintiff was authorized by the defendant to do in regard to any letters, and whether or not there was any misunderstanding between them in regard thereto, and to weigh and consider all the facts in this connection, upon the questions of motive and probable cause, and what was the motive of the defendant in making the affidavit, as charged in plaintiff's petition, if you find he did so make it.'"

Chas. E. Dwyer, for appellant. Hutcherson, Carrington & Sears, for appellee.

GAINES, J. This suit was brought by appellee against appellant to recover damages for a malicious prosecution. This is the second appeal. The opinion on the former appeal is reported in 70 Tex. 343, 8 S. W. Rep. 51. It appears from the evidence that Wood was a constable of Harris county, and had Sutor under arrest to answer a complaint made against him in a justice's court. Wood testified that he placed Sutor under the guard of one Dixon. Sutor wrote to Houston to his wife, to have a bail-bond executed, and, as Wood testified, authorized him, when it came to the post-office, to take it out and open it. Wood did take from the post-office a letter containing a bond, and the bond not being properly executed, and another having been sent for, opened a second. When his trial came on, Sutor was convicted, and was adjudged to pay the cost. The evidence in the present case tended to show that Sutor was dissatisfied with the costs charged by Wood in the criminal case. He caused Wood to be proceeded against for extortion, and

also made before a United States commissioner an affidavit charging him with "opening a letter addressed to the affiant, with design to pry into the business or secrets of affiant, against the laws of the United States governing postal matters." Upon this affidavit the district attorney of the United States for the eastern district of Texas filed an information against Wood in the circuit court of the United States at Galveston, and caused him to be arrested, and he came before that court for trial. Having been tried before that court, and acquitted, he brought this suit to recover of Sutor damages for maliciously prosecuting the criminal action against him.

Upon the trial appellee was permitted, over appellant's objection, to offer testimony to show that appellant had authorized him to open the letters. The ground of the objection was that there was no allegation in the plaintiff's pleading to authorize the introduction of the evidence. The objection was not well taken. A party is required to plead only the issuable facts which constitute his cause of action, and is not required to plead the evidence by which such facts are to be established. The issuable facts in this case were that the defendant had caused a prosecution against the plaintiffs; that the action was at an end; that there was no probable cause for the prosecution; that it was instigated by malice; and that the plaintiff had been damaged thereby. *Griffin v. Chubb*, 7 Tex. 603. The want of probable cause and malice were issuable facts, and not mere conclusions of law; and plaintiff was not required to go beyond the averment of these facts, and to allege the evidence by which he expected to establish them. In the case cited it is said: "It is incumbent on the plaintiff * * * to allege the want of probable cause and malice. The denial of these averments puts in issue * * * the facts. It further devolves on the plaintiff to prove the truth of his averments. And when the issue has been thus formed, and the proofs adduced by the plaintiff which conduce to establish the issue on his side, no reason is perceived why the defendant may not maintain his side of the issue by the proof of any facts which go to rebut or repel the evidence introduced by the plaintiff, without specially pleading them." This extract shows the principle that facts which are merely evidence of the material facts in issue need not be pleaded. In order to show malice and the want of probable cause, the plaintiff had the right, under his pleading, to prove that the defendant authorized him to open the letter he was charged with having unlawfully opened.

It is also complained that the court erred in admitting in evidence the certified copy of the affidavit of defendant, in which he charged plaintiff with having unlawfully opened his letters. The grounds of objection to the evidence are substantially stated in the assignment of error as follows: "For the reason that the said C. M. Dart, clerk as aforesaid, only certified that it is a correct

copy of affidavit of John R. Sutor attached to information filed in cause No. 163, on the criminal docket of said court, entitled *The United States v. Geo. Wood*; does not certify that the affidavit was made by John R. Sutor; does not certify that said affidavit was ever filed in the said United States circuit court, or that it was or is a legal record of said court; because said affidavit does show by the indorsements thereon that it was filed in and was a record of another court, to-wit, the court of the United States commissioner, having jurisdiction to act upon it; and because the laws of the United States give the commissioner no authority to transmit the affidavit to the United States circuit court, but made it his duty to act thereon; and because, not being a legal record of the United States circuit court, the certificate of the clerk of said court gave no probative effect to said affidavit."

None of the grounds of objection are tenable. The certificate of the clerk does show that the affidavit is that of Sutor, and it sufficiently appears that it was filed in the United States circuit court, and was a record of that court. As to the objection that the affidavit was never properly filed in the United States court, we think that question was settled by the decision upon the former appeal. It was there conceded that the offense which was set out in the affidavit was such as could only be prosecuted by indictment, and that it was not within the power of the court to proceed by information. But it was held, nevertheless, that the defendant was liable in damages for the prosecution, if in fact it was malicious. The plaintiff was actually prosecuted, arrested, and brought to trial, and it does not lie in the mouth of the defendant to say that the court was without jurisdiction. So the affidavit was actually filed in the United States court as the basis of the prosecution, and it became in fact a record of that court, whether the proceeding was proper or not. It was substantially upon this ground that the affidavit was excluded upon the first trial, and it was held upon the former appeal that its exclusion was error.

The third assignment of error is as follows: "The court erred in refusing to permit defendant to offer evidence tending to prove that defendant's wife wrote to him to send the girl Amelia to Houston, to get her out of the way as a witness against him, and that the plaintiff, at the time he handed said letter to defendant, Sutor, told the girl Amelia that she must give bond for her appearance, as she was going to Houston; said evidence being offered as a circumstance tending to prove that plaintiff had possessed himself of the contents of said letter, which he did not claim to have been authorized to do, and being also admissible upon the question of exemplary damages and motive." Should it be conceded that the testimony offered tended to prove that plaintiff had acquainted himself with the contents of the letter, we think

the testimony was immaterial, because his case was not based upon the ground that he did not open the letter, but upon the ground that the defendant had authorized him to do so. There was no evidence to justify the charge the refusal of which is complained of in the tenth assignment of error, and never could have been properly introduced.

The fourth assignment is as follows: "The court erred in refusing to permit defendant to testify as to the distance between the house of the defendant and that occupied by John P. Dixon, the same having been offered for the purpose of contradicting the testimony given by the plaintiff, Geo. W. Wood, upon a material fact, and also tending to corroborate defendant's testimony," etc. The testimony offered was, in our opinion, wholly irrelevant. There was much immaterial testimony introduced as to what occurred between the plaintiff and defendant, while the former had the latter under arrest. The testimony sought to be disproved by that offered was of that character. What plaintiff testified in reference to the distance between defendant's house and that of Dixon was not material to any issue in the case. A witness cannot be impeached by showing that he swore falsely as to an immaterial matter.

It is complained in the fifth assignment that the court erred in refusing to permit defendant to ask plaintiff, upon cross-examination, whether he did not, from the time he arrested defendant, up to the time defendant gave bond for his appearance before the justice of the peace, have in his (plaintiff's) possession 10 head of stock, as security for defendant's appearance; the same being offered as a circumstance tending to show that the parties were not anxious for the immediate execution of the appearance bond, and corroborating defendant's testimony as to what he really did tell the plaintiff in regard to the letters in question. We think the evidence offered was foreign to any issue presented either by the pleadings or evidence. We fail to see how it tended to show that defendant did not authorize plaintiff to open the letter containing the bond.

We do not think the charge, the refusal of which is complained of in appellant's seventh assignment, was calculated to enlighten the jury in determining the issues presented. Every juror should be presumed to understand that all the evidence introduced is admitted for his consideration. It is the privilege of counsel in argument to select such parts of the evidence as they choose, and urge upon the jury its especial consideration. The charge of the court, though concise, was clear and full, and, as we think, sufficiently presented all the phases of the case presented by the pleadings and evidence.

We are also asked to reverse the judgment on account of improper language used by counsel for plaintiff in the closing argument to the jury. A portion of the language complained of we do not deem improper. It

is as follows: "I proved that he [meaning defendant] was down at the trial; [meaning that of plaintiff, in the United States court,] and that plaintiff was acquitted upon the ground that he had permission to open the letters." It was proved that the defendant was present at the trial of plaintiff, and it is a legitimate deduction, from all the testimony taken together, that plaintiff was acquitted on the ground stated. The verdict and judgment in the case were introduced in evidence. The other remark, being a reference to plaintiff's property, was objectionable; but it was promptly checked by the court, and the jury were instructed to disregard it. The evidence being ample to sustain the verdict, and the damages not appearing excessive, we have no reason for concluding that the remarks complained of in any manner influenced the jury.

The appellant also complains of the refusal of the court to give the following charges: "You are instructed that no verbal authority from defendant to plaintiff to take defendant's letters from the post-office would authorize the defendant [plaintiff] to take any registered letter from the post-office directed to defendant." "You are instructed that the verdict in the United States circuit court is no evidence to be considered by the jury upon the trial of this cause." "We fail to perceive the propriety of the first of these instructions. We do not see what difference it made, so far as this case is concerned, whether the letter was registered or not. If plaintiff got possession of it, and opened it by authority of defendant, the defendant was not warranted in instituting the prosecution. As to the second, we think it would have been error to give it. The plaintiff was bound to prove that the prosecution was at an end. *Griffin v. Chubb*, supra. The verdict and judgment were the best evidence of this fact, and as such demanded the consideration of the jury. In the case last cited it was held that a verdict of not guilty did not raise a conclusive presumption that there was no probable cause for the prosecution, and the rule was followed in the subsequent case of *Heldt v. Webster*, 60 Tex. 207. But in the latter case the court say: "Whether there was a want of probable cause was for the jury to determine under the facts in evidence, and they might consider in making up their verdict the fact that the appellee had been discharged by the examining court." So, also, a verdict of not guilty is to be considered under the same circumstances. There is no error in the proceedings, and the judgment is affirmed.

RAINS v. WHEELER.

(Supreme Court of Texas. March 7, 1890.)

TRESPASS TO TRY TITLE—PLEADING—SEPARATION AGREEMENT—APPEAL—STATEMENT.

1. Rev. St. Tex. art. 4790, provides that defendant in trespass to try title shall be the person in possession if the premises are occupied, or some person claiming title thereto if they are unoccupied. Article 4794 provides that an answer to the

merits shall be deemed an admission by defendant that he was in possession or claimed title when the action was begun. *Held*, that an allegation in the petition that defendant claimed title to the premises was sufficient without an allegation that he had dispossessed plaintiff, though article 4786, in prescribing the form of the petition, makes the latter one of the requisite allegations.

2. Averments that plaintiff is the owner in fee-simple of certain land, and that defendant is setting up a pretended claim thereto, authorize, on general demurrer, the intendment that plaintiff is entitled to the possession of the premises.

3. Where defendant files a plea in reconvention claiming an interest in the property, in reply to which plaintiff files a supplemental petition, fully and specially pleading his title, and praying for specific and general relief, the overruling of a demurrer to the original petition is not prejudicial to defendant.

4. A separation agreement between husband and wife, made while they are living apart, and in consideration of that fact, and of their agreement to continue to live apart, whereby they make a fair division of their community property, is valid.

5. Where plaintiff recovers on his first ground of action, the ruling of the court on so much of his petition as seeks alternative relief, even though erroneous, is not prejudicial to defendant.

6. Where a term of court does not adjourn for two weeks after judgment, and after motion for new trial is overruled, the facts that the court stenographer was unable to write out the testimony before court adjourned; that the term might by law have continued several days longer; and that its adjournment was unexpected,—do not excuse delay in preparing the statement of facts until after court adjourned, where it does not appear that the judge announced that the term would continue for the statutory time, but simply that the clerk informed counsel to that effect.

Appeal from district court, Galveston county.

Howard Finley and Wharton Branch, for appellant. *McLemore & Campbell* and *H. W. Rhodes*, for appellee.

GAINES, J. This suit was brought by R. T. Wheeler, as executor of the will of George C. Rains, against appellant, to determine the title of the estate represented by him to certain parcels of real estate in the city of Galveston. The issuable averments in the petition are, in brief, that the estate of plaintiff's testator is the owner in fee-simple of the property, and that the defendant, for the purpose of injuring the estate, and to prevent a sale of the lots, was setting up a pretended claim to them, and that such claim was a cloud upon the title. The prayer was that the cloud be removed, and that the plaintiff may have general relief, etc. A general demurrer was interposed to the petition, and it was overruled.

The ruling on the demurrer is assigned as error. In *Shepard v. Cummings*, 44 Tex. 502, it is held that, when the leading object of a suit is to try the title to land, the additional allegation that the adverse claim is a cloud upon plaintiff's title does not change the real character of the action. The petition contains, in substance, the allegations of the statutory action of trespass to try title, with the exception that it does not expressly allege that the plaintiff was entitled to the possession, and that the defendant had unlawfully entered upon and dispossessed him of the premises, etc. It seems to us that the aver-

ments that the estate was the owner in fee-simple of the land, and that the defendant was setting up a pretended claim to the property, are sufficient to justify, upon general demurrer, the reasonable intendment that the plaintiff was entitled to the possession of the premises.

The other question is more difficult. The action of trespass to try title is the only formal civil action known to our law, and the statute states substantially what the form shall be. Rev. St. art. 4786. But, while one of the requisite allegations of the petition is that the defendant has entered upon and dispossessed the plaintiff, it was evidently intended that it should not be necessary to prove that allegation. Article 4790 of the Revised Statutes provides that "the defendant in the action shall be the person in possession if the premises are occupied, or some person claiming title thereto if they are unoccupied." Article 4794 also provides that an answer to the merits shall be deemed an admission by the defendant that he was in possession of the premises, or claimed title thereto, at the time the suit was instituted. We think it evident, therefore, that it is not necessary to the maintenance of this action that the defendant should have possession of the disputed premises. It is sufficient that he claims title thereto. Why, then, under our liberal rules of pleading, should not the allegation that defendant is claiming the premises, when such is the fact, be as effectual to maintain the action as the fiction that the defendant has taken possession, and withholds the same from plaintiff?

If it were necessary definitely to decide the question, we should hesitate before holding the petition bad on general demurrer. We do not think it necessary; for, if the general demurrer to the petition had been well taken, we are of opinion that no prejudice has accrued to the defendant from overruling it. In connection with her other pleadings, she filed a plea in reconvention, in which she claimed of the plaintiff an undivided one-half interest in the property described in the petition, as well as other property alleged to be in his possession as executor of the will of George C. Rains, deceased, and prayed that she have judgment for its recovery. In reply to this, plaintiff filed a supplemental petition, in which he fully and specially pleaded his testator's title. Her plea in reconvention, and the plaintiff's reply thereto, were sufficient to present the issues, and, so far as mere pleadings are concerned, to warrant a judgment for either party. If the original petition had been stricken out, no reason is seen why the case should not have proceeded to trial, and judgment upon the plea in reconvention, and plaintiff's supplemental petition in reply thereto. The latter, as well as the original petition, contains a prayer for specific, and, in the alternative, for general, relief. What has already been said is a sufficient answer to appellant's second assignment of error. The allegations in the supplemental petition

might properly, in part at least, have been pleaded as an amendment to the original petition; but they were also proper in reply to the cross-action of defendant.

Appellant's third assignment of error presents a question which lies at the foundation of plaintiff's claim, and we here copy it: "The court erred in overruling the exceptions of defendant to plaintiff's supplemental petition for the ground stated in exception No. 11 in defendant's first supplemental answer, and because the supplemental petition showed on its face that the property was common property of plaintiff's testator and defendant, his surviving wife, and she was and is entitled to one undivided one-half thereof in her own right." In her plea in reconvention the defendant alleged that she and plaintiff's testator had been lawfully married, and that she was his wife at the time of his death; that the property described in plaintiff's petition, as well as other property claimed by her, had been acquired during the existence of the marriage between her and her husband; and that as such it was community property, and she was entitled to one-half thereof. In the supplemental petition the existence of the relation of husband and wife between George C. Rains and defendant was admitted, but it was averred that long prior to his death he and the defendant had lived separate and apart from each other; that, during the time of their separation, she had brought a suit against him for divorce, and for a division of property, which was decided against her, and that after the termination of that suit, being still separated, in consideration of that fact, and of their agreement to continue to live apart, they agreed together upon a division of their property. It was further alleged that, in pursuance of such agreement, he conveyed to her by deed certain property in the pleading described, and alleged to be of his separate estate, and that, on the other hand, they jointly conveyed to R. T. Wheeler, (now the plaintiff,) as trustee, the property in controversy in this suit, for the sole use and benefit of the husband. It was also alleged that plaintiff subsequently conveyed the property to George C. Rains, now his testator. It was alleged that the division of the property between the husband and wife was equitable and fair. The question presented has never been decided, so far as we are advised, by this court. In *Ximines v. Smith*, 39 Tex. 50, it is intimated that equity will, under certain circumstances, enforce post-nuptial agreements between husband and wife, where their terms are fair and equitable. But the facts of that case bear no analogy to the facts of this. At common law, agreement between husband and wife, commonly known as "separation deeds," have usually been treated as against public policy, and as capable of a partial enforcement only. All deeds for future separation are held to be absolutely void; but, where the spouses have already separated, or have determined upon a separation, and are in the

act of executing it, a conveyance by the husband intended as a provision for the support of the wife will be upheld. In other respects a deed of separation was held void. This was the carefully restricted doctrine at an early day in the English courts; and, as so limited, it has been universally recognized in the courts of this country. The tendency of the later English cases is to extend to deeds of separation a more liberal support, (1 Bish. Mar. & Div. § 634a,) while, by the weight of authority in the American courts, they are held valid in so far as they settle the rights of property between the husband and wife, provided they have been entered into without coercion or other undue influence, and the provisions are just and equitable, (Hitter's Appeal, 54 Pa. St. 110; Hutton v. Hutton, 3 Pa. St. 100; Dillinger's Appeal, 35 Pa. St. 357; McKennan v. Phillips, 6 Whart. 571; Loud v. Loud, 4 Bush. 453; McCubbin v. Patterson, 16 Md. 179; Randall v. Randall, 37 Mich. 563; Robertson v. Robertson, 25 Iowa, 350; McKee v. Reynolds, 26 Iowa, 578; Walker v. Walker, 9 Wall. 743. See, also, Fox v. Davis, 113 Mass. 255; Switzer v. Switzer, 26 Grat. 574.) In most of the cases cited, the only interest in property relinquished by the wife in the agreement was her dower in the husband's lands. But we think that, in a jurisdiction where the spouses hold each an equal interest in the property acquired during marriage, the same principle should apply to deeds of separation which make a partition of the common property. Unless against the policy of the law, and on that account void, there is no difficulty in giving effect to the conveyances in the present case. The power of the husband in this state to convey direct to the wife is well established by our decisions; and at common law the wife may convey to the husband through the intervention of a trustee, as was done in this case. If the allegations in the petition were true, the property in controversy was the separate property of plaintiff's testator at the time of his death, and the exception to the petition was not well taken.

What we have said is sufficient to dispose of all other special exceptions, except such as raise the question of the sufficiency of certain alternative averments. After stating the facts, the plaintiff prayed that, in the event the conveyance from Rains and wife to himself, in trust for Rains, be held invalid, Rains' conveyance to her should be held of no effect, and that he be permitted to recover his testator's original interest in the property attempted to be conveyed in that deed; or that, at all events, the property so conveyed to defendant be treated as an advancement to her out of her husband's estate. The plaintiff having recovered upon his first ground of action, the ruling of the court upon so much of the supplemental petition as sought alternative relief, even if erroneous, could not have prejudiced appellant.

The paper copied into the record, and purporting to be a statement of facts was strick-

en out, upon motion, on a former day of the term. Without the evidence being brought before us in authentic form, we cannot determine whether or not there was reversible error in the admission of evidence or the charge of the court. The bills of exception to the introduction of testimony in this record are not sufficient, of themselves, to show reversible error. The assignments relating to those matters cannot be considered in the present state of the record.

Appellant's twelfth and thirteenth assignments are too general; but, if not, could not be considered, in the absence of a statement of facts.

The last assignment is that "the court erred in refusing to approve the statement of facts agreed to by the attorneys and filed in the cause." Upon the motion to strike out the alleged statement of facts we held that, for want of the approval of the judge, it was a nullity, and that the act of March 8, 1887, (Sayles' Ann. St. art. 1379a,) did not apply to the case. That act only dispenses with the limitation as to time, when there has been no lack of diligence in preparing a statement of facts, and does not dispense with the essential prerequisite of the approval and signature of the judge. The question now is, shall we reverse the judgment because of the refusal of the trial judge to approve the statement of facts after the close of the term? We take it that, without an order entered during the term allowing 10 days after adjournment within which to file a statement of facts, it cannot be gainsaid that, as a general rule, the judge has no authority to sign one, except in term-time; and it may be doubted whether, under any state of the case, without such order, he has the power to do so. If the time between the final disposition of the case in the lower court and the final adjournment be too short to allow a proper preparation of the statement of facts, and if the judge, upon a proper application, refuse to allow the additional 10 days for the purpose, it is probable that such refusal should be a sufficient ground for reversing the judgment. So, also, where the appellant is diligently preparing his case, and the court adjourns suddenly and unexpectedly, without entering an order allowing the 10 days, and without notice to his counsel, so that they may make application therefor, we are not now prepared to say that relief should be denied. But we are clearly of opinion that, if relief is to be extended under such circumstances, it can only be upon a showing of the strictest diligence, and upon proof of the happening of such unforeseen contingency as could not reasonably have been anticipated. In this case the judgment was rendered on the 8th day of May, 1889, and the motion for a new trial overruled on the 13th. The adjournment did not occur until the 27th. It would seem that two weeks was ample time in which to prepare a statement of facts in almost any case. But the excuse is that the stenographer who had taken notes of the evidence had

been unable by reason of other employment to write out the testimony until after the court had adjourned. It was further shown by affidavit of counsel that, although the term of the court could have continued under the law until June 1st, it was, unexpectedly to the attorneys of appellant, and to the stenographer, adjourned on the 27th of May. It does not appear that the judge announced that the term would continue until June 1st. It is merely negatively averred that, when the court adjourned on the Saturday previous, (the 25th,) no announcement was made that it would finally adjourn for the term on the next Monday. It was also deposed that on Sunday the clerk of the court informed counsel that the court would not adjourn before the middle of the week. This showing is insufficient to excuse the default in this case. It was not the object of the statute, in providing that a stenographer might be appointed to report the evidence in a case, to devolve the duty of preparing a statement of facts upon him, or of releasing counsel in any manner from the responsibility of preparing it and submitting it to the judge within the time prescribed. It is unfortunately one of the many provisions of the statute intended to promote the administration of justice that is habitually abused. Instead of using the stenographer's work as a means to assist in preparing a statement of the evidence in accordance with the rules, he is relied upon to make the statement itself. The result is that, instead of a concise relation of the evidence introduced upon the trial of a cause, we frequently have the stenographer's report, with all the frivolous details and tiresome repetitions characteristic of a *verbatim* report of a trial. This practice is not in accordance with the rules of this court, and is not to be encouraged. The beginning point, then, in the excuse here presented, is that the stenographer did not have time to do what could only have been properly done by counsel. Moreover, when counsel are aware that the end of a term of the court is at hand, and desire to know definitely the day of adjournment, they should make application to the judge himself, and should not rely upon the opinion or conjecture of the clerk. We think that in the present case there was neither diligence shown in the preparation of the statement of facts, nor in taking the steps essential to its being approved and filed after the adjournment for the term. We find no error in the judgment, and it is affirmed.

GALVESTON, H. & S. A. RY. CO. v. KUTAC
et al.

(Supreme Court of Texas. March 11, 1890.)

DEATH BY WRONGFUL ACT—EVIDENCE—INSTRUCTIONS.

1. In an action under Rev. St. Tex. art. 2899, subd. 1, authorizing an action for death caused by the negligence of the proprietor of a railroad, or by the gross negligence of his servants, charges authorizing a recovery on the ground of ordinary negligence of defendant's servants, and a refusal

to charge that gross negligence must be shown, are erroneous. Following *Railway Co. v. Hanks*, 11 S. W. Rep. 877.

2. In an action for the killing of plaintiffs' mother by a collision between defendant's train and a wagon in which deceased was riding, evidence of the rate of speed at which the same train was run on the same day, by the same servants, at different places along the road, is admissible on the question of the servants' gross negligence.

3. A charge that plaintiffs cannot recover if deceased's husband, with whom she was riding, could, by the use of ordinary care, have prevented the collision, and if his failure to use such care contributed proximately to the death of deceased, is properly refused.

4. A charge that, in passing on the question of negligence of defendant's servants in charge of the train, the jury might consider the place at which the injury occurred, its surroundings, the rate of speed at which the train was being run, and whether or not the required signals were given, is erroneous, as giving too much emphasis to the circumstances referred to.

5. Such charge is also objectionable as recognizing the fact that no signals were given, where all of the witnesses who saw the collision, except two, testify that the signals were given, and those two merely state that they did not hear them.

Commissioners' decision. Appeal from district court, Colorado county. For report on former appeal, see 11 S. W. Rep. 127.

W. N. Shaw and *D. C. Bolinger*, for appellant. *Phelps & Lane* and *Foard, Thompson & Townsend*, for appellees.

HOBBY, J. This is the second appeal in this cause. There seems to be no material difference between the facts of the case reported in the first appeal (11 S. W. Rep. 127) and those contained in the record before us. The suit was brought by appellees for damages resulting from the killing of their mother, Mrs. Annie Kutac, on February 14, 1885, in a collision between defendant's train and a wagon in which she was riding. It was alleged that it was caused by the gross negligence of the agents and servants of the defendant in operating its train, running the same at a reckless and dangerous rate of speed, which it was alleged defendant authorized and directed to be done through different towns along and on its line of road, and through the town of Schulenberg, where the collision occurred, and in not giving any warning or signal of the approach of said engine at the crossing. With respect to the character of negligence which would render appellant liable in this suit, the court instructed the jury as follows: "If you find from the evidence that Annie Kutac was killed as charged by plaintiffs in their petition, you will then consider whether or not, from the evidence, such killing was done or caused by the want of the exercise and use of ordinary care on the part of defendant's agents and employes in propelling and running its engine and the train over its road. If you find," etc., "that Annie Kutac, while crossing the railroad track of defendant in a wagon at a public crossing, was run over or so injured by the engine and train of defendant that she died from injuries then received, and that such death was caused by the want of the exercise of proper care and

prudence on the part of said employes and agents, which could, if exercised by them, have prevented the injury complained of, and that by the use of ordinary care and watchfulness on the part of the person or persons so running said engine could have been prevented by them, then, in such case, you will find for plaintiffs; subject, however, to the further instructions here given you in this charge." The jury were also instructed as to the statutory signals the defendant was required to make near or at a public crossing, and that if by reason of the failure to give these Mrs. Kutac was killed, plaintiffs would be entitled to recover. The jury were charged as follows: "But you are further instructed that, before the plaintiffs would be entitled under the law to recover any damages from defendant, you must find from the evidence before you that the said Annie Kutac could not, by the use of that ordinary care and prudence which everybody ordinarily exercises, or should exercise, to protect themselves from injury, have prevented the injury complained of by plaintiffs." "For to entitle plaintiffs to recover you must find from the evidence, not only that defendant failed to exercise ordinary care and prudence to prevent the injury, but also that the injury was not done the woman by any fault or want of proper care on her part, as every person is bound to take due care of himself, and when a person contributes to an injury to himself, by his own act, or want of proper care and attention to his safety, no damage will lie for such injury. If, therefore, you find that Annie Kutac, by a want of proper care and prudence, contributed to her injury, then you will find for the defendants."

The foregoing instructions are complained of, under the fourth assignment, because they "authorize a recovery against the defendant for the death of Mrs. Kutac, caused by the ordinary negligence of the employes, agents, and servants of defendant, and fails to limit the right of recovery to gross negligence on the part of the agents and servants of defendant." It will be proper in this connection to consider appellant's fifth assignment, which is that "the court erred in refusing the following charges asked by it:" "The defendant is not chargeable with any act of ordinary negligence, by or on the part of their employes or servants, causing the death of the deceased." "To make them liable, the act or omission alleged to have caused the death must have been willful or grossly negligent." "Negligence cannot be considered gross, unless evidenced by an entire failure to exercise care, or by the exercise of so slight a degree of care as to justify the belief that the person on whom care was incumbent was indifferent to the interest and welfare of others." There is no controversy as to the fact that the allegation of plaintiff and the proof showed that the injuries resulting in the death of Mrs. Kutac occurred in February, 1885. We think the case of *Railway Co. v. Hanks*, 11 S. W. Rep. 378, is de-

cisive of the question raised by these assignments. In that case Associate Justice GAINES said, in delivering the opinion of the court: "The negligence shown by the evidence, if any, was that of the servants of the company operating its train. As the law then was, [July 6, 1886,] there could be no recovery against a railroad company for injuries resulting in death caused by the negligence of the mere servants of the company unless the negligence was gross. Rev. St. art. 2899, subd. 1."¹ A similar doctrine was held in *Railway v. Scott*, (not reported,) Tyler term, 1886, and also in *Railway Co. v. Hill*, 71 Tex. 451, 9 S. W. Rep. 851. The language of Judge GAINES, above quoted, is applicable to the case before us. The law of the twentieth legislature (Gen. Laws, 44, approved March 25, 1887, amendatory of article 2899, supra) provided, in effect, that the company should be liable for the negligence, etc., of the servants or agents, etc., and omitted the word "gross" before "negligence," as it stood in the original article. For the reason given in *Railway Co. v. Hanks*, supra, we think the charge was erroneous, as it authorized a recovery upon the ground of ordinary negligence, when the law authorized it only upon the ground of gross negligence. If the facts in this case had established gross negligence on the part of the employes and servants of the defendant at the time of the collision, then a reversal would be necessary, because there was nothing contained in the instructions given by the court from which the jury could have ascertained the meaning of that term, or whether the facts constituted gross negligence. But, as the law then in force only authorized a recovery on proof of such negligence, the charge requested, or a similar one, we think, ought to have been given.

This dispenses with the necessity for a consideration and determination of the question raised by the first assignment. That is whether the evidence showed that the servants of defendant were guilty of negligence, and that the collision was the result of the reckless conduct of the driver of the wagon in which Mrs. Kutac was riding; because if, as we have seen under the authorities cited, there could be no recovery of damages for the death of Mrs. Kutac, on the 14th day of February, 1885, caused by the ordinary negligence of the defendant's servants and agents in charge of the train, it would be immaterial, in so far as it affects appellee's right to recover on the one hand, or appellant's liability on the other, whether that character of negligence was shown by the proof. Either could only be affected by proof of gross negligence. The result, then, in the case presented by the record, briefly stated, is that, if it be conceded that ordinary negligence was shown, no recovery could be had

¹ This section authorizes a recovery for the death of any person, caused by the negligence of the proprietor of a railroad, or the gross negligence of his servants.

for that alone, if gross negligence was not shown by the evidence. No charge was given on that subject to authorize the recovery. As gross negligence was not shown, the charge requested, or a similar one, should have been given.

We do not think there was any error in admitting evidence of the rate of speed at which the same train was run, by the same servants operating it, on the same day, at the different places along the road alleged. It was admissible upon this issue, because it was one of the alleged grounds of gross negligence charged against defendant.

The appellant requested the following charge: "If you believe from the testimony that Joseph Kutac, the husband of Annie Kutac, deceased, was in said wagon with his wife, and in a position to have, by the use of reasonable or ordinary care, prevented said collision, or injury and death, and that he failed to do so, or use such care as a reasonable, prudent person would have used under the circumstances, and that such failure on his part contributed proximately to the death of said Annie Kutac, then she would be charged with said negligence, if living, and the plaintiffs, therefore, would not be entitled to recover." This was, we think, correctly refused.

The following was given by the court at the request of appellee: "In passing upon the question of negligence of the parties in charge of defendant's train, you may consider the place at which the accident or injury occurred, its surroundings, the rate of speed at which said train was then being run, and whether or not the signals, required by law to be given, were given by the parties in charge of said train." We think this was error, because the effect of it, in our opinion, was to give too much emphasis to the particular circumstances referred to. *Medlin v. Wilkins*, 60 Tex. 415. Almost all of the witnesses who saw the collision, except Kutac and the driver, testify that the whistle was blown, and some of them that it was repeatedly blown, on approaching the crossing. The two referred to state merely that they did not hear it. Under this state of the proof, we do not think an instruction recognizing the fact that no signals were made should have been given. For the errors mentioned we think the judgment should be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment reversed, and the cause remanded.

ILSE v. SEINSHEIMER.

(*Supreme Court of Texas*. March 11, 1890.)

MORTGAGES—LIEN—MISTAKE.

Where a lot intended to be conveyed is by mistake omitted from a mortgage, but public notice of the mistake and of the mortgagee's claim is given, the mortgagee's claim on the omitted lot is superior to that of a subsequent purchaser under execution against the mortgagee.

Appeal from district court, Jackson county. *W. S. Delany*, for appellant. *Wm. H. Burkhardt*, for appellee.

HENRY, J. This was an action of trespass to try title, instituted by appellee. The land in controversy is described as the "east half of lot No. 2, in block No. 14, range 6, in the town of Edna." The defendant pleaded, "Not guilty." The cause was tried without a jury, and judgment rendered in favor of the plaintiff for the recovery of the land. Both parties claimed under O. A. Baring as common source. Appellant's title is as follows: Baring purchased lots 2 and 4 in 1884, and his title papers were duly recorded in Jackson county on September 5th of that year. The deed correctly described the lot No. 4, but by mistake there was a misdescription of the other lot. Instead of describing it as the east half of lot No. 2, the deed described it as the east half of lot No. 3. Baring was ignorant of the mistake in the deed. On December 19, 1884, Baring mortgaged the two lots to appellant to secure a loan of \$2,000; but the same mistake and misdescription which had occurred in the deed to Baring was carried into the mortgage,—that is, the east half of lot No. 2 was described as the east half of lot No. 3. Ilse was also ignorant of the mistake. This mortgage was duly recorded in Jackson county on April 13, 1885. On October 5, 1887,—after the levy, but before the sale under which appellee bought,—Ilse, having discovered the mistake in his mortgage, filed suit in the district court of Jackson county to correct the mistake in the mortgage, and foreclose it. The decree correcting the mistake in the mortgage, and foreclosing it, was rendered November 19, 1887. Under an order of sale by virtue of this decree, the lots were sold by the sheriff in February, 1888, and bought by appellant Ilse. On February 25, 1888, W. H. Carter, the vendor of Baring, made a deed to him for the east half of lot No. 2, above described. This deed recites the mistake and misdescription contained in the original deed of August 19, 1884, and states that it was made to correct that mistake, and to convey the east half of lot No. 2, as was the intention of the original deed. This last deed was properly recorded. The plaintiff's claim is as follows: April 8, 1887, Frelberg, Klein & Co. recovered in Galveston county a personal judgment against Baring for \$7,306.51. On April 25, 1887, an abstract of this judgment was recorded in Jackson county. On September 2, 1887, an execution was issued on this judgment, and, by direction of the plaintiffs therein, was, on September 15th, levied on the two houses and lots above mentioned. At a sheriff's sale under this execution, and after public notice had been given of appellant's (Ilse's) claim, and of the mistake in his mortgage, appellee, Seinsheimer, bought the two lots, and received the sheriff's deed, on November 7, 1887, which was recorded next day. Baring had been in possession of the

two lots, by his tenants, ever since his purchase, in 1884.

It is evident that just such title as was purchased or conveyed to Baring by his vendor he mortgaged to Ilse before the judgment in favor of Freiberg, Klein & Co. was rendered. By reason of an entire misdescription the deed to Baring failed to convey to him any title to lot No. 2. Such title as he acquired to that lot by his purchase could not be shown by the registration of the deed made to him. The purchaser under the execution asserts that a purchase by Baring of lot No. 2, and a deed made to him by mistake for lot No. 3, invested him with such a title to lot No. 2 as to make it subject to be reached by a judgment lien and execution. If the deed to him with the intention and the mistake conveyed such title, we are unable to see why the mortgage made by him under the same description, with the same purpose, and by the same mistake, failed to bind the property. In any event, the title conveyed to Baring to lot No. 2, and that incumbered by his mortgage to Ilse upon the same lot, was not capable of registration; and therefore notice of the mortgagee's equitable rights, given at any time before the sale, was sufficient to preserve them. *Parker v. Coop*, 60 Tex. 111. The record shows that such notice was given before the execution sale. The judgment of the district court will be reversed, and judgment here rendered that appellee take nothing by his suit, and that appellant have judgment for costs incurred in this court and in the district court.

MUGGE *et al.* v. ADAMS *et al.*

(Supreme Court of Texas. March 11, 1890.)

PAROL EVIDENCE—PROOF OF HANDWRITING.

1. Parol evidence of the contents of a letter, which is not produced or accounted for, is not admissible.

2. A witness who has not qualified himself to testify to a signature to a letter which is not produced, cannot be permitted to testify that the signature was similar to that to a paper in the case.

Appeal from district court, Wharton county.

I. N. Dennis, G. G. Kelley, and John R. Shook, for appellants. *Wm. H. Burkhardt*, for appellees.

HENRY, J. Appellees brought suit for debt in a justice's court against W. F. Steagall, and sued out a writ of attachment, which was levied upon six mules, as his property. J. E. Mugge & Co. claimed the property levied upon, and made affidavit, and gave bond to try the right of property in the mules. The writ of attachment was levied on the 23d day of August, 1888. The claimants, who were defendants, alleged that they were the owners of the property by virtue of its sale and conveyance to them by a bill of sale made by the debtor, Steagall, on the 6th day of August, 1888, including the property in controversy, as well as other property. The con-

sideration of said bill of sale was the satisfaction and payment of a note due from W. F. Steagall to defendants for the sum of \$1,000, and the payment by defendants of a debt due by said W. F. Steagall to C. H. Waterhouse & Co., which amounted, with the expense of attorneys employed in settling the case, to the sum of \$296.75; making the aggregate amount paid for said property, \$1,296.75. Appellants testified by deposition. Their depositions were taken twice. In the first one they stated that they paid Steagall for the property \$250 cash, and canceled a note which they held against him for \$1,000. They testified that the transfer of the property satisfied said debts, and that they left the property in the possession of Steagall, because he was engaged in doing certain work for them. By their deposition subsequently taken, defendants testified that the notary who took the first deposition failed to properly express the actual facts of the matter with reference to the item of \$250. They explained that they meant to say that they paid the Waterhouse debt of about that amount, which, with interest, costs, and attorney's fees, amounted to about \$297. They testified that the property purchased was not, when purchased or afterwards, worth more than \$900. They denied that they paid Steagall any money for the property. A witness for plaintiffs testified that on the 4th or 5th day of August, 1888, W. F. Steagall handed him a letter written by J. E. Mugge & Co. to either W. F. Steagall or to C. H. Waterhouse & Co.,—witness did not positively remember which; that the letter had a blank note for \$1,000 attached, dated August 4, 1888, and that the letter contained instructions that the note was to be signed by Steagall, with a deed of trust on all of his property to secure it; that his recollection was that this letter stated that the claim of C. H. Waterhouse & Co. for \$255, and expenses of attorney's fees and costs in the attachment proceedings, was included in this \$1,000 note; that witness had delivered the letter to C. H. Waterhouse & Co. or to W. F. Steagall,—he did not positively remember to which one; that they were both present at the time he delivered the letter; that he had never seen the letter since, nor had he ever made any search therefor; that he was not familiar with the handwriting of J. E. Mugge & Co. prior to the day of this transaction, and would not swear that the letter was written by them, but it had their signature to it. The witness was shown the bond for the trial of the right of property, which defendants had filed in this case, and which contained their names, and he stated that the signature to the letter was the same as that signed to the bond. The attorney for plaintiffs testified that plaintiffs had never made any effort to procure said letter. Defendants' evidence as to the value of the property was not contradicted. The defendants objected to the evidence of the contents of the letter, because the letter itself was not produced or accounted for, and

because the witness, instead of qualifying himself to testify to the signature of the letter otherwise, was permitted to express an opinion that the unproduced signature was similar to the signature to the bond made by defendants for the trial of the right of property. We think both objections were well taken. The letter itself was the best evidence. As it was neither produced, or its absence excused, evidence of its contents was not admissible. If the absence of the letter had been accounted for, the signature to it could not properly have been proved, when it was not before the court, by comparison, as was permitted. The judgment is reversed, and the cause is remanded.

DANSBY v. FREIBERG *et al.*

(Supreme Court of Texas. March 11, 1890.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES.

A promise made by a debtor, to induce one of his creditors to accept a statutory assignment made by him, that he would pay the balance of such creditor's claim remaining after the distribution of the assigned estate, is fraudulent and void, as being a secret agreement by which a preference is given by an assignor to one of his creditors.

Commissioners' decision. Appeal from district court, Galveston county.

W. B. Denson, for appellant. *Scott & Levi*, for appellees.

ACKER, P. J. R. C. Dansby made a statutory assignment for the benefit of his creditors, being then indebted to Freiberg, Klein & Co. in the sum of about \$875. To induce Freiberg, Klein & Co. to accept the assignment, Dansby agreed that he would pay them the balance of their claim remaining unpaid after they received their *pro rata* interest in the assigned estate; they having refused to accept the assignment unless he did so agree. In pursuance of this agreement, Freiberg, Klein & Co. accepted the assignment; and, after the estate was distributed among the creditors, Dansby executed and delivered to them his promissory note for the balance due them, upon which they brought this suit. The defendant answered that the note was without consideration, and void, and that its payment could not be enforced, for it was tainted with fraud of a secret agreement, by which a preference was given by an assignor to one of his creditors, and set out the agreement between him and plaintiffs, in pursuance of which he alleged that the note was executed and delivered. The court sustained plaintiff's demurrer to that part of the answer which set up fraud of the agreement under which the note was executed, and the trial by the court without a jury resulted in judgment for plaintiffs, from which this appeal is prosecuted.

Under proper assignments of error, it is contended that the answer set up a good defense, and that the court erred in sustaining the demurrer, and rendering judgment for plaintiffs. Mr. Story, in his work on Equity

Jurisprudence, § 378, says: "There other cases of constructive frauds against creditors which the wholesome moral justice of the law has equally discredited and denounced. We refer to that not unfrequent class of cases in which, upon the failure or insolvency of their debtors, some creditors have by secret compositions obtained undue advantages, and thus decoyed other innocent and unsuspecting creditors into signing deeds of composition which they supposed to be founded upon the basis of entire equality and reciprocity among all the creditors, when in fact there was a designed or actual imposition upon all but the favored few." This doctrine has been adopted and applied in this state, (*Willis v. Morris*, 63 Tex. 458;) and it is insisted that it applies to this case. Appellees contend that the doctrine does not apply, because the agreement was entered into after the execution of a statutory assignment by the debtor; and this, therefore, is not a case of secret agreement in violation of the apparent terms of a composition agreement with all creditors. The acceptance necessarily had the effect to take from other accepting creditors so much of the proceeds of the assigned estate as were applied to plaintiffs' claim. The case of *Ramsdell v. Edgarton*, 8 Metc. 230, seems to us very much in point. Chief Justice SHAW, delivering the opinion in that case, said: "It is found that this memorandum, promising to pay the balance of the debt in full as far as the assigned property should fall short, was made as an inducement to the plaintiff to sign the assignment, and that he objected to signing it till this was done. If the memorandum could be considered as made before signing the assignment, then the obligation created by it would have been discharged by the general release contained in the assignment. But the true way is to consider them as made at the same time, and the one act as the inducement to the other. * * * It was a secret agreement made at the time of the assignment, and repugnant to its terms. By the assignment the creditor professed to unite with other creditors in discharging the common debtor on receiving an equal distribution of his property. This was wholly counteracted by the secret agreement. It was an unwarrantable coercion upon the debtor, and a fraud upon the other creditors, and so was void. The cases cited for the plaintiff, where it has been held that an express promise to pay the balance of a debt discharged by an act of bankruptcy is a good foundation to support an action, have no application. They proceed on the ground that the debt thus discharged leaves a moral obligation, which is a good consideration for an express promise. The distinction is obvious. The discharge is past, and the conscious moral obligation is the real consideration for the express promise. Here the consideration for the promise is that the creditor will execute a nominal and formal release, which may influence others, but which is intended to be counteracted by the

agreement so as to operate as no discharge of the debt." See, also, Greenh. Pub. Pol. 146-148. The language of Chief Justice SHAW in the foregoing quotation expresses more clearly than the writer could our view of the law governing the disposition of this case. We are of opinion that the court below erred in sustaining the demurrer to the answer, and rendering judgment for plaintiffs, and that the judgment should be reversed and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment reversed, and the cause remanded.

GERMAN INS. CO. v. SMEAD *et al.*

(*Supreme Court of Arkansas. March 8, 1890.*)

ACTIONS ON BONDS.

In an action against the sureties on a bond conditioned that the principal should promptly account for, and pay over and apply, all sums of money received for plaintiff, plaintiff need not show that before bringing suit there had been a settlement of accounts between it and the principal, and the balance due plaintiff ascertained.

Appeal from circuit court, Columbia county; C. W. SMITH, Judge.

Action by the German Insurance Company against H. P. Smead and J. B. McKemie on a bond executed by defendants as sureties, and James W. Harper as principal. The condition in the bond was that Harper, plaintiff's agent, should duly and promptly account for, pay over, and apply all sums of money which might be received by him as such agent, on collections or otherwise, and should also duly and promptly account for and apply all goods, chattels, or other property which might come into his hands or possession for or on behalf of the said plaintiff, and should keep true and correct books of account, and make regular and correct reports of the business transacted by him to plaintiff, and upon the termination of his agency, from any cause whatever, deliver up and hand over all of the money, books, accounts, memoranda, property, effects, and other things belonging to the said insurance company, or connected with or growing out of his said agency. This bond was dated in 1880. The complaint alleged a breach of the bond, in that the said James W. Harper had collected the sum of \$211.55 as agent for said company, and had failed to pay the same over as he should have done by the obligations of said bond. To the complaint was attached an itemized statement of his collections so claimed to have been made by him, and not accounted for. The plaintiff prayed judgment against the sureties on the said bond for the sum of money. There was a general denial on the part of the sureties on the bond of the indebtedness set out in the complaint. James W. Harper was not sued. The case was tried before a jury, and plaintiff's evidence established the collections by Harper as set out in the complaint, and his failure to

pay over or account for any of them. It also showed that Harper had left the state in 1883, and soon after died in Texas. The court gave the following instructions to the jury, among others, for the defendants: "No. 4. And, unless the jury find that there has been ascertained balance due from Harper to the plaintiff, of which Harper had notice before the institution of this suit, they will find for the defendants." There was a verdict for defendants, and plaintiff appeals.

Sanders & Watkins, for appellant.

PER CURIAM. The fourth instruction given at the instance of the defendants, which is the only ground assigned as error in the appellant's abstract, is clearly erroneous. Reverse the judgment, and remand the cause for a new trial.

BUCKNER *et al.* v. PACIFIC & G. E. RY. CO.

(*Supreme Court of Arkansas. March 8, 1890.*)

CANCELLATION OF CONTRACTS—DAMAGES—PLEADING.

1. Where a railroad company has built its road on a right of way granted to it in reliance on its contract to erect machine-shops and a round-house in a certain town, and to build its road to a certain point, the deed for the right of way will not be canceled, though the company has failed to perform its contract, since the parties cannot be placed *in statu quo*.

2. Where the complaint, in an action for the cancellation of the deed, contains also an alternative prayer for damages, but fails to allege that plaintiffs have sustained any special damages, or that the road was negligently constructed, the supreme court will not grant a new trial for the action of the lower court in dismissing the complaint, since, on the allegations in the complaint, plaintiffs are entitled to only nominal damages.

Appeal from circuit court, Washington county; J. M. PITTMAN, Judge.

Action by C. B. Buckner and Nannie Buckner against the Pacific & Great Eastern Railway Company for the cancellation of a deed for a right of way. In their complaint, plaintiffs alleged that they owned some farm land, across which they gave a deed to the railway company, and that thereafter the railway company constructed its road across the same; that said railway company proposed to the citizens of Fayetteville that it would begin at Fayetteville, and build east to the Madison county line, if the citizens would give \$25,000 in money, and the right of way to White River; that they fraudulently contracted to erect a round-house and machine-shops in Fayetteville,—and a contract made with trustees (not plaintiffs) is exhibited; and that they believe the erection of the same would enhance the value of their property. The plaintiffs, "in hope of increasing their said property in value," and that said road would be built, etc., "and the enhancement of the property of plaintiffs in the city of Fayetteville and vicinity, were induced to deed to the said railroad company the right of way, one hundred feet wide," across certain lands in complaint mentioned. The plaintiffs state that at the time of mak-

ing said deed they were wholly and solely influenced by the assurance and the agreement on the part of said railroad company to erect said railway to the Madison county line, and establish and maintain a depot and machine-shops and round-house in the corporate limits of the city of Fayetteville by the time and in the manner in said contract agreed. Plaintiffs exhibited a contract made by the railroad company with W. B. Welch et al., trustees, on the 24th of April, 1885, by which the railway company agrees to erect certain buildings on a certain 20 acres of land, (not owned by plaintiffs,) provided the trustees would obtain title to it, and donate it. They also exhibited an agreement made on April 24th, with Thomas White as trustee for certain parties therein named, (not including plaintiffs.) The parties to this contract stipulated for damages against the railway company in case of certain breaches, and a deposit of money was made as a forfeit, as shown by its terms. Plaintiffs allege that the contract by the railroad company to build to the Madison county line by the 1st day of September, 1886, and the erection of the buildings, was the sole and only consideration for the deed, and the railway company has failed to perform its contract; that said railway company was insolvent, but falsely represented itself to be solvent, etc.; that by means of the building of said road through said land the same has been impaired in value \$2,000; and pray that deed be canceled, and that the railway company be restrained from selling the same, or, in the alternative, that damages be awarded, etc. A demurrer was interposed (1) because the complaint did not state facts sufficient to constitute a cause of action; (2) that the facts alleged to have been falsely and fraudulently made are not material; (3) the statements are not alleged to have been made to plaintiffs; (4) it is not alleged who made the false and fraudulent statements, or how, through whom, or in what manner the said company made such statements and representations; (5) the facts set out in the amended complaint do not warrant the relief prayed for, and said complaint is otherwise informal and insufficient, etc. The demurrer to the complaint was sustained, and plaintiffs appeal.

C. R. Buckner and J. D. Walker, for appellants. Sam H. West and B. R. Davidson, for appellee.

PER CURIAM. The action of plaintiffs could not be sustained as one for rescission. The parties could not be put *in statu quo*.

Had it been treated as an action for damages, the plaintiffs, upon the allegations contained in the complaint, would have been entitled to nominal damages only. There is no allegation of special damages. The use to which plaintiffs' land was put, was contemplated and intended by the parties at the time of the conveyance, and it is not charged that the injury resulted from a negligent construction of the work. This court will not

reverse and remand a cause where appellant's claim would entitle him to nominal damages only. 3 Grah. & W. New Trials, 1856. Affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. YONLEY.
SAME v. BROWN.

(Supreme Court of Arkansas. March 8, 1890.)
RAILROAD COMPANIES—MASTER AND SERVANT—
CONTRACTOR—NEGLIGENCE.

1. A person employed by a railroad company to clear off and burn the rubbish from its right of way at so much per mile, who hires, pays, and controls his own help, is not a servant of the company, but an independent contractor.

2. Mansf. Dig. Ark. §§ 1958, 1959, providing that if any "hireling" shall willfully set fire to any woods, etc., so as to occasion damage to any other person, with the consent or by the command of his employer, such employer shall be liable, refers to the servants of a railroad company, but not to independent contractors.

Appeal from circuit court, Pulaski county; J. W. MARTIN, Judge.

Action for damages for the negligent burning of plaintiffs' property by persons employed by defendant to clear off its right of way. Mansf. Dig. Ark. § 1958, provides that "if any person shall willfully set on fire any woods, marshes, or prairies, so as thereby to occasion any damage to any other person, such person shall make satisfaction in double damages to the party injured, to be recovered by civil action." And section 1959 provides that "when an offense shall be committed against this act by a hireling with the consent, or by the command, of his employer, such employer shall be liable in the same manner, and to the same extent, as if the act had been committed by himself."

J. M. Moore, for appellant. Ratcliffe & Fletcher, for appellees.

PER CURIAM. The question in this case is whether Campbell was the servant of appellant, or whether he was an independent contractor. His employment was by letter of the road-master, as follows: "Little Rock, Arks., Nov. 27th, 1887. E. A. Campbell, Redfield—Dear Sir: I will pay \$25 per mile for cutting and clearing right of way from 89-mile post to 101-mile post. Want all trees, bushes, logs, weeds, grass, and all rubbish cleared off the right of way, and burned. Yours, truly, C. RUSSELL, R. M." Campbell, whose testimony is uncontradicted, says: "I accepted the offer, and did the work under it. I hired my men, and paid them myself. The defendant had nothing to do with them, and did not undertake to order or control my men. The witness Campbell was an independent contractor, and the railway company was not liable for the negligence of his employees. Mechem, Ag. § 747; Story, Ag. § 454 et seq.; Cooley, Torts, (2d Ed.) 643; Kellogg v. Payne, 21 Iowa, 575; Callahan v. Railway Co., 23 Iowa, 562; McCafferty v. Railway Co., 61 N. Y. 178; Mansf. Dig. § 1959. Digitized by Google

The statute does not control the question. The word "hiring" means "servant," and this is clearly demonstrated by reference to the following: *Webst. Dict.* "Hiring;" *Worcester, Dict.* "Hiring;" *Boniface v. Scott*, 3 Serg. & R. 353; *Gravatt v. State*, 25 Ohio St. 168; *Heygood v. State*, 59 Ala. 51; *Williamson v. Wadsworth*, 49 Barb. 298; *Morgan v. Bowman*, 22 Mo. 546. Reverse.

RECTOR v. McDERMOTT.

(*Supreme Court of Arkansas. March 8, 1890.*)

BUILDING CONTRACTS—ACTION FOR BREACH.

1. Where a building contract provides that the contractor shall erect the building "in the best, most substantial, and workman-like manner," and authorizes the owner to terminate it if the work is not done in accordance with its terms, the incapacity of the contractor to do the work properly, arising from his ignorance and dissipation, and the incompetency and dissipation of his workmen, justifies the owner in terminating the contract.

2. In an action by the contractor for damages sustained by the termination of the contract, it appeared that he had done some extra work not called for by the specifications, and that the owner afterwards finished the building. *Held*, that the contractor was entitled to recover, if the cost of completing the building was less than the contract price and the value of the extra work; but that, if the cost of completing the building was greater than the contract price and the value of the extra work, the owner is entitled to recover.

Appeal from Pulaski chancery court; D. W. CARROLL, Chancellor.

Thomas McDermott filed his complaint in the chancery court, alleging that he contracted with Mrs. E. F. Rector, through her agent, H. M. Rector, to erect a dwelling-house on a lot, the property of said defendant, located in Little Rock, Ark., for the sum of \$3,875. The contract was dated September 6, 1886, and the work begun on the 9th day of September following. He alleged that he proceeded with the work until the 16th day of October, at which time the plans and specifications were "surreptitiously" taken from him by one Max Orlopp, the architect supervising said work, and that, although he demanded a return of the said plans and specifications, and that although defendant promised to return them, yet he could never obtain the delivery and possession of them, and could not, therefore, complete his contract; that a short while thereafter the defendant relet the contract for building the house to Pettefer Bros., without his knowledge or consent; that up to the date when said work was taken from him he had furnished materials and had done work and labor to the amount of \$2,050; that he had received from defendant the sum of \$851, leaving a balance due him for materials furnished and labor done of \$1,198, and that if he had been allowed to complete said building he would have made, in addition to the above, a net clearing of \$800; that, therefore, the defendant was indebted to him in the sum of \$1,998.90; and prayed a decree establishing a lien and foreclosure for that sum. On the 5th day of March, 1887, Henry M.

Rector appeared and filed his petition, representing that the contract was made with him in his individual capacity, and that he alone was responsible for any and all demands growing out of the same. Thereupon he was made a party defendant by order of court, and from that time became the real defendant in the case, and filed his answer to the complaint, and a cross-bill against J. W. Callo-way and J. P. Simpson, the sureties on the bond of the plaintiff, McDermott, which he had given to faithfully and properly perform his contract in the building of said house.

In his cross-bill, Rector alleged that plaintiff was utterly incompetent to perform the work; that plaintiff had been paid \$1,005 on the contract; that defendant had paid Pettefer Bros. \$3,400 for completing the house, making a total of \$4,405, or \$530 in excess of the contract price, for which amount he asked judgment against plaintiff and the sureties on his bond. The following are the material parts of the contract: "The said T. McDermott covenants to perform the whole of his agreement in the best, most substantial, and most workman-like manner, subject to the directions from time to time and to the entire satisfaction of said architect, (M. A. Orlopp,) or his successors, appointed by the party of the first part, and to deliver his work completely finished on or before the 20th day of November, 1886." "If the said party of the second part shall become bankrupt or insolvent, or assign property for the benefit of creditors, or become otherwise unable himself to carry on the work, or shall neglect or refuse to do so at any time for six days in the manner required by the architect, or shall refuse to follow his directions as to the mode of doing the work, or shall neglect or refuse to comply with any of the articles of this agreement, then the said party of the first part or his agent shall have the right, and is hereby empowered, to enter upon and take possession of the premises, with the materials and apparatus thereon, after giving two days' notice, and thereupon all claims of the party of the second part shall cease; and the said party of the first part, or his agent, after using such of the materials already on the ground as shall be suitable, may provide other materials and workmen sufficient to finish the said work, and the cost of labor and materials so provided shall be deducted from the amount to be paid under contract." "The contractor is to lay out the work correctly, and is to give his personal superintendence, keeping also a competent foreman on the grounds, and is not to sublet any part of the work without the written consent of the owner. The architect is to have at all times access to the work, which is to be entirely under his control."

For defendant, M. A. Orlopp, the architect, testified as follows: "When we first started on the building, I went up to see McDermott lay the work off. McDermott started, and I saw immediately that he was not up in his business in regard to laying

out on work. I then took the tape myself, and laid out part of the building for him, and I explained to him the manner of laying out the rest. I left the work then, and went back to the office. This had been in the morning. In the afternoon, I came back and found out that that part of the work that McDermott had laid out was entirely wrong, the angles not being properly laid off. I then laid the work off myself for him, and started him on the foundation. McDermott let the foundation out to a man by the name of Brunhafer, and there was no trouble then until the foundation was up to where the joists were to be put on. After the foundation was finished, I went up to the building again. McDermott had started to raise the building, or the frame, and he got along very well for awhile, until he got to putting in the spaces for the stairway. These he laid off entirely wrong. Then I ordered him to change it immediately, and I showed him where the stairway was to go. He said he he would attend to it immediately, but he did not do so. I repeatedly ordered him to change this part of the work, but he never would obey any orders. In the specifications the plates of the building were called for double thick. These he put on single, in many instances refusing to change them after being ordered to do so repeatedly. About this time I had a talk with McDermott, and tried to get him to do the work better than he was doing, but never got any satisfaction out of him, because he was always in a state of intoxication. He let the brick-work out to a man by the name of Grant, who was also intoxicated almost all of his time, and it was almost an impossibility to get any work done that I ordered. After the plates were on, he started putting on the roof. He first got the roof on entirely wrong,—that part he was building on the front of the building. The way he was putting on this part of the roof would have been very much cheaper than what the plans called for, and would have been a great saving to him, and a great loss to Gov. Rector. This work I had torn down. After the work was torn down, he came to the office and asked me to explain the work to him; that he did not know how to do it. I did everything in my power to help him along, and showed him everything I could, and he left me under the belief that he understood it very well. I went back to the building next day, and this work that they were renewing on the roof was wrong again. I ordered that torn down again, and told McDermott that he would have to get a competent foreman that understood his work. He told me he would do so, and in order to facilitate the work I went up on the roof again where it was to be put, and showed him again exactly how to get the measurement of the principal rafters, and the valley rafters and the jack rafters. I also explained this to the man whom he had on the building, and whom he said was the foreman. Thinking I had made the work perfectly plain

to him, I went back to my office. Coming back the next day, I found out these timbers had been cut perfectly true, but were set in the wrong place. I then told McDermott that he would have to stop until Gov. Rector came back, and I would have a talk with him, seeing that he left it to an ignorant class of mechanics. On this account the work was stopped several days. When Rector came home, I told him that it was an impossibility for McDermott to complete the house, and I recommended that the contract be taken away from him; the right being reserved in the drawing up of the contract. I also told Rector that I had done all in my power to help him along, and had spent more of my time at the building than was necessary. Gov. Rector told me he did not see what else I could do but take the contract away from him, and I left the building, intending to write out the notice for McDermott to leave the building. Before I got out of the yard Rector called me back, and told me that he wanted to be as lenient as possible to McDermott, and told me to see him, and get him to employ a competent foreman and finish the work. I told him it was not much use to give him another chance; that he had promised to put on a good foreman, and he had not done it. Nevertheless, Rector gave me orders to see McDermott, and get him to put on a good foreman that understood the work. I saw McDermott, and he promised to do so, and that he would bring the foreman to me that afternoon. McDermott never brought me a foreman. The next day I saw a man by the name of Sullivan, who had promised to take charge of the work at \$3.50 per day, the very least a foreman can be employed for. I told McDermott about this man, and that I could get him, but McDermott positively refused to see him. I went back to Rector, and told him about it, and Gov. Rector sent for McDermott, and asked him to carry on the work, and told him that he would give him two days in which to get his foreman. The two days having elapsed, McDermott failed to put in an appearance. I then gave the said McDermott a written notice that the contract would be taken from him, the work let out to the lowest bidder, and the building finished. Should there be any amount left between the second and his original contract, including all extra work, I would pay him the difference, and that, should the work run over his original contract, Rector would hold his bondsmen responsible for it. After the two days had elapsed after I gave him the notice, I commenced to let out the work. I finally, at the recommendation of Gov. Rector, let the work to Pettefer Bros. at a price I do not now remember, but the papers will show. Harry Pettefer came on the ground, and I took him on the ground through the building, showing him the work, and had a great deal of it changed that McDermott had done. Pettefer took the building, and completed it according to the plans and specifications, with the ad-

dition of one room, flooring in the garret, and putting on blinds to the windows. I can say that all the time McDermott was on the building he was drunk, which entirely incapacitated him from work. He would sit on a chest in the yard, smoking his pipe, neglecting his work entirely, and leaving it to his mechanics. They did just as they pleased. After the work had been taken away from McDermott, Gov. Rector paid off all the hands, even overpaying the brick-masons. He paid T. H. Jones for lime; Bragg for brick; D. R. Wing for iron-work; Rudd for sand; and paid McMillan & Co. for lumber; in fact, he paid off all the bills which were chargeable upon the house. He relet this work to Pettefer Bros., making the house cost him in the neighborhood of \$4,500, when the contract price should have been \$3,875, according to McDermott's bid. McDermott could have built the house for this amount had he attended to his business strictly; but this he did not do. I can further state that I have taken more time, been more lenient, and more patient with McDermott than any man that has ever done any work for me. I did everything in my power to help him along, and advanced him money on the work, to the loss of Gov. Rector. The only extra work that we put on for McDermott, and for which he was to be paid at a fair price, was the addition of one room. McDermott set the studding for this room at a cost, perhaps, of \$16 or \$17, and not more than \$20. To this room was also added a small platform or porch, which is included in the \$16 to \$20. In conclusion, I will state that Gov. Rector did everything in his power to help McDermott along, and get him to quit drinking and do his work properly, according to the plans and specifications, which he had contracted to do, and for which he gave bond."

Defendant, Rector, testified to the same effect.

The plaintiff, McDermott, testified that at the time when he was stopped from work he had done \$2,175 worth of work, including the materials on hand. In addition to this, he would have made a profit of \$800 or \$900 on the work. In answer to the questions as to how and why the building was taken from him, he answered: "Mr. Orlopp came down there on Saturday evening. He said that the rafters were all right, but one on the corner. I told him that that should be changed to its correct place, and that that building should be put up according to his plans and specifications, and any changes that were made on the building should be done according to his wishes and the owner of the property. He picked up some plans, and asked me where the specifications were. I had thought at the

same time that I had left the specifications in the secretary at home, and told him so; and then Mr. O'Neal, a colored laborer of mine, steps forward, and tells him that they were in my tool-chest, and he told him to bring them there, and he would look over them, which he did. He rolled them up with the drawings. I asked him what he was going to do, and he said that he was going to take them away, and take the building from me, and I said to him: 'Don't you try to injure me. Everything must be done according to the plans and specifications. Any changes made I shall make at my own expense;' and he took them away. That is all that stopped me from work the next week." When asked what reason Orlopp gave for taking the specifications away, he answered: "Nothing more than I said in my last answer. He said that he heard that I was drinking, and took them away for that reason."

The case was submitted to the court on the pleadings and evidence, and the court rendered a judgment of \$169.87 in plaintiff's favor, from which defendant appeals.

Sanders & Watkins, for appellant. *T. J. Oliphint* and *J. C. Barrow*, for appellee.

PER CURIAM. McDermott admits that he received \$841 from Rector under the contract. Rector claims to have paid to McDermott, and for materials ordered by him, \$1,005. The contract authorized Rector to put an end to it, if the work was not done in accordance with its terms. He was justified, by the proof, in terminating it. Thereafter Rector caused the house to be completed at a cost of \$3,400. McDermott claims that he did work worth \$500, not called for by the specifications, and claims also that \$3,400 paid by Rector was more than it should have cost to complete the house according to the specifications by which he was bound. If the cost of completing the house according to the specifications was more than the contract price and the value of extra work done by McDermott, Rector should recover the difference of McDermott and his sureties. If the cost of completing the house was less than the contract price, added to the extra work done by McDermott, he should recover the difference of Rector. The burden is upon Rector to show that the house cost him more than the contract price, and it is upon McDermott to show that what he has received, and the reasonable cost of completing the building according to the specifications, was less than the contract price, increased by the value of his extra work. We can make no accurate statement from the abstracts furnished by counsel. It will be referred to W. P. Campbell to state the account, and report the result, upon the basis indicated.

DEPOSIT BANK OF OWENSBOROUGH v. BARRETT *et al.*

(Court of Appeals of Kentucky. March 15, 1890.)

RAILROAD COMPANIES—CONSOLIDATION—RIGHTS OF STOCKHOLDER.

Plaintiff and other creditors of an insolvent railroad company authorized their agents to purchase the road, and afterwards to transfer it to a new corporation, to complete the road, and operate it, all of which was done for the purpose of securing their debts. Subsequently this corporation was consolidated with another, and plaintiff sued to recover the value of its interest in the property, as having been converted without its consent. *Held*, that plaintiff was only entitled to recover its proportionate share of the stock of the corporation to which the road, with plaintiff's consent, was transferred after its purchase.

Appeal from circuit court, Daviess county.
"Not to be officially reported."

Weir, Weir & Walker and *W. N. & J. J. Sweeney*, for appellant. *G. W. Williams, R. S. Bevier*, and *W. F. Browden*, for appellees.

PRYOR, J. The Evansville, Owensborough & Nashville Railroad Company, originally incorporated as the Owensborough & Russellville Railroad Company, was declared a bankrupt many years since; many of its creditors holding its first mortgage bonds for money advanced, or other indebtedness. These creditors, for the purpose of securing their debts, gave to Barrett, Weir, and Brown a writing authorizing them, as their agents, to purchase the road and its franchises at the bankrupt sale; the bid not to be made unless those holding or representing \$1,000,000 of the bonds should sign the writing creating the agency. The writing being signed, the road was sold in May, 1877, and purchased at \$63,000 by the agents of the bondholders. After the purchase, the road was placed under the control of a new corporation, called the Owensborough & Nashville Railroad Company. This was done under the act of March, 1876, and now a part of the General Statutes, authorizing the purchasers of a railroad to become a corporate body for the purpose of operating and completing. The provisions of the charter are, in substance, such as are usually found in such charters; and the corporation thus created was really composed of the bondholders and creditors who had made the purchase. The new corporation was created in May, 1877, the same month in which the road was purchased. The agents of these bondholders were permitted to transfer their bid to the new corporation, manifestly with the consent and knowledge of their principals, and for the purpose of securing the large indebtedness of the old corporation.

This action was filed in the year 1883 by the Deposit Bank of Owensborough, one of the bondholders, against the new corporation and its agents, Brown, Weir, and Barrett, seeking to recover the value of its interest in the property purchased, and alleging that it had been converted to the use of the new corporation without its consent, and also asking an account of the management of the

road. The appellant, the bank, claims that it had no right to become a shareholder in the new corporation; that such an act would have been *ultra vires*; and, besides, that it never gave its consent to become a member of the new body. It appears from the record that one T. S. Anderson, purporting to represent the bank, recognized the existence of the corporation, and voted the number of shares of the bank on certain amendments, and that one of the attorneys of the bank, and perhaps a director, participated at one of its meetings, although not at the instance of the bank, and, while no corporate action was ever taken by the bank, or these parties directed by the corporate authority to act for it, it is evident that the creation of the new corporation was known to the bank, and that it was a party to the action in which the road was sold, and the bid by its agents transferred to the new corporation. It had the right to consent to the transfer of the bid, and must have known through its chief officers that the transfer had been made. That the bank had the right to consent to the transfer is unquestioned, and that it did consent is plain from the facts before us. The bank was entitled, if not a member of the corporation created when the bid was transferred, to its share of the purchase money, and nothing more. We think, however, it was a member of the corporation to the extent that it was entitled to the stock in lieu of its debt, or of its interest in the proceeds of sale made to the new corporation. It was making the effort to secure the indebtedness, and the purchase of the road had not accomplished the purpose, and there was no reason why the bank should not or could not have accepted the stock of the new company in discharge of its debts, in lieu of its interest in the road. The stock had a marketable value, or might have, and there was no reason why the bank could not have disposed of it, and in this manner rid itself of all connection with the railroad corporation. A bank, it is true, has no power to invest its means in railroads, as coming within the scope of its powers as a corporation. It may accept mortgages, stock, or even purchase the road itself, to secure its debts; and we perceive no reason why the bank could not have accepted stock in the new company in payment of what was owing by the old company. It is said, however, that the new corporation had extended its line of road, and, by legislation following its formation, had consolidated its road with that of the Tennessee & Kentucky Railroad Company, thus making the bank a stockholder in a road against its consent, and perhaps lessening its security. The consolidation was evidently illegal, if done without the consent of all the stockholders, unless the original articles of association gave such a power to the majority. The legislature could not compel the stockholder to go into a new and distinct corporation without his consent, as such action may in many instances materially affect the rights of parties interested.

and is in violation of the contract resulting from the original charter. *Clearwater v. Meredith*, 1 Wall. 25.

It is needless to say that the bank had no power to construct a railroad. This is too plain for argument. But it had the right to take stock in the new road to save its debt. The road having consolidated with the Tennessee road against the consent of the bank, its stock of the value before the consolidation is what it is entitled to, as against the new corporation. The new corporation has done that which it had no right to do, and it must place the bank in the condition it was before the consolidation was made. This is the equity of this case. The doctrine of *ultra vires* is not involved here. The new corporation has extended its road,—made, perhaps, large expenditures; and the question is, shall that corporation or the agents of these bondholders be liable to the bank, one of the bondholders, for the value of the road at the time of the sale, giving to the bank its proportionate share of that value? We think not. The bondholders purchased the property in common; and, after the lapse of six or seven years, the bank, when the road has been extended, improvements made, and large expenditures incurred, is claiming that it never surrendered its right as a joint purchaser, and could not have done so, because such an act would have been *ultra vires*. Now, if the bank could purchase the road to save its debt, it could take stock in the new road for the same purpose. That it consented to the transfer of the bid by its agents must be presumed. Some of them lived in the same town where the bank is located, and the road has its beginning; and, after it has been operated under the new directory for five years, to say that it never knew of the transfer would suggest that the officers were not very vigilant in looking to the bank's interest. If all the bondholders take this stock in lieu of their debts, it gives no one advantage over the others; but, if the bondholders who are in the new venture are compelled to pay the Deposit Bank its proportion of the value of the road at the time of the sale, on the ground that it was converted by the new company, or on the ground that the action of the bank, if it agreed to become a stockholder, was *ultra vires*, you then lose sight of the equities following these creditors in the attempt to save their debts, and give to the bank a preference over the others that it ought not to have. There is nothing illegal in the act of the bank transferring its bid, and accepting stock. It could not extend

and run this railroad with a view of making profit; and, with the other bondholders as joint owners, it must either sell its interest, or accept the stock in the new corporation. It does not appear that the bank ever attempted to sell, but stood by until this consolidation with another road was made, and the road about to be incumbered with a mortgage for a large sum of money that would likely swallow up its entire stock before any claim was made of its right to an interest in the road as originally sold, and its conversion by the parties who held with it. It had the right to complain when the act of consolidation was made; and, if dissatisfied before that time, its remedy was to sell its stock. Up to the period of consolidation; it stood upon an equal footing with all the other bondholders. Its rights and equities were the same, and no more; and, if the stock has not in fact been issued to it, it is nevertheless entitled to it. The Louisville & Nashville Railroad Company, never having leased the road, is in no manner liable to the appellant corporation; but the corporation the Owensborough & Nashville Railroad Company is liable for the value of the appellant's stock as of the date of the consolidation, and to any dividends or profits that had been declared upon it, or that the stockholders were of that date entitled to; and with that view, if demanded, a settlement should be made. The stockholder may sue because the corporation, through its officers, has changed the contract by its consolidation with another company, and thus ended, if the appellant desires to so treat it, the existence of the corporation in which it holds stock. As the effect of the judgment below is to make the bank a stockholder in the consolidated companies, the judgment below is reversed, and remanded for proceedings consistent with this opinion.

ON PETITION FOR MODIFICATION.

PRYOR, J. In response to the petition for a modification of the opinion, we can only say that the consolidation between the two corporations has been made, and a stockholder at this late day would scarcely be heard to complain. The action by the bank was instituted in the year 1883. It is recited in the opinion that the road had been leased by the Louisville & Nashville Railroad Company. This has been erased, and the error originated from the brief of appellee, where the operation of the road by the Louisville & Nashville Company is discussed, and also in the brief of counsel for the appellant. Petition overruled.

DEPOSIT BANK OF GEORGETOWN v. FAYETTE NAT. BANK.

SAME v. SECOND NAT. BANK OF LEXINGTON.

(Court of Appeals of Kentucky. March 8, 1890.)

BANKS AND BANKING—FORGED CHECKS.

Where forged checks on a bank, purporting to be drawn in the name of one of its principal depositors, and running through a period of five months, before the forgery is discovered, are accepted and paid by the drawee bank to other banks, which accepted and paid them in good faith, after inquiry of the drawee as to the depositor's account, the drawee bank must stand the loss.

Appeals from circuit court, Fayette county.

"To be officially reported."

A. Duvall, Breckinridge & Shelby, and Wm. Lindsay, for appellant. J. D. Hunt and Beck & Thornton, for appellees.

PRYOR, J. These two cases involve similar questions, and have therefore been considered as one case. The Deposit Bank of Georgetown, the appellant in this court and the plaintiff below, paid a number of forged checks purporting to have been drawn on that bank by one of its depositors, Thomas J. Burgess. The checks were successively presented through a period of four or five months, there being eighteen in number, and were all paid by the Georgetown bank in good faith, and before any discovery of the fraud had been made. All the checks were drawn in the name of Thomas J. Burgess, who was a regular depositor and customer of the bank; the first check having been paid early in December of the year 1883, and the last check paid in April, 1884. The name of Burgess was discovered to be a forgery on the 8th of May, and notice given to the appellees, the two banks to whom these checks were presented and paid, on the 9th of that month. John R. Wolfe, who had committed all these forgeries, had at one time been a clerk in the bank of the appellant, and was in that way familiar with the account and deposits of Burgess. The checks were drawn by Thomas J. Burgess, whose name was forged in favor of Williamson & Wolfe, on the appellant, and were presented to the two Lexington banks by John R. Wolfe, the payee, and payment asked of these banks. The Fayette National Bank, before advancing the money on the first check, made inquiry as to the account of Burgess, and, receiving a satisfactory response, upon the indorsement made by Williamson & Wolfe, paid over the money. Wolfe was identified, and no reason on the part of the Fayette National Bank existed for indulging a suspicion as to the *bona fides* of the transaction. There were 16 checks in all taken up by this bank, and forwarded to the drawee, the appellant. They were taken in the usual course of business, and when sent to the Georgetown bank, charged to the account of its depositor, Burgess. There was in fact no such firm as Williamson & Wolfe, but the fictitious firm

name used by Wolfe in the perpetration of his forgeries. Both the appellant and the appellees acted in good faith; the former believing that Burgess was in fact the drawer of the paper, and the latter advancing its money on the checks supposing (Wolfe having been identified) that it would be paid, as it was, by the Georgetown bank, and charged to the account of the drawer.

Which of the banks should lose the money? The bank at Georgetown, where the depositor, Burgess, whose name had been forged, deposited his money; or the banks at Lexington, where the money was paid to Wolfe under the belief that the checks were genuine, and Burgess in fact the drawer? It is evident that the bank at Georgetown honored the checks drawn upon it by Burgess, for the reason that its officers believed the name of the drawer was genuine; and, if the liability of the Lexington banks to refund this money is to be determined by the well-known rule of law applicable to the payment of money through a mistake of fact, the judgment in this case is erroneous. It is insisted, however, that it is a rule of commercial law long since recognized, and now firmly established, applicable at least between parties equally innocent of fraud, that the bank or its officers must know the signature of its depositor; and if such a doctrine is made to apply in this case, the appellant is the loser, and the judgment dismissing its petition was proper. The rule laid down by Lord MANSFIELD is that, if the banker or drawee makes a payment or gives credit upon the strength of a forged signature, the loss must be his, as between himself and the holder. "He has not known what he is bound to know." *Price v. Neal*, 3 Burrows, 1355. This doctrine of commercial law has been followed and recognized by nearly all the courts of the country, and as said by Mr. Justice STORY in the case of *Bank of U. S. v. Bank of Georgia*, 10 Wheat. 333, delivered in 1825, has never been departed from, and, in the earlier cases on the subject, able jurists, in alluding to this rule, regarded it as essential as a rule of law, and right between business men. The author in his work on Banking, has collected the authorities, and presented what, but after a modern doctrine on this subject, authorities re-examination of the authorities referred to, it will be found that the decided weight of authority is with Lord MANSFIELD, and the rule laid down in *Price v. Neal* is criticised only as being too sweeping in its character. Nor is it just to say that the rule adopted requiring the bank to know the signature of a depositor is without an exception; for it is undoubtedly true that the neglect or knowledge of intervening parties who come into the possession of the check, and receive the money on it from the bank where it is payable, will in some instances be of such a character as to enable the bank to recover back the money. This doctrine is recognized by Mr. Daniel in his work on Negotiable Instruments; and, while doubting the

justice of the rule recognized by nearly all the authorities, under which the bank is required to know the signature of its depositor, he proceeds to say that when one knows that it is a forgery, or takes it "under circumstances of suspicion, without proper precaution, or whose conduct has been such as to mislead the bank," the money may be recovered back. Volume 2, p. 669. The case of *National Bank v. Bangs*, reported in 106 Mass. 441, and relied on by counsel for the appellant in this case, was where a stranger giving his name as "William D. Riskford" drew his check, payable to the order of E. D. & G. W. Bangs, on the National Bank of North America. Bangs indorsed the check, and the bank paid the money, and, when discovering the forgery, notified Bangs, the payee and indorser, and sued to recover the money back; and a judgment was obtained. This, we think, was proper, as it would be an exceedingly harsh rule to permit one who negotiates with the payor, and obtains his check payable to the use of the party obtaining the money, who then indorses it to a bank, to hold on to the money when the payee has himself contracted with the payor, and given credit to the payor by his indorsement, that led the bank to believe the paper was genuine. The case of *Ellis v. Trust Co.*, reported in 4 Ohio St. 628, sustains this view of the question. The case relied on is unlike the case before us. The banks at Lexington took the checks in the usual course of business, with the indorsement of the payee, and then indorsed the paper for collection, forwarding it to appellant's bank, where the money was credited to the Lexington banks, and charged to the account of the one supposed to be the *bona fide* drawer of the paper. In the case relied on, of *National Bank v. Bangs*, it is said: "If the suit were between the bank or drawee and a party who took the check in the usual course of business, finding it in circulation, or even by first indorsement from the payee, the loss would fall upon the bank; because, having greater means and opportunity to become familiar with the handwriting of their correspondents or depositors, the law presumes that drawees will know their signatures and be able to detect forgeries. * * * But this responsibility, based upon presumption alone, is decisive only when the party receiving the money has in no way contributed to the success of the fraud, or to the mistake of fact under which the payment was made." There is a manifest distinction between the case of one who is both the payee and indorser of the check, and who negotiates directly with the payor in the loan or advance of the money for which the check is given, and a bank taking a check by indorsement from the payee in the usual course of business, with no ground of suspicion, and that receives the money on the check from a bank where the funds of the drawer are deposited. One of the two innocent parties must suffer, and there must be some rule of commercial law to guide banks and business

men in this character of business transactions. Therefore, when a bank has the means of knowing the signature of the drawer of a check upon it by reason of the drawer being its depositor or customer, the relation between the bank and its depositor is such that the bank must be presumed to know that the signature is genuine when making payment.

The case of *Ellis v. Trust Co.*, reported in 4 Ohio St. 628, recognizes this rule, and says the foundation for it is: "The party is supposed to know his own handwriting in the one case, or that of his customer or correspondent in the other, much better than the holder can; and the law, therefore, allows the holder to cast upon him the entire responsibility of determining as to the genuineness of the instrument, and, if he fails to discover the forgery, imputes to him negligence, and, as between him and the innocent holder, compels him to suffer the loss." After conceding the general doctrine on the subject, the court proceeds to say that the holder may by his negligent conduct deprive himself of the benefit of this rule, and that case was decided upon the ground that the holder had contributed to induce the payee to believe the paper was genuine. All the cases cited in the text-books or relied on by the appellant, while they criticise the rule as harsh, only make the particular case under consideration an exception to the rule, and permit the recovery by the drawee for the reason that the holder of the paper receiving the money was himself neglectful, and caused the loss, or by his conduct made the drawee believe the paper was genuine. These cases are exceptions to the rule, but all recognize the doctrine that where the parties are equally innocent the drawee paying the money must suffer the loss. The two cases—one found in 22 Neb. 769, 36 N. W. Rep. 289, of *First Nat. Bank v. State Bank*, and the other of *People's Bank v. Franklin Bank*, 12 S. W. Rep. 716—go further in discarding the rule than any cases to which our attention has been called; but in those cases the banks upon which the checks were drawn were permitted to recover upon the ground that the banks paying the checks had neglected to make the proper inquiry as to the identity of the holder, who was a stranger, and that this was such a want of precaution as deprived the bank advancing the money of any superior equity as against the bank upon which the checks were drawn. The court expressly says in the *Nebraska* case that the loss may therefore be traced directly to the negligence of the plaintiff in error. Whether the facts of those cases justified the conclusion reached is not necessary to inquire, as, after a careful review of all the authorities, it is found that the general doctrine fixing the liability on the drawee in such cases is fully sustained. In the case of *Espy v. Bank*, reported in 18 Wall. 604, the money was paid on a raised check, neither party being in fault. It was held that the money could be recovered back as having been paid without consideration.

The principle involved in the case being considered was not discussed in that case, nor could it have been well applied, as the bank paying the money could not be presumed to have had knowledge of the fraud practiced by the holder in raising the amount of the check that had been given by its regular depositor. We find no court as rigid in adhering to the rule that a bank is bound to know the signature of its depositor on this kind of paper as the supreme court of the United States. In *Levy v. Bank*, 1 Bin. 27, a forged check drawn on a bank, and accepted and carried to the credit of the holder when the fraud was discovered, in a few hours after, and it was held that the bank was the loser. And the supreme court, in the case of *Bank of U. S. v. Bank of Georgia*, when discussing the doctrine that the acceptor is presumed to know the drawer's handwriting, said: "After some research, we have not been able to find a single case in which the general doctrine thus asserted has been shaken, or even doubted; and the diligence of the counsel for the defendants on the present occasion has not been more successful than our own." In the case cited, reported in 10 Wheat. 333, the Bank of Georgia issued originally the bank-notes that when put in circulation were fraudulently altered. The Bank of the United States, coming into possession of the notes, presented them to the Bank of Georgia; and the latter received them as genuine, placing the amount to the credit of the United States Bank. The forgery was discovered, and the Bank of Georgia claimed that the Bank of the United States should lose the money. The court held that the Georgia Bank must lose, as it was bound to know its own paper. There is a manifest distinction between the last-named case and that of *Espy v. Bank*, reported in 18 Wall. 604. In the case of *Espy*, if the Cincinnati bank had recognized the name of the drawer as genuine, it could not well have known that the check had been raised. It was not the bank's own check, but that of another; and while, as between parties equally innocent, it is presumed to know the signature of its regular customer on the class of paper in question, it is not presumed to know that the amount is all correct, or that no fraud has been perpetrated in that regard.

While it rests upon one signing his own name, or that of a bank affixing its signature, to notes to pass as current money, to know that the signature is genuine, it also rests on a bank, where checks are drawn upon it in the name of its customer, to know his signature; and, instead of the party to whom the money is paid being required to show negligence in the bank paying the money, it devolves on the drawee to show negligence in the indorser or holder who in good faith has received the money before the drawee can escape liability. When the parties are equally innocent the drawee is the loser. There is no precedent in this court on the question. Still, we are not inclined

to follow the views of text-writers, in the face of so many adjudications on the subject, and with no case presented that goes further than to modify the rule in cases where bad faith or negligence is to be attributed to the holder or indorsee when taking the check. Besides, it appears from the finding of facts in this case that Burgess, the real depositor, and whose name has been forged, lived near Georgetown, in which the appellant is located, and was one of its largest depositors. These checks were continued to be paid during a period of nearly five months before the forgery was discovered,—a fact, it seems to us, that should be decisive of this case; and while the appellant, by its officers, was acting all the while in the best of faith, believing that the signature of Burgess was genuine, the length of time these checks were being received for collection, and paid without question, by the appellant, must necessarily fix the responsibility where it was placed by the court below. The judgment denying the right of recovery by the appellant is therefore affirmed.

COQUARD v. WERNSE et al.

(Supreme Court of Missouri. March 10, 1890.)

BAILMENT—CORPORATE STOCK.

Plaintiff and others bought shares of stock which were included in a certificate standing in the name of E. Each purchaser paid his share of the purchase to defendants, who paid it over to E., and received the certificate from him. Defendants then signed a paper, stating that they had received from plaintiff the number of shares bought by him, and agreeing "to forward the same to W., [the office of the company,] for the purpose of transfer, and * * * to deliver new certificate to him [plaintiff] as soon as received." Held, that the receipt showed a bailment to, and not a sale by, defendants.

Appeal from St. Louis circuit court; L. B. VALLIANT, Judge.

H. A. Clover, for appellant. Geo. W. Taussig, for respondents.

BLACK, J. The plaintiff, Coquard, brought this suit against Wernse & Dieckman, to recover \$2,805.32, that being the amount which he paid them for 400 shares of stock in the Pan Electric Telephone Company, on the ground that they failed to deliver the stock within a reasonable time after the purchase. The evidence for the plaintiff is to the effect that, after some conversations between himself and the defendant Wernse, he agreed to take 400 shares of the stock, and then paid defendants therefor the sum of \$2,805.32, and received from them the following receipt:

"Received of L. A. Coquard, January 25th, 1886, St. Louis, Missouri, 400 shares of the Pan Electric Company Telephone stock, parent company. The same is included in a certain certificate of said company, numbered 29, for one thousand shares, dated April 30th, 1866, issued to R. F. Looney. We agree to forward the same to Washington, D. C., for

the purpose of transfer, and agree to deliver new certificate to him as soon as received.

"WERNSE & DIECKMAN.

400 shares, at 7 dollars..... \$2,800 00
Expenses 5 32"

The plaintiff made repeated demands for a certificate for the 400 shares, and finally, on the 2d March, 1886, made a formal demand for a certificate, or a return of the purchase price with interest. The evidence for the defendants is to the effect that James Edwards had for sale a certificate for 1,000 shares of Pan Electric Telephone stock, and finally proposed to take seven dollars per share. Wernse says Coquard was to take 400 shares, J. & J. Taussig 200 shares, Wernse & Dieckman 200 shares, A. J. Well 100 shares, and James Edwards 100 shares; that the certificate for the 1,000 shares was handed to him, and he saw it contained a provision to the effect that it was not transferable, except with the consent of the president and secretary of the company; that he showed the certificate to plaintiff, who said he was satisfied the company could not enforce the clause; and that it was after this that the plaintiff paid the money, and received the receipt from Wernse & Dieckman. He says: "We got the 1,000 shares at seven dollars per share,—all of us together. We all bought it together, as I understood it." Plaintiff says he did not see the certificate until after he had purchased and paid for the 400 shares. Defendants received the money from the persons above named, and paid it over to the person from whom the certificate for the 1,000 shares was purchased, reserving no fee as compensation. They then sent the certificate to the company at Washington, D. C., with a request that new certificates be issued to the various purchasing parties, but the company declined to consent to the transfer; and it was not until February, 1887, that a certificate for the 400 shares could be procured in the name of the plaintiff. He then declined to accept the stock. The plaintiff asked, and the court refused to give, this instruction: "And the court further declares that, by the terms of said paper given in evidence, the same constituted a contract between plaintiff and defendants, whereby defendants sold to plaintiff 400 shares of the capital stock of the Pan Electric Telephone Company, to be delivered in a new certificate as soon as received, but within a reasonable time." The contract or receipt simply states that the defendants received from the plaintiff 400 shares of stock included in the certificate for 1,000 shares, which is described. It assumes that plaintiff had in some way become the owner of the 400 shares, and the defendants thereby agree, and only agree, to forward the certificate to Washington for the purpose of procuring a transfer and new certificates. By it the defendants constitute themselves bailees only for certain purposes, which are clearly specified. The receipt does not profess to set out the terms of any sale.

The instruction was therefore properly refused.

The terms of sale can only be ascertained by a resort to the parol evidence, and that evidence is conflicting. On the one hand, it tends to show a sale of 400 shares by defendants to plaintiff for \$2,800, and a failure of the defendants to deliver the stock. On the other hand, it tends to show that the plaintiff purchased a specified interest in the particular certificate, and that he got all he contracted for. No instructions were asked upon this parol evidence, and there is therefore nothing further before us for review. The judgment, which was for the defendants, is affirmed.

BARCLAY, J., not sitting. The other judges concur.

BROWN v. WELDON *et al.*

(*Supreme Court of Missouri. Feb. 24, 1890.*)

SALE—ACTION FOR PRICE—BREACH OF WARRANTY.

In an action on a note given for the price of a chattel bought for a particular purpose, whether on an express or implied warranty, with or without fraud, it is not necessary that the purchaser should return the article, or offer to return it, or rescind the contract, or that such article should be wholly worthless, in order that he may avail himself of his plea of a failure of consideration; but if he retains the article, and does not offer to return it, and such article is not wholly worthless, such plea can avail him only to the extent of the difference between the value of the article, had it been what it was represented to be, and its value such as it is shown to be.

Appeal from circuit court, Daviess county; CHARLES H. S. GOODMAN, Judge.

Case certified from Kansas City court of appeals.

Crosby Johnson, for appellant. Mr. Rush, for respondents.

BRACE, J. In this case the judgment of the circuit court of Daviess county in favor of the defendants, on appeal to the Kansas City court of appeals, was reversed, and the case remanded. But, one of the judges of said court of appeals being of the opinion that the decision of the majority of the court rendered therein is contrary to a previous decision of the supreme court, the cause was certified to this court under the provisions of section 6 of the constitutional amendment of 1884, (1 Rev. St. 1889, p. 88.) The case, fully reported in 27 Mo. App. 251, was carefully considered by the court of appeals, and correctly decided, and we deem it necessary only to consider the point of difference between the majority and minority of the court, as distinctly brought out in the first paragraph of Judge PHILIPS' opinion, in which he says: "I cannot concur in so much of the opinion of my associate, Judge HALL, as seeks to maintain that the instructions given for defendants asserted error in directing a verdict for defendants, if the jury found from the evidence that the horse and jack were worthless for the purpose for which they

were sold and bought, although they might be of some value for some other purpose;" and, in support of the correctness of the proposition asserted by the instructions, cites *Barr v. Baker*, 9 Mo. 850; *Murphy v. Gay*, 37 Mo. 535; and *Compton v. Parsons*, 76 Mo. 455. The last two cases, so far as they are authority in this contention, rest upon the first, and the whole upon this expression in the opinion in *Barr v. Baker*, supra: "If the article which forms the consideration of the note be worthless, for the purpose for which it was purchased, the consideration has wholly failed, although it may be of some value for another purpose." In that opinion it will be observed that, having disposed of the instructions upon the first plea, (that the note was obtained by fraud, covin, and misrepresentation,) which included one of plaintiff's instructions refused, the second, third, and fourth given for the plaintiff, and the second and fourth given for the defendants, the learned judge disposes of the other instructions in the last paragraph of the opinion thus: "The second ground of defense, to-wit, the failure of the consideration of the note, was properly placed before the jury by the other instructions given." The remainder of the paragraph, in which occurs the expression cited, and which is the cause of the present contention, is argument in support of this disposition of these instructions. Now, what issue did these other instructions "properly place before the jury?" They are, on behalf of the defendant: "(1) If they shall believe from the evidence in the cause that the note sued on was given by the defendants for the price of a jackass sold to the defendants by plaintiff's assignor, and that said jack was wholly valueless, they should find for defendants. (5) If they shall believe that the jack sold was wholly valueless, no return, or offer to return, the jack was necessary, in order to entitle the defendants to avail themselves of the defense of failure of consideration." And on behalf of plaintiff: "(1) If the jury believe that the jack was the consideration of the note, and was worth anything, and that the defendant has failed to give notice of his defects in a reasonable time to the plaintiff, or to return the same, then he is presumed to have acquiesced in the defect, and is not entitled to any deduction from the amount of the note." By these instructions the jury could not possibly have found for the defendant upon any other theory than that the jackass was wholly worthless. The remarks of the judge *arguendo*, "for the purpose for which it was purchased, although it may be of some value for another purpose," was outside the issue decided, and mere *obiter dicta*, and ought not to be authority, if incorrect in principle. The case was rightly decided. The instructions were based upon the evidence that the jackass was worthless for breeding purposes; that that was the purpose for which he was bought; and that was the only purpose for which a jackass was worth anything.

In *Murphy v. Gay* the court said: "The evidence tended to show the pipe was defectively made, unfit for the uses for which it was ordered, and worthless for any purpose but old iron;" which is but another form of saying that the pipe was of no appreciable value for any purpose. The case of *Barr v. Baker* is cited in that opinion in support only of the proposition that, in order to maintain the defense of failure of consideration, the defendant was not "bound to return, or offer to return, the goods at all." To the same purpose is *Murphy v. Gay*, cited in *Compton v. Parsons*; and while in this latter case the remark is made that, "if the 'water drawer' was worthless for the purposes for which it was purchased, this was a valid defense, as showing an entire failure of consideration; and this, whether defendant returned, or offered to return, the machine or not, or failed to notify plaintiff of its worthlessness." This remark must be read in the light of the fact that the case was an action in a justice's court for the price of a patent device to water stock, and that, if it was worthless for that purpose, it is not conceivable that it would have any appreciable value for any other purpose. In view of the actual points decided in these cases, considered in connection with the other authorities cited in the opinions delivered in this case, and the legislative provisions for the defense of a total or partial failure of consideration in the practice act, this rule of law may be deduced, though not entirely reconcilable, perhaps, with the logic of either Judge HALL or Judge PHILLIPS: That while, in an action upon a promissory note given for the purchase price of a chattel bought for a particular purpose, whether upon an express or implied warranty, with or without fraud, it is not necessary that the purchaser should return the article, or offer to return it, or to rescind the contract, or that such article should be wholly worthless, in order that he may avail himself of his plea of a failure of consideration, yet if he retains the article, and does not offer to return it, and such article is not wholly worthless, such plea can avail him only so far as to defeat a recovery on the note to the extent of the difference between the value of the article, had it been such as it was represented to be, and its value such as it is shown really to be. The *dicta* in *Barr v. Baker* ought not to stand in the way of the application of this just and reasonable rule to the plea of failure of consideration in cases like the one in hand. That it is sound in principle, and consistent with legislation and precedent in this state, we think is successfully maintained in the opinion of ELLISON, J. It follows that, as an abstract proposition, the clause in the instructions given, wherein the jury were directed to find for the defendant, if they find that the horse and jack were not of any value for the purpose for which defendant purchased them, although they may find such horse and jack were of some value for another and different purpose, must be condemned. As the case

must be reversed in any event, it would be superfluous to inquire whether, on the evidence, the error was of such a prejudicial character as alone to furnish reversible error. The judgment of the Kansas City court of appeals, reversing the judgment of the circuit court of Daviess county, is affirmed. All concur.

BULLER v. LINZEE et al.

(*Supreme Court of Missouri*. March 10, 1890.)

PARTITION—APPEAL—FINAL JUDGMENT.

In partition proceedings a judgment for partition and order of sale are interlocutory merely, and are not final judgments, within the meaning of Rev. St. Mo. 1889, § 7184, providing that appeals and writs of error will lie from a final judgment in partition proceedings.

Appeal from circuit court, Jasper county; J. D. PERKINS, Special Judge.

Jos. Cravens and H. W. Maxwell, for appellants. *Harding & Buller*, for respondent.

BARCLAY, J. This is an action for the partition of certain lands in Jasper county. It was tried upon pleadings which show that the title to an undivided one-fifth of the property is disputed, the ownership of the residue being uncontested. Upon a hearing, the trial court found for plaintiff as to the one-fifth interest in controversy, and entered an interlocutory judgment in partition accordingly, with an order of sale. After unavailing motions for new trial and in arrest, the defendant, against whom that finding stood, appealed to this court. No sale, or report of sale, or order of distribution, or any further action by the trial court, was had. It has long been the law of this state that a judgment that partition be made, ascertaining the interests of the parties litigant, and ordering a division of the land in kind, is merely interlocutory, and not reviewable by appeal, until action had by the trial court on the report of the commissioners in partition. *Gudgell v. Mead*, (1843,) 8 Mo. 54; *McMurry v. Glascock*, (1855,) 20 Mo. 432; *Stephens v. Hume*, (1857,) 25 Mo. 349; *Ivory v. Delore*, (1858,) 26 Mo. 505; *Papin v. Blumenthal*, (1867,) 41 Mo. 439; *State v. Sutterfield*, (1873,) 54 Mo. 394; *Strickler v. Tracy*, (1877,) 66 Mo. 466. But prior to the enactment of sections 7174 and 7184, Rev. St. 1889, (sections 89 and 58, c. 152, Gen. St. 1865,) as now worded, a judgment of that nature, which ordered a sale of the property, instead of a division in kind, was held by this court to be sufficiently final for the purposes of a review under the law then existing. *Durham v. Darby*, (1864,) 34 Mo. 447. Since the amendment of the statutes on the subject into their present form, it has been declared, with more or less positiveness, in a number of cases, that such a judgment, ordering a sale, is of no greater finality than one directing a partition in kind, and that neither will support an appeal. The partition must be perfected by the final report, required by law, and action thereon by the trial court, before the case can

regularly be the subject of appellate review. This is the result of repeated decisions, which should be accepted as settling the rule. *Parkinson v. Caplinger*, (1877,) 65 Mo. 290; *Murray v. Yates*, (1880,) 73 Mo. 18; *Turpin v. Turpin*, (1885,) 88 Mo. 337; *Harbison v. Sanford*, (1886,) 90 Mo. 481, 3 S. W. Rep. 20; *St. Joseph, etc., Ry. Co. v. Hannibal, etc., Ry. Co.*, (1887,) 94 Mo. 542, 6 S. W. Rep. 691; *Holloway v. Holloway*, (1888,) 97 Mo. 628, 11 S. W. Rep. 283. A remark was made in *Holladay v. Langford*, (1885,) 87 Mo. 582, and repeated in *Bobb v. Graham*, (1886,) 89 Mo. 207, 1 S. W. Rep. 90, which seems to give some effect to the ruling in *Durham v. Darby*, (1864,) 34 Mo. 447, (concerning the finality of an order of sale,) as a correct interpretation of the law now in force. The change in the statutes noted in *Hinds v. Stevens*, (1870,) 45 Mo. 211, and in *Murray v. Yates*, (1880,) 73 Mo. 18, was overlooked. The remark is out of line with many decisions above mentioned, in which the learned judge who made it concurred. It is evidently an inadvertence, and should not be considered as authority. The appeal in the case at bar is premature. As the merits of the cause are not now properly before us for review, we refrain from any expression of opinion regarding them. We all agree that the appeal should be dismissed, and it is so ordered.

CITY OF ST. LOUIS v. THIERRY et al.

(*Supreme Court of Missouri*. March 10, 1890.)

MUNICIPAL CORPORATIONS—ORDINANCES—SEWER CONNECTIONS—ACTIONS.

St. Louis city ordinance No. 10,977, § 2, provides that no person shall connect a private sewer with a public sewer without a permit from the sewer commissioner, and that these permits shall be issued only to such persons as shall give bond as required by the ordinance. Section 5 provides that any person desiring to work under such permits shall give a bond in the sum of \$500, conditioned that he will faithfully comply with the regulations of the sewer commissioner and the requirements of the ordinance, and that he will be responsible for the acts of his employees in such work. Defendants, as principals and sureties, executed a bond conditioned as required by the ordinance. A permit to connect a drain from the premises of one S. with the district sewer was issued to the principals on such bond, and under cover thereof they connected a drain from the premises of certain adjoining owners with the sewer instead of the premises of S., as designated in the permit. Held, that this was a breach of the bond, defendants' liability for which was not affected by the fact that the ordinance declares any violation of the bond to be a misdemeanor.

Appeal from St. Louis circuit court.

This action was brought by the city of St. Louis against Edward Thierry and Charles Thierry as principals, and Charles H. Peck and John C. Black as sureties, on a bond for the faithful performance of the duties of said principals, as drain layers, under the ordinances of the city. There was judgment for defendants on demurrer, and plaintiff appealed.

L. Bell, for appellant. *H. A. Haussler* and *C. V. Scott*, for respondents.

RAY, C. J. This is an action by the city of St. Louis to recover damages for the breach of a certain bond executed by the defendants. A demurrer on the part of defendants to the amended petition, on the ground that the same did not state a cause of action, was sustained, and, plaintiff declining to plead further, final judgment on the demurrer was given for defendants, from which the city has appealed. The only question involved, therefore, is whether the amended petition states a good cause of action. Ordinance No. 10,977 of the city, set out *in hac verba* in the amended petition, establishes, among other things, regulations and conditions for connecting private sewers with public and district sewers. Section 2 provides, so far as we need now notice, that no person shall connect any private sewer with any public or district sewer, except in pursuance of a permit so to do, issued by the sewer commissioner; that these permits will only be issued to such persons as have given bond as required by the ordinance; and that, if the property to be drained has been assessed for the construction of district sewers, no permit for its connection with a public or district sewer shall be issued until such assessment has been paid. Section 3 of said ordinance provides as follows: "Sec. 3. Any person desiring to work under permits from the sewer commissioner shall first file with the city register a bond in the sum of five hundred dollars, with two securities, to be approved by the mayor, said bond to be conditioned that he will in all work of constructing private sewers, and connecting the same with public and district sewers, faithfully comply with all regulations and instructions of the sewer commissioner, or his duly authorized agents, in reference to such work, and all the requirements of this ordinance, and will enforce the same upon his employes, and hold himself responsible for all their acts; and in case any work under a permit shall be improperly done, and in violation of the foregoing conditions, or in case of any damage to any public or district sewer caused by such violation, either on the part of the person to whom the permit is issued or his employe, the sewer commissioner shall have the right to reconstruct such defective work and repair such damage, and the whole cost thereof, together with the costs of suit, shall be recovered by the city of St. Louis by suit on such bond. If any one who has given bond as hereinbefore provided shall violate any of the conditions of said bond, the sewer commissioner may refuse to grant any further permits until all improper or defective work done by him shall have been repaired, and all expense which may have been caused to the city by such work shall have been paid into the city treasury." Defendants, as principals and sureties, executed a bond as required by the said section, being the bond sued on, and in words and figures as follows: "Know all men by these presents, that we, Edward Thierry and Charles

Thierry (Edward Thierry & Co.) as principal, and Charles H. Peck and John C. Black as securities, are held and firmly bound unto the city of St. Louis in the sum of five hundred dollars, to the payment of which well and truly to be made we bind ourselves, our heirs, executors, and administrators. Witness our hands and seals this 12th day of July, A. D. 1880. The condition of the foregoing obligation is such that whereas, the said Edward Thierry and Charles W. Thierry are doing business as drain layers, necessitating the uncovering of public and district sewers, and connecting private drains therewith: now, therefore, if the said Edward Thierry and Charles Thierry shall, in all work of connecting private drains with public and district sewers, faithfully comply with all regulations and instructions of the sewer commissioner or his duly-authorized agents, and all requirements of ordinance No. 10,977, approved January 23, 1879, and shall enforce the same upon all their employes, and hold themselves responsible for all their acts, then this obligation to be void; otherwise to be of full force and effect." The breach thereof alleged is that defendants Edward Thierry and Charles Thierry obtained from the sewer commissioner of the city a permit to lay a private sewer from the premises of one Schmidt, in block No. 755, to the district sewer, in said block; and that under cover of said permit, and without authority so to do, and in violation of said ordinance, defendants connected the adjoining premises of certain other designated owners with said sewer, instead of the premises owned by said Schmidt, for which the permit in question was granted.

The facts alleged, if true, as they are conceded to be for the purpose of the demurrer, show a violation of the permit which was to connect the premises of Schmidt only, and a violation of the ordinance which forbade the making or establishing any connection between private and public sewers, without a permit so to do from the commissioner. The said act was therefore unlawful, and is manifestly embraced within the letter of the bond, which is conditioned that the obligors therein will faithfully comply with all the requirements of the ordinance. In view of the language of the bond itself, as well as that contained in the ordinance, it is, we apprehend, a strained construction which would limit the obligation to work lawfully done under a permit, which is the contention made in this court in behalf of defendants. The contractors for these private drains undertake to connect them with the public or district sewers under the authority of this ordinance, and to comply with its requirements, and give their bond so to do, and, if they make such connections in violation of the ordinance, they are manifestly guilty of a breach of the bond. This is, we think, the plain import as well as the express terms of the bond and the ordinance in question. Defendants say that they are not liable on the bond, because

the act alleged in the amended petition is a misdemeanor under section 7 of the ordinance. But this construction, we apprehend, would make the bond altogether worthless, as that section imposes a fine for any violation of the provisions of the ordinance, and by its terms would include violations by parties working under such permits or otherwise. The city in this proceeding is seeking to recover on the bond, and is not proceeding against defendants for any misdemeanor as provided in said section 7. We see no reason why the parties may not be liable on the bond in this civil action to recover the damages, if any sustained, by a breach thereof, notwithstanding the penal provision of section 7, subjecting the party to a fine for a violation of the ordinance. While the same facts may, to some extent, be involved in both, these proceedings may not constitute any bar or defense to each other. But, as said before, so far as appears there is no prosecution by the city for said offense, and we need not now consider whether the prosecution for the misdemeanor and this civil action may be concurrently commenced and proceed *pari passu*. We are therefore of opinion, and so hold, that the amended petition states a good cause of action, and that the action of the trial court, in sustaining said demurrer, was error, for which its judgment ought to be reversed, and the cause remanded for a new trial, and it is accordingly so ordered. All concur.

COREY v. CHICAGO, B. & K. C. RY. CO.

(Supreme Court of Missouri. March 10, 1890.)

RAILROAD COMPANIES — EMINENT DOMAIN — PROCEDURE — COMPENSATION.

1. The general railroad law of Missouri, (1 Rev. St. 1855, pp. 414-417, §§ 13, 14, incorporated into Gen. St. Mo. 1865, pp. 351, 352, §§ 1-3,) making provision for the appropriation of lands "by any road, railroad, or telegraph corporation, created under the laws of this state," gives to a railroad company created by special charter a mode of procedure to condemn land in addition to that given by its charter, and it may resort either to the provisions of its special charter, or to those of the general law.

2. Under section 1 of the above law, requiring the petition for the condemnation of lands of a private person by a railroad company to set forth the general directions in which it is desired to construct the road over such lands, and a description of the real estate which the company seeks to acquire, it is sufficient if it sets forth the particular tract over which the road is to be constructed, gives the general direction in which it is to run, and for a more particular description refers to a map filed therewith. Following Railroad Co. v. Story, 10 S. W. Rep. 208.

3. The above law authorizes the company to apply to the circuit court to have the land condemned when "such corporation and the owners cannot agree upon the proper compensation to be paid," and where the petition avers the failure to agree it is sufficient. The company need not sustain the averment by oral proof; nor can the owner, after proceedings have been had, and the land has been condemned, deny the truth of such assertion.

4. Under the provision of such law in regard to the duties of the commissioners appointed to assess damages, "who, after having viewed the land, shall forthwith return, under oath, such assess-

ment of damages to the clerk of such court," it is not required that they be sworn before entering upon their duties, but it is sufficient if their affidavit be attached to their return.

5. Under the provision in section 2 of such law requiring 10 days' notice to the owner of the time when the petition will be heard, it is sufficient if the notice be given 10 days before the hearing. The law does not require it to be given before the damages are assessed.

6. A railroad company which has begun the construction of its road can in its own name institute proceedings to condemn land, though it has sold and conveyed its rights. Such case is not within Rev. St. Mo. § 3463, requiring actions to be brought in the name of the real party in interest.

7. The fact that a railroad company has already appropriated land does not affect the validity of proceedings to condemn the same subsequently instituted.

8. Where, after proper proceedings by a railroad company, land has been condemned, title thereto passes to the company; and the only measure of the owners' damages is the amount assessed by the commissioners.

9. Where the owner of land through which a railroad company wishes to construct its road takes a position with the company under a parol agreement to "drop the question of damages," such agreement is a bar to a subsequent suit for the damages to his land, though the agreement may have been terminated by the company contrary to its terms.

Error to circuit court, Linn county; G. D. BURGESS, Judge.

The general railroad law of Missouri, as laid down in 1 Rev. St. Mo. 1855, pp. 414-417, §§ 13, 14, incorporated in Gen. St. Mo. 1865, pp. 351, 352, §§ 1-3, provides as follows:

"Section 1. In case lands sought to be appropriated by any road, railroad, or telegraph corporation created under the laws of this state belong to private persons, and such corporation and the owners cannot agree upon the proper compensation to be paid, * * * such corporation may apply to the circuit court * * * by petition, setting forth the general directions in which it is desired to construct their road * * * over such lands, a description of the real estate which the company seeks to acquire. * * * Sec. 2. Upon the filing of the petition, a summons shall be issued, giving such owner at least ten days' notice of the time when said petition will be heard, which summons shall be served by the sheriff of the county, in the same manner as writs of summons are * * * required to be served. * * * Sec. 3. The court, or judge thereof, * * * shall appoint three disinterested commissioners * * * to assess the damages, * * * who, after having viewed the land, shall forthwith return, under oath, such assessment of damages to the clerk of such court, setting forth the amount of damages. * * *

" * * *

A. W. Mullins and B. J. Northcott, for plaintiff in error. Karnes & Krauthoff and L. T. Hatfield, for defendant in error.

SHERWOOD, J. This cause has been transferred to this court from the Kansas City court of appeals on the ground that the title to real estate is involved. It is an action for \$1,000 damages for taking plaintiff's land, in the construction of a railroad, wrongfully

and without legal authority. Briefly told, the essential facts are substantially these: In the month of July, 1872, the St. Joseph & Iowa Railroad Company resolved to build a branch road, and on the 13th of that month proceeded to condemn the right of way through the grounds of various persons, and among others those of plaintiff; and the result of such proceedings was that the plaintiff was duly notified thereof, and the commissioners made report of their action, which was duly recorded August 5, 1872. The report of the commissioners awarded to plaintiff the sum of one dollar; but he made no objection, and saved no exceptions, to the report. The defendant, in its answer, set up title to the land in controversy under and by virtue of a purchase thereof in 1880 from the trustee, who bought under a decree of foreclosure of the premises in 1876, and also claimed to be the purchaser without notice, and after due examination of the records aforesaid, and upon the ground of the plaintiff's acquiescence in the report aforesaid, and by reason of his residing continuously near the railroad ever since the work complained of was done, and without making any claim for damages, or any complaint about the same, to the receiver appointed by the federal court, who had the road in charge upwards of six years. The present action was not begun until May, 1882; almost, if not quite, 10 years from the time the railroad company first entered on plaintiff's land, and began its work. The substantial portion of plaintiff's own testimony was as follows: "I bought the land in 1869. I could have sold it in 1872 for \$30 per acre. I was willing to give the right of way to the railroad company if they would go along the public highway on the east side of my farm. I don't recollect of any service of notice of the appointment of commissioners to assess damages by the building of this road through my farm. I consulted an attorney, about the time of the construction of the road, about my claim for damages; but I accepted a position as section foreman on the line with the understanding that I was to have a permanent position, and drop the question of damages. But there was no contract to that effect. I held the position only about three or four months, and never received any pay for my work. The road was sold on my judgment for wages, and I bought the part running through my farm, and also a hand-car, and run the road myself while there were no trains, and until the Qualeys commenced operating it. I was waiting for the road to get out of the hands of the receiver. I have worked some for the road since it has belonged to the defendant. I have recently built a new barn on my farm. I think the strip of ground taken by the railroad company for right of way contained about seven acres. In waiting for the road to get out of the hands of the receiver, I acted under the advice of Major Mullins. Mullins did not say I could not recover from the receiver. He was only my counsel gen-

erally. The railroad passes along about one hundred feet from the house. Dirt has been piled up on each side of the track, and I had to put in one week's work with my boy and team to keep the graders from piling the dirt in front of the house, and get it so I could cross the railroad. Most of the dirt was hauled away."

The claim is made that the proceeding instituted for the condemnation of a portion of plaintiff's ground was a nullity; the chief reason for so regarding it being that it failed to conform to the special charter under which authority was granted. Under the general law relating to the incorporation of railroads, as it existed in 1855, a company, whether formed under the general law, or under "any special act," when desirous of condemning land in consequence of being unable to agree with the owner, had a right to proceed under that general law. 1 Rev. St. 1855, pp. 414-417, §§ 13, 14. When the next revision of the statutes occurred, these sections were in substance incorporated into sections 1-3, Gen. St. 1865, pp. 351, 352, which make provision for the appropriation of lands "by any road, railroad, or telegraph corporation created under the laws of this state." Taking the history of this litigation, there can be no doubt that a railroad or other corporation enumerated above may, in order to condemn lands, resort either to the provisions of its special charter, or to those of the general law. This point was so ruled as to a macadamized road company, though possessing a special charter. *Road Co. v. Dennis*, 67 Mo. 438.

The question then occurs, did the condemning company conform to the provisions of the general law? It is insisted that the petition does not contain a "description of the real estate which the company seeks to acquire;" but the petition mentions the particular 80 acres of the defendant's land over which the proposed road was to be constructed, gives the general direction in which it was to run, and then, for a more particular description of the location and course of the road, it refers to a map filed therewith, and marked "Exhibit A," and made a part of the petition. This was a sufficient description, under the authority of *Railroad Co. v. Story*, 10 S. W. Rep. 203, (decided a short time ago,) and, inasmuch as the map is not attached to the files, we will not assume that it was not all that was asserted concerning it in the petition with which it was filed; and this must be regarded as especially true, since the lower court, in its trial of this cause, will be presumed to have examined said map, and found it sufficient.

The petition also contained the averment that the company "cannot agree with the defendants as to the amount of compensation to be paid." This averment conformed to the general law, was sufficient, and it was not necessary for the defendant to sustain this averment of the petition by oral testimony; nor was it competent for the plaintiff to nullify the effect of the record by denying

the truth of such assertion, even if his language can be construed into such a denial.

Nor was there any failure to comply with the general law by the commissioners. True, the special charter required the oath they were to take was to be taken "before entering upon the duties of their appointment," but, under the general law, the prior taking of such oath was not requisite. On the contrary, the language of the general law in touching upon the duties of such commissioners in this respect declares: "Who, after having viewed the land, shall forthwith return, under oath, such assessment of damages to the clerk of such court." The report of the commissioners was made on the 31st day of July, 1872, and immediately below the same is the necessary affidavit made by them; so that under the general law their duty was fully discharged, since their report in other respects is full and complete.

And the same line of remark applies to the notice served upon the owner of the property. It was in the form of a summons, and was served, as the law aforesaid required, 10 days before the petition was heard; and, under that law, it was not requisite that notice should be given to the owner before making the assessment of damages. Nor is there any merit in the point that the condemning company instituted its proceedings to appropriate the land in question 20 days after it had sold and conveyed its rights, and entered, etc. Section 3462, Rev. St., requiring actions to be brought in the name of the real party in interest, does not touch a case of this kind, or affect the jurisdiction of the court. It appears, too, that the St. Joseph & Iowa Railroad Company began the construction of the road prior to such sale; and, if so, it was the proper party to institute the necessary proceedings to acquire the title, as such title would of course inure to the benefit of its grantee. And there is no doubt about the validity of proceedings to condemn instituted after an appropriation of the land taken. *Secombe v. Railroad Co.*, 28 Wall. 108. Of course, such subsequent condemnation proceedings could not heal or cure any antecedent trespass committed by the company. *Id.*

But it is urged that, the one dollar assessed as damages not having been deposited with the clerk until some six years after the consummation of the proceedings to condemn, there was no compensation, and hence no

title passed by reason of the proceedings. While, under our rulings, this failure to pay the assessed compensation might have been a valid ground for an action of ejectment, or for an injunction to restrain the company till compensation made, this rule would not apply where there had been a waiver of prepayment, or a contract releasing payment altogether, or a parol license to enter and build the road, under which license, unrevoked, the road had been built. In such case, the title of the owner would pass, but, unless to an innocent purchaser, of course subject to his right to recover his compensation by any appropriate method of procedure. But when, as here, such compensation has become fixed by appropriate statutory proceedings, the measure of the damages or compensation the owner can claim is the amount of the compensation awarded him by the commissioners. *Railroad Co. v. Johnston*, 59 Pa. St. 290; *Pierce, R. R.* 170; *Smart v. Railroad Co.*, 20 N. H. 233. Under the general law as it then existed, the present plaintiff could have procured the issuance of an execution to collect his damages. Gen. St. 1865, p. 352, § 3. But, taking the plaintiff's own testimony as a basis for the inference, there can be but little doubt that he made a valid contract with the company, though by parol, to accept the position as section foreman, and to "drop the question of damages." It is true he retained the position only a few months; but this may have been his own fault, as there is no testimony on this point, and it will not be assumed that the company was in fault. But, granting so much as that, this is not a suit on that contract. That contract and that release, if valid, saying nothing about the condemnation proceedings, is certainly a bar to the present action. *Pierce, R. R.* 168, and cases cited.

In conclusion, taking this whole record into consideration, there are such circumstances of statutory proceedings had; of acquiescence in the taking of plaintiff's land; of a release of all damages by him, upon a valid consideration; of a failure on his part to take any steps to assert, or even to claim, his alleged rights, during a period of nearly 10 years,—as ought to preclude him from relief now, especially as against a purchaser at a foreclosure sale; and so we affirm the judgment.

RAY, C. J., and BLACK and BRACE, JJ., concur.

HALL v. GLESSNER *et al.*

(Supreme Court of Missouri. March 10, 1890.)

PARTNERSHIP—SPECIAL PARTNERS—LOAN BY PARTNER INDIVIDUALLY—EVIDENCE.

1. N. and W. were partners, and as such leased to defendants, also a partnership. Soon afterwards W. became a special partner in defendants' firm. N. loaned money to the defendant partnership, giving the check of N. & W., and the loans were entered in defendants' books as from N. & W. It appeared, however, that N. & W. had the right to check out partnership money for individual use, and that the loans were in fact made by N. individually, though by the firm checks. *Held*, that this evidence was sufficient to sustain a finding that the loans were made by N. individually, and not by N. & W. as partners.

2. The fact that W.'s contribution as special partner to defendants' firm was in the form of a check of N. & W. did not constitute N. a special partner as well as W.

3. And an attachment by N. of the property of defendant partnership could not fall within the provisions of Rev. St. Mo. 1879, § 8410, declaring that "no sale, transfer, or change of the property or effects" of a limited partnership, "made for the purpose of giving a preference or priority to one over others of his or its creditors, shall be valid against its creditors, if made where he or the firm is insolvent, or in contemplation of insolvency."

Appeal from circuit court, Clay county; D. C. ALLEN, Special Judge.

The plaintiff, Nathan J. Hall, brought an action by attachment on certain notes against defendants, Glessner & Ross. After the plea of the latter in abatement had been tried, and had failed, Selden and others, who, meanwhile, had obtained judgments against Glessner & Ross by confession, levied executions on the property which plaintiff's attachment held, and then filed interpleas in the plaintiff's action, praying the circuit court to postpone the lien of his attachment to that of the executions mentioned. After a full hearing on the merits, the trial court denied the relief asked by the interpleading creditors, found for plaintiff, and gave judgment accordingly. The interpleaders then appealed in due form.

Bottsford & Williams and Lathrop, Smith & Morrow, for appellants. *Wash. Adams and F. L. Wilkinson*, for respondent.

BARCLAY, J. 1. In the view we take of the merits, it will not be necessary to consider various questions regarding the form of the proceedings which counsel have discussed. We pass them, and deal at once with the substance of the controversy. Nathan J. Hall, plaintiff, and his brother, William M. Hall, as partners under the name of Hall Bros., leased a building in Kansas City, in 1883, to Glessner & Ross, defendants, who occupied it, until their failure, as a candy and cracker store and manufactory. When the lease was made William M. Hall became a special partner in the firm of Glessner & Ross by formal articles under the statute governing limited partnerships. Rev. St. 1879, c. 57; Rev. St. 1889, c. 123. Afterwards funds to a large amount were loaned, at various dates, to Glessner & Ross, in circumstances which give rise to the litigation now before us. Plaintiff claims that these loans were made by him individually, and they form the basis of his

cause of action. The interpleaders assert that they were made by the firm of Hall Bros., and not by plaintiff alone. This issue is the most important one in the case, for it is obvious that plaintiff's rights would be materially different from what he claims, if the interpleaders' assertion were established, having in view section 3409, (Rev. St. 1879,) which declares that, "if the partnership become insolvent, no special partner shall be paid as a creditor of the firm, or receive the benefit of any lien in his favor as such, until the other creditors of the firm are satisfied." Without going into every detail of the evidence on this point, and assuming (though not, however, deciding) that this issue, which the trial court found for plaintiff, is open for review here on the facts, it may be stated that the most material testimony supporting the theory of the interpleaders is that the funds in question were actually transferred to Glessner & Ross by means of checks of the firm of Hall Bros., and that the money thus borrowed stood on the books of Glessner & Ross to the credit of Hall Bros., in the account of the latter, until shortly before the attachment, when the account was changed into the name of Nathan J. Hall, and the notes to him, as sued upon, were executed. Some of these notes were antedated. Plaintiff, in explanation, showed that under the terms of partnership of Hall Bros. either partner had, and each often exercised, the right to check out partnership money for individual use, subject to ultimate settlement; that the loans mentioned were so made by Nathan J. Hall with checks of Hall Bros.; that William M. Hall had no interest (other than as limited partner of Glessner & Ross) in the money loaned; that the entry of the items to the credit of Hall Bros. on the books of Glessner & Ross was ascribable to an error of the latter's book-keeper, which was corrected when the notes in suit were made; and that the antedating was done to conform to agreements between the parties, regarding the dates from which interest should run on the several items of loan. It does not seem necessary to further particularize the testimony on this subject. Even treating the issue as one in equity, we should not feel at liberty to disturb the finding of the trial court on the record before us. There is no apparent preponderance of probability in the evidence against that finding. Some of the facts, exhibiting plaintiff's dealings regarding these loans, may, at first glance, bear a suspicious appearance, but the explanation given of them is reasonable and natural. We see no reason to discredit it or to reverse the ruling thereon of the trial judge, who had the advantage of gathering the materials for estimating its credibility from the living witnesses before him at the trial.

2. The fact that the contribution by William M. Hall, as special partner, to the limited partnership of Glessner & Ross, took the form of a check of Hall Bros., did not constitute Nathan J. Hall a member of the firm of

Glessner & Ross. The undisputed evidence of the agreement and practice of the Hall Bros., regarding the use of firm funds for individual purposes when needed, (subject to adjustment at periodical settlements,) explained the use of that check, and there was other evidence sufficient to establish that the contribution, whatever its form, was in fact that of William.

3. The interpleaders next contend that the transaction already described, culminating in the attachment, amounted, in effect, to a violation of section 3410, Rev. St. 1879, which declares that "no sale, transfer, or change of the property or effects of the firm, or any member thereof, made for the purpose of giving a preference or priority to one over others of his or its creditors, shall be valid against its creditors, if made when he or the firm is insolvent, or in contemplation of insolvency." There is obviously little force in that contention, if it be once conceded that Nathan J. Hall was the sole creditor in the dealings which form the subject of this action. That fact has been established, as already shown, and, indeed, without it, his case would fail at several points. Whatever preference Nathan J. Hall secured was not by any "sale, transfer, or change of the property or effects of the firm" by Glessner & Ross, or any member thereof, but by virtue of adverse proceedings against them in this action under the attachment law. It is not charged or intimated that the attachment was collusive. It was actively resisted by Glessner & Ross upon their plea in abatement until a judgment thereon sustained the plaintiff's lien. The object of the section last quoted is not to preclude creditors of a limited partnership from reaping the benefits of diligence in enforcing their just claims against it, but to prevent preferences from being secured by the voluntary or collusive acts mentioned of the insolvent firm or its members. No other assignments of error seem to call for remark. With the concurrence of all the members of the court, the judgment is affirmed.

MACKLIN v. ALLENBERG *et al.*

(Supreme Court of Missouri. March 10, 1890.)

DECREE TO CONVEY LAND—REVERSAL—INNOCENT PURCHASERS.

1. In ejectment it appeared that defendants' grantor had purchased the land in dispute at an execution sale against plaintiff's grantor; that prior to such sale plaintiff's grantor had executed a trust-deed, conveying the property for the use and benefit of his wife. Defendants' grantor brought suit in equity to set aside the trust-deed, and obtained a decree declaring the deed null and void, and vesting all the right, title, and interest in the property in himself. *Held*, that under Rev. St. Mo. 1879, § 3862, providing that, in all cases where judgment is given for the conveyance of real estate, the court may by such judgment pass the title of such property without any act to be done on the part of the defendant, such decree was sufficient to pass the title to the property to defendants' grantor.

2. And in such case it further appeared that the final decree fixing the title in defendants' grantor was rendered in October, 1878, and that he

obtained a writ of possession thereunder; that in March, 1879, he executed a deed of trust, under which defendants acquired title; that in a year thereafter, lacking a few days, plaintiff's grantor sued out a writ of error, under which the decree first mentioned was reversed. *Held*, that while the reversal of the decree entitled the plaintiff's grantor to restitution, as against defendants' grantor, it did not affect the rights of an innocent third person claiming under him; the writ of error being a new action.

3. And in such case, where defendants' grantor had alleged that the trust-deed from plaintiff's grantor was contrived and made to defraud creditors, a finding to that effect, and a judgment declaring the deed null and void, confirmed the title of defendants' grantor as a purchaser at the execution sale, without any decree to that effect.

Appeal from St. Louis circuit court.

Action of ejectment by Marie J. Macklin against August Allenberg and others. There was judgment for plaintiff, and defendants appealed.

D. T. Jewett, for appellants. *T. J. Rowe*, for respondent.

BLACK, J. This is an action of ejectment for a lot in the city of St. Louis. The judgment of the circuit court was for the plaintiff, and defendants appealed. Patrick Macklin is, for all the purposes of this appeal, conceded to be the common source of title. On the 14th May, 1873, he conveyed the lot to F. L. Haydell in trust for the use and benefit of Ann Macklin, the wife of said Patrick Macklin. The plaintiff put in evidence other deeds, showing a perfect and complete title in her, but they are all dated subsequent to the decree hereafter mentioned. Michael Kinealy purchased the lot in December, 1873, at a sale under an execution issued on a judgment against Patrick Macklin and in favor of Ferguson; and in February, 1874, Kinealy commenced a suit against Macklin and his wife and Haydell as trustee, to set aside the deed of trust to Haydell, on the ground that the same was made in fraud of the creditors of Patrick Macklin. Notice of that suit was duly filed in the office of the recorder of deeds. In October, 1878, Kinealy obtained a decree which declared the deed to Haydell to be null and void and of no effect, as against Kinealy as purchaser at the execution sale; and after describing the property the decree goes on and vests all the right, title, and interest of the defendants to the property in the plaintiff, and the plaintiff is also awarded a writ of possession. A copy of this decree was duly recorded in the recorder's office. The defendants in that case filed a bill of exceptions in November, 1878, but took no appeal. Kinealy was put in possession by a writ issued pursuant to the decree, and thereafter in March, 1879, he conveyed the property to Southerland in trust to secure his note for \$2,000 payable to defendant Sanderson. The defendants acquired their title at a sale under this deed of trust. In March, 1880, Macklin and wife, and her trustee, Haydell, sued out of the St. Louis court of appeals a writ of error in the former suit of Kinealy against them. That court affirmed the judgment of the circuit

court, but the judgment of the court of appeals was reversed, and the bill dismissed by this court in 1886. 89 Mo. 433.

1. The plaintiff assails the decree rendered in the case of Kinealy against Macklin and wife, and her trustee, Haydell, on the ground that the circuit court could not vest the title of the defendants in the plaintiff. A court of competent jurisdiction, it is insisted, can by its decree find and declare that a title has been acquired by operation of law or by the act of the parties, but the decree cannot be made a mode of transferring title. To all this the statute furnishes a sufficient answer. It declares: "In all cases where judgment is given for the conveyance of real estate, or the delivery of personal property, the court may, by such judgment, pass the title of such property without any act to be done on the part of the defendant." Section 3692, Rev. St. 1379, and section 2760. It is perfectly competent for the circuit court, as a court of equity, to divest one party to the suit of the title to real estate, and to invest it in another. The power of the court to pass the title by its decree to the party to whom the law says it belongs cannot be doubted. The statute is too plain, and the practice under it too well established, to admit of question; so that it is not essential to look beyond or outside of the statute itself.

2. But there was no necessity for any such a decree. Kinealy in his petition alleged, in legal effect, that the deed from Patrick Macklin to Haydell was contrived and made to defraud creditors, and so the circuit court found from the evidence; and the judgment declaring the deed to be void and of no effect, as against Kinealy, left him with a clear and unclouded title. The balance of the decree, save that part which awards a writ of possession, is mere surplusage.

3. As we have said, the final decree in favor of Kinealy was rendered in October, 1878, and he obtained possession by a writ thereunder. Thereafter, and in March, 1879, he executed the deed of trust, under which the defendants acquired title. A year thereafter, lacking four days, the writ of error was sued out, and the question is whether the defendants' title is affected by the subsequent reversal of the decree. When this court reversed the decree and dismissed the plaintiff's bill, the defendants became entitled to restitution, and as against Kinealy they were entitled to have the property itself restored. *Gott v. Powell*, 41 Mo. 417. In that case it was said: "Where a man recovers land in a real action, and takes possession or acquires title to land or goods by sale under execution, and the judgment is afterwards reversed, so far as he is concerned his title is at an end, and the land or goods must be restored in specie,—not the value of them, but the things themselves. There is an exception where the sale is to a stranger *bona fide*, or where a third person has *bona fide* acquired some collateral right before the reversal." In *Vogler v. Montgomery*, 54 Mo.

577, Nussberger recovered a judgment against Vogler, and purchased the property thereunder. Nussberger conveyed it to Montgomery in trust for the benefit of Shields, and in less than 10 days after the date of this deed the judgment was reversed. Montgomery being a purchaser in good faith, it was held his title would not be invalidated by the reversal. Where a stranger to the proceedings purchases property under a judgment which is afterwards reversed, his title will not be affected by the reversal. It is equally clear that if the plaintiff in the execution purchases the property, and he still has it when the judgment is reversed, he must restore it to the execution defendant. There are many cases which hold that the grantee of a party to the suit stands in no better position than his grantor; but it will be seen from the cases cited that this court considers such a purchaser as occupying the same position as if he had himself bought at the sheriff's sale. The cases thus far cited are not in exact point here, because there was no sale of the property under the decree, so that Kinealy was not a purchaser under it; but the cases have been noted for the purpose of showing that titles acquired by third persons in good faith, whether at the execution sale or from a party to the suit who was a purchaser at such sale, will not be affected by a reversal of the judgment. The disposition which the court has heretofore manifested to protect the rights of purchasers who are not parties to the suit is to be kept in mind in the disposition of the case at bar. An appeal is generally held to be a continuation of the suit. A writ of error, however, is considered a new action, and that it is a new action has been repeatedly and often held by many courts. 2 Tidd, Pr. (3d Amer. Ed.) top page 1141; *Ripley v. Morris*, 2 Gilman, 381; *Allen v. Mayor*, etc., 9 Ga. 286; *Robinson v. Magarity*, 28 Ill. 426; *Eldridge v. Walker*, 80 Ill. 270; *Bank v. Jenkins*, 104 Ill. 151; *Pierce v. Stinde*, 11 Mo. App. 364. The facts in *McCormick v. McClure*, 6 Blackf. 466, were, in substance, these: McCormick filed a bill in chancery against McClure and others for a decree for a tract of land, and the trial court rendered a decree as prayed for, and McCormick was accordingly put in possession of the premises. The decree was afterwards reversed, and McClure applied for a writ of restitution, which was resisted by Armstrong, who purchased from McCormick after the decree, and before the writ of error was sued out. Says the court: "After the decree and before the commencement of the suit in error, the suit in which the decree was rendered was not pending; and the land, during that period, might be *bona fide* purchased for a valuable consideration from the complainant, and the title of the purchaser, and of those claiming under him, would not be affected by the subsequent reversal of the decree." *Taylor v. Boyd*, 8 Ohio, 388, is to the same effect. Boyd prosecuted a bill in chancery against Taylor, and obtained a decree requiring Taylor to convey

the premises to him within a given time, or the decree should operate as a conveyance. Taylor made no conveyance. Boyd took possession, and after the time limited by the decree conveyed the property. At the date of the conveyance Taylor had sued out a writ of error, but it had not been served, and the purchaser had no notice of it. The court held that the writ of error was a new suit, and among other observations said: "We are of opinion that, until the service of the citation, a writ of error is not to be considered as pending so as to affect strangers as a *lis pendens*. This, we think, is not only in accordance with good sense and fair dealing, but is also according to the best authority." As a result from these considerations, it was held that a reversal of the decree did not divest the purchaser's title, he having acquired the property in good faith.

Under our statute, appeals may be allowed and writs of error sued out in actions at law and in equity, without distinction. Appeals are allowed with or without stay of execution, but they must be allowed at the term at which the judgment is rendered. Writs of error may be sued out within 3 years, saving to persons under the age of 21 years the right to bring their writs within 3 years after such disability is removed. Notice of suing out the writ must be given to the opposite party. From these statutory provisions, it will be seen the distinction between appeals and writs of error is still preserved, and it must be held that the writ of error is a new suit. When Kinealy executed the deed of trust under which the defendants acquired title, there was no suit pending in any court. He was in possession with a perfect title, and that Sanderson loaned the money and took the deed of trust in good faith is not questioned. Under those circumstances, the validity of the deed of trust ought not to be affected by a reversal of the decree on a writ of error sued out nearly a year after the date of the deed of trust. The argument which opposes this conclusion is that the defendants in the suit which resulted in the decree had, by the law, three years in which to sue out a writ of error, and that persons purchasing from Kinealy were bound to know that the decree was subject to review during that time, and they should be held bound to take subject to the result of such review by the appellate courts. This argument overlooks several important considerations. The judgments of the circuit courts are presumed to be correct until reversed. The decree was valid and binding on the parties to the suit. It fixed and settled the rights of the parties thereto.

The litigation was at an end, and persons dealing with the property had a right to rely upon the validity of the decree, and they may invoke it to protect rights acquired while it remained in full force, and not questioned by any pending litigation. Judicial sales, made under judgments and decrees afterwards reversed, to strangers, are upheld, it is often said, to encourage bidders, and on grounds of public policy; but the true reason is that such purchasers, as well as purchasers from parties to the suit, have a right to rely upon the validity of the judgment or decree, execution not having been stayed. So, if the decree is not one for the sale of property, but operates directly on the title, persons dealing with the property, while there is no suit pending, have a right to rely upon the decree establishing the title. In such cases it is an easy matter to keep the suit pending by taking an appeal, and that, too, without giving bond, or by immediately suing out a writ of error. If we rule the question now under consideration for plaintiff, we must establish the doctrine that decrees for titles are not to be relied upon in any case until the time for suing out writs of error has expired,—a rule which would be far-reaching in its consequences. The cases cited from Ohio and Indiana are in point, and they show that a purchaser from one who has acquired title by operation of a decree will be protected, where the purchase was made after the termination of the suit, and before the suing out of a writ of error, and this is the correct rule. Mrs. Macklin has her remedy against Kinealy for that which she lost, and it is not in his hands in specie. We do not disagree with the result reached in *Fishback v. Weaver*, 34 Ark. 569, for the decree for sale in that case had been superseded. *Marks v. Cowles*, 61 Ala. 299, was a case where a party to a decree became the purchaser, and then sold to a stranger. On appeal, but without a *superseas*, the decree was reversed. It was held the stranger obtained a defeasible title only. That case is not in accord with the rulings of this court, as will be seen by an examination of *Vogler v. Montgomery*, supra; and *Clarey v. Marshall's Heirs*, 4 Dana, 95, and *Debell v. Foxworthy's Heirs*, 9 B. Mon. 228, do support the claims made by the respondent in this case. But it is our opinion that they do not assert a correct doctrine, so far as the question in hand is concerned. For the reasons before stated, the judgment is reversed, and the cause remanded.

BARCLAY, J., not sitting. The other judges concur.

McCULLOUGH'S ADM'R v. ANDERSON *et al.*

(Court of Appeals of Kentucky. April 10, 1890.)

WILL—CONSTRUCTION—DEVISE OVER.

Where a will gives to the wife of testator all his estate, both real and personal, "during her life," with "full and ample authority to dispose of the whole of it as she pleases," but makes several devises of any property not alienated before her death, and which she has not by will disposed of, such devises will take effect upon any property not so disposed of by her.

Appeal from circuit court, Fayette county.
Breckinridge & Shelby, for appellant.
Beck & Thornton, for appellees.

PRYOR, J. In the year 1878, Samuel McCullough died in the county of Fayette, leaving his widow, Harriet McCullough, surviving him, to whom he devised his estate in the following manner: "To my most precious and well-beloved wife I give during her life all my estate, real and personal, whether in possession or in action, with full and ample authority to dispose of the whole of it as she pleases. At her death, should she not have previously made a testamentary disposition of all remaining undisposed of by her, I desire that such remainder shall be distributed as herein directed. * * * (2) To my niece, Mrs. Mary, of Indianapolis, I give my house and lot on High street, where I now reside," etc. The testator then proceeds to make other special devises, and directs his executors, within two months after the death of his wife, to sell and dispose of all the real estate left undisposed of by himself or his wife, and to distribute the proceeds as directed, etc. They had no children, and his wife, Harriet, dying intestate in the year 1887, leaving much of the property devised to her undisposed of, this controversy is between the devisees under the will of the husband and the heirs at law of the wife, each claiming the property undisposed of by the wife. The personal representative of McCullough filed his petition in equity against the devisees of the one and the next of kin of the other, in which he claimed that the estate undisposed of passed by the will of the testator. The heirs of Harriet McCullough, the wife, filed an answer, in which they claim that the estate passed under the statutes of descent and distribution to the heirs of Harriet. The chancellor below adjudged on a demurrer to this answer that on the death of the wife (intestate) the real estate in Kentucky descended to her heirs in fee, and the personal estate to her heirs and distributees; in other words, that under the will of the husband his wife took the absolute estate without limitation or restriction. The contention by the devisees is that by the express terms of the will she took a life-estate only, with the power to dispose of it if she saw proper during her life, or at her death by last will and testament, and, not having exercised that power, the estate left passed by the will; that, while the life-estate might have been enlarged by the exer-

cise of the power of disposition, the wife, having failed to exercise that power, left the estate to pass as the testator directed it should. The power of absolute disposition carries with it, nothing else appearing, the absolute property in that which is to be disposed of, but there may be such an intention arising from the language used as will limit the power or confine its exercise to the life of the first taker.

It is manifest from the provisions of this will the testator desired that his wife should use and dispose of this estate during her life as she wished, and to make a testamentary disposition of it if she saw proper, but the testator, in the event the wife declined to exercise the power given her, made provision for those who had claims upon his bounty, and intended that those devisees, after the termination of the life-estate of the wife, should take what was undisposed of by her. The testator doubtless thought that the necessities or wants of the wife, or the changes that time might bring in reference to the property or its value, might require the expenditure of the whole estate, or that his wife might desire to give the estate to her own kindred instead of having it pass to his; and to provide for her wants or to gratify her desires, and certainly in the execution of a purpose of his own, gave to the wife the power to make any disposition of the estate she saw proper, but, if she failed to do this, then the testator provided that his own kindred should take. Here was simply a devise over after the termination of the life-estate, and the failure of the life-tenant to make any disposition of the property whatever under the power conferred.

In considering a question of the importance that this is, although aided by arguments on each side evidencing great ability and much research, we find it difficult to reconcile many of the cases with the general doctrine on the subject, or to follow them, unless we lose sight of the intention of the maker of this will, and adopt a rule of construction so technical in its character and application as to defeat the very object the testator had in view when executing the paper. His purpose was to give to his wife the benefit of his entire estate, and to provide for his kindred out of that portion of it that might remain undisposed of at her death. After a careful review of all the authorities to which our attention has been called, the rule sanctioned and followed is this: If the estate is given or devised generally or indefinitely, with a power of disposition, it passes a fee; but where the deviser or grantor owning the fee gives to the first taker an estate for life, with the power to dispose of the fee, no greater estate is vested in the first taker than that carved out of the fee, and vested in him by the deviser or grantor. He is given a life-estate in express terms, and the failure to exercise the power gives to the remainderman the fee, because, no disposition having been made of it by the life-tenant, he takes

under the will or conveyance. It is said: "If an estate be given to a person generally or indefinitely with a power of disposition, it carries a fee, unless the testator gives the first taker an estate for life only, and annexes to it a power of disposition. * * * In that case the express limitation for life will control the operation of the power, and prevent it from enlarging the estate into a fee." 4 Kent, Comm. 535, 536.

Counsel for the appellees has referred us to several cases, English and American, in direct antagonism to the doctrine laid down by Chancellor Kent. In *Barford v. Street*, 16 Ves. 135, there was a devise of real and personal estate in trust to pay the rents and dividends to Mary Barford during her life, and after her death to convey according to her appointment, by deed or will, with a limitation over in case of her death in the life-time of the testator or in default of appointment. Mary Barford filed her bill, in which she alleged that she was, by reason of the unqualified power of appointment by deed or will, invested with the fee; and it was held by Sir WILLIAM GRANT, M. R., that she had the absolute estate, and in determining the extent of her interest he said: "An estate for life, with an unqualified power of appointing the inheritance, comprehends everything." In the case of *May v. Joynes*, reported in 20 Grat. 692, the devise was: "I give to my beloved and excellent wife, subject to the provisions hereafter declared, my whole estate, real and personal, and especially all real estate which I may hereafter acquire, to her during her life, but with full power to make sale of any part of the said estate, and to convey absolute titles to the purchasers, and use the purchase money for investment, or any purpose that she pleases, with only this restriction: that whatever remains at her death shall, after paying any debts she may owe or any legacies she may leave, be divided as follows," etc. The court held that the limitation over was repugnant to the grant of the fee, and that the wife was vested with the absolute estate. In *Pulliam v. Byrd*, 2 Strob. Eq. 184, and in *Smith v. Bell*, Mart. & Y. 802, the same rule was recognized; the court remarking, in the first-named case, that "when a life-estate is created in terms, and to this is added a power of ulterior disposition, unconfined as to mode or object, no case has been produced suggesting that this power is a naked power, and requiring to be executed in order to divest the grantor of the fee." In *David v. Bridgman*, 2 Yerg. 557, the same utterance is made, the court holding that the wife took the absolute and unqualified property in the estate devised. Following these cases might be cited many others recognizing the rule under which the first taker took the fee, and, whether exercising the power of appointment or not, the limitation over in nearly all the cases was held void, as being repugnant to the fee.

In view of these authorities, it is maintained that, although the wife, Harriet, in

this case, was given a life-estate, there was coupled with it a power to dispose of the entire estate for her own use or that of another at any time during her life, or to pass it by her will at her death; and, as no greater dominion could have been exercised over it by the deviser if he were living, the fee must necessarily have passed to the wife, and such was the intention of the testator. The argument certainly strikes one with much force, for, if the dominion over the estate is such that it can be used, conveyed, devised, or otherwise disposed of by the donee without restriction or limitation, the power over it is as great as any that could have been exercised by the one grantor or deviser in whom the title to the estate was originally vested. We perceive, however, no reason why such a power may not be conferred, if it appears from a consideration of the whole will that the intention of the testator was not to create a fee in the first taker. The right of absolute dominion and control, with the power to sell or devise, would, unexplained, pass the absolute estate. In this case the testator proceeds in the first place to give to his wife, Harriet, during her life, all his estate, real and personal, with the full power to dispose of the whole of it as she pleases. Now, if he had intended to vest the wife with the fee, or to give her the absolute estate without any limitation, it could have been readily expressed, and there would have been no necessity for carving a life-estate out of the fee, and then conferring upon the life-tenant the power to pass the fee by deed or will, if she desired to do so. The provision of the will giving the wife this power shows that upon its exercise alone could the wife pass the fee, so as to defeat the objects of the testator's bounty, designated to take the remainder. Such was his plain intention. He described the estate in express terms that the wife was to have, and that was a life-estate; but as she might need the entire estate, or desire to make some other disposition of it than that I have made, I will vest in her the power to destroy the rights of those in remainder, and she may dispose of the whole of it; but, failing to do so, the remainder will pass to those who are named to take at her death.

The provisions of the will were plain and easily understood. The testator had placed it within the power of his wife to destroy the devises made to his own kindred, and by will or deed give it to those of her own blood. The wife must have known the contents of the will, and, although living for many years after her husband's death, failed or declined to disturb the devises to his kindred, but left the estate to pass in the precise manner the testator wished. The fact of a life-estate having been carved out for the wife with a power to appoint or dispose of as she pleased, and if she fails to appoint or dispose of the estate to pass to others in remainder, negatives the idea that the testator intended to vest in the wife the absolute fee. As said in *Burleigh v. Clough*, 52 N. H. 267, where a

testator gives a life-estate, with a general power of appointment of the inheritance, and, in case of a failure to appoint, gives the estate to other parties, the latter take a vested remainder, subject to be defeated by the exercise of the power. Where an estate is given for life only, though a general power of appointment is annexed, it does not convert the estate into a fee, but the donee takes a life-estate, unless there is some manifest general intent to the contrary in the instrument creating the power. 4 Kent, Comm. 319; Pulliam v. Byrd, 2 Stro. Eq. 134; Bentham v. Smith, 34 Amer. Dec. 599; Johnson v. Cushing, 15 N. H. 298. In 16 Johns. 587, in the case of Jackson v. Robins, Chancellor KENT said: "We may lay it down as an incontrovertible rule that, where an estate is given to a person generally or indefinitely with a power of disposition, it carries a fee, and the only exception to the rule is where the testator gives to the first taker an estate for life only by certain and express words, and annexes to it a power of disposal. In that particular and special case the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the reversion. This distinction is carefully marked and settled in the cases." In Fairman v. Beal, 14 Ill. 244, the testator devised his farm, describing it, to his wife "during her natural life, to take the issues and profits thereof; at her death she may dispose of it as she pleases." The wife under this power conveyed the land to Waddle, the court holding that the wife took a life-estate under her husband's will, with the power to dispose of the inheritance, and, as the mode of exerting the power was not prescribed by the will, the conveyance made by the wife was a rightful exertion of the power. In the case of Glover v. Stillson, 56 Conn. 316, 15 Atl. Rep. 752, the will contained this provision: "I give, devise, and bequeath the residue of my estate, both real and personal, unto my sisters, Polly A. Stillson and Mary A. Stillson, for the term of their natural lives; hereby empowering my sisters to dispose of any portion of my estate, either real or personal, if they should so desire." It was held that the life-estate was not enlarged into a fee by the power given to sell. In Funk v. Eggleston, 92 Ill. 515, the testator devised, after the payment of debts, "two-thirds of my real and personal estate" to his wife "during her life, with full power and authority for her to dispose of the same as she may think proper," by will or otherwise, before her death. The testator then proceeded to dispose of what estate might remain undisposed of by his wife at her death. It was held that the wife had a life-estate only, with power of disposition by will or deed. In the case of Moore v. Webb, 2 B. Mon. 282, the life-tenant had exerted the power; and in Ball v. Hancock, 82 Ky. 107, there was no estate for life. In Caleb v. Field, 9 Dana, 346, the doctrine established

in this case is recognized, but is not decisive of the question.

We are to arrive at the intention of the testator in interpreting his will by looking to the whole instrument and the objects of his bounty. That his wife was first looked to as the prime object of his care is evident, but in the event she did not wish to appropriate all the estate by making a disposition of it, as authorized, he saw proper to provide for others. It seems to us the only question presented in this case is, can a testator, in disposing of his estate by will, create a life-estate in one with remainder to another, and at the same time give to the life-tenant the power to defeat the remainder by disposing of the property by deed or devise to whomsoever he pleases. It will not be contended that, with a devise of the absolute fee in the first taker, a limitation over can be upheld; but there is no such devise in the will before us, but the testator, with the right to dispose of his property as he sees proper by last will, having complied with the rules of law in its execution, has given to his wife a life-estate in all the property he owned, with the right to dispose of it as she may please, but if she fails to do so the devise over takes the estate. The testator in this case is particular to name each one of those to take the remainder, making a special devise to each, and in more than one provision of the will is disposing of what his wife may leave of the devised property by reason of her failure to exercise the power given her. We think there is a marked distinction between a power given to one who already has the fee and that given to a life-tenant, who may acquire the fee by the exercise of the power given him. In the latter instance it is the manifest intention of the testator that the life-tenant must acquire the fee in the mode provided by the will, and, if the power is not exerted, those in remainder take the estate. In our opinion, therefore, the devisees of the testator are entitled to the estate, and not the heirs of the wife. The judgment is therefore reversed and remanded, with directions to sustain the demurrer to the answer, and for proceedings consistent with this opinion.

WHITAKER, Auditor's Agent, v. BROOKS.

(Court of Appeals of Kentucky. April 1, 1890.)

CORPORATE STOCK—TAXATION.

1. Where the sole defense made to an information under the "Auditor's Agent Act" Ky. April 29, 1880, to compel defendant to list shares of corporate stock owned by him, for taxation, is that the stock is not liable to taxation, an objection that the information proceeds for an assessment of the shares of stock as such, for taxation, while, if taxable at all, they are by law taxable as surplus wealth only, is waived.

2. Stockholders in corporations not included in Gen. St. Ky. c. 92, art. 12, which required certain corporations to report and pay taxes on their property, and section 8 of which enacted that the individual stockholders of the companies therein referred to should not be required to list their

shares in such companies for taxation, were individually liable for taxes on their shares of stock prior to Act Ky. April 22, 1884, which made all corporations subject to that statute.

3. The act of April 22, 1884, took effect from its passage, changed the mode of assessment, and repealed all inconsistent laws. Assessors were not then required to return their lists until May 1st in each year. By chapter 92, art. 12, corporations had been required to report their lists by July 10th. *Held*, that the act of 1884 applied to taxation for that year.

4. Under the Act of 1884, the stockholders are not liable to taxation on their stock, though the corporation has not reported and paid taxes on its property.

Appeal from chancery court, Kenton county.

"To be officially reported."

H. P. Whitaker, for appellant. *O'Hara & Bryan* and *Hallam & Myers*, for appellee.

HOLT, J. In July, 1882, the appellee, L. H. Brooks, and others, incorporate themselves under chapter 56 of the General Statutes, by filing articles of incorporation in the Kenton county court of this state, under the name of the "Brooks-Waterfield Company," for the purpose of carrying on the tobacco warehouse business. The articles located its principal office or place of doing business in Covington, Ky., but in fact the business was conducted in Cincinnati, Ohio. Its tangible property, real and personal, was located there, save a comparatively small amount of real estate in Mason and Lewis counties, Ky., which had been taken for debt. Its property in Ohio was listed for taxation there, and its real estate in Kentucky in the counties where it was situated. The appellee Brooks is the owner of shares of stock in the corporation of the par value of \$75,000, and actually worth, according to the assessment made, \$52,000. He, and in fact all of the corporations, are residents of Kenton county, Ky. He declined to list his shares of stock for taxation in Kenton county, Ky., by reason of the payment of taxes by the corporation in Ohio and this state as above stated, and upon the ground that under our law, where the corporation lists the corporate property for taxation, the stockholder is not required to list his shares of stock. The appellant, as auditor's agent, thereupon filed an information before the Kenton county judge, as authorized by the act of the legislature of April 29, 1880, commonly known as the "Auditor's Agent Act," for the purpose of compelling the appellee to list his stock for taxation for the years from 1882 to 1888. A response was filed, and, after hearing, the county court assessed it, and the list was placed in the hands of the auditor's agent for collection. The appellee then brought this action enjoining its collection. The chancellor perpetuated the injunction as to all the years named, and the case is now here upon appeal.

Prior to the present revenue law, which became operative on May 17, 1886, there appears to have been no provision for the taxation in any case as against the stockholder of

shares of stock *eo nomine* in a corporation. Where liable to be embraced in his list, it could only be as a part of his surplus wealth left after giving in the specific list required, and deducting his indebtedness, or under what was commonly known as "the equalization law." Gen. St. 1878, c. 92, art. 1, § 5. It is now urged, therefore, that if the stock of the appellee be liable to taxation for any of the years named, that yet the judgment below should be affirmed, because the information proceeded for, and the county court made an assessment of, the shares and stock as such for taxation. It does not, however, appear that there was any objection to the information for insufficiency; or that there was any claim that the appellee had included the value of the stock in an assessment under the equalization law, or that he should not have done so because of any indebtedness. Upon the contrary, his response shows that his sole objection to the assessment was that the stock was not liable to taxation. It is therefore now too late to raise this formal objection. It was waived by the failure to present it in the county court. The statute authorizing the proceeding in that court should be liberally construed, in view of the mischief intended by the legislature to be remedied; and the assessment as made in this instance should be regarded as one merely taxing so much surplus wealth of the appellee.

Prior to April 22, 1884, certain corporations were required to pay taxes upon their property by article 12, c. 92, Gen. St., and section 8 thereof provides: "The individual stockholders of the companies, which are by this article required to report and pay tax upon the value of their property, shall not be required to list their shares in such companies for taxation." It was decided by this court, however, in the case of the *Mail Co. v. Barbour*, 9 S. W. Rep. 516, that a steamboat corporation was not embraced by article 12 of the statute, and that up to April 22, 1884, when the statute was changed, the value of the stock was liable to assessment as against the stockholder. In other words, in cases where the corporations were expressly required to assess the corporate property and pay the taxes, the shareholder was not liable to taxation upon his stock, but where they were not so required the burden was upon him. Under the ruling in that case the Brooks-Waterfield Company is not a corporation of a character embraced by article 12, and it is manifest that it did not embrace all corporations from the language of section 8, *supra*. As the then existing law looked only to the stockholder in a corporation like this one for the taxes, a payment of them by the corporation was without legal warrant, and would not relieve him from tax liability as to his stock. The legislature, however, on April 22, 1884, by the first section of an act, which then took effect, provided: "That hereafter all corporations in this commonwealth, except railroad and turnpike compa-

nies, shall, in the manner provided by article twelve, chapter ninety-two, of the General Statutes, list their property with the assessor of the county in which the corporate property is situated." 1 Acts 1883-84, p. 70. This made section 8 above cited applicable to a corporation like this one; and while, owing to some of the provisions of the act a doubt at first arises whether it applies to the year 1884, yet upon reflection we think such was the legislative intention. It took effect from its passage. The assessor was not required under the then existing law to return his lists before the 1st of May in each year, and although not so entitled it really was an amendment of article 12, c. 92, of the Revision of the Statutes of 1873. This article, as contained in the Revision of 1873, required the corporations embraced by it to report their lists to the state auditor by July 10th in each year, the same to relate to the 10th of January preceding. The amendatory act changed the mode of assessment, save as to railroad and turnpike companies, and provided that all laws inconsistent therewith were thereby repealed. Unless it therefore be regarded as applying to the year 1884, it would at least be questionable whether as to that year any law was in force after its passage for the assessment of any corporations, save railroad and turnpike companies. It cannot be presumed the legislature intended such a result. There was still time after its passage, and before the assessor was required to complete his year's work, to make the assessment; and the corporations, which under the old law were required to report to the auditor by July 10th, could not, with the exception of railroad and turnpike companies, do so after the passage of this amendment, as it repealed the old law in this respect. It is proper to here say that the provisions of the present revenue law, and which was enacted May 17, 1886, are, as respects the question whether a corporation like this one shall assess its property or the stockholder therein his stock, substantially the same as those in the Revision of 1873, as amended by the act of April 22, 1884.

The assessment as to 1883 being proper, and the judgment of the chancellor to this extent certainly erroneous, the question next arises whether this is true as to the subsequent years embraced by the assessment. It is conceded upon the side of the appellant, if the corporation had listed in this state its property in the main, and not a comparatively insignificant portion of it, and thus complied with what is said to be the spirit and real meaning of the law as amended in April, 1884, that then the stockholder would not be subject to taxation upon his stock. In other words it is contended that, although it be a home corporation, yet the listing of its corporate property in this state, and the payment of the tax, is a condition precedent to the exemption of the shares of stock from taxation in the hands of the stockholder. The rule is that all property is taxable in re-

turn for the governmental protection afforded, unless it be exempted by statute conforming to constitutional requirement, and an exemption should not be held to arise out of doubtful language. But here the statute plainly says that the corporation shall list its property, and in equally plain terms it provides that, where it is required to do so, the stockholder shall not be required to list his shares for taxation. In this case the trouble grows out of the fact that the corporate property in the main is in Ohio, and at least the real estate, if not all the tangible property, is taxable there, and owing to its *situs* cannot be reached for taxation here. It is unnecessary, however, to decide what portion of its property, if any, which is employed in its business in Ohio, can, by proper steps against it as a home corporation, be reached for taxation here; because it seems to us it is a sufficient answer by the stockholder when called upon to assess his stock to say the law requires the corporation to assess its corporate property, and declares that the stock of the shareholder shall be exempt. It matters not to him whether the corporation has done so or not. If not, it should be made to do so. The grant of exemption to the stockholder has not been made to depend upon this being done. If it cannot be done under existing law, then resort must be had to additional legislation, instead of a court attempting to annul a plain legislative grant of exemption to one, because another has failed to perform what is perhaps a legal duty. If the statute declares without condition (as it does) that the corporation, and not the stockholder, shall answer for the tax, then it is immaterial to him in the present condition of the law whether the corporation has or not listed its property and paid the tax. He need only show that the law places the burden upon the corporation. His non-liability does not arise out of the fact that the property of the corporation in Ohio is taxed there. To also tax his stock here would not be double taxation, because to be such it must be twice taxed within the same jurisdiction. Each state is sovereign and independent in this respect, and one state cannot, of course, exempt property from taxation in another. Nor is the the taxation of shares of stock in a foreign corporation owned by a resident of this state the question here, as appears to have been the case in the most, if not all, the cases cited by the appellant in argument.

Our attention has been called to the Ohio statute upon this subject, and the construction there given to it by the supreme court of that state, whose opinions are justly held in high regard. It seems to us, however, that there is a difference between it and our own, conceding that the construction to the extent claimed has been given to the former. Our statute declares that where the corporation is "required to report and pay tax" upon the value of its property, the stockholder therein shall not be required to list his stock. The Ohio statute provides: "No person

shall be required to list for taxation any share or shares of the capital stock of any company, the capital stock of which is taxed in the name of such company." Rev. St. § 2746. If its proper construction be that the shares of stock are exempt only when the state has in fact exercised the right to tax the capital stock, yet a like construction should not be given to our statute because of the difference between them. It is true the appellee's stock is a part of the wealth of this state. As a matter of proper and just policy, it should perhaps contribute by taxation to the support of the government, if the property of the corporation cannot by reason of its *situs* be made to do so; but this is a matter for legislative, and not judicial, action. Judgment reversed, with directions to enter one dissolving the injunction as to the taxes for 1883, and perpetuating it as to the subsequent years.

WILLIS' ADM'R v. ROBERTS' ADM'R.

(Court of Appeals of Kentucky. April 8, 1890.)

VENUE—ACTION FOR SALE OF DECEDENT'S ESTATE.

Under Civil Code Ky. § 66, providing that an action for the distribution of the estate of a deceased person, or for the sale, for the payment of his debts, of property descended from or devised by him, must be brought in the county in which his personal representative qualified, an action by a ward against the administrator and heirs of his guardian, to subject land which descended from such guardian to the heirs to the payment of the amount of the ward's estate in the hands of the guardian, is properly brought in the county where the heirs reside and the property is located. The provision of section 67, that a ward must sue his guardian for a settlement of his accounts, for additional security, or for his removal, in the county in which the guardian was qualified, does not control.

Appeal from circuit court, Kenton county.

"To be officially reported."

H. Clay White and J. F. & C. H. Fisk, for appellant. O'Hara & Bryan, for appellee.

HOLT, J. Samuel F. Roberts was appointed the guardian of William Willis by the Scott county court. Roberts resided in Kenton county, and died there intestate. His personal representative was appointed there, his heirs live there, and the real estate left by him to his heirs is situated there. Willis having also died, his personal representative brought this action in the Kenton circuit court against the administrator and heirs of Roberts, to subject certain real estate, which had descended from him to his heirs, to the payment of the amount of the ward's estate in his hands at his death. A special demurrer to the jurisdiction of the court was sustained, and the action dismissed. Section 10, art. 1, c. 44, Gen. St., provides: "The heir or devisee may be sued in equity by a creditor for any liability of the decedent or testator, and he may also in such suit, if demanded, obtain, by the proper procedure, a lien on any specified property, descended or devised, not theretofore aliened, but not so as to prejudice thereby any other creditor."

No judgment had ever been obtained upon the claim against the administrator of Roberts; but, even if this had been done, the action should be brought upon the original liability, as against the heirs, to subject estate descended to them. *Hopkins v. Stout*, 6 Bush, 375; *Craig v. Garnett's Adm'r*, 9 Bush, 97. The petition avers that the personal estate of the decedent or the most of it had been distributed, and sets out *inter alia* a description of the land received by the heirs, and asks that it be subjected to the payment of the claim. The appellees insist that the action should have been brought in Scott county, and that the venue in such a case is governed by section 67 of the Civil Code, which reads: "An action by a ward against his guardian for a settlement of his accounts, for additional security, or for his removal, must be brought in the county in which the guardian was qualified." Upon the other hand, the appellants contend that the action was properly brought, and that section 66 controls. It provides: "An action for the distribution of the estate of a deceased person, or for its partition among his heirs, or for the sale for payment of his debts of property descended from or devised by him, must be brought in the county in which his personal representative was qualified." It is urged upon behalf of the appellees that the cases of *Stone's Adm'r v. Powell*, 13 B. Mon. 342, and *Greenly v. Daniels*, 6 Bush, 41, are decisive of this one. We do not think so. Neither of them were suits to subject land descended to the heir to the payment of the ward's claim against his guardian. The first-named case appears to have been an action brought against the guardian and his sureties. The court properly held that the jurisdiction was local to the county where the guardian had qualified. The other case was a suit upon the bond of the guardian, and the same rule was announced. In both cases the petitions did not *in totidem verbis* ask a settlement of the guardian's accounts. In the one case none appears to have ever been made; in the other, a settlement had been made in the county court, but as it was only *prima facie* correct, and subject to revision by the circuit court, this court held that in each case the settlement of the guardian's accounts was necessarily involved. It is urged that this is so in this case, and that the enforcement of the lien against the estate descended is but an incident, and not the substance, of the action. Conceding that the suit involves the settlement of the guardian's account, and a determination by the court of the amount due the estate of the ward, yet unquestionably the object of this action is to subject the real estate in the hands of the heir to the payment of the claim. It is an action for a sale for the payment of his debts of property descended from the decedent, and in such case it "must be brought in the county in which his personal representative was qualified." The liability is sought to be imposed upon property now

belonging to the heir. The title is not in the personal representative. The heir is the party to be affected; his land is to be sold, if the liability exists; and the letter as well as the reason of the case requires that section 66 of the Code should control the jurisdiction. Suppose the action had been brought in Scott county. Can it be supposed for a moment that it would not have been met with the objection that the court had no jurisdiction, since not only the party to be affected did not reside there, and the real estate to be subjected was not situated there, but the decedent did not reside there, nor did the personal representative of his estate qualify there; but, upon the contrary, the land is situate where this action was brought, the party to be affected by it resides there, as did also the decedent, and his administrator qualified there. It seems to us that the claimant has brought his action in the county most convenient and favorable to the appellees, and that, under the circumstances, they reasonably ought not to object. True, this fact cannot, of course, deprive them of a right given by law; but, if the action had been brought in Scott county, these circumstances would undoubtedly have been urged as explanatory of the Code provisions and their true construction, which in our opinion require an action like this one to be brought in the county where the personal representative of the decedent qualifies. The judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

HOLMES v. HERRINGER.

(Court of Appeals of Kentucky. April 8, 1890.)

EJECTMENT—INSTRUCTIONS.

Plaintiff and defendant in ejectment owned adjoining tracts each claiming up to the division line, wherever that might be, and both held under the same patent. Defendant had inclosed the disputed tract, but there was no evidence showing that it had been so inclosed for 15 years. *Held*, that it was error to instruct that the jury should find for plaintiff, "unless they find from the evidence that defendant, and those under whom he claims, have been in actual possession of the land, by themselves or their tenants, with claim of title, holding openly, notoriously, continuously, and adversely, for 15 years, in which case the jury should find for the defendant."

Appeal from circuit court, Campbell county.

"Not to be officially reported."

This was an action for the recovery of land, brought by George B. Holmes against Jacob Herringer. There was judgment for defendant, and plaintiff appealed.

John D. Ellis and Reiley & Reiley, for appellant. *T. M. Hill*, for appellee.

LEWIS, C. J. The parcel of land in dispute in this case is 55-100 of an acre, and the question for consideration is as to correctness of the following and only instruction of the court: "The jury should find for the plaintiff, as to the land in contest, if they be-

lieve she has proven title to it, or any part of it, unless they find from the evidence that the defendant, and those under whom he claims, have been in the actual possession of the land, or any part thereof, by themselves or their tenants, with claim of title, up to a defined boundary, holding openly, notoriously, continuously, and adversely to all the world, for as much as 15 years next before the 10th day of August, 1886, in which case the jury should find for the defendant, as the case may be, according to the proof as hereinbefore stated." It seems to us that the instruction is erroneous, and was prejudicial to appellant, plaintiff below; for, as both parties claim under the same patent, no question of superiority of title arises in the case. Nor has either acquired any legal advantage by adverse possession of the land in contest; for both parties, having the undisputed title to, and possession of, two adjoining tracts, respectively owned by them, must be regarded as claiming and holding up to the division line, wherever that may be, until one or the other, by actual inclosure, takes possession beyond. It is true, appellee did have the disputed land under fence when the action was commenced by appellant; but, as there is no evidence whatever showing it had been so inclosed 15 years, he acquired no right thereby. Consequently, the jury must have understood the instruction as requiring the plaintiff to establish her title to the land in dispute by a regular chain, while allowing possession of the defendant to extend over the parcel in dispute, whether actually within the boundary of the tract owned by him or not. Whether the land in dispute belongs to one or other party depends upon the true location of the dividing line between them, which is also the original division line between Canington and Beale; for, as this record stands, if that line is north, or to the extent it is north, of the parcel in contest, the plaintiff is entitled to recover,—otherwise not. It is a simple issue of fact, where that line is. Judgment reversed, and cause remanded for new trial, and further proceedings consistent with this opinion.

MEASELS *et ux.* v. MARTIN.

(Court of Appeals of Kentucky. April 8, 1890.)

CONVEYANCE BY WIFE.

In order to convey the wife's right of dower and homestead, her name must appear in the body of the conveyance as one of the grantors; and the mere signing and acknowledging of the instrument by her will not operate to convey her interest in the property.

Appeal from circuit court, Webster county. "Not to be officially reported."

Action to foreclose a mortgage, brought by N. Martin, as assignee, against R. V. Measels and wife. From a judgment for plaintiff, defendants appealed.

John D. Hill, for appellants. *Towery & Bourland*, for appellee.

BENNETT, J. In this action to foreclose the mortgage executed by the appellant R. V. Measels, and purporting to have been signed and acknowledged by the other appellant, his wife, the wife appears nowhere in the mortgage as one of the grantors. It has been repeatedly held by this court that the name of a married woman, in order to convey her right of dower or homestead, must appear in the body of the deed or mortgage as one of the conveyancers. *Hatcher v. Andrews*, 5 Bush, 565; *McDowell v. Prather*, 8 Bush, 61. See, especially, *Hedger v. Ward*, 15 B. Mon. 116. The husband appears in this mortgage as the sole conveyancer. The only time that the wife's name appears in said mortgage is in the testimonial, wherein it says: "In testimony whereof, I, R. V. Measels, together with my wife, who relinquishes," etc., "both hereunto set our hands." This in no wise appears as the act of the wife, but it appears as the sole act of the husband. He is speaking for her. According to the foregoing authorities, the signing of the instrument, and the acknowledgment of it, by the wife, do not have the effect of conveying her interest, unless her name appears in the body of the instrument as one of the conveyancers. The judgment is reversed, with directions for further proceedings consistent with this opinion.

MATHIS v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 3, 1890.)

INCEST—INDICTMENT—NAME OF PARTY—EVIDENCE.

1. In an indictment for incest committed by defendant with his daughter, it was immaterial by what name the daughter was or is now called, if her identity is established as the daughter of defendant.

2. Proof of one commission of the offense is sufficient for conviction, but it is not error to permit the proof of the various times and circumstances of the repetition of the offense.

3. Where it appears that defendant made a confession of the crime to the daughter's husband under duress, but afterwards made the same confession to another when not threatened or menaced, such confession was properly admitted.

4. Testimony for the purpose of showing that the daughter had had sexual intercourse with another person prior to her marriage was properly rejected.

Appeal from circuit court, Graves county.
"Not to be officially reported."

Indictment against W. F. Mathis for incest. Upon conviction defendant appealed.

Smith & Robbins and *J. T. Webb*, for appellant. *P. W. Hardin*, for appellee.

LEWIS, C. J. Appellant was indicted and convicted of the crime of incest, committed with his daughter, Luella Mathis; her evidence being to the effect that, when she was between 14 and 15 years of age, her father, by force and threats, compelled her to submit to carnal connection with him, which was repeated at intervals, 20 or 30 times, until she arrived at the age of 20 years, and was married to one Jeff Williams. One of the errors of law complained of is that the court as-

sumed in the instruction, instead of requiring the jury to believe from the evidence beyond a reasonable doubt, that Luella Williams, her name when the trial was had, is the identical Luella Mathis with whom it is charged in the indictment the crime was committed. It is true the jury is required to believe from the evidence every fact exists which is essential to conviction; but it is not material by what name the daughter of appellant may have been or is now called, if her identity is, as is the case here, established beyond dispute.

Counsel, we think, is in error as to the proper interpretation of the instruction, for it does not assume, but requires the jury to believe from the evidence, appellant knew Luella Mathis, now Williams, was his daughter when the crime is charged to have been committed. Proof of a single commission of the offense would have been sufficient to convict, but it was not an error, if one at all, to the prejudice of appellant to permit evidence of the various times and circumstances under which it was repeated, but rather to his advantage, because thereby a bar is made to any other prosecution.

There is some evidence tending to show that at the time appellant made confession to Jeff Williams he was under duress, but he afterwards repeated the same confession to one Parker, uncle of Luella, when he was not threatened or menaced, and the instruction as to such confession was therefore not improper. Moreover, independent of any confession by him, there were circumstances proved which corroborated the testimony of the daughter, not only in respect to the actual commission of the crime, but also as to her statement it was done by force and threats on the part of appellant. The offer of appellant to prove by a witness he had sexual intercourse with Luella before her marriage to Williams was, we think, properly rejected by the court, because it did not tend to illustrate the issue before the jury, nor was it the legal mode by which to invalidate her testimony as a witness. It seems to us the court erred in rejecting the testimony offered which tended to contradict and lessen the weight of Jeff Williams' testimony; but, discarding his testimony altogether, the evidence was not only sufficient, but so convincing the crime was committed by appellant as to leave no reasonable doubt. There was an instruction given upon the assumption Luella Williams was an accomplice. But we think, according to her own testimony and corroborating evidence of others, she was forced against her will to submit to the lust of her father, and therefore not his accomplice. Judgment affirmed.

O'RILEY et al. v. McKiernan et al.

(Court of Appeals of Kentucky. April 3, 1890.)

WILLS—CONSTRUCTION—NATURE OF ESTATE.

Where a testator devised all his property, real and personal, to his wife, to be administered

by her for the support of herself and his children, the wife takes the property as trustee merely.

Appeal from Louisville law and equity court.

"To be officially reported."

N. G. Rogers, for appellant. *R. A. Batman*, for appellees.

PRYOR, J. The will of Miles O'Riley contains the following provision: "I will and bequeath to my wife, Ann O'Riley, all my real and personal property, to be administered by her for the support of herself and my children." The will is here for construction. While we agree with the chancellor below that the legal estate or title is in the wife, at the same time it must be regarded as being held in trust for the benefit of herself and children. There is no power of disposition given the wife, and the aid of the chancellor must therefore be invoked if a sale is required. This is simply a devise in trust for the benefit of the wife and children, and, if the name of a stranger had been inserted as the trustee instead of the wife, there could be no trouble in arriving at the intention of the testator. If the testator had said, "I devise all my estate, real and personal, to A., to be administered for the support of my wife and children," there is no doubt that A. would hold in trust for their benefit. If, therefore, the testator, instead of devising it to a stranger for such a use, makes the devise to his wife, Ann O'Riley, to be administered for her support and that of his children, the wife holds as trustee, with a beneficial interest in connection with her children.

The judgment below is reversed, and remanded for proceedings consistent with this opinion.

BOWEN v. STONE.

(*Court of Appeals of Kentucky*. April 8, 1890.)

VENDOR AND VENDEE—AGENT TO PURCHASE.

In an action to recover certain real estate, it appeared that the land had been sold under a mortgage executed by plaintiff, and purchased by the mortgagee, who conveyed to one H., with a stipulation that H. should reconvey to the plaintiff on the payment of a certain sum. Afterwards defendant entered upon the land as agent for plaintiff, and plaintiff having failed to make the payment required, H. sold the land to defendant. Plaintiff consented to the sale, and knew defendant had taken possession and made improvements, and acquiesced therein for a number of years. *Held*, that he could not now attack defendant's possession on the ground that he held as agent merely.

Appeal from circuit court, Powell county.
"Not to be officially reported."

Action brought by Hezekiah Bowen against A. Stone to recover certain real estate. There was judgment for defendant, and plaintiff appealed.

Robt. Riddell, for appellant. *H. C. Lilly & Son* and *R. Fluty*, for appellee.

BENNETT, J. Hazelrigg held a mortgage on the land of the appellant. The mortgage

lien was enforced, the land sold, and Hazelrigg purchased it, and it was conveyed to him by the commissioner. Thereafter, in 1858, Hazelrigg sold and conveyed said land to John Hon. In the deed of conveyance it is stipulated that Hon is to convey said land to the appellant upon the appellant paying to Hon a certain sum, etc.; said payment to be made when "reasonably required." The appellant did not pay this sum, and Hon conveyed the land without any condition whatever to the appellee, Stone. Said Stone entered upon the land in 1861 or 1862, and has held the possession of it ever since, claiming it as his own, and has, during said time, greatly improved it. The appellant claims that Stone entered upon said land and took possession of it as his agent to sell the same, and pay off the appellant's debts with the proceeds of sale; and that he has held the land ever since his entry thereon as appellant's agent. The proof is that Stone entered upon said land, and took possession of it and controlled it, as the agent of the appellant, and sold it, as appellant's agent, to Anderson; that thereafter the contract with Anderson was rescinded, and thereafter Stone bought the land from Hon, and Hon made him a deed to the same. The weight of the evidence is that Stone never claimed to hold said land as the agent of the appellant after he purchased the same from Hon; that while he admitted, after said purchase, that he entered upon and held the possession of the land as the appellant's agent, yet he evidently referred to his entry and holding prior to his purchase from Hon. The weight of the evidence is that, when the Anderson purchase failed, the appellant gave up all hope of redeeming the land, and authorized Stone to buy it for himself. This fact is fortified by Stone's, ever since his purchase, claiming the land as his own, and holding the adverse possession of it and improving it, with the knowledge of the appellant, and without any complaint from him, until he brought this suit in 1880. The judgment is affirmed.

HOLT, J., not sitting.

JOYES et al. v. SHADBURN et al.

(*Court of Appeals of Kentucky*. April 8, 1890.)

MUNICIPAL CORPORATIONS—SIDEWALKS—ASSESSMENTS.

1. The charter of the city of Louisville, of March 24, 1852, § 2, provides that, where an improvement is the original construction of any street, alley, or avenue, it shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned according to the number of square feet owned by them. Section 3 provides that the costs of making sidewalks, including curbing, whether by original construction or reconstruction, shall be apportioned to the front foot as owned by the respective parties fronting such improvement. *Held*, that the cost of curbing an alley adjoining defendant's property should be apportioned on the front feet bordering thereon.

2. In an action to tax defendants' property for improvements on an adjoining alley, an answer alleging that the city council, in ordering the im-

provement, did not fix the grade nor specify the improvements to be made, presents a good defense.

8. The city council is the sole judge whether the work was done according to contract, and not the person for whose benefit the improvement was made.

Appeal from Louisville law and equity court.

"Not to be officially reported."

Action by William Shadburn and others to subject the property of Patrick Joyes and others to the payment of the cost of improving an alley in the city of Louisville. There was judgment for plaintiffs, and defendants appealed.

P. Joyes, for appellants. *Lane & Burnett*, for appellees.

PRYOR, J. The property of the appellants in this case is sought to be subjected to the payment of the cost for improving an alley in the city of Louisville. The charter of the city of March 24, 1882, provides (section 2) that, when the improvement is the original construction of any street, alley, or avenue, such improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the general council according to the number of square feet owned by them, etc. Section 3 provides that "the cost of making sidewalks, including curbing, whether by original construction or reconstruction, shall be apportioned to the front foot as owned by the parties, respectively, fronting said improvement." The appellants' property was made liable for the cost, including the curbing, as provided in section 2, when it is plain that section 3 exempted any part of it from payment for curbing except the front feet bordering on the alley. The cost of the curbing is confined to the front foot bordering on the alley, and is so plain as to be unmistakable. No other construction can be given it, and there is no escape from the conclusion that such was the legislative intent. It is immaterial what has been the custom or practice heretofore. There is no reason for any other construction.

It seems to us, also, that the question as to the right of the city to improve this alley was put in issue. If only a private way, for private use, attached or appurtenant to the property owned, with no title vested in the city by dedication or otherwise, the right to order the improvement did not belong to the city, and, besides, it was the duty of the council to fix the grade, and to specify the improvements to be made; and, for that reason, the answer, alleging that such steps were not taken, presented a defense to the action. We perceive no other valid defense interposed.

As to whether or not the work was done according to contract, the council must judge, and not the party for whose benefit the improvement was made. The judgment below is therefore reversed and remanded, with directions to overrule the demurrer to the an-

swer to the extent indicated, and for proceedings consistent with this opinion. We perceive no reason why, under the charter, a reapportionment may not be made, if asked for.

WEBB v. TRUSTEES OF FIRST COLORED BAPTIST CHURCH OF LEXINGTON *et al.*

(Court of Appeals of Kentucky. April 8, 1890.)

CURTESY—LIABILITY FOR DEBTS—RECEIVER.

1. F. devised certain land to J. in fee, subject to the defeasance that, if she should die without leaving lawful issue, or the descendants of such issue, the land should be sold, and the proceeds divided between certain charities. J. married defendant, and had one child by him, which died in infancy. Afterwards J. died, having no other children. *Held*, that defendant had an estate by curtesy in the land.

2. A portion of the lands had been sold, and the proceeds used to purchase other lands, in Ohio. The lands purchased had belonged to defendant, and in payment therefor he received the proceeds of the land sold by J. Afterwards defendant mortgaged the land in Ohio to secure his indebtedness to third parties, which indebtedness he never paid. *Held*, that the court of chancery could put defendant's estate by curtesy into the hands of a receiver for the purpose of paying the indebtedness on the lands thus mortgaged.

Appeal from circuit court, Fayette county.
"To be officially reported."

Breckinridge & Shelby, for appellant. *D. G. Falconer*, for appellees.

BENNETT, J. Landon Ferrell willed to Elizabeth Jackson certain real estate, situated in the city of Lexington, and certain other real estate to Eleazor Jackson, situated in said city. The said estate was devised to each devisee in fee, but the same was subject to the defeasance that, if either devisee should die, before or after the death of the devisor, without leaving lawful issue, or the descendants of such issue, the estate devised to such devisee should go to the other devisee; and if both should die, before or after the death of the devisor, without leaving lawful issue, or the descendants of such issue, then the estate devised to both should be sold, and the proceeds divided between the First Colored Baptist Church of Lexington, Morton City School, and the Orphan Asylum of Lexington, one-third to each. Eleazor Jackson died without having left surviving him living issue, or the descendants of such issue; consequently, Elizabeth Webb, formerly Jackson, took Eleazor's part of the estate. Said Elizabeth had one child by her husband, the appellant, which died in infancy, and some time thereafter the mother died without having any other child or children. This suit was instituted by the appellees to have said property sold, and the proceeds divided among them in accordance with the provisions of the will. It is too plain for serious controversy that Eleazor and Elizabeth took, under said will, a fee, subject to be defeated by their deaths, without leaving living lawful issue, or the descendants of such issue, in which event the appellees took the estate.

There are no words in the granting clause of the will indicating that the testator intended to devise any estate to the children of Eleazor and Elizabeth Jackson. The estate is willed to these two persons in language that conveys to them an absolute estate, subject only to be defeated upon their dying without living issue, or the descendants of such. But, Elizabeth having had a child by the appellant, the question is, is appellant entitled to a curtesy in the land? This question is settled by this court in the case of *Northcut v. Whipp*, 12 B. Mon. 71-76, in the affirmative. We are not now disposed to disturb that decision.

Under a decree of the Fayette circuit court a part of this land was sold, at the instance of the appellant and Elizabeth, for the purpose of reinvesting the proceeds in a small tract of land, situated in the state of Ohio, for the benefit of said Elizabeth, and to be held by her under the provisions of the will, and in accordance with it. Said land, in Ohio, belonged to the appellant, and he received the money that Elizabeth's land sold for as the consideration for the conveyance of his Ohio land to her. A deed was made to Elizabeth for this Ohio land, but the same was not recorded in the state of Ohio. Afterwards the appellant mortgaged this Ohio land to third parties to secure his indebtedness to them, which indebtedness he has never paid. The chancellor in this case put the appellant's curtesy right in the Lexington property in the hands of a receiver, to be rented out by him, and the proceeds applied to the payment of such indebtedness, until the same was discharged. The appellant held only a curtesy right in any of this property, including that in Ohio; and he fraudulently mortgaged the fee to the Ohio property; and, the court having the control of the property in Lexington for the purpose of adjusting the respective rights of the appellant and appellees thereto,—the appellant claiming curtesy in said property,—it did right in taking charge of said property, and renting the same out, and appropriating the rents to the payment of the liens that the appellant had fraudulently put upon the appellee's remainder interest in a portion of said property. The mortgagees are not proceeding in this action. The proceeding is against the appellant for the purpose of lifting a cloud off of the appellee's title to this land, and of paying the indebtedness of the appellant, which he had placed as a lien upon this land. We do not see any just grounds that he has to complain of this action. He admits that he owes the debt. The fact that the mortgagees might have been apprised of the sale of the land to Elizabeth does not alter the appellant's attitude towards the mortgagees and the appellees. He nevertheless owes the debt, and the mortgage lien is, as to him, enforceable upon the fee, and therefore he has no right to complain. The judgment is affirmed.

DUNN'S TRUSTEE v. McALPIN et al.

(Court of Appeals of Kentucky. April 8, 1890.)

ATTACHMENT — PROPERTY INSUFFICIENT TO PAY DEBTS—JOINT DEBTORS.

1. Under Civil Code Ky. § 194, subsec. 2, authorizing an attachment on the ground that the debtor has no property in the state subject to execution, or not enough to satisfy the plaintiff's demand, and the collection of the demand will be endangered by delay in obtaining judgment, "an attachment will not lie unless it be alleged and shown, not only that the property is not sufficient to satisfy the demand, but also that the collection would be endangered by delay.

2. Where the demand is against two or more obligors, attachment will not lie against one of them on the ground that he has no property sufficient to pay the demand; but it must be alleged and shown that the other obligors have no property, subject to execution, sufficient to pay the demand, and that it would be endangered by delay.

3. An allegation that such co-obligor had made an assignment for the benefit of his creditors is not a compliance with the provisions of the statute.

Appeal from circuit court, Madison county.
"To be officially reported."

Action on promissory note brought by George W. McAlpin & Co. against Robert G. Dunn and J. O. Dunn. There was judgment for plaintiffs, and defendant appealed.

J. A. Sullivan and C. H. Buck, for appellant. John Bennett, for appellees.

BENNETT, J. R. G. Dunn and J. O. Dunn were sued, and served with process, as co-obligors on a note for \$2,100 executed to the appellees. An attachment was obtained against the property of R. G. Dunn alone, upon grounds alleged against him alone, which were that said Dunn had "no property in this state subject to execution, or not enough thereof to satisfy the plaintiffs' [appellees'] demand; and the collection of the demand will be endangered by delay in obtaining judgment, or a return of no property found." Subsection 2, § 194, Civil Code, authorizes an attachment upon these grounds; but, as it will be readily seen, two things must concur in order to authorize the issue of an attachment, and the sustaining of it, under said subsection of the Civil Code. These two things are—*First*, the defendant has no property in this state subject to execution, or not enough thereof to satisfy the plaintiff's demand; and, *second*, the collection of the demand will be endangered by delay in obtaining judgment, or a return of "No property found." As said, these two things must concur in order to authorize a proceeding under said subsection, and the concurrence of these two things must be both alleged and proven; else the attachment cannot be sustained under said subsection. It is true that, ordinarily, proof under said subsection to the effect that the defendant has no property in this state subject to execution, or not enough thereof to pay the plaintiff's demand, is *prima facie* sufficient to sustain the allegation that the demand will be endangered by delay in obtaining judgment,

or a return of "No property found." This ground of attachment is not given upon the idea that the defendant is a wrong-doer, or contemplates any wrong-doing, in reference to his creditors. He may be never so innocent; but nevertheless, by reason of his sheer inability, though his honesty of purpose is unquestioned, he may be subjected to this extraordinary remedy.

As intimated, the proof of the fact that the debtor has not property enough in this state, subject to execution, to pay the demand of his creditor, is *prima facie* sufficient to sustain the allegation that the demand will be endangered by delay, etc.; but it is only *prima facie* evidence of such fact; for it is well known that a person may not have as much as a dollar's worth of property subject to execution, and be, nevertheless, perfectly responsible for debts against him, and such person's business habits and integrity may be so well established that the debts against him will be in no wise endangered by reason of the fact that he has not property enough in this state, subject to execution, to satisfy them. It would be a harsh rule, indeed, to put the thumb-screw's extraordinary remedies to such person upon the ground that he had not property enough in this state, subject to execution, to satisfy his creditor's demand, although he was perfectly able to pay the demand, and had manifested no disposition not to do so. So, ordinarily, the lack of property enough in this state, subject to execution, to pay the demand, is *prima facie* evidence that the demand will be endangered by delay, etc.; but this *prima facie* case may be rebutted by showing that defendant was, notwithstanding his lack of property subject to execution, etc., both able and willing to pay the demand. A person having no property subject to execution, but a plenty of means, not subject to execution, with which to pay the demands against him, may be regarded, in the eye of the law, as not so safe as another person who has ample estate, subject to execution, with which to pay the demands against him; but in fact the demands against the former may be just as safe, in fact more safe, as the demands against the latter. So, it would be contrary to all the the practicable business purposes of life to hold that the former would be subject to attachment, and the latter would not be subject to it. This *prima facie* case proceeds upon the idea that, to the extent that a person is unable to furnish property, subject to execution, to the sheriff, for the purpose of paying the demand against him, he is insolvent, and the demand will therefore be endangered by delay, etc. But, as said, this presumption may be rebutted by showing that, although the property subject to execution was not sufficient, etc., the person was both able and willing to pay the demand, and for that reason was not subject to this extraordinary remedy.

As said, a *prima facie* case must be made

out. But, where two or more co-obligors are sued on the same debt, does the allegation, and proof of it, as to one of them not having a sufficiency of property in this state subject to execution, and that the demand will be endangered by delay, etc., authorize an attachment against him? We think not. Suppose the other co-obligors had ample property, subject to execution, with which to pay the demand. Could it then be truthfully said that the demand would be endangered by the delay, etc.? We think not. Would it, in that case, be contended that the Code had reference to the demand being endangered by delay, etc., so far as defendant who was attached was concerned, and not the other defendants? The Code has no qualifying words of this, or any other, kind. Where all of the co-obligors are solvent save one of them, and the demand is not endangered by delay, etc., it is presumed that the codifiers did not intend to authorize an attachment against said insolvent one upon the ground that he alone did not have property enough in this state, subject to execution, and that the demand as to him would be endangered by delay, etc. Such a construction would be absurd. It seems, the plain meaning of the Code is that the demand must, in reference to all of the obligors subject to the jurisdiction of the state, be endangered by delay, etc., else an attachment cannot be sustained against any one of them. Where one of the defendants is about to dispose of his property with a fraudulent intent to cheat his creditors, etc., the creditors may have an attachment against him, notwithstanding there are other co-obligors amply good for the debt, and it is not endangered by delay, etc. This right is allowed the creditors by the Code. To entitle them to this remedy, they do not have to allege and prove that their demands will be endangered by delay, etc. All they have to allege in reference to the particular debtor is that he has done, or is about to do, some act supposed, so far as he is concerned, to be hurtful to the rights of the creditors, or that he is beyond the reach of his creditors by means of the process of the state. But, in a case like the present, the defendant's misfortune in not having property enough to pay the demand does not subject him to this extraordinary remedy, unless the additional allegation that the demand will be endangered by delay, etc., is made, which must be proven, if denied, before an attachment can be obtained or sustained.

If there are two or more obligors subject to the process of the state, the allegation must be made, and the proof must show, that they not only have not property in this state, subject to execution, sufficient to pay the demand, but it will be endangered by delay, etc. No allegation of the kind was made in reference to J. O. Dunn. The presumption is that it could not be made as to him, else it would have been. Therefore, upon the face of the pleading, the action is

devoid of any ground of attachment whatever.

But it is said the proof shows that R. G. Dunn, after the appellee obtained the attachment, made an assignment for the benefit of his creditors, and J. O. Dunn, also, some time prior thereto, made an assignment for the benefit of his creditors; that these things show the appellees' demand was endangered by delay, etc. As said, there is no allegation as to J. O. Dunn not having property enough, subject to execution, etc., to satisfy the demand. Without this allegation, we cannot consider any proof in reference to that matter. This is for the reason that the proof of a substantive fact without an allegation to support it is never allowed. The judgment sustaining the attachment is reversed, with directions that the attachment be dismissed.

WILSON et al. v. THORN et al.

(Court of Appeals of Kentucky. April 5, 1890.)

MORTGAGE FORECLOSURE—CONTINUANCE—SALE.

1. In an action to enforce a mortgage lien, an order of sale was made, and the report of sale was filed on the second day of the term of court next thereafter. Time was given, from day to day, for the defendant to file his objections to the sale, but he did not do so until the last day of the term. The cause was therefore continued until the next term, when defendant again asked for a continuance, on the ground that he was informed that the attorney who had been representing him was sick. He was, however, then represented in court by two attorneys. *Held*, that the continuance was properly refused.

2. In a sale of lands on foreclosure the property was bid in by the wife of the mortgagor, who was notified by the commissioner that she must give bond or he would resell the property. She having failed to give the bond, the land was again offered the same day, and sold. *Held*, that it was within the power of the commissioner to offer the property a second time without readvertising the sale.

Appeal from circuit court, Pulaski county. "Not to be officially reported."

Action to enforce a mortgage lien brought by W. F. Thorn & Co. against Riley Wilson and others. There was judgment for plaintiffs, and defendants appealed.

M. H. Owsley, for appellants. *O. H. Waddle*, for appellees.

HOLT, J. The appellees, W. F. Thorn & Co., brought this action to enforce their lien against a house and lot, and some other real estate, mortgaged to them by the appellant, Riley Wilson, and his wife. Other lienholders were made defendants. This is an appeal from the judgment confirming the sale made under the decree enforcing the lien.

Various grounds for a reversal are urged. Among them, it is said that the court did not determine the priorities of the lienholders, or render judgment in favor of any of them, save the appellees; and that therefore the court erroneously ordered all of the land sold, and evidently more than was necessary for the payment of the appellees' debt; also, that it was prejudicial to appellant to authorize

the advertisement of the sale, and which was made upon written notices, by either printed or written ones; that the judgment did not sufficiently describe the property to be sold; and that the wife's rights were not ascertained or protected.

It is sufficient to say, if any of these objections are well founded, yet they relate to the judgment of sale, from which no appeal has been taken. Indeed, time had run against such an appeal when this one was taken. The report of sale by the commissioner was filed upon the second day of the October, 1888, term of the court. Time was given, from day to day, during the term, to appellant, to file his objections to the sale. He did not do so until the last day of the term. Their trial was then continued until the next term, when the appellant asked a continuance upon the ground that he was informed that the attorney who had been theretofore representing him in the case, and who was then absent, was sick. The appellant was then represented in court by two attorneys. Under such circumstances, the action of the court in refusing a continuance will not be disturbed.

It was agreed upon the trial below that the sale was properly advertised.

It appears that the wife of the appellant bid in the house and lot at the sale at \$1,200; that being the sum at which it had been appraised. The sale took place about the middle of the day. It was not made known to the commissioner at the time, by her bid or otherwise, that she was bidding for her husband, as he now claims. She was notified by the commissioner that she must give bond, or he would resell the property. Failing to do so, he, at the end of about an hour, or a little longer, perhaps, after the first sale, did so, and it was purchased by another party at the price of \$1,100. The testimony shows that a number of persons were present at the last sale, and every one who was a bidder at the first sale was present at the second one. The commissioner testifies that before he made the second sale he announced it publicly, and it is evident no considerable sacrifice of the property resulted. No creditor of the appellant is complaining. The purchaser who bid in the property when it was reoffered appears to have acted fairly and *bona fide* in all respects. It does not appear that any one would have bid more than he did for the property. Reasonable time was given the wife of the appellant to complete her purchase by the execution of sale bonds, and the record is not devoid of *indicia* that delay was intended upon the part of the appellant. It was not necessary to readvertise the sale in order to reoffer the property. The sale had been duly advertised for that day. The main contention of the appellant appears to be, however, that the commissioner, after accepting the bid of the appellant's wife, and after announcing her as the purchaser of the property, had no power to reoffer it; that he was then *functus officio*, and could do nothing save to report what had been done to the

court, and await its action in the matter. If this were so, then a calculating debtor, desirous of delay, could prevent a final sale almost *ad infinitum*. This question was settled by this court, however, in the case of *Hughes v. Swope*, 1 S. W. Rep. 394, where it was held that, while a commissioner should afford a purchaser a reasonable time to execute his sale bonds, yet the officer must judge whether, under all the existing circumstances, he is likely to do so; and, if he fails, after a reasonable time, to do so, the officer may upon the same day reoffer the property for sale.

Judgment affirmed.

JONES v. BREED'S EX'X *et al.*

(Court of Appeals of Kentucky. April 5, 1890.)

TESTAMENTARY POWERS.

Testator devised his estate to his wife and children, and gave his executor and executrix "full and discretionary power to sell any or all of my estate, and reinvest the same, when they may deem it most conducive to the interest of my wife and children, and for that purpose, vest title to all and every part of the same in them," and in the survivor, if either should die. The wife of testator was made executrix, and one H. executor, who died, leaving the wife of testator sole personal representative. *Held*, that the wife held the property as trustee, and had power to sell the same, and reinvest, when the interest of the estate demanded, and mere lapse of time would not divest her of this right.

Appeal from Louisville law and equity court.

"Not to be officially reported."

Action for specific performance brought by the executrix of James E. Breed against Paul Jones. There was judgment for plaintiff, and defendant appealed.

Byron Bacon, for appellant. *Humphrey & Davis* and *John C. Walker*, for appellees.

PRYOR, J. James E. Breed, by his will, devised his estate to his wife and children, and following that provision is the following clause: "I hereby give to my said executor and executrix full and discretionary power to sell any or all of my estate, of every kind whatever, and reinvest the same, when and as they may deem most conducive to the interest of my said wife and children, and for that purpose I hereby vest title to all and every part of the same in them, or either of them who may qualify, and I hereby give, and for that purpose vest, title of the same, and all thereof, in the survivor of my said executor or executrix, should one of them die before the estate is finally disposed of." The wife of the testator and George Hood, who were named, one as executor, and the other as executrix, qualified; and Hood, the executor, died, leaving the wife of the testator the surviving personal representative, who was empowered, in express terms, by the will, to do that in regard to the sale and investment of the estate or its proceeds which was conferred on both. The will was admitted to probate more than 80 years before the transaction out of which this action originated took place.

The estate was settled prior to the year 1877. The children of the testator, at his death, were infants, but all of them now of age who are living, and parties are plaintiffs in this proceeding. One of his children married Alex Booth, and died leaving two children, who are infants and defendants herein. Under the provision of the will authorizing the executrix to sell and invest for the benefit of the family, the executrix and her children, adults, sold to the appellant, Paul Jones, a lot of ground, with the improvements upon it, for \$34,000. Jones declined to comply with his contract, for the reason, as is alleged, the infant grandchildren of the testator were vested with the interest of their mother, Mrs. Booth, and that no right existed in the testatrix to dispose of the estate, or execute the trust, after such a lapse of time. The chancellor below, on the petition of the executrix and her children, enforced the sale or contract, and required Jones, the purchaser, to accept the title.

There is no question as to the title, in the event the executrix had the power to sell. That her power as executrix had long since ceased, is evident. The estate, or her acts as executrix, had been wound up; and she was then left to hold the estate in trust for herself and children, with the power to sell conferred by the will. The testator wished, and directed by his will, that his estate "should be divided between my wife and children as it would be by the laws of the state of Kentucky." The estate had never been divided, and the widow was invested with title as executrix; and in this condition the property in question was sold. There was no limit to the exercise of the discretion conferred on the trustee, who was empowered to make the investments for the benefit of herself and children. They were all young, and the purpose of the testator was to give to the wife or his executors the power to sell and reinvest whenever they believed it would advance the interest of the children. The lapse of time can make no difference in the execution of this trust, unless there is evidence of bad faith, or a sacrifice made of the property. Here the children are all consenting, and there is nothing in the record showing that the interest of the infant defendants would be prejudiced or sacrificed by the execution of the contract. The power to sell and invest being plainly given, the only defense the defendants could make would be to show that the trustee was acting in bad faith, or the property was sold at such a sacrifice as would indicate bad faith on the part of both the trustee and the purchaser. The fact that the trustee may have delayed the sale for so long a time may arise from the fact that she supposed the property would increase in value, and, acting, as the testator supposed she would, for the best interests of herself and children, held onto the lot in question until, in her opinion, it would be advantageous for the family to dispose of it. What would be a reasonable time for the execution

of the trust must, in a case like this, depend on the discretion of the trustee; for, by the language of the will, it is manifest that the power of sale, and the right to invest, was unlimited, and did not depend upon its exercise within the time the wife, as executrix, would or could be required to settle. He invests them with power "to sell any or all of my estate, of every kind whatever, and reinvest the same, when and as they may deem most conducive to the interest of my said wife and children," etc. We see no reason why the contract should not be enforced. The purchaser acquires the title of all the parties in interest, plaintiffs and defendants, and the judgment is therefore affirmed.

HISE v. HARTFORD LIFE INS. CO.

HITE v. AETNA LIFE INS. CO.

(Court of Appeals of Kentucky. April 5, 1890.)

EXEMPTIONS—PROCEEDS OF LIFE INSURANCE.

In an action to subject the proceeds of a life insurance policy to the payment of the debts of the deceased, it appeared that the deceased, as guardian of plaintiff, had received funds belonging to his estate; that at the time he was perfectly solvent; that he insured his life, for the benefit of his wife and children, in the sum of \$32,000, paying the premiums for several years, and then taking a paid-up policy; that he afterwards died insolvent. Held that, under Act Ky. 1870, providing that life insurance made by a husband for the benefit of his wife and children, whether insolvent or not, is valid as against creditors unless made with intention to defraud creditors, plaintiff was not entitled to have such insurance money applied on his demands.

Appeals from Louisville law and equity court.

"To be officially reported."

These actions were brought by Alfred Hise against the Hartford Life Insurance Company, and by Joseph Hite against the Aetna Life Insurance Company. There was judgment for defendants in both cases, and plaintiffs appealed.

R. T. Colston, for appellants. *N. G. Rogers* and *Thos. B. Fairleigh*, for appellees.

BENNETT, J. Joseph S. Hite, now deceased, qualified as the guardian, in 1867, of the appellants, and received, as estate belonging to them, about \$13,600, consisting of bonds. In 1868 and 1869, after said qualification and receipt of said bonds, he insured his life in the appellees' companies for the benefit of his wife and children, which sums amounted, in the aggregate, to about \$32,000. The premiums on these sums were paid annually until 1871, including that year, when the said Hite ceased to pay any more premiums; and for the premiums already paid he took a paid-up policy, likewise for the benefit of his wife and children. In the course of two or three years thereafter said Hite became hopelessly insolvent, and later on he died. These suits were instituted by the appellants, his former wards,

against the said insurance companies and said wife and children, to subject said policies to said demands, upon the grounds (1) that the investment for the benefit of said Hite's wife and children was in the nature of a gift, and therefore void as to existing creditors; and (2) that it was intentionally fraudulent as to said creditors. The proof shows that said Hite, at the time he took out said policies for the benefit of his wife and children, and the payment of the premiums thereon, was not insolvent; that he was in debt, but not to the extent of his ability to pay, nor to the extent of affecting his credit, nor to the extent of materially impairing his ability to pay, nor to the extent of materially affecting the rights of creditors, by investing as much as between \$5,000 and \$6,000 (this was the sum invested in the paid-up policy) in a policy for his wife and children,—nine children in all, the most of whom were infants, and one of whom (an infant) was a cripple.

It was held in the case of *Stokes v. Coffey*, 8 Bush, 533, that an insurance by the husband for the benefit of his wife and children was not within the statute of voluntary conveyances, consequently, was not *per se* fraudulent as against antecedent creditors, but, if said insurance did not materially affect the rights of such creditors, by withdrawing the money that they were entitled to receive from the insurer on account of his indebtedness to them, the insurance for the benefit of his wife and children would be valid as against said creditors. It was also held that an insolvent husband might insure his life for the benefit of his wife and children in a reasonable sum, and the same would not be subject to the payment of his debts, provided his wife had not a sufficiency of estate of her own with which to support herself and children, and to educate the latter. This decision was rendered without reference to the act of 1870, which provides, in substance, that insurances made by husbands, whether insolvent or not, for the benefit of his wife and children, are valid as against creditors unless the insurance is made with the intention to defraud creditors, in which case only the premiums paid on such policies shall be subject to their debts. This court, in the case of *Thompson v. Cundiff*, 11 Bush, 567, decided that this act, while it did not control, as matter of statutory obligation, insurances theretofore effected, should be received as a legislative interpretation of such policies, to the effect that they were valid against existing creditors, though made by an insolvent husband, to the extent that the "sum was reasonable;" that in no case could said policies be successfully attacked by antecedent creditors except for intentional fraud; and insurances by insolvent husbands for the benefit of their wives and children, in unreasonable sums, would be sufficient evidence of such fraud, and would subject the premiums paid to the debts of such creditors.

The judgment is affirmed.

NEWSON v. CITY OF GALVESTON et al.

(Supreme Court of Texas. March 18, 1890.)

CITY ORDINANCES—MARKETS—RESTRAINT OF TRADE.

1. Where a city, by its charter, is given full power to establish and control market places and privileges, one who spends money in fitting up a private market, under a license granted pursuant to an ordinance limiting the duration of the privilege to one year, acquires no vested right to exercise his business therein, and cannot complain of the refusal to renew his license pursuant to a subsequent ordinance prohibiting private markets within a given area.

2. An ordinance prohibiting private markets within a prescribed area, where the city has erected a market-house for the accommodation of those engaged in vending provisions, etc., is not in restraint of trade.

Commissioners' decision. Appeal from district court, Galveston county.

Quitman Finlay, John Lovejoy, and A. Sampson, for appellant. *S. W. Jones*, for appellees.

STAYTON, C. J. This was a suit for injunction, instituted in the district court of Galveston county, January 26, 1889, by A. S. Newson against the city of Galveston, in which it was sought to restrain the latter from interfering with the private market for the sale of fresh meats, conducted by the former in violation of an ordinance of the city prohibiting such markets in the territory bounded by certain streets within its corporate limits. Judge N. G. KITTRELL, of the twelfth judicial district, granted a preliminary injunction in accordance with the prayer of the plaintiff's bill; and on February 23, 1889, this injunction was by the court, on motion of defendant, and after demurrer and sworn answer filed by it, dissolved; and the plaintiff declining to introduce any evidence in support of the allegations of his bill, or to proceed further with the case, the same having been regularly called for trial on its merits, the bill was dismissed; to which rulings the plaintiff excepted, and gave notice of appeal. The facts bearing on the controversy, necessary to be stated, are thus correctly given in condensed form by counsel for appellees, from the pleadings:

"By its charter, the city of Galveston is authorized and empowered to establish and erect markets and market-houses; designate, control, and regulate market-places and privileges; inspect and determine the mode of inspecting meat, fish, vegetables, and all produce, and every article and thing brought therein for sale; to license, tax, and regulate merchants and all other trades and professions, occupations and callings, the taxing of which is not prohibited by the constitution of the state; to regulate the inspection and vending of fresh meats, poultry, fish, vegetables, fruits, butter, lard, and other provisions, and the place and manner of selling fish and inspecting the same; to make such rules and regulations in relation to butchers as the city council may deem necessary and proper; and to pass all ordinances, rules, and police

regulations, not contrary to the constitution of this state, for the good government, peace, and order of the city, and the trade and commerce thereof, that may be necessary or proper to carry into effect the powers vested by its charter in the said corporation, the city government, or any department thereof; and to enforce the observance of all such rules, ordinances, or police regulations, and punish violations thereof by fines, penalties, and imprisonment,—fines being limited to \$200, and imprisonment to three months. In pursuance of these powers, the city council, in 1880, passed an ordinance authorizing the establishment of private markets for the sale of fresh meats within the corporate limits, upon written application to the city council for that privilege, stating the length of time and the place where such market was to be established, the time for such privilege not to be less than three nor more than twelve months; and if granted, in whole or in part, each and every person occupying such market to pay for the privilege quarterly, in advance, at the rate of \$50 per annum, and all private markets to be governed by and stand under the ordinances, rules, and regulations of the said city, and imposing a fine or penalty of not less than \$10 nor more than \$50 for each day's violation of any of the provisions of said ordinance. In October, 1887, the city council amended this ordinance by providing that all market privileges theretofore granted should terminate on the 1st day of January, 1888, and all market privileges thereafter granted should terminate on the 1st day of the next succeeding January. June 18, 1888, the city council digested all ordinances of the city of a general nature, and continued in full force and effect the ordinance of 1880, as amended in October, 1887. On October 2, 1888, the city council adopted an ordinance amendatory of the Revised Ordinances of the city adopted June 18, 1888, providing that from and after January 1, 1889, no private market should be established in the city of Galveston within the territory embraced between Thirteenth street on the east, and Twenty-Seventh street on the west, and Avenue K on the south, and the channel of Galveston bay on the north; and by the ordinances of the city any person violating the provisions of this ordinance is subject to a fine of \$10. On February 18, 1889, the city council again amended the Revised Ordinances by the passage of the following: 'Hereafter it shall be unlawful for any person to establish, operate, or maintain any private market for the sale of butchers' meats within the following boundaries in the city, to-wit: Between Thirteenth street on the east, and Twenty-Seventh street on the west, and between Avenue K on the south, and the channel of the bay on the north. Any person who shall violate the provisions of this article shall, on conviction, be fined ten dollars, and each and every day any such violation shall occur shall constitute a separate offense.'

"In October, 1884, the plaintiff, A. S. Newson, made application in writing to the city council for permission to establish, under the ordinance of 1880, which was then in force, a private market, in the city of Galveston, for the sale of fresh meats. This application was granted by the council, and immediately thereafter the plaintiff established, on Twenty-First street, between Market and Mechanic streets, in said city, a private market for the sale of fresh meats, sitting up the same with refrigerator and other appliances at an expense to himself of several thousand dollars, and continued, unmolested, to conduct such market, at a profit, from that time until January 1, 1889, paying to the proper officer of the city, quarterly in advance, the tax imposed by that ordinance for the exercise of such privilege. This private market of the plaintiff is located within the limits in which such markets are inhibited by the provisions of the ordinances of October 2, 1888, and February 18, 1889. Prior to January 1, 1889, the city had erected and completed, within the limits defined by the ordinance of October 2, 1888, a large and commodious market-house, for the accommodation of the public and those engaged in vending fresh meats, etc., and containing stalls to let for such purposes at a reasonable rental fixed by the city council. No privilege to establish or conduct a private market in the city limits had been granted to the plaintiff since January 1, 1888, and the last granted to him expired December 31, 1886. In January, 1889, he tendered, for the quarter commencing the first of that month, to the city official whose duty it is to collect taxes and fees for licenses, the amount imposed, under the ordinance of 1880, for the privilege of conducting a private market within the city, but the officer declined to receive the same, and refused to issue him further license in that behalf; and the plaintiff was then notified to desist, under penalty of the law, from further conducting his said market for the sale of fresh meats at the said locality on Twenty-First street, within the said prescribed limits. Notwithstanding, however, the change in the law, and the refusal of the city to further grant him the privilege of conducting his said market, the plaintiff continued the same, and was in January, 1889, arrested under a warrant from the recorder's court of said city, upon complaint filed therein, charging him with a violation of the ordinances prohibiting the establishment of private markets for the sale of fresh meats within the limits in said city prescribed by the aforementioned ordinances. The plaintiff was at the time a renter of stalls in the said market-house erected by the city, and vended meats therein, as well as at his private market. The prosecution in the recorder's court was pending at the time of the filing of the bill and the service of the writ of injunction in this case. The bill charges that the plaintiff's private market having been established at an expenditure of his moneys in October, 1884, under

permission from the city council, his right to conduct the same, unmolested, had become vested, and the city was without authority to interfere with him in its exercise; and the ordinances passed subsequently in October, 1884, prohibiting the establishment or conduct of private markets within the limits therein defined, are null and void, in so far as they affect that right; that the said ordinances are in restraint of trade; that the enforcement of them would be to deprive the plaintiff of his property without due process of law; and also other matters,—all of which are specifically denied in the defendants' answer."

Under the provisions of the charter empowering the city to establish market-houses, designate, control, and regulate market-places, and to regulate the vending of fresh meats, poultry, fish, and other things, no doubt can exist of the power of the city to establish market-houses, and to require fresh meats to be sold there, and also to forbid their sale at other places. Such a power is most necessary for the protection of the health of a city, and has often been recognized under charters not so clearly conferring it as does the charter of the city of Galveston. *Buffalo v. Webster*, 10 Wend. 100; *Bush v. Seabury*, 8 Johns. 327; *Winnsboro v. Smart*, 11 Rich. Law, 552; *Bowling Green v. Carson*, 10 Bush, 65; *New Orleans v. Stafford*, 27 La. Ann. 417; *St. Louis v. Weber*, 44 Mo. 549; *Wartman v. Philadelphia*, 83 Pa. St. 209; *Ash v. People*, 11 Mich. 351; *Tied. Lim. Police Power*, § 104; 1 Dill. Mun. Corp. §§ 881-892. The case of *Le Claire v. City of Davenport*, 13 Iowa, 210, goes much further, in that it protected a private individual in the exclusive privilege to furnish a market-place. *Palestine v. Barnes*, 50 Tex. 538, seems to have recognized the power of a municipal corporation to confer like exclusive market privileges. We refer to the last two cases cited for illustrations of the rulings on the general question before us, but are not called upon, by the facts of this case, to adopt or reject them on the question of power to confer such exclusive privileges. The character of power the city exercised in authorizing meats to be sold in private markets was not such as the city could be prevented from exercising again by withdrawing the privilege whenever the public good required it. The police power possessed by such corporations cannot be fettered by contracts, but must be left free to be exercised at all times, whether in conferring or withdrawing privileges once conferred. If license tax had been paid for a year, this would not deprive the city of the power to withdraw the privilege before its expiration, if the public welfare demanded it. Much less would the fact that the city for a time had received the tax, and granted the privilege, make it incumbent on it to continue to do so. If appellant expended money in preparing his private market-place for the conduct of his business, he did so with full knowledge that the city might at any time

forbid the business to be there conducted. The city has neither divested him of a right nor deprived him of his property, nor are the ordinances complained of unlawful because in restraint of trade. He is not denied the right to sell meats, but is denied the right to sell at a particular place. This is but that regulation of his right which the charter of the city authorized it to make, and it must be presumed that the city council in its action was prompted solely by a desire to promote the public welfare. There is no error in the judgment, and it will be affirmed.

FREYBE v. TIERNAN, Sheriff, et al.

(Supreme Court of Texas. Feb. 25, 1890.)

**SUPPORT OF INFANTS—LIABILITY OF MOTHER—
FRAUDULENT CONVEYANCES.**

1. When a mother is unable to support and educate her son, and the income of his estate is insufficient to do so, the amount expended by her for his support and education, though without a special order of a probate court, is a charge on the *corpus* of his estate.

2. In an action against a sheriff for the seizure of goods conveyed to plaintiff, under an averment in the answer that the debt in consideration of which the goods were conveyed to plaintiff was fictitious, evidence of a counter-claim of the debtor against plaintiff is admissible.

3. When the amount of the debt recited in the conveyance is overstated through a mistake of law or fact, and the value of the property conveyed does not exceed the actual amount of the debt, the conveyance is not fraudulent.

Appeal from district court, Galveston county; WILLIAM H. STEWART, Judge.

Action by Olympia Freybe against Patrick Tiernan and others. Judgment was rendered for defendants, and plaintiff appealed.

Hume & Kleberg, for appellant. *George Mason and Howard Finley*, for appellees.

GAINES, J. This suit was brought by appellant to recover of appellee Tiernan, as sheriff of Galveston county, and the sureties on his official bond, damages for the seizure of a stock of goods in which she claimed an interest. The goods were levied upon by virtue of a writ of attachment in favor of E. R. Singleton against Charles A. Freybe, the son of appellant. Tiernan answered, among other things, that the plaintiff in the attachment suit had given him an indemnity bond, and prayed that he and his sureties on that bond be made parties defendant. Singleton and his sureties appeared, and answered; and upon the trial before a jury there was a verdict and judgment for the defendants. The facts which gave rise to the suit are as follows: Charles A. Freybe, in 1877, being then about 19 years old, and having had the disabilities of minority removed, borrowed of his mother, the appellant, the sum of \$2,500, and with it purchased half interest in a business then conducted by Singleton. He subsequently bought all of Singleton's interest in the business, and gave him his note for the purchase money. At the time of the loan from his mother he executed no written evidence of debt; but at a later date, and after

some partial payments had been made, executed to her his promissory note for \$2,200, for the balance then due. On the 23d day of December, 1887, being unable to meet his obligations, and being indebted to Ullman, Lewis & Co. and to Adoue & Lobit as well as his mother, he conveyed to them jointly all the stock of merchandise and certain other personal property in full satisfaction of their claims. It was after this sale that the writ of attachment was levied. The property was sold by the sheriff under the order of the court; and the proceeds were divided between the plaintiff in attachment, Ullman, Lewis & Co., and Adoue & Lobit, from which it would seem that Singleton did not contest the title of these firms to their respective interests in the property. Singleton and his sureties, in their answer to the present suit, alleged that the debt for which an interest in the goods was transferred to Mrs. Freybe was fictitious, and that, therefore, the sale to her was fraudulent. The testimony of Mrs. Freybe, who was examined on her own behalf, and that of her son, who testified for the defendants, leaves no doubt that the money was lent by her to her son, as she claims, and that there remained due upon that particular transaction, at the time of the sale, the sum of \$2,195, the amount recited in the bill of sale as the consideration of the conveyance to her. But during the cross-examination of Mrs. Freybe it was disclosed that, during the year 1875, her father-in-law in Germany gave her \$1,800 or \$2,000 in German money,—the German dollar being worth 70 cents of our money. The testimony does not make it clear whether this was given to her alone, or to her and to her children. But in the charge of the court it was disregarded, and seems to have been treated as a gift to her for her own use. It was further disclosed by her testimony that, in the year 1884, she collected in Germany, from her deceased father-in-law's estate, \$1,800 or \$2,000 in German money. In one place she testified that this money was inherited by her children, and in another that it belonged to her and her children as heirs of her deceased father-in-law. She further testified that she was in moderate circumstances; that while she had considerable property she was largely in debt; and that she had spent her son's portion of the money in his maintenance and education.

Under this state of the case, the court first charged the jury, in effect, that if, at the time of the sale of the property in controversy, Mrs. Freybe was indebted to her son on account of the money received by her in Germany in 1884, and that she failed to give him credit therefor on her claim against him for the borrowed money, they should find for defendants; and then proceeded to give the following further instruction: "In determining whether Mrs. Olympia Freybe was indebted to her son for moneys for which he should have had credit on her claim against him, you cannot take into consideration any expenses she may have incurred for his main-

tenance, support, or education during his minority. Parents cannot use the money or estate of their children to aid in their raising without the probate court authorizes them by special order, and there is no evidence that any such order was made." In giving the instruction, the court evidently acted upon the theory that the only method by which a mother can establish a debt against her child for expenses incurred on account of his maintenance and education is by means of the procedure in the county court provided by our statutes in relation to guardians and wards. In this view of the law, we do not concur. There are cases in which equity recognizes the claim of the mother against her child, for reimbursement for expenditures made on account of his support and education; and, our courts being courts of equity as well as law, we see no reason why such claim should not be sustained in any case in our courts, when, under the evidence adduced, a court of equity would have held it valid. At common law, it is the duty of the father to support his minor children, and upon the death of the father that duty devolves upon the widowed mother. If, however, her means are limited, and the children have means of their own, their maintenance and education becomes a proper charge against their own estate. *Mowbry v. Mowbry*, 64 Ill. 383; *Wilkes v. Rogers*, 6 Johns. 566; *Heyward v. Cuthbert*, 4 Desaus. Eq. 445. It is a sound principle that the *corpus* of the estate of an infant should not be intrinched upon for his support and education, so long as the income is sufficient for that purpose; but it is held that, when the means of the parent are not ample, expenditures by the parent for the support and education of a minor child may be made a charge upon the body of the estate, provided it be so small that the income is wholly inadequate for the purpose. In *re Bostwick*, 4 Johns. Ch. 100; *Osborne v. Van Horn*, 2 Fla. 360. The evidence upon the question of the mother's ability to support and educate her children, and upon that of the amount of the expenditures made by her on her said account, was not very satisfactory. But we think it sufficient to go to the jury, and to have demanded a charge in accordance with the principles announced. The charge under consideration was erroneous, and requires a reversal of the judgment.

It is submitted that the court erred in refusing to give charge No. 2, asked by plaintiff, which was as follows: "Whether or not any lawful claim existed or exists in favor of Charles Freybe against the plaintiff on account of any money received by her in Germany in 1884; and whether or not any lawful claim existed or exists in favor of the plaintiff against Charles Freybe on account of the support, education, and maintenance of said Charles by plaintiff; and whether or not, upon an inquiry into, and offsetting of the said claim of the one against the said claim of the other, the balance, if any found, should be in favor of the plaintiff, or of the said

Charles,—are all questions with which you have nothing to do in this case, and you are instructed not to consider them." In support of the assignments relating to this ruling, it is insisted that the pleadings of defendants were not sufficient to admit evidence of the defense that, at the date of the bill of sale, C. A. Freybe had an offset against his mother, which was not credited upon his debt, and that "said pleadings charged only that said debt, for the payment of which said bill of sale was made, was fictitious, had no existence in fact, and that the parties of said bill of sale had combined to defraud the creditors of C. A. Freybe, but in no way apprised plaintiff that defendants relied as a defense upon showing a counter-claim in favor of C. A. Freybe against the plaintiff." We think, however, it would be a dangerous rule that would require a creditor who attacks a conveyance of his debtor for fraud to state with exactness and particularity the circumstances in which the fraud consists. Transactions of such a character are usually conducted secretly, and their details are known only to the parties immediately concerned. The allegation in the answer that the debt was fictitious, we think, was sufficient to admit evidence to show that it was in part unreal, and thereby to establish the fraudulent nature of the conveyance.

It is also assigned that the court erred in refusing to give the following instruction, as requested by appellant: "If the jury believe from the evidence that C. A. Freybe was indebted to his mother, the plaintiff, after deducting the sum she may have owed him, if any, (in an amount) reasonably equal to the value of the goods sold by him to her, then you are instructed that the plaintiff is entitled to recover the value of the goods so sold to her at the time of their seizure under the writ of attachment." We think the charge involves a legal proposition, which, as applied to every case of like character, is unsound, but that it was probably sufficient to have called the attention of the court to a phase of the case upon which an instruction should have been given. We are of the opinion that when an insolvent debtor transfers to a creditor property in satisfaction of the debt, and in the conveyance overstates the amount of the indebtedness which purports to be extinguished by the transfer, such false statement, in the absence of some satisfactory explanation, should be held conclusive evidence of fraud. Its evident purpose is to obviate any question as to whether the value of the property exceeds the amount of the debt, and is inconsistent with fair dealing. It was so held at the last term at Tyler, in an opinion by the commission, which was adopted by this court. *Brasher v. Jemison*, 12 S. W. Rep. 809. On the other hand, when a creditor accepts from his debtor property in satisfaction of his debt, and the value of the property is more than is fairly sufficient to discharge the obligation, we think the transaction fraudulent in law, whether the

taking of the excess was intentional or not. The right of an insolvent debtor to prefer his creditor by a transfer of property to satisfy the debt is limited strictly to a conveyance of so much only as is reasonably necessary for that purpose. The unpreferred creditors are entitled to subject any surplus that may remain after satisfying such debts as the debtor may determine to prefer, and hence any appropriation, by way of preference of more property than is reasonably sufficient to pay the preferred debt, is a necessary infringement upon the rights of those who are not preferred. As long as the conveyance is recognized as valid, its inevitable result is to remove the excess beyond the reach of the other creditors, and the parties to the transaction are not permitted to say that they did not intend the necessary consequence of their action. This is the principle of the rule, and it is also supported by sound policy. When an insolvent debtor prefers a creditor, he should be required to do it with strict regard to the rights of other creditors. A hope should not be held out that an excessive transfer may be explained by parol evidence. To permit this would be to encourage fictitious transfers under the guise of preferences, and to promote fraud. But the question which is presented by the phase of the case now under consideration is, should the amount of the debt recited in the conveyance as its consideration be overstated, not intentionally, but on account of a mistake of fact or law, and should at the same time the value of the property conveyed not exceed the amount of the actual indebtedness, ought the transaction to be held fraudulent? We think not. In such a case, there is neither an actual intent to defraud, nor is there legal fraud resulting from a transfer of more property than is sufficient to pay the debt. We think the court should have charged the jury in accordance with the law as here announced.

We do not concur in the proposition urged by appellants, that a mere acquiescence of C. A. Freybe in the appropriation of his money by his mother, and his failure to demand it, should, under the circumstances, be considered a discharge of the debt. His acquiescence is proper to be looked to as evidence in determining whether his mother owed him anything on account of the money received in Germany or not, but it should have no other effect. We deem it unnecessary to consider the other questions presented. For the errors indicated the judgment is reversed, and the cause remanded.

JACOBS *et al.* v. TOTTY.

(*Supreme Court of Texas.* Feb. 25, 1890.)

TROVER AND CONVERSION—FRAUDULENT CONVEYANCES.

1. Where the jury has been charged, in an action for conversion, that plaintiff must prove his ownership, it is not error to refuse to charge that he must prove that the sale under which he claims actually occurred.

2. A sale by an insolvent debtor, in which the purchaser, knowing such insolvency, is allowed an indefinite credit, is fraudulent.

3. A sale of goods by an insolvent to a creditor in consideration of the debt, and of payments by the creditor of debts due those from whom the goods were purchased for a fair price, is not fraudulent.

Appeal from district court, Houston county; NORMAN G. KITTRELL, Judge.

Action by William Totty against S. Jacobs, Bernheim & Co., and B. F. Holcomb. Judgment was rendered for plaintiff, and defendants appealed.

Nunn & Nunn, S. A. Denny, and Robert G. Street, for appellants. *Maxey & Davis, A. W. Gregg, and T. T. Gammage*, for appellee.

STAYTON, C. J. Appellant firm, being creditors of W. H. Campbell, caused writ of attachment to be levied on a stock of goods claimed by appellee, which was sold to satisfy the debt due by Campbell. The goods belonged to Campbell prior to July, 1887, at which time appellee claims to have bought them. This action was brought by appellee to recover damages for the seizure and conversion of the goods, and the issues were: (1) Did Campbell sell the goods to Totty, as claimed? (2) Was that sale fraudulent as to creditors of Campbell?

There was much, and it may be said conflicting, evidence on the last question; but on the first the evidence all tended to show that a sale was made, though fraudulent it may have been. The first assignment of error is: "In the second paragraph of the charge the court improperly limits the defense to the issue of a fraudulent sale, when it was denied that any sale had ever been made, and there was strong circumstantial evidence tending to support such defense, and this error is repeated and perpetuated in succeeding parts of the charge, without mitigation or correction." The ninth assignment is: "The court erred in refusing defendants' special charge placing the burden of proof to show a sale, as contended for, on the plaintiff, and especially has the court erred in assuming as proved beyond dispute that there was an actual sale because Campbell and Totty say so, when all the independent facts and circumstances attending upon the parties and subject-matter, upon which defendants relied, contradicted them." So much of the charge of the court as has bearing on these assignments is as follows: "(1) The plaintiff, William Totty, alleges that he was the owner of the goods described in his petition, and that defendants seized and converted them to their own use, and these allegations he is required to prove by the preponderance of evidence; that is, by the greater weight and degree of credible evidence. (2) The defendants S. Jacobs, Bernheim & Co., who were creditors of Campbell, allege that the goods were not Totty's property, because the sale made by Campbell to him was fraudulent in law; being, as they aver, made

with the intent to hinder, delay, or defraud Campbell's creditors, and that, therefore, it conveyed no title, but was void. This allegation of fraudulent sale the defendants are required to establish to your satisfaction, by a preponderance of evidence, in like manner as plaintiff is required to show ownership by him, and conversion by defendants, as instructed in the preceding paragraph. (3) It is admitted that for some time prior to July, 1887, Totty was conducting for Campbell a cash store in Grapeland, in the name of him, (Totty,) and he claims to have bought the stock of goods in said store from Campbell by purchase, for a valuable consideration; while the defendants deny that there was any such purchase, and aver that, if there was anything in the nature of a sale, it was invalid, and in law fraudulent and void. (4) Whether there was any sale by Campbell to Totty, and, if so, whether the same was legal and valid, or was fraudulent and void, is a question of fact for you to decide, under the rules of law laid down in this charge. (5) The law you will receive in the charge, and be governed thereby; of the facts proved, the weight of the evidence, and the credibility of the witnesses you are the sole and exclusive judges. (6) If you believe Campbell agreed to sell and Totty to buy the goods, and that they agreed upon a price and terms, and that thereupon Campbell placed Totty in possession of said goods as owner, under and in pursuance of said agreement of sale so entered into between them, and so executed by said delivery of possession, the title to said goods rested in Totty, and, in the absence of what you are hereinafter instructed would constitute fraud in law, said sale was valid."

The first and second paragraphs of the charge it will be seen were intended to inform the jury as to the general nature of the claim asserted by each party, and as to the burden of proof resting on each. There was no pretense that Totty owned the goods otherwise than through a purchase from Campbell, and, in view of that fact, the first paragraph must be understood to inform the jury that the burden of proving a sale from Campbell to himself rested upon him. The second, in effect, repeats this; for, unless such a sale was shown, the jury could not have come to the conclusion that Totty was owner,—a fact which they were more than once told it was necessary for him to establish to entitle him to recover. The third, fourth, fifth, and sixth paragraphs certainly gave the jury to understand that sale or no by Campbell to Totty was a vital issue in the case, on which they were required to pass. The jury, in another paragraph, were told to look to the entire charge; and in addition to the paragraphs set out, there were many from which the jury could not have understood that it was not their duty to determine whether a sale had in fact been made by Campbell to Totty, as well as to inquire whether, under other paragraphs, such a sale was fraudulent as to Campbell's creditors. The court, having in-

structed the jury correctly as to the burden of proof, did not err in refusing to repeat this at request of counsel for appellants.

The court in one paragraph gave the following: "(17) Concerning the evidence admitted of Campbell's acts or declarations made after the sale to Totty, if you find such sale was made, you are instructed that no such acts or declarations of Campbell made after such sale will be considered by you as evidence to show fraud on the part of the plaintiff, but you may consider the same in determining the question of the intent and purpose of Campbell in making such sale; and if you find it was made with such purpose and intent, and under such circumstances as you are told would render it fraudulent in law on Campbell's part, you will then inquire whether Totty had such actual knowledge of the facts as was sufficient to put him upon inquiry which would have enabled him by reasonable diligence to have ascertained Campbell's intention, and thereby rendered the sale also fraudulent in law as to him, Totty,"—which it is insisted was erroneous, in that it was a comment on the weight of evidence, and in that it limited the effect of Campbell's acts and declarations. We do not see wherein it was a comment on the weight of evidence, and it certainly authorized the jury to consider acts or declarations of Campbell, made after the sale to Totty, for every purpose for which they could possibly be considered; and it may be true that such acts or declarations, not done or made in the presence of Totty, ought not to have been considered for any purpose. We do not understand that the evidence referred to was introduced under the rules which admit declarations or acts made at other times for the purpose of impeaching the credibility of a witness; but, had this been so, the charge was not calculated to induce the jury to believe that contradictory statements, if any, made by Campbell, as well as statements testified by others to have been made by him, but denied on the stand, might not be considered in determining his credibility, which the charge informed the jury was for their determination. It simply informed the jury that fraud on part of Totty could not be proved by such after acts or declarations. The court did not err in refusing to give a charge as to what would be the effect of an executory agreement by Campbell to sell to Totty, for there was no evidence tending to show such agreement.

The third assignment of error, in terms, relates to the twelfth paragraph of the charge, to which it has no application whatever, but the eleventh paragraph is doubtless the one in mind of counsel. That paragraph is as follows: "(11) If you believe the sale was made upon the consideration of a certain amount due from Campbell to Totty, and the further consideration of the payment by Totty of certain debts due by Campbell to those from whom the goods had been bought by him, and that such agreement was made

in good faith, and that the consideration was fair and reasonable for the goods, then the said sale was made upon what was deemed a valuable consideration in law." This states the law correctly as applied to a state of facts which the evidence for appellee tended to establish, and it was not error to give it, although there may have been evidence tending to show a state of facts to which the charge was not applicable. The court evidently intended, as was proper, to inform the jury as to the law applicable to the different phases of the case which the evidence tended to establish. The charge given at request of appellee stated the law correctly, and, though it may not have been strictly applicable to the case made by the evidence, there is no reason to believe that the jury could have been misled by it.

There was evidence tending to show that, in consideration for the goods, Totty undertook to discharge certain debts incurred by Campbell in the purchase of the goods, and also to pay to Campbell a sum of money which he had expended in their purchase, and that the latter was discharged by a sum of money then due to Totty from Campbell. There was also some evidence tending to show that the goods were sold to Totty on a credit, with an understanding that they should be paid for at some indefinite period, when it might suit his convenience. It was also contended that the price Totty was to pay for the goods was less than they were worth, and to meet these states of fact the court gave the following charge: "If you believe Campbell was not solvent, and did not have assets sufficient to meet his existing debts, but that he was in failing circumstances when he sold the goods to Totty, and that being in such condition he sold the goods for a price largely disproportionate to their value, and upon an indefinite credit,—that is, to be paid for when Totty was able,—and that Totty knew of Campbell's financial condition, or knew of such facts as were sufficient to put him upon inquiry which would have enabled him by reasonable diligence to have ascertained such condition, then a sale so made, under such circumstances, was invalid and void in law, and not upon a valuable consideration, and conveyed no title to Totty." By the words "largely disproportionate to" the court doubtless meant to say "greatly less than," and so understood the charge would not be erroneous. But it is insisted that this charge was misleading, in that it gave the jury to understand that the sale was not fraudulent as to creditors, if made under the circumstances given in the charge, unless the goods were sold for greatly less than their value, and also upon an indefinite credit; that the two things must have concurred to make the sale fraudulent as to creditors, although Campbell was insolvent, and known to be so by Totty at the time he purchased. If the goods were sold for an inadequate price, this was a fact which the jury might properly take into consideration in determining the character of the transaction; but, if the sale was made on such

credit as is referred to in the charge, the transaction would be fraudulent as to creditors of Campbell, if he was insolvent, and that fact known to Totty, without reference to whether the price to be paid was adequate.

The effect of such a sale would necessarily be to hinder and delay creditors of Campbell; for, if permitted to stand, they could not subject the goods to the payment of their claims, and, if they proceeded through garnishment against Totty, would be compelled to abide by his contract, and await his ability. Such a promise to pay is conditional, and the debtor has no right to place his property beyond the reach of his creditors when insolvent, and known to the buyer to be so, and substitute in the place thereof the conditional obligation of the latter. The mere fact that an insolvent debtor may sell property on credit, even to one who knows of his insolvency, will not necessarily make the transaction fraudulent, for such sale may be the very best means to realize on the property; but in such sales the absolute liability of the buyer ought to be fixed by the contract of sale, and he be left subject to all the remedies creditors have in such cases. Appellants requested a charge which, while not correct in all respects, called the attention of the court to the matter referred to. This the court refused to give, on the ground that it had already been substantially given. This evidences the fact that the judge who tried the cause was of the opinion there was evidence requiring the submission of some such issue. In view of the evidence in the case, it is rendered probable that the jury may have been misled by the charge referred to, and for this the judgment will be reversed, and the cause remanded, which renders it unnecessary to consider the other assignments of error, which question the sufficiency of the evidence to sustain the verdict. It is so ordered.

GULF, C. & S. F. RY. CO. v. JONES.

(*Supreme Court of Texas. Feb. 23, 1890.*)

MASTER AND SERVANT—INFANTS.

In an action against a railroad company for injuries received while employed as a brakeman, where it appears that plaintiff was 16 years of age at the time of the accident, was of average intelligence, and was employed without the consent of his parent, defendant must show that plaintiff possessed the capacity and experience to do the work in safety, though there is no evidence of negligence on the part of plaintiff or of his fellow-servants.

Appeal from district court, Harris county; JAMES MASTERMAN, Judge.

Action by Jordan Jones, by his next friend, against the Gulf, Colorado & Santa Fe Railway Company. Judgment was rendered for plaintiff, and defendant appealed.

J. W. Terry, for appellant. Brady & King, for appellee.

GAINES, J. This case was before this court at a former term, and the opinion is reported in 78 Tex. 232, 11 S. W. Rep. 185. It was then reversed, on account of improper lan-

guage used by counsel for the plaintiff in his closing argument to the jury. Upon the second trial, the plaintiff again obtained a verdict and judgment in his favor, and the case now comes before this court, solely upon the question of the sufficiency of the testimony to sustain the verdict. The court in its general charge instructed the jury, in effect, that if the employment at which the plaintiff was engaged was dangerous, and if from his age, size, and capacity the agent who employed him knew, or should have known, that it was not prudent to put a person of his capacity at such employment, and if it was or should have been apparent to the agent that he did not have the capacity and discretion reasonably necessary for that business, and if he were not himself negligent, and his injuries resulted from his want of capacity and discretion by reason of his youth, they should give a verdict in his favor. The charge is not complained of. In addition, the court, at the request of counsel for the defendant, gave the following instruction: "You are charged that, if you believe from the evidence that the plaintiff, prior to the day of his injury, had had experience as a brakeman or switchman, sufficient to enable him to learn and appreciate the dangers of the employment, and that he had the strength and intelligence to perform the work of a brakeman or switchman, and that these facts were known to the agent of the defendant who employed him, then, under such circumstances, such agent was not required by the law to advise or caution him as to the dangers or character of the employment; and if you believe from the evidence that the facts are as above stated, you will find for the defendant." It is apparent from these instructions that the case was made to turn upon the capacity and discretion of the plaintiff for the employment of a brakeman or switchman. If the verdict had depended upon plaintiff's proving that he had no experience in the work of switching or braking, we are inclined to think that it should not be sustained. He testified positively that he had never acted as a brakeman before, and that he entered upon the service against his will. His mother corroborated him so far as her knowledge extended, but it is probable that he may have served in the capacity occasionally without her knowledge. On the other hand, several witnesses who had been or were at the time of trial in the employment of the defendant testified that he had made trips as a brakeman, and had frequently acted as switchman on the yard for a half day or a day at a time. It was undisputed that for a year or more he had been employed about defendant's yard in coaling engines. This he did at the instance of the company's brakemen, who were under contract to do the work, but who preferred to pay another to do it, rather than do it themselves. It appeared, however, that plaintiff's name was never placed upon the company's pay-roll as a brakeman. We doubt whether the jury were warranted in believ-

ing plaintiff upon the question of his previous experience, against so many witnesses, who had no immediate interest in the result of the trial. The truth probably is that the plaintiff was desirous of qualifying himself for railroad service, and that, when a brakeman upon defendant's yard or trains desired relief from duty for a day or part of a day, he employed plaintiff to take his place. Admitting, then, that the jury should have found that plaintiff was not wholly without experience, does it follow that they should have found that the defendant was not in fault in employing him in the dangerous operation of coupling cars? The evidence shows that he was the son of a freedwoman, and it was sufficient to warrant the finding that he was but 16 years old at the time of the accident. There is nothing in his testimony, as it appears in the statement of facts, to indicate that he possessed more than the average intelligence of boys of his age and race. Besides, being upon the stand before the jury, they had a better opportunity of estimating his intelligence and capacity than any one could have who had never seen him. Such being the case, we cannot say that the verdict of the jury upon the vital question, as presented by the charge of the court, was against such a preponderance of evidence as to warrant this court in setting it aside. It is by no means clear that the jury were not correct in finding that the plaintiff's age and incapacity were such as to render his employment as a brakeman extrahazardous, and to make it a wrong to employ him in the dangerous service of coupling cars. There was no proof of negligence on his part, or on part of the otherservants of the company. The cars which caused the injury were proved to be in good order. Some of the witnesses to the accident testified that they were wholly unable to account for it. The jury probably accounted for it upon the score of the plaintiff's incapacity and want of experience. A parent has the right to engage his minor child in a dangerous employment. In such case, the parent impliedly assumes for himself and his child the ordinary risks of the employment. A minor whose age and experience is such as to enable him to appreciate the hazards of the service may also engage in a dangerous employment, and assume the same risks as a person of full age. *Railway Co. v. Carlton*, 60 Tex. 397. But if the minor has not the mental capacity and experience to appreciate the danger, and if he be employed in a dangerous business, not by the contract of the parent, and if he be injured as the result of his inexperience, the master ought to be held liable. *Railway Co. v. Fort*, 17 Wall. 553. Very young persons rarely appreciate danger to its fullest extent, and for the performance of a dangerous task are liable to overrate their capacity. It therefore follows that, before engaging them by their own contract in a hazardous employment, the employer should know that they have the necessary capacity and experience to do the work in safety, or

be prepared to take such measures by way of instruction as will secure the same end. The judgment is affirmed.

O'DONNELL *et al.* v. C. R. JOHNS & Co. *et al.*

(Supreme Court of Texas. Feb. 28, 1890.)

EVIDENCE—ANCIENT DEED—SECONDARY PROOF—CHANGE OF CORPORATE NAME.

1. A deed, over 30 years old, coming from the proper custody, under which title has long been asserted, is admissible in evidence without producing the power of attorney under which, according to its recitals, it was executed.

2. An attempt by a corporation to change its corporate name in a manner not authorized by law does not avoid its charter.

Appeal from district court, Harris county; JAMES MASTERMAN, Judge.

John G. Tod, for appellants. *R. J. Thacker* and *E. P. Hamblen*, for appellees.

HENRY, J. This suit was commenced in the year 1886 by Sarah Margaret Dickson, joined by her husband, Hugh S. Dickson, and the corporation of C. R. Johns & Sons, as plaintiffs, against M. Looscan, as administrator of the estate of James M. O'Donnell, deceased, and the heirs of said James M. O'Donnell, to recover two tracts of land, each containing 640 acres, patented by the republic of Texas to Charles Kessler as assignee of H. A. Robinson. The defendants pleaded not guilty. The plaintiffs suggested to the court, by their pleadings, the death of Hugh S. Dickson, who, they allege, was only a *pro forma* party, and also that after the suit was instituted the charter of the corporation of C. R. Johns & Sons was amended so as to make the name of the corporation "C. R. Johns & Co.," and prayed that the suit proceed in the name of C. R. Johns & Co. and Sarah Margaret Dickson as plaintiffs. The defendants pleaded, under oath, that since the commencement of the suit the corporation of C. R. Johns & Sons had ceased to exist under that name, and, further, that the purported amendment of the charter of said corporation, changing its name to "C. R. Johns & Co.," was not lawful, because one of the three stockholders whose names were signed to the proposed amendment was, when she signed the same, a married woman, and that by reason of her coverture she was not qualified to perform that act. Plaintiffs' evidence of title was as follows: (1) Patents from the republic of Texas to Charles Kessler, assignee of H. A. Robinson, dated the 26th day of February, 1842. (2) A deed from Charles Kessler by his attorney in fact, James A. Mason, to Frederick Stover. This deed recites that said Mason was duly appointed by a letter of attorney dated the 5th day of March, 1841; and the deed to Stover is dated the 16th day of September, 1844, and was recorded on the 4th day of January, 1845. (3) The last will of Frederick Stover, with certificates showing its probate in the state of Pennsylvania in the year 1866, and

in this state in the year 1885. This will, after certain specific bequests, not naming the land in controversy, makes the plaintiff Sarah Margaret Dickson residuary legatee of the testator's estate. (4) A certified copy of a deed by Hugh S. Dickson and Sarah Margaret Dickson, dated April 1, 1885, conveying to the corporation of C. R. Johns & Sons the lands in controversy for a period of five years upon certain trusts, mentioned in the deed, looking to the perfection and preservation of the titles to said lands, and the sale thereof for the equal benefit of said corporation and the grantors in the conveyance. (5) The resolution of three stockholders of the corporation of C. R. Johns & Sons, one of them being a married woman, changing the name of the corporation as before specified, and the certificate of the secretary of state of the filing of said resolution in his department. (6) The certificate of the state comptroller showing that Frederick Stover had paid taxes on the land in controversy from his purchase until his death. Defendants introduced a deed from Charles Kessler to Hugh Towers dated July 29, 1884, and a regular chain of title from said Towers down to themselves. No power of attorney from Charles Kessler to James A. Mason was produced, and defendants objected to the introduction of the deed in evidence because the power of attorney was not produced.

We think there was no error in allowing the deed to be read. It came from the proper custody, was over 30 years old, and it was shown that title under it had been long asserted, and the taxes on the land paid, by Stover, and those holding through him. Even less evidence than was produced would have justified the admission of the deed, without producing or accounting for the power of attorney. The existence of the authority recited in the deed was correctly presumed.

When the certified copy of the deed from Hugh S. and S. M. Dickson to C. R. Johns & Sons was offered, it was accompanied by an affidavit of an officer of the corporation stating that the original deed was "lost, and could not be found." Plaintiffs also produced the testimony of a witness to the effect that he had searched for the deed among the papers of a deceased attorney for plaintiffs, to whom it had been sent, without being able to find it. The court overruled an objection made to the testimony of this witness. The affidavit of the officer of the corporation furnished the predicate prescribed by statute for the introduction of a certified copy of the recorded deed, and it is unnecessary to consider whether or not the testimony objected to was admissible. It did no harm.

The court charged the jury that the evidence showed that the plaintiff corporation was a legal corporation, and had the legal capacity to sue. Defendants requested the court to charge that, if the jury believed the amendment to the charter of C. R. Johns & Sons was subscribed by only three persons, and that one of them was a married woman,

"then the plaintiffs C. R. Johns & Sons are not a corporation, have not the capacity to take and hold land, or sue as such, and this suit cannot be maintained; and you will find for the defendant, and against the plaintiffs ('C. R. Johns & Sons.'" The court refused to give the charge. The action of the court, both in refusing this charge and in giving the one it did on the subject, is assigned as error. No question is raised about the legality of the corporation of C. R. Johns & Sons. The only one raised is about its attempted change of its corporate name. If the attempted change of name was unlawful, it would still be a lawful corporation with the name by which it brought this suit. An attempt to change the corporate name in a manner not authorized by law cannot be held to have had the effect given it by the charge asked and refused, but would rather leave the corporation as expressed in the general terms of the charge given by the court.

As the case before us does not demand an expression of our opinion as to whether or not a married woman can be one of the three persons who may subscribe the charter of an intended corporation, as directed by article 568 of the Revised Statutes, we do not express one. Nor do we decide that a change of the name of an existing corporation in pursuance of article 571 of the Revised Statutes would be governed by the same rule that is applicable to the creation of one.

The records fails to show that any objection was made to the introduction in evidence of the will of Frederick Stover. The objection made to it in this court, if it was good, which we do not intend to intimate, comes too late. We find no error in the proceedings, and the judgment is affirmed.

INTERNATIONAL & G. N. R. CO. v. DYER.

(Supreme Court of Texas. March 11, 1890.)

RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—INSTRUCTIONS.

1. Where the flagman stationed at a railroad crossing where an accident occurred, testified on cross-examination that he saw one D. there on the evening in question, and that it was untrue that plaintiff, in the presence of D., and after he was hurt, asked him (the flagman) why he told him to cross, and that he did not flag plaintiff across, a sufficient predicate of time, place, and person has been laid to impeach such evidence by the testimony of D.

2. Though plaintiff has not pleaded the flagman's intoxication to charge the company with his negligence, he may cross-examine him as to whether he was intoxicated, and as to his position when the accident occurred, in order to show the condition of his mind, and the facilities he had for knowing what happened.

3. Where the evidence conflicts as to the condition of the mule which plaintiff was driving at the time of the accident, and there is no evidence that he failed or refused to draw the load across the track, or that his condition contributed to the accident, it is proper to refuse to instruct that if the mule was crippled and unfit for hauling the load placed behind him, and such inability contributed proximately to the accident, it will be imputed to plaintiff, and defendant shall recover.

4. Where the evidence conflicts as to whether or not the flagman signaled plaintiff to cross the track, and the court has defined "contributory negligence" to the jury, and instructed that plaintiff could not recover if his negligence contributed to the injury, it is not necessary to instruct that if the flagman warned plaintiff not to cross, or told him that he did so at his peril, plaintiff could not recover if his crossing contributed to the injury.

5. Where the gist of the complaint is that the injury was caused by the negligence of defendant in propelling unguarded cars against other detached cars, forcing them over the crossing, it is immaterial that the injury was not caused by a "flying switch," as alleged, especially where the description following such allegation shows that a "flying switch" was not meant.

6. An instruction that plaintiff would be guilty of negligence if he failed to use such care and prudence in crossing the track as would be exercised under like circumstances by persons of ordinary care and prudence, and that if plaintiff contributed to the injury by his own negligence he could not recover, is sufficient on the question of plaintiff's negligence.

7. It is not error to refuse to instruct that a recovery will be precluded by a failure to look and listen before attempting to cross a railroad track on a much-used thoroughfare in a populous city. *Following Railway Co. v. Anderson*, ante, 190.

8. An instruction that defendant is entitled to recover if it is not established by a preponderance of evidence that the flagman gave plaintiff permission to cross, is erroneous, in that it takes the question of negligence away from the jury.

Commissioners' decision. Appeal from district court, Galveston county.

Action by James T. Dyer against the International & Great Northern Railroad Company for personal injuries sustained through defendant's alleged negligence. Verdict of \$5,000 for plaintiff, and from the judgment and order denying a new trial defendant appeals.

Willie, Mott & Ballinger, for appellant.
Wheeler & Rhodes, for appellee.

COLLARD, J. Appellant's first assignment of error is: "The court erred in admitting the testimony of the witness Dick, over the objection of defendant, as evidenced by bill of exceptions No. 2." The question asked of the witness was, "Did you hear any admissions from the flagman as to the waving of the flag?" to which question defendant objected, on the ground that a sufficient predicate had not been laid to impeach the witness Long. Then the witness answered: "He [Dyer] said, 'Why did you flag me over?' and Long said, 'I thought there was a brakeman on the car.'" The answer was objected to by defendant, because it was incompetent, improper, and irrelevant, was hearsay, and an attempt to impeach a witness upon a collateral issue. The court overruled both objections, as shown by the bill of exceptions. Neither the bill nor the assignment of error points out in what particular the predicate was not laid. On cross-examination, Long, the flagman, (posted at the crossing to inform people passing along the street when they could cross the railroad,) testified: "I know Mr. George Dick. I saw him there that evening, after the dray was gone. The witnesses you have all came after the accident." The cross-examination con-

tinued as follows: "Question. I will ask you if Dyer didn't turn to you in the presence of Mr. Dick, after he was hurt, and ask you why it was you flagged him across, and told him to go across. Answer. I told him if he went across it would be at his own risk. Q. And didn't you admit you had flagged him across, that you thought the way was clear, and that you made a mistake? A. I did not flag him at all. He said he wanted to get across, and I said, 'If you go across it will be at your own risk.' Q. I know you say that. I now ask you if Dyer did not ask you after he was hurt why you flagged him across, and you admitted you had flagged him across? Is that true or not? A. That is not true."

The proposition of defendant is that the predicate of time, place, and person was not made so as to admit the contradictory evidence of Dick. While it is true that the last question was not sufficient to predicate the impeaching evidence upon, the whole of the cross-examination on the point makes it clear beyond dispute that the inquiry was as to whether Long made the admission to Dyer, in the presence of Dick, directly after and at the place where the accident occurred. All that was necessary was that the witness should have known what time, place, and to whom the supposed declaration was made, so that he could explain, if he desired, and it is immaterial whether this was done in one or several questions. 1 Greenl. Ev. § 462. The evidence being admissible for purposes of impeachment, it is not necessary to decide whether it was a part of the *res gestæ* or not.

Appellant by assignment complains of "error in allowing plaintiff to pursue the line of cross-examination followed with witness Long as to his condition and position at the time of the accident." The witness was rigidly cross-examined, without objection, as to how much beer he had drunk, or whether he was intoxicated at the time of the accident, and where his position was as flagman. The answers of the witness showed that he was not intoxicated, and that his position was on the north side of the track, because he could see better from that point. After the examination, defendant moved to exclude the questions and answers, which the court refused to do. We think the examination did not exceed the limits of the privilege of cross-examination. The matter was not entirely irrelevant; certainly not as to his position and means of observation. It was plaintiff's right to examine him as to the condition of his mind, memory, and facilities of knowing what occurred. Id. § 446. It is true the drunkenness of the flagman was not set up in the petition, nor are we prepared to say it should have been if it had been relied on. If it had been the intention to prove the flagman's drunkenness, to show that the company had not exercised proper care in the selection of a competent and trustworthy man as a flagman, it would probably have been necessary to allege the fact; but not when

the matter becomes merely an incident or circumstance tending to show negligence of the servant in the discharge of his duties at the time in question. Plaintiff was not bound to plead his evidence.

The refusal of the court to give the following special charge is assigned as error: "If you believe from the evidence that the mule driven by Dyer was crippled, and hence unfit for hauling such a load as was placed behind him, and that the inability of the mule to draw the load across said track contributed proximately to the accident, this will be imputed to plaintiff, and you will find for the defendant." This charge was correctly refused upon the ground that, though the evidence was conflicting as to the condition and capacity of the mule, there was no evidence of any failure on the part of the mule on this occasion, and nothing to indicate that her condition contributed in any way to the accident; nothing to show that she refused or was incapable of drawing the load across the track; but, on the contrary, she did pull the load, and it is shown that the dray was crossing the track at the time of the collision.

The court refused a special charge asked by defendant, as follows, which is assigned as error: "If you believe from the evidence that the flagman Long warned or advised the plaintiff not to cross the track, or told him it was at his own risk if he did so, then, if plaintiff's crossing after he did so contributed to the injury, you are instructed that plaintiff cannot recover." Long swore positively that he did warn plaintiff not to cross, and that if he did so it would be at his own risk; and plaintiff swore positively that he inquired of Long if he could go across, and that Long told him to go on, and it was in proof by other witnesses that Long signaled him to go across. The court instructed the jury that if plaintiff by his own negligence contributed to the injury he could not recover; this, with the definition of contributory negligence given, was sufficient. It submitted to the jury the issue of contributory negligence, under all the facts as they might find them to be. The effect of the requested charge was to tell the jury that the particular fact stated would amount to contributory negligence, whether they should find it to be so or not, under all the circumstances of the case. Negligence or not is generally a question of fact to be found by the jury. The fact stated in the requested charge is not an exception to the rule. *Denham v. Lumber Co.*, 73 Tex. 83, 11 S. W. Rep. 151; *Markham v. Navigation Co.*, 73 Tex. 251, 11 S. W. Rep. 181; *Railway Co. v. Foreman*, 73 Tex. 313, 11 S. W. Rep. 326; *Railroad Co. v. Dorrough*, 72 Tex. 108, 10 S. W. Rep. 711; *Railway Co. v. Gasscamp*, 69 Tex. 545, 7 S. W. Rep. 227; *Railroad Co. v. Moore*, 69 Tex. 157, 6 S. W. Rep. 631; *Railway Co. v. Lee*, 70 Tex. 496, 7 S. W. Rep. 857; *Railway Co. v. Anderson*, ante, 196, (Galveston term, 1890;) and *Railway Co. v. Porfert*, 72 Tex. 349, 10 S. W. Rep. 207.

Defendant complains of the refusal of the

court to give the following requested charge: "You are instructed that, unless the plaintiff has proven by a preponderance of evidence that the injury was caused by a flying switch, he cannot recover." The petition contains the following allegations: "That, as your petitioner was driving across said railroad track, the servants and agents of said railroad company, at the time engaged in the operation of the said railroad, and switching its railroad cars in reckless disregard of the lives and safety of the public using said street, made what is known as a 'flying' or 'running' switch, that is, sending back with great speed, and driving with great force, and disconnected with an engine three or more of defendant's cars, along and over said railroad track which traverses a public street in said city, said cars having at the time no brakeman thereon," etc. It was in proof that no "flying switch" was being made at the time of the accident. Defendant's evidence shows that there were some five or six cars standing on the main track at or close to the crossing; that two cars were "kicked" back onto the six, causing them to come in contact with plaintiff and his dray. This movement of the cars was not a "flying switch." We are not advised by the testimony as to what a "flying switch" is, but the term is generally understood. We do not think the allegation of a flying switch a material or essential one. The gist of the complaint was that defendant without proper care, and in disregard of the safety of the public, propelled unguarded cars along its track, which forced other detached cars onto the street crossing, thereby causing the injury. "It is sufficient if the substance of the issue be proved;" non-essential allegations need not be established. *Kottwitz v. Bagby*, 16 Tex. 656; 1 Greenl. Ev. § 56 et seq. If it should be claimed that the averment is necessarily descriptive of the manner in which the injury occurred, it may be replied that the explanation following the term shows that a "flying switch" was not in fact meant. The pleader shows what he did mean by more particular allegations defining the so-called "running" or "flying" switch; these more definite allegations must surely control.

Appellant assigns as error the refusal of the court to give the following instruction asked: "You are instructed that the degree of care imposed upon an individual about to cross such a track as the one in question is not slighter or less onerous than that imposed upon the defendant, and the plaintiff is required to use such precaution as an ordinarily prudent man would use under like circumstances; and you are further instructed that plaintiff was required to use such care, despite any permission that might have been given him by the flagman." Instead of the foregoing, the court instructed the jury that "the plaintiff, in attempting to cross the track with his dray, was obliged to use such care and prudence as persons of ordinary care and prudence would have observed under like cir-

cumstances, and a failure by plaintiff to use such care and prudence would be negligence on his part." The jury are elsewhere instructed by the court that if plaintiff by his own negligence contributed to the injury he could not recover. Charges of this character have been frequently approved by the supreme court of this state, and we think they were sufficient upon the subject of plaintiff's negligence.

Defendant asked the court to charge the jury that "it was the duty of one about to cross a railroad track in a populous city, and upon a much-used thoroughfare, to look and listen before attempting to cross, and the failure to do so will preclude a recovery." It was not error to refuse to give the charge, as has been more than once decided in this state. *Railway Co. v. Anderson*, ante, 196, (Galveston term, 1890;) *Railway Co. v. Porfert*, 72 Tex. 349, 10 S. W. Rep. 207.

The defendant also complains of the court's refusal to give a special charge asked, as follows: "If you are not satisfied by a preponderance of the testimony that the flagman gave plaintiff permission to cross the track, you will find for the defendant." This charge, if given, would have taken the question of negligence away from the jury. The failure to have the permission of the flagman to cross the track, if true, might have induced the jury to find that plaintiff was negligent, but the court could not in effect so instruct them. We have already, under another assignment, given our views of this question, and deem further discussion unnecessary. We conclude the judgment of court below ought to be affirmed.

STATTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

SCREWMEN'S BEN. ASS'N v. BENSON.

(Supreme Court of Texas. March 14, 1890.)

BENEVOLENT SOCIETIES—MEMBERSHIP—MANDAMUS.

Where the constitution of a charitable corporation reserves to a member expelled by the board of trustees the right to appeal to the members of the corporation at a corporate meeting, *mandamus* will not issue in favor of an expelled member who has taken no appeal from the action of the board, though the order of expulsion may be contrary to law and void.

Appeal from district court, Galveston county.

Hume & Kleberg, for appellant. *L. E. Trezevant*, for appellee.

GAINES, J. Appellee brought this suit against appellant, alleging that it is a corporation organized under the laws of the state for charitable purposes, and that he was a member of the body, and had been unlawfully expelled. He prayed that he have a writ of *mandamus* restoring him to membership, and for a judgment for damages alleged to have resulted from his exclusion. The

petition avers that by the laws of the corporation the power of trying and expelling members is lodged with a committee of five corporators, known as the "board of trustees," and that he was expelled by the action of that board. The grounds upon which the sentence was alleged to be illegal were that no evidence was introduced upon the trial; that the offense with which plaintiff was charged was one for which that penalty could not be enforced; and that the report of the board which contained the order of expulsion was the act of but three of the five members, and that one of the three was not present at the trial. The petition also contains the following additional averments: "That article 10 of the constitution of the association provides that the board of trustees of said association shall have power to try and adjudicate all charges against any member when the charges involve suspension or expulsion, and their decision shall invariably be final, without any further action on part of the association, unless an appeal be taken, which appeal must be made by the member or person against whom the charges are pending. In cases of appeal a two-thirds vote of all the members present shall be necessary to overrule the decision of the board, and all members present shall be required to vote on this question." There was an exception to the petition, based, specifically, upon the grounds that the petition did not show that plaintiff had ever appealed from the finding of the board of trustees, or that he had in any manner been deprived of that privilege. The exception was overruled, and the ruling is assigned as error.

In *Manning v. San Antonio Club*, 63 Tex. 166, the writ of *mandamus* is recognized as the appropriate remedy by which to restore a member of an incorporated society to his rights and privileges in the association. Cases may be found which do not accord with this doctrine, but we think it is supported by the great weight of authority. *Society v. Weatherly*, 75 Ala. 248; *Otto v. Union*, 75 Cal. 308, 17 Pac. Rep. 217; *Exchange v. Warfield*, 54 Ga. 668; *Society v. Com.*, 52 Pa. St. 125; *State v. Lipa*, 28 Ohio St. 665; *Com. v. Society*, 2 Bin. 441; *Sibley v. Carteret Club*, 40 N. J. Law, 295; *Green v. Society*, 1 Serg. & R. 254; *Roehler v. Society*, 22 Mich. 86. But the writ of *mandamus* is a remedy of the last resort. It is universally held that if a party have an adequate common-law or statutory remedy he cannot resort to this writ, and the rule has been repeatedly announced in this court. *Commissioners v. Bell*, Dall. Dig. 366; *Cullem v. Latimer*, 4 Tex. 329; *Arberry v. Beavers*, 6 Tex. 457; *Ewing v. Cohen*, 63 Tex. 482. A member of a voluntary association is bound by a sentence of expulsion against him lawfully rendered by a tribunal created in pursuance of its constitution, and clothed with that power. The rule also applies at least to such incorporated societies as are not organized principally for commercial gain.

By uniting with the society, the member assents to and accepts the constitution, and impliedly binds himself to abide by the decision of such boards as that instrument may provide, for the determination of disputes arising within the association. The decisions of these tribunals, when organized under the constitution, and lawfully exercising these powers, though they involve the expulsion of a member, are no more subject to collateral attack for mere error than are the judgments of a court a law. But if the tribunal act illegally; if it declare a sentence of expulsion for an offense for which that penalty is not provided by the constitution and laws of the association; and if there be no right of appeal, within the association, reserved for the redress of the injury,—the courts will review the proceedings, and, if found illegal, will treat them as null, and restore the member to his privileges as such. But, if there be a right of appeal, should a *mandamus* be awarded before that remedy has been exhausted? We think not. It seems to us that the rule that this extraordinary writ will not lie where another adequate remedy exists, applies with peculiar force to this class of cases. Members of such associations, having voluntarily constituted tribunals to adjust their differences, should not be permitted to resort to the courts of justice to set aside the illegal awards of such tribunals as long as there is another body which has power to reverse the sentence, and which has not been appealed to. The presumption is that if plaintiff had appeared before the association at a proper meeting, and had taken an appeal from the sentence of the board of trustees, the sentence, if illegal, would have been set aside. At all events, if refused, it would have been soon enough for plaintiff to have applied to this court for restitution through a writ of *mandamus*. If his expulsion was illegal, and if the association had refused, upon appeal, to set it aside, it may be that this court would have granted redress. We think it matters not that the order of expulsion may have been contrary to law and void, and such as this court would not hesitate to annul in case there was no appeal within the association. The point is that it was the action of the tribunal created in accordance with the constitution, and the appellee had an adequate remedy by appeal within the society itself. The doctrine is expressly announced and applied in the case of *German Reformed Church v. Com.*, 3 Pa. St. 282. See, also, *White v. Brownell*, 2 Daly, 329, and *Olery v. Brown*, 51 How. Pr. 92. The exception to so much of the petition as sought a *mandamus* on the ground that the plaintiff did not show that he had exhausted his remedies in the association should have been sustained.

The other questions presented are not likely to arise upon a future disposition of the case, and need not be considered. The judgment is reversed, and the cause remanded.

GRAHAM *et al.* v. STRUWE *et al.*

(Supreme Court of Texas. March 14, 1890.)

DEED OF MARRIED WOMAN—CANCELLATION.

A conveyance of land by a married woman to her husband, without consideration, it not appearing that her disabilities of coverture were in any way removed, or that she ratified the conveyance afterwards, will be canceled.

Appeal from district court, Washington county.

R. E. Pennington, for appellants. *J. T. Swearingen*, for appellees.

STAYTON, C. J. On June 22, 1882, Amanda Struwe, who was then the wife of J. H. Graham, conveyed to him, by deed executed by herself, and acknowledged as conveyances are required to be when made by married women conveying their separate estate, four separate tracts of land, which were her separate estate. After this, two of the tracts were sold by Graham and wife, and therefor was received \$1,600, which was invested in other land, the price of which was \$2,100. Three hundred dollars of this was paid out of funds presumed to have been of the community estate of Graham and wife, and the balance of the purchase money was unpaid at the time of trial. This suit was brought by Mrs. Struwe, formerly Graham, against her two children by her former husband, to cancel the deed of date June 22, 1882, and to establish her right to an interest in the tract of land purchased in part with the proceeds of the two tracts of land before referred to; title to that land standing in the name of her former husband, the father of appellants. There was a judgment in her favor, canceling the deed of date June 22, 1882, and declaring her entitled to 85 or 42 parts of the land bought in part with the proceeds of her separate estate.

There are no facts out of which equities in favor of appellants can arise; for the conveyance from their mother to their father was voluntary, and without valuable consideration. No facts are shown which in any manner relieved Mrs. Struwe from the disabilities resulting from her coverture existing at the time she attempted to make the conveyance to her husband, nor are facts shown which could operate as a ratification of that instrument. The conveyance in question was made by the wife alone, directly to her husband, without valuable consideration, and under such circumstances that we all agree it was properly canceled. For myself, I desire to say that I fully concur in the holding of the judge who tried the case, that the deed was null, and would have been, had it been supported by valuable consideration. It has been held in this state that a husband may convey directly to his wife. *Hartwell v. Jackson*, 7 Tex. 576; *Fitts v. Fitts*, 14 Tex. 454; *Reynolds v. Lansford*, 16 Tex. 292; *Story v. Marshall*, 24 Tex. 306; *Smith v. Boquet*, 27 Tex. 518. It does not follow, however, because a husband may convey directly to his wife, that she may so convey her

separate property to him. The husband labors under no legal disabilities to contract arising from the fact of marriage, and may convey his property in any manner, and to any person, to whom it may seem to him proper, unless restrained by some rule of law not based on the fact of marriage. A married woman, however, does labor under disabilities resulting from coverture, and can make conveyances, where the common law is in force, and gives measure to her capacity to contract, only in such manner as the statute may permit. There is no error in the judgment, and it will be affirmed.

TEXAS & N. O. RY. CO. v. CROWDER *et al.*

(Supreme Court of Texas. March 18, 1890.)

MASTER AND SERVANT—INJURIES TO SERVANT.

In an action against a railroad company for the negligent killing of an employe, where the evidence does not show that defendant was negligent, and that the deceased exercised due care, a verdict should be directed for defendant.

Commissioners' decision. Appeal from district court, Harris county.

W. N. Shaw and *S. R. Perryman*, for appellant. *F. F. Chew* and *W. P. Hamblen*, for appellees.

HOBBY, J. Mary Crowder, joined by her present husband, sued appellant for damages resulting from the death of her son, George Cohn, a minor, which, it is alleged, was caused by the negligence of appellant, while Cohn was in its service as a brakeman. There was a verdict and judgment for appellees for \$1,000, from which this appeal is prosecuted.

The only question raised by the assignments, necessary to be considered, is as to the sufficiency of the evidence to support the judgment, and whether the charge requested by the appellant, in effect, instructing the jury to find a verdict for the defendant, should have been given. Three appeals heretofore prosecuted in this cause by the appellant will be found reported, respectively, in 61 Tex. 262, 63 Tex. 502, and 70 Tex. 222, 7 S. W. Rep. 709. With respect to the facts of this case upon a former appeal, it was said by Chief Justice STAYTON that "the evidence does not show what was the action of the deceased at the time he was injured, nor so develop the facts as to show that he was in the exercise of due care," and again, that "the true rule, in this class of cases, is that the servant seeking to recover for an injury, takes the burden upon himself of establishing negligence on the part of the master, and due care on his own part." 63 Tex. 503. The only difference at all material between the testimony upon the previous appeals of this cause and that contained in the record before us is that a witness, Eli Burge, for the first time, testified upon the last trial as follows: "I did not see how George Cohn was hurt. When I saw him he was sitting on the main track, on the end of a tie. He was hurt on

the south track. To the best of my judgment, it was between 10 and 12 minutes after he was hurt before I saw him. When I got to him, I found him sitting on a tie about four or five feet from where he was hurt. I suppose it was about two or three feet from one tie to another, between the tracks. The rails of the two tracks were about four feet apart. His leg was run over, and cut off above the ankle. It was his left leg. I saw signs indicating how he was hurt; saw blood on the rail and tie, and on the flange of the wheel of a car opposite to him; and I saw a foot-track right down along-side of this bloody tie, in the angle between this tie and the inside of the rail. It seemed to me, it was where Cohn put his foot down, inside the track, between the tie and rail. The track of the railway was unfilled at this point. The top of the tie was from eight to nine inches above the surface of the ground, and the top of the rail is five inches above the tie. There was blood on the rail, and on the tie, above the foot-track." No reasonable construction of this testimony as to "the facts surrounding and leading to the accident" will authorize the conclusion or inference that the negligence of the appellant contributed to the injury, and that there was due care exercised on the part of the injured party, which, under the rule laid down in this case heretofore, was held to be essential for the appellee to establish, to entitle her to a recovery. See *Railway Co. v. Crowder*, 63 Tex. 504, 505. Under the facts of this case as now presented, we think the charge requested, instructing the jury to find for the defendant, should have been given; and if upon another trial the evidence is of the same character as that now before us, a charge such as was requested in this case should be given. Because it was not given, we think the judgment should be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment reversed, and the cause remanded.

HUMASON v. LOBE *et al.*

(Supreme Court of Texas. March 18, 1890.)

RES ADJUDICATA—DORMANT JUDGMENT.

Plaintiffs sued on a note for \$691.25, and an account of \$34. Defendant pleaded *res adjudicata*, and showed that, 13 months before, plaintiffs had in another county recovered judgment against him for \$725.25, and testified that this action was for the same indebtedness. Plaintiffs did not show that it was not for the same indebtedness, nor offer to prove the judgment dormant, because execution had not issued thereon within a year. *Held*, that the plea of *res adjudicata* was established.

Commissioners' decision. Appeal from district court, Harris county.

James E. Hill, for appellant.

HOBBY, J. Lobe & Sons, residents of the city of New Orleans, La., sued the appellant,

T. N. Humason, in the district court of Harris county, in January, 1889, on a promissory note executed by the latter to the former for \$691.25, and also upon a verified account for \$34, dated August 15, 1887. An affidavit for attachment was made by the agent of appellees. In March, 1889, appellant filed a sworn plea of *res adjudicata*, alleging that there is in the district court of Polk county a valid judgment between the same parties to this suit, involving the same subject matter and cause of action here in issue. In reply appellees pleaded a general denial, and, further, that, "if the facts stated in said plea are true, no execution had issued on said judgment, and it was dormant, and that they were entitled to their action for their debt." The cause was tried by the court. The attorney who brought this suit testified that "he did not know when this suit was filed that they had a judgment against appellant in the district court of Polk county, nor did he know that it had any connection with this suit." The appellant, Humason, testified that "he never owed appellees but one indebtedness, and it was sued for in the district court of Polk county, September 13, 1887, and embraced the very same indebtedness sued for in this case; that he gave the appellees' agent, S. C. Branch, September 10, 1887, the note here sued on, which embraced all he owed appellees, except the account for \$34, in this suit; that the suit in the district court of Polk county was for \$725.25, being the entire amount he owed appellees. The suit in Polk county was for that indebtedness, and this suit is for the very same indebtedness." The judgment in the district court of Polk county was rendered on December 9, 1887, with a stay of execution for 60 days. This suit was filed on January 5, 1889. Upon the foregoing facts, the court below found against the defendant's plea, and entered judgment in favor of plaintiffs for \$814 and costs, and foreclosing the attachment lien on lots and buildings in Corrigan, Polk county. The defendant appeals, and assigns as error, in effect, the action of the court below in finding against his plea of *res adjudicata*, and in rendering judgment for the plaintiffs. We think there was error in the judgment entered in the lower court. The proof, we think, established satisfactorily the defendant's plea of *res adjudicata*. The former judgment pleaded in bar was recovered by the plaintiffs against the defendant in a court of competent jurisdiction, and upon the same indebtedness as that sued for in this case.

We are not apprised of the grounds upon which the present judgment was rendered against the appellant. If upon the theory that that rendered in the district court of Polk county was, as alleged by plaintiffs, dormant, because execution had not issued thereon within 12 months from its rendition, it is not supported by the evidence. There was no proof to that effect made by plaintiffs; and, in the absence of such proof, that fact will not be presumed. *Laughter v. Seela*, 59

Tex. 179. We think the judgment should be reversed, and the cause dismissed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, judgment reversed, and cause dismissed.

POUNCEY v. MAY *et al.*

(*Supreme Court of Texas. March 18, 1890.*)

COMMUNITY PROPERTY—INNOCENT PURCHASER.

Where the deed of land, purchased with community property, is lost without being recorded, and after the wife's death the husband procures a second deed to himself from the vendor, which is in form an original deed, reciting the consideration as paid by him, and containing no reference to the former deed, one who purchases for value from the husband, or at an execution sale under a judgment against him, without notice of any facts showing the land to have been community property, is an innocent purchaser, and acquires a good title.

Appeal from district court, Gonzales county.

Harwood & Harwood, for appellant. *W. S. Fly*, for appellees.

HENRY, J. This suit was brought by appellees to try title, and for partition. It was tried by the court without a jury. Plaintiffs were the children and heirs of M. Putman and his wife, Rebecca Putman. The wife and mother died in the year 1846. The land in controversy was purchased and paid for in the year 1845, and a deed was then made for it to M. Putman, but that deed was lost without being recorded. The land was paid for with community property, and in equity belonged to the community estate of M. Putman and his wife, Rebecca. After the death of his wife, Putman procured a second deed for the land from his vendor, which had the form of an original deed, and contained no reference to any other deed or transaction. The deed was in his own name, and contained no reference to his widow or children. It recited that the consideration was paid by him. In the year 1868, M. Putman conveyed part of the land to appellant, who subsequently purchased the remainder of the tract at an execution sale made under a judgment against said M. Putman. The evidence shows that at the date of his purchase the defendant had had some previous acquaintance with M. Putman, and knew that plaintiffs were his daughters. He had not then lived in the neighborhood of the land, and did not know anything about the history of the family of said Putman. He paid to M. Putman the amount named in his deed, which was the full market value of the land, and he had no notice that the land was purchased during the life-time of Rebecca Putman. He did not know that there was such a person as Rebecca Putman until long after his purchase of the land. When he purchased, he did not know that the land was claimed adversely to his vendor by plaintiffs, or by anybody else. The court found that all of the plaintiffs except one were barred by the statute of limit-

ations, and that defendant "knew, or might have known, by the use of ordinary care and diligence, that the property was community." Judgment was rendered in favor of one of the plaintiffs for the recovery of an interest in the land, to reverse which the defendant prosecutes this appeal. Appellant assigns as error the failure of the court to find, as a fact established by the evidence, that the defendant was an innocent purchaser for value of the land in controversy. We think the objection is well taken. The deed conveyed the legal title to M. Putman. The appellant testified that he purchased and paid for the land without notice of any facts showing the existence of an equitable title in appellees. We do not find in the record any evidence sufficient to show notice to plaintiff of such facts, or to put him upon inquiry as to them. The judgment of the court below will be reversed, and one rendered by this court that plaintiffs in the court below take nothing by their suit, and pay all costs of both courts.

NASS v. CHADWICK.

(*Supreme Court of Texas. March 18, 1890.*)

VENDOR'S LIEN—FORECLOSURE—JUDGMENT.

A judgment foreclosing a vendor's lien on land as described in the petition, but including 50 acres which were excepted from the conveyance to the vendee, is in no wise prejudicial to the latter.

Appeal from district court, Waller county.

Harvey & Browne, for appellant. *Wm. H. Burkhardt*, for appellee.

HENRY, J. This suit was brought by appellee to recover judgment upon three promissory notes, and to foreclose a vendor's lien upon a tract of land conveyed by him to defendant by a general warranty deed. The land was described in an exhibit attached to the petition "as a part of the Jesse Clary headright in Waller county, conveyed by W. S. Day to W. T. Tollard, and by Tollard to Dillard, beginning," etc., (reciting the boundaries,) "and containing an area of two hundred and seventy-three and four-tenths acres, more or less, not to include a tract of about fifty acres sold out of said tract to ———. This tract of land, the part of two tracts conveyed to Chadwick by M. M. Felder as trustee, and described in his deed dated April 20, 1870." The defendant pleaded a general denial, and the statute of limitations of four years to one of the notes, and, specially, that plaintiff represented that the tract sold by him contained 273.4 acres, less 50 acres, which defendant, believing, purchased the tract, paying therefor \$1,200, of which \$300 were paid in cash, the balance being represented by the notes sued on; that defendant afterwards discovered that some of the land described in the deed to him was owned by other persons, whom he named, and that plaintiff did not own, and his deed did not convey, more than 94.86 acres; that he believed he was purchasing certain timbered land, for which he had a special use in oper-

ating a steam gin and mill; that the land conveyed by the deed was poor, and not worth exceeding \$2 per acre. The jury returned a verdict in favor of plaintiff for two of the notes sued upon; and the court entered judgment upon the verdict, foreclosing the vendor's lien by the same description that was given of the land in plaintiff's petition, without excepting the 50 acres.

It is complained that the court erred "in accepting the verdict as returned, and in entering the judgment as recorded." We can see no objection to the verdict, nor to the judgment, except that it includes in the foreclosure 50 acres of land that was excepted from the conveyance to defendant. It is not shown how appellant can be prejudiced by this. He did not make the particular objection in the district court. If he had called the attention of that court to the error in the judgment, it would, doubtless, have been corrected. No error was committed in overruling defendant's demurrer, nor in permitting plaintiff to read in evidence his deed made to the defendant. It was correct to exclude evidence offered by defendant for the purpose of showing his reason for desiring to purchase the land, and "to prove the value of the land, to which plaintiff could make undisputed title, for the timber thereon." No other errors are assigned, and the judgment is affirmed.

TEXAS LAND & MORTGAGE CO., Limited, v.
WORSHAM *et al.*

(Supreme Court of Texas. March 18, 1890.)

FOREIGN CORPORATIONS—RIGHT TO SUE—FEDERAL
COURTS.

1. Act Tex. April 2, 1887, § 1, requires a foreign corporation, desiring to do business in the state, to file an application with the secretary of state, containing, among other things, a stipulation that the permit to be issued, without which no business can be transacted in the state, shall be subject to all the provisions of the act. Section 3 provides that, when such corporation is in any manner sued in the courts of the state, on removal of the cause for any reason to a federal court, the permit shall be forfeited. *Held*, that the statute is void, since it makes the permit conditional on the surrender by the corporation of a privilege secured to it by the constitution and laws of the United States.

2. Though the failure to obtain a permit as required by statute may preclude a foreign corporation from transacting further business in the state, it cannot be made to divest the right of such corporation to go into court and assert rights and recover property already acquired.

Appeal from district court, Gonzales county.

Harwood & Harwood and Thos. McNeal, for appellant. *Burges & Dibrell*, for appellees.

HENRY, J. The appellant is a corporation organized under the laws of the kingdom of Great Britain and Ireland. In the year 1886 it made a loan of money, and to secure it took a mortgage on the land in controversy in this suit. Subsequently it bought the land under the mortgage. In September,

1888, appellee procured to be issued an order of sale that was adverse to appellant's claim of title, and under it had caused to be advertised a sale of the land to take place on the first Tuesday in December, 1888. On the 29th day of November, 1888, appellant brought this suit to enjoin said sale. Among other defenses, the defendant especially excepted to the petition because it failed to show "that plaintiff is a person entitled to sue in the courts of this state, and does not show that plaintiff, if a corporation under the laws of a foreign state, has complied with the laws of Texas, so as to entitle it to do business in this state, and because plaintiff, if it had not done so, cannot legally do business in this state, and has no standing in the courts of Texas." The defendant also filed a general demurrer. The court first sustained the above special exception, and overruled the general demurrer. Afterwards, when the plaintiff proposed to introduce its evidence to prove its cause of action, the court required it to first produce and read in evidence its permit from the state to transact business under the act of the legislature passed on the 2d day of April, 1887, which plaintiff failed to do, whereupon the court set aside its judgment overruling the general demurrer, sustained the demurrer, and dismissed the cause. The correctness of this ruling is the only question presented by the record for our decision.

The first section of the act referred to requires any foreign corporation, desiring to transact business in this state, on or after January 1, 1888, to file with the secretary of state "a certified copy of its articles of incorporation, duly attested, accompanied by a resolution of its board of directors or stockholders, authorizing the filing thereof, and also authorizing service of process to be made upon any of its officers or agents in this state engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this state, said application to contain a stipulation that said permit shall be subject to each of the provisions of this act. And thereupon the secretary of state shall issue to such corporation a permit for the general transaction of the business of such corporation, and upon the receipt of such permit such corporation shall be permitted and authorized to carry on its business in this state." The second section directs that no foreign corporation which has not in good faith complied with the provisions of this act, and taken out a permit, shall hereafter be authorized to exercise any of the rights and privileges conferred upon corporations until it has complied herewith, and taken out such permit. The third section provides that "any foreign corporation sued or impleaded in any of the courts of this state, upon any contract made or executed in this state, or to be performed in this state, or for any act of omission, public or private, arising, originating, or happening in the state,

which shall remove any such cause from such state court into any of the federal courts held or sitting in this state, for the cause that such corporation is a non-resident of this state, or a resident of another state from that of the adverse party, or of local prejudice against such corporation, shall thereupon forfeit and render null and void any permit issued or granted to such corporation to transact business in this state." The above statute is substantially, almost literally, the same as one previously enacted in the state of Iowa, and passed upon by the supreme court of the United States in the case of *Barron v. Burnside*, 121 U. S. 186, 7 Sup. Ct. Rep. 981. The court said: "As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the constitution and laws of the United States, the statute requiring the permit must be held to be void." That case does not decide, nor do we, that a state may not require foreign corporations to obtain permits to transact their business within the state. As is said in the opinion in the case cited: "The filing of the articles of incorporation, and the provision in regard to service of process, are to be authorized by the same resolution which requests the issue of the permit, and this request or application is to contain the stipulation above mentioned. These various things are not separable. They are all indissolubly bound up with the application for a permit, which is to be subject to every provision of the act. The permit cannot be issued unless such a stipulation is given, and the corporation is not to be permitted to carry on its business in the state unless the permit is issued to it and received by it." We see no ground for questioning the correctness of the conclusions here announced. Even if there existed no question about the constitutionality of the statute, we do not think it should be given the construction attached to it by the ruling of the court. We do not think that the failure of the corporation to procure a permit, even if such failure had the effect of preventing it from further prosecuting its business in this state, should have the further effect of closing the courts of the state to it, so as to preclude it from asserting rights and recovering property already acquired. The judgment is reversed, and the cause is remanded.

ROBERSON *et al.* v. TONN.

(Supreme Court of Texas. March 14, 1890.)

GUARDIAN'S BOND—RELEASE—PRINCIPAL AND SURETY.

1. Where a deceased guardian unlawfully loaned his ward's money to a firm composed of himself and one of the sureties on his bond, and the surviving partner subsequently made an assignment both of his individual and the partnership property for the benefit of creditors, an acceptance by the ward, after attaining majority, of a dividend on his claim from the assignees, with full knowledge of all the facts, releases the surviving partner from liability on the guardian's bond.

v.138.w.no.8—25

2. This release is not affected by the fact that the ward's claim was presented to and allowed by the assignees as a demand against the partnership, instead of against the surviving partner as surety, since both the partnership property and the individual property of the surviving partner were liable for the debt.

3. Since the surviving partner, as between himself and a co-surety on the guardian's bond, became a principal debtor on the loan of the ward's money to the partnership, the release of the surviving partner likewise releases his co-surety.

4. Where a guardian's bond is made payable to the county judge, and is conditioned for the faithful performance of the duties of guardian of the estates of two minors, as to one of whom the guardian is subsequently discharged, neither the county judge nor the discharged minor is a necessary party to an action by the other minor against the sureties on the guardian's bond.

5. The bond being given to secure the faithful performance of the duties of guardian as to the estates of both minors, the guardian's discharge as to one of them did not release the sureties from liability for the guardian's misconduct in managing the estate of the other.

Appeal from district court, Washington county.

Action by C. J. Tonn against A. J. Roberson and B. H. Bassett, as sureties on the bond of plaintiff's guardian, Jefferson Bassett. The bond was made payable to the county judge and his successors in office, and was conditioned for the faithful discharge of the duties of guardian of the estates of two minors, Theodore Tonn and plaintiff, C. J. Tonn. Under said appointment, the guardian took charge of the joint estates, amounting to the sum of \$4,100. On the 16th of March, 1881, the minor Theodore having come of age, the guardian filed his account, and applied for a discharge as to him, and on the 28th of March, 1881, the order of discharge was granted as prayed for. Without any new appointment, oath, or bond, the guardian afterwards continued to act as guardian of the plaintiff until his own death, which occurred on the 25th of May, 1885. The alleged *devastavit* occurred after his discharge as guardian of Theodore Tonn. From a judgment in plaintiff's favor defendants appeal.

Bassett, Muse & Muse and *C. R. Broadlove*, for appellants. *Searcy & Garrett* and *Bryan & Campbell*, for appellee.

STAYTON, C. J. We concur in the holding of the court below that neither Theodore Tonn nor the county judge were necessary parties to this action, and in the further holding that the bond given to secure the faithful discharge of the duties of the guardian of the estates of Theodore and C. J. Tonn was binding on the sureties as fully, in so far as the right of appellee is concerned, after the discharge of the guardian from further liability to his ward Theodore, as was it before.

The other questions arise on the following facts: In July, 1877, Jefferson Bassett was appointed guardian of the estates of Theodore and C. J. Tonn, and to secure the faithful discharge of his duties he executed a bond on which A. J. Roberson and B. H. Bassett

were sureties. On March 16, 1881, there was in the hands of the guardian, belonging to his ward C. J. Tonn, the sum of \$2,000, which without compliance with law he, on that day, loaned to the banking firm of Bassett & Bassett, composed of the guardian, Jefferson Bassett, and the surety B. H. Bassett. To evidence this transaction, a certificate of deposit, payable one year after its date, and bearing 6 per cent. interest per annum, was executed to the guardian by the banking firm. On January 1, 1885, the guardian filed an account with his ward, which showed an indebtedness at that time to his ward's estate amounting to \$1,882.45, which embraced interest on the certificate of deposit. On May 25, 1885, the guardian died without having restored this sum to his ward's estate, and without leaving any estate, other than partnership effects, subject to the payment of debts. Three days after his death B. H. Bassett, the surviving partner and surety on the guardian's bond, made an assignment, in the form required by the statute, of all the partnership property of the firm of Bassett & Bassett and of himself, subject to forced sale, for the benefit of such of the creditors of the firm and of himself as would consent to take under it and release him. The deed of assignment was signed by the assignees, who qualified under it, and proceeded to administer the trust-estate in accordance with the provision of the statute regulating assignments for the benefit of creditors. On the 26th of September, 1885, George Roberson was duly appointed guardian of plaintiff's estate, and afterwards, on the same day, duly accepted of the assignment, and presented to the assignees an account properly authenticated against the estate of Bassett & Bassett for \$1,882.45, and interest from January 1, 1885, balance then due his ward, as per exhibit of guardian filed that day. The account was duly allowed by the assignees. Upon this claim two dividends were paid, which amounted to 35 per cent. of the claim presented, and it is shown that dividends amounting to 50 per cent. of the claim will probably be paid. Roberson, guardian, received from the assignees a dividend of 18 per cent. on the claim of his ward, and the latter, after he became of age, through his attorneys received another, amounting to 22 per cent. of his claim. The court found that "the dividend of \$414.10 was paid to plaintiff's attorneys, Garrett, Searcy, and Bryan, who thereafter paid the same over to plaintiff, said attorneys having full knowledge of all the facts concerning the assignment. Plaintiff also received through his said attorneys all of the first dividend above named, except amount reserved to meet court expenses of guardianship." The inference from the record is that some further payment would be made from the assigned estate. This action was brought by the ward against sureties on his first guardian's bond, and the court held that each of the sureties was liable for the full amount of

the guardian's (Bassett's) indebtedness, less such sum as had been received from the assignees. The court further held that it was unnecessary to determine whether the assignment was valid as an assignment under the statute or at common law; for, be that as it might, the "plaintiff has estopped himself from raising the issue by acquiescence in and accepting dividends under the assignment."

The court, however, did hold that, on account of the separate sources of obligation resting on B. H. Bassett, he was not released from individual liability as a surety by reason of the fact that appellee had accepted under the assignment.

The court gave two reasons for this holding: "(1) Because the liability and the amount thereof, if any, at the time of the assignment, and for more than six months thereafter, was uncertain and contingent, and not a provable claim in bankruptcy." Was it true that the claim was of such nature as could not be allowed by the assignees? The claim which was presented and allowed was in amount the same as made the basis of the judgment in this case, and B. H. Bassett was liable for it as surety, as was he as a member of the firm of Bassett & Bassett. His dual liability existed from the moment his firm received the money, for in the act of lending his principal committed a *devastavit*, and in the act of borrowing he became individually liable, notwithstanding the firm of which he was a member as between themselves were jointly bound. We do not see wherein his individual liability was in any wise uncertain or contingent. Whether it would become necessary to resort to his individual liability to secure the debt may have been uncertain, but there was neither such uncertainty nor contingency as to his liability as would have precluded the allowance of every claim that at any time might be asserted against him as surety or partner.

The second ground was "because his liability as surety is of a separate nature, and against himself individually, and was primarily a demand against his separate estate in the hands of the assignees, in case it could have been and had been proved up, while the claim actually proved up and allowed by the assignees was against Bassett & Bassett, and arose out of a copartnership transaction, and was a demand primarily against the copartnership assets, and represented an amount which did not necessarily and probably does not indicate the amount of B. H. Bassett's individual liability." It appears that all the separate estate of B. H. Bassett, subject to forced sale, passed by the assignment, as well as the partnership property; and that of the former, more than sufficient to pay all sums due to appellee went into the hands of the assignees; but that, notwithstanding this, no one solely an individual creditor of him presented a claim. All the property to which creditors, of any class, could look was placed subject to their demands, and if under an assignment it was true that the individual creditors of B. H.

Bassett had a right, superior to that of creditors of the firm, to have satisfaction of their claims out of their separate estate, it would seem that this was a case in which such a right might and ought to have been asserted, if it was not. No such right, however, is recognized; for the separate estate of one partner is as fully liable for partnership debts as for his own personal obligations, although as between partners the firm assets constitute the primary fund for satisfaction of firm debts. The claim actually proved and allowed by the assignees on which dividends were received was identical with that on which the judgment in this action on the guardian's bond is based. In the one case, as in the other, the admitted liability to appellee shown by the guardian's report of January 1, 1885, is made the claim; and for its payment all the property in the hands of the assignees was liable just as fully as though there had been one claim made with all technical precision on the suretyship of B. H. Bassett, and another on the certificate of deposit. The claim presented to the assignees was as follows: "Bassett & Bassett, to George B. Roberson, guardian of estate of the minor, C. J. Tonn, to amount of balance due the minor, January 1, 1885, as per exhibit of Jefferson Bassett, former guardian, filed January 1, 1885, in county court of Washington Co., Tex., \$1,882.45; said amount bearing interest from January 1, 1885." Although the account was made up against the firm, both members of which were separately liable for the entire sum due, there is nothing to show that the claim then asserted was not the identical claim now asserted. The amount is the same, except as to some interest which rests on the holding that the guardian should be charged with a higher rate of interest than the certificate of deposit promised. It was made against a fund in the hands of the assignees, one part of which was as much subject as the other to its payment; and there is no evidence that the guardian who presented and had it allowed, or the assignees who allowed and paid dividends on it, had any knowledge whatever, when the dividends were paid, that any liability on the part of the firm of Bassett & Bassett or of B. H. Bassett, other than that now sued on, existed. As between appellee and the firm of Bassett & Bassett and B. H. Bassett, it was but one debt, though evidenced by two papers, for which their partnership as well as separate estates were liable. The payment from either would satisfy appellee's claim against both, and there would be no equities to adjust, unless between the parties themselves or their representatives, however it might be paid.

Under the obligation imposed on appellants as sureties on guardian's bond, one of them, on payment by him of sum due to ward, would be entitled only to contribution from his co-surety; but when the money was loaned to Bassett & Bassett the surety Bassett, as between himself and co-surety on

guardian's bond, became a principal debtor, from whom the other surety, on payment of the debt, would be entitled to recover all he paid. B. H. Bassett became primarily liable to the ward,—as to his co-surety, a principal,—having, through the firm of which he was a member, borrowed and had the benefit of the ward's money for which both sureties were liable. Having thus become a principal debtor, if he has been released then his co-surety is as clearly released as would he be had appellee in some way voluntarily released the guardian whose sureties both were. This is not a case in which a co-surety only has been released, but one in which, in effect, a principal has been discharged, whereby the right of co-surety, Roberson, to subrogation, if he shall pay the debt, has been destroyed. It is very generally held that the discharge of a principal, by the act of the law, as in cases of discharges in bankruptcy or under insolvent laws compulsory in character, does not discharge a surety, but this rule has no application to cases in which the discharge of the principal depends on the volition and act of the creditor. The discharge of a principal which discharges a surety must be a discharge by some act or neglect of the creditor, and a discharge by operation of law, being, as it is, against the consent and beyond the power of the creditor, does not discharge the surety. Looking to the facts, it seems to us that the claim of dual character of indebtedness by B. H. Bassett is based on distinctions which can have no bearing on the merits of the present controversy. It is true that B. H. Bassett was bound by the existence of two states of fact, but under each of these he was bound for the same debt, and a payment by him as principal or surety would discharge it. There can be no pretense that the claim presented to assignees, approved, and dividends thereon paid, was not in form a claim sworn to be due from Bassett & Bassett, nor can it be denied that this was the very claim or debt for which the sureties were liable. If B. H. Bassett was discharged on that claim, he is discharged *in toto*. If he is thus discharged, then his co-surety is discharged; for B. H. Bassett, as between himself and co-surety, having become a principal debtor, his discharge defeats the right of his co-surety to subrogation, which cannot be taken away from him without releasing him from further obligation.

Under the findings of the court below, we are relieved from consideration of the question whether a guardian may consent to take under an assignment, and release the debtor on payment of only a part of the debt, for it appears that appellee, after he became of age, with full knowledge of what had occurred under the assignment, received the dividends paid. It is not shown that any fact material for him to know was concealed from him, or unknown to him, nor that any fraud was practiced to induce him to receive the dividends. If the guardian had power to bind

him, he is bound; and if the guardian had not power so to bind him, his own act does. If he did not intend to be bound by his guardian's act, he ought not to have received the fruits of it, but should have repudiated it, instead of receiving the dividends. Having received these, he must be held to have ratified the act of his guardian. He seems to have acted under advice of counsel. It is very generally, if not uniformly, held that one who takes dividends under even an invalid assignment is precluded from controverting its validity in its entirety. *Wallace v. Cumming*, 27 La. Ann. 631; *Burrows v. Alter*, 7 Mo. 424; *Moale v. Buchanan*, 11 Gill & J. 326; *Hone v. Henriquez*, 13 Wend. 241; *Adlum v. Yard*, 1 Rawle, 163; *Fiske v. Carr*, 20 Me. 301; *Rapalee v. Stewart*, 27 N. Y. 310; *Varnum v. Evans*, 2 McM. 409; *Richards v. White*, 7 Minn. 345, (Gil. 271); *Merrill v. Englesby*, 28 Vt. 156; *White v. Banks*, 21 Ala. 706; *Frierson v. Branch*, 30 Ark. 454. This, as held by the court below, renders it unnecessary to consider the validity of the assignments. The facts proved showing that B. H. Bassett had been released, no judgment could be legally rendered against either of appellants, and, as the cause was tried without a jury, on the findings of the facts the judgment of the court below will be reversed, and here rendered for appellants. It is so ordered.

HUDSON v. STATE.

(Court of Appeals of Texas. Jan. 23, 1890.)

HOMICIDE—JURY—EVIDENCE—INSTRUCTIONS.

1. Code Crim. Proc. Tex. art. 618, authorizes attachment, at the instance of either party, for jurors who do not appear. Article 640 provides that "no cause shall be unreasonably delayed" for such absent jurors. Defendant demanded attachment; and, after 18 or 20 hours, the officer not having had time to execute the process, the jury was completed. Though defendant exhausted his peremptory challenges, he did not show that any juror sat on the trial against whom such cause for challenge existed as would affect his competency or impartiality. *Held*, that an abuse of discretion in refusing to await the execution of the writ of attachment was not shown.

2. Defendant cannot complain that the court refused, after the special venire was exhausted, to postpone the case till some of the regular panel should be through deliberating on another case, so that they could be passed on in their order, where such jurors were actually called and passed on before talesmen were ordered.

3. Refusal to stand aside a special venire man for misnomer in the copy of the special venire served on defendant is error; but the error is immaterial where he was peremptorily challenged by the defense, and no objectionable juror was impaneled.

4. The defense, on the cross-examination of a state's witness, proved defendant's attempts to prosecute deceased before the witness, who was a justice of the peace. The state, in response, proved by the witness, over defendant's objection, that deceased had previously instituted prosecutions before him against the defendant. *Held* that, whether or not the evidence was improper, defendant, having caused its introduction, could not complain.

5. To contradict a witness, the state read in evidence the record of his testimony on the examining trial of defendant. It was not objected that the impeachment was upon immaterial and collateral matter, nor was the identity of the record of

the evidence duly and legally taken on the examining trial questioned. *Held*, that the evidence was properly admitted.

6. A pending indictment against defendant for murdering the child of deceased by poison was properly read in evidence as showing a motive for the crime; and, as it tended to establish the main issue, it was not necessary for the court, in its charge, to restrict the purposes for which the evidence could be considered.

7. A remark by the prosecuting attorney, in argument, that he could strengthen the state's case by an absent witness, is not reversible error, where the testimony given is amply sufficient to sustain the verdict.

8. Defendant having testified that he was shot at by deceased; that he retreated and fired as he retreated; and that, if he killed deceased, he killed him under these circumstances,—he cannot object that the court failed to instruct that he had the right to act on apparent danger; that the danger need not be real; and that he was not bound to retreat in order to justify the killing; as, according to his testimony, the danger was real, and he did actually retreat.

Appeal from district court, Washington county; C. C. GARRIE, Judge.

Alfred Hudson appeals from a conviction for murder.

Bassett & Muse, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. Several bills of exception appear of record, saved to the rulings of the court with reference to the impaneling of a jury for the trial of the case. Sixty names had been ordered drawn, selected, and the parties summoned as special venire men. When the case was called for trial on the 27th of September, the state announced itself ready for trial, and defendant asked, and was granted, time to prepare his application for a continuance. Another case, viz., *The State v. Allcorn*, charged with a felony, was called, and its trial proceeded with, to fill up the interim. The jury impaneled in the Allcorn Case were selected from the list of jurors who had been regularly drawn and selected for that week of the term. As soon as the Allcorn Case had been submitted to the jury, and they had retired to consider of their verdict, appellant's case was again called; and, his application for continuance having been overruled, the trial was ordered to be proceeded with. Of the special venire which had been summoned, it was ascertained, when their names were called, that five of the said venire men were absent. Defendant immediately demanded an attachment for each of said absentees, and asked a postponement of the trial until the service and return of said process. This request was granted, in so far as the issuance of the attachments was concerned, but the court refused to postpone the trial; and the remaining names upon said special venire were ordered to be called and passed upon until the same was exhausted. Meantime, two of the five absentees were brought in under the attachments issued, and they were also passed upon. When the special venire was exhausted the defendant again moved the court to postpone the trial until the other three absentees who had been summoned upon said venire could be attached and brought in under the

process which he had sued out for them, or until the said process had been returned; the sheriff stating that said attachments had not been executed, for want of time. This motion was refused by the court, and the court directed the call of the regular jury for the week, consisting of 28 names, the same having been regularly drawn by the clerk, and a list thereof furnished the defendant, and ordered the further completion of the jury to be made from said list, which was done, over objections of defendant. This was the proper practice. *Cahn v. State*, 27 Tex. App. 709, 11 S. W. Rep. 728. When a special *venire*, after being summoned, is called, in the trial of a capital case, and any person or persons who shall have been summoned fail to appear and answer to his or their names, either party may have attachments issued for such absentee or absentees to have him or them brought forthwith before the court. Code Crim. Proc. art. 618. If the attachment is not demanded for the absentee at this time, the party will be deemed to have waived his right to the same, and cannot be heard afterwards to complain. Again, it is provided that, "in selecting the jury from the persons summoned, the names of such persons shall be called in the order in which they appear upon the list furnished the defendant, and each juror shall be tried and passed upon separately, and a person who has been summoned, but who is not present, may, upon his appearance before the jury is completed, be tried as to his qualifications, and impaneled as a juror, unless challenged; but no cause shall be unreasonably delayed on account of the absence of such person." Id. art. 640; Willson, Crim. St. § 2287; *Cahn v. State*, 27 Tex. App. 709, 11 S. W. Rep. 728. Under this statute, before the jury is complete, any of the persons summoned who were absent when the *venire* was first called, whether they appear with or without having been brought under attachment, may be tried and passed upon as jurors. But in no case is the trial to be unreasonably delayed on account of the absence of any of the persons summoned on said special *venire*; "and though," as was said in *Thuston v. State*, 18 Tex. App. 26, "an attachment might be out for some of the original *venire* men, that should not unreasonably delay the completion of the jury out of new talesmen summoned."

In this case the defendant had availed himself of his right to attachments for the absentees at the proper time, and he was entitled to assert his right to have them in court, to be passed upon, provided it would not cause unreasonable delay in the trial. Now, what are the facts on the question of the reasonableness of the delay? At 2 o'clock on the 27th the attachments were ordered issued, and placed in the hands of an officer for service. On the morning of the 28th the sheriff reported that the officer having the process had not had time to execute the process, and the court ordered the completion of the jury out of the names drawn by the clerk from

the lists of jurymen of the term, and the jury was completed by noon; the absentees not having been brought in. So it appears that some 18 or 20 hours elapsed between the issuance of the attachments and the completion of the jury. It was a matter within the discretion of the court to determine the reasonableness of the delay. Do the facts show that the court abused its discretion, or that defendant has suffered injury on account of the court's action? We do not think the facts show an abuse of discretion. It is true that defendant says he exhausted his peremptory challenges in the selection of the jury, and that an objectionable juror was put upon him, and, notwithstanding his challenge, sat upon his trial. He does not show wherein said juror was objectionable, or the reasons of his objection to him, nor that he was not a fair and impartial juror. An "objectionable" juror, in the sense in which the term is used in this connection, means one against whom such cause for challenge exists as would likely affect his competency or his impartiality in the trial. Without some such showing, it is idle simply to say that a juror is objectionable. Having exhausted his peremptory challenges, he was not, under the circumstances here presented, entitled to exercise a further challenge of this character. *Loggins v. State*, 12 Tex. App. 65.

After the special *venire* was exhausted, and resort was had to the list of the 28 jurymen drawn by the clerk from the regular jury for the week, it was found, when their names were reached, that several of these jurymen were upon the Allcorn jury, and were considering of their verdict in that case. Defendant moved for a delay and postponement until said jurors could be brought in and passed upon in the order in which their names appeared upon the list, which motion the court refused; and defendant saved his exception. In certifying this bill of exceptions the learned trial judge says: "The call of the remainder of the panel was proceeded with, and the jurors passed upon, and the Allcorn jury, being unable to agree, was discharged; and the jurors were called and passed on in this case before talesmen were ordered." There is no substantial merit in the bill of exceptions reserved to this ruling. The point here made is not analogous to the questions as made in *Bates v. State*, 19 Tex. 123, and *Thuston v. State*, 18 Tex. App. 26. These jurors were not summoned upon the special *venire* in this case at the time they were impaneled in Allcorn's Case, and, besides this, appellant did in fact have the privilege of passing upon them as jurors after they had been selected and summoned in this case. We cannot see that he has any ground of complaint in the matter.

Another exception of defendant growing out of the organization of the jury arose from the following facts: The fifty-third name summoned on the special *venire*, as shown by the sheriff's return thereon, and

by the copy served upon the defendant, was C. F. Sanders. In response to the call of this name, one C. F. Sander appeared and answered as the party who had actually been summoned. Defendant moved the court to stand said Sander aside for variance in the names, which motion was overruled; and defendant, over his objections, was compelled to exhaust a peremptory challenge upon said juror. "Where a juror is misnamed in the copy of the special venire served on the defendant, it is the proper practice to stand him aside." *Thompson v. State*, 19 Tex. App. 594; *Swofford v. State*, 3 Tex. App. 77; *Bowen v. State*, Id. 617; *Hubbard v. State*, 72 Ala. 164. It was error to refuse to stand the juror aside, but the error becomes harmless in view of the fact that the juror did not sit upon the case; the defendant having rid himself of him by a peremptory challenge, and no objectionable juror having set upon the case.

The defendant assigns as error the admission of evidence over his objection, and the improper remarks of the district attorney made in the presence and hearing of the jury, as shown by his several bills of exception relating thereto, as follows: "(1) In admitting the testimony of B. C. Anderson, justice of the peace, as to complaints made by the deceased against the defendant; and in admitting the alleged examining trial record in impeachment of the witness Mary Hudson. (2) In admitting in evidence the indictment in cause No. 3,351, *The State of Texas v. Alfred Hudson*, charged with the murder of J. D. Brackens by poison, and a subpoena for Ed. Brackens as a witness therein. (3) In permitting the district attorney to state, in presence and hearing of the jury, that he could strengthen the State's case by the testimony of an absent witness; to argue to the jury in his closing speech his belief in the defendant's guilt, and that he was also guilty of poisoning J. D. Brackens, a child of the deceased, as charged in said indictment in cause No. 3,351. (4) Even if said evidence should be held admissible, still the court erred in failing to instruct the jury as to the only purposes for which the same could be considered by them, viz., in determining the credibility of the witness, and as a circumstance tending to show motive in the defendant for the homicide, and in failing to instruct the jury to disregard the improper remarks of the district attorney."

Defendant himself, on cross-examination of Anderson, the justice of the peace, drew out from the said witness matters relating to the defendant's attempts to prosecute deceased before said justice; and in response the state was permitted to prove by said witness that deceased had previously instituted prosecutions before him against defendant. Even if said evidence was collateral, irrelevant, and immaterial, the defendant should not be heard to complain; he having provoked or caused its introduction.

Nor did the court err in permitting the prosecution to impeach the wife of defendant by reading her contradictory statements made at the examining trial. It was not objected that the impeachment was upon immaterial and collateral matters; nor that the papers in the examining trial, and the signature of the witness, had not been proved. There appears to have been no question made at the time as to the fact that the paper read from was the evidence duly and legally taken at the examining trial.

It was not error to permit the state to read in evidence the indictment against this defendant charging him with having murdered by poison one J. D. Brackens, the child of deceased, and which indictment was pending. This indictment, together with the fact, otherwise proved, that deceased had accused defendant and others of poisoning his child, and that he was prosecuting him for it, were circumstances tending to establish, and were legitimate for the jury to consider in determining defendant's motive in killing deceased. *Kunde v. State*, 22 Tex. App. 65, 3 S. W. Rep. 325, and authorities cited. This evidence did not prove, or tend to prove, an extraneous crime. Such evidence being legitimate and admissible to prove a main issue in the case, to-wit, defendant's motive and malice in the perpetration of the murder, it was not obligatory upon the court, in its charge, to limit and restrict the purposes for which the evidence was admitted. The rule as to restriction or limitation does not obtain with regard to evidence proving directly the main issue involved in the trial. *Davidson v. State*, 22 Tex. App. 373, 3 S. W. Rep. 662.

It is not shown that defendant was in any manner injured or prejudiced by the remark of the district attorney made in the presence and hearing of the jury, and which is complained of by the defendant. If the evidence is amply sufficient to sustain the verdict and judgment (which is the case, in our opinion) without the testimony of the absent witness Carr, whose testimony the district attorney said would make the case stronger if the court would hold the case open until he could produce it, we cannot possibly see how such a remark could in any manner prove injurious.

Quite a number of objections are urged to the charge of the court as given to the jury, and exceptions were reserved to the refusal of the court to give the several special instructions requested for defendant. We are of opinion that none of these exceptions are maintainable. Upon self-defense, it is objected that the charge did not instruct the jury that the defendant had a right to act upon the appearances of danger, and that it was not necessary that the danger should be real. It is also objected that the court wholly omitted to instruct the jury that the defendant was not bound to retreat. The defendant testified in his own behalf. He testified that he was shot at, and that he

retreated; that he fired as he retreated; and that, if he killed deceased, he killed him under these circumstances. According to this statement of defendant, his danger was not apparent but real danger; and appearances of danger was not an issue in the case. He also testifies that he did retreat. If this was his own tale as to the matter, how could he be injured by the omission to instruct the jury that he was not bound to do what he did do to save himself? If he had not retreated, then he might reasonably have claimed that the jury should have been instructed that he was not bound, under our law, to retreat, before he could justify a killing on the ground of self-defense against an unlawful attack upon his person likely to produce death or serious bodily injury. Whether he retreated or not was not an issue in the case as made by his own testimony, and there were no other eye-witnesses to the homicide who testified on the trial. We are of opinion the charge presented sufficiently the law applicable to the legitimate issues in the case, and that the court did not err in refusing defendant's special requested instructions. We have found no reversible error in the record of this case as it is presented to us on this appeal, and the judgment is therefore, in all things, affirmed.

THOMAS v. JOYNER.

(Supreme Court of Arkansas. March 8, 1890.)

NON-PAYMENT OF TAXES—FORFEITURE—DONATION BY STATE.

Act Ark. March 14, 1879, which revises the whole subject of donation of farm lands forfeited to the state for non-payment of taxes, and which permits the state to donate such lands to any adult citizen of the United States, "subject to the conditions hereinafter mentioned," but which mentions no condition obliging the donee to pay for improvements on the land, repeals Act Ark. Dec. 23, 1840, § 8, (Mansf. Dig. § 4250,) which provides that the donee of improved land forfeited to the state shall pay the person owning the improvement double its value.

Appeal from circuit court, Little River county; H. B. STUART, Judge.

Action by L. J. Joyner against John Thomas to recover double the value of improvements on farm land donated by the state to defendant. At the trial it appeared that the improvements were made in 1877 and 1878, and that the donation by the state to defendant was made January 1, 1880. There was a judgment in plaintiff's favor, and defendant appeals. The act of December 23, 1840, § 8, (Mansf. Dig. § 4250,) on the subject of the donation of lands forfeited to the state for non-payment of taxes, provides: "If any one shall obtain such donation to a tract of improved land, he shall pay to the person owning such improvement double the value thereof." The act of March 14, 1879, revises the act of 1840. Section 1 of the act of 1879 provides: "The right of the state to all lands, other than town and city lots, which have been forfeited to the state for non-payment of tax, penalty, and cost due

thereon, may be donated to any adult citizen of the United States in tracts not to exceed 160 acres to each applicant therefor: provided * * * that such donation shall be granted subject to the conditions hereinafter mentioned." The act makes no provision obliging the donee to pay anything for the improvements on land donated to him.

Dan. W. Jones, for appellant. Compton & Compton, for appellee.

PER CURIAM. The right of action of the appellee, who has the plaintiff below, rests upon the third section of the act of December 23, 1840. Mansf. Dig. § 4250. But that provision of the statute, if not repealed by the act of January 11, 1851, was repealed by the act of March 14, 1879, which was passed before the plaintiff's rights accrued. The act of 1840, from which the provision referred to was taken, was the first statute upon the subject of the donation of lands forfeited to the state for the non-payment of taxes. It provided for the donation of the state's right to such lands upon the conditions thereafter to be mentioned. Then follows the provision under consideration, making the donee of any improved land liable to the owner of the improvements in double the value thereof, to be recovered by the owner by judgment *in personam* against the donee. This liability was not a condition which could in any event defeat the title of the donee; but it was one of the terms, or, in the language of the statute, one the "conditions," upon which the state parted with its interest in the land. The act of 1879 revised the whole subject treated by the act of 1840. It follows the latter act, with some variations in granting the power to its officers to donate lands forfeited for the non-payment of taxes, down to the "conditions" upon which the grant should be made, when a proviso to this effect was added, viz., "that such donations shall be granted subject to the conditions hereinafter mentioned." Now, the condition of paying for improvements on the land is not mentioned, and the language of the proviso does not permit us to look beyond the act itself to impose other terms or conditions upon the donee. The improvements, therefore, go with the land, without any liability upon the donee to pay for them; and the plaintiff's cause of action fails, even conceding, which we do not, that he has stated facts which would warrant a recovery under the statute, if it were in force. Reverse and remand.

STATE v. SMITH.

(Supreme Court of Arkansas. March 8, 1890.)

CRIMINAL LAW—FORMER CONVICTION.

One who has been convicted, before a justice of the peace, of an aggravated assault, and fined and imprisoned therefor, cannot afterwards be tried on an indictment for assault with intent to kill for the same offense, under Const. Ark. art. 2, § 8, which provides that "no person, for the same

offense, shall be twice put in jeopardy of life and liberty."

Error to circuit court, Little River county; R. D. HEARN, Judge.

W. E. Atkinson, Atty. Gen., and T. D. Crawford, for the State. J. C. Head, for appellee.

HUGHES, J. The appellee was indicted with assault with intent to kill. He pleaded former conviction for the same offense, setting up in his plea that, upon a charge of assault with intent to kill, before a magistrate, growing out of the same transaction, he had been adjudged not guilty of the assault with intent to kill, and was discharged from further prosecution upon said charge; that he was then held by the magistrate for trial for assault and battery, and was convicted of an aggravated assault for the same offense, and fined \$50, and sentenced to one day's imprisonment. The state demurred to the plea, the demurrer was overruled, and the state appealed. Was the plea of former conviction good? In section 8, art. 2, of the constitution, it is provided that "no person, for the same offense, shall be twice put in jeopardy of life or liberty." In *State v. Nichols*, 38 Ark. 550, it was adjudged that a demurrer to a plea of former conviction was good; where, upon an examination before a justice of the peace upon a charge of maiming, the defendant was discharged, but was held for and convicted of an assault and battery, and adjudged to pay a fine of five dollars, and was afterwards indicted in the circuit court for maiming, for the same offense. In *Southworth v. State*, 42 Ark. 270, it was adjudged that a conviction of petit larceny, in a justice of the peace's court, would bar an indictment for grand larceny for the same offense, because, upon a trial for either grand or petit larceny, the accused is in jeopardy, and the "constitution protects life and liberty" * * * from being twice put in jeopardy." The court said, in this case: "We are unwilling to extend the decision in *State v. Nichols* to cases of larceny." While the doctrine of this case is settled in our decisions, and we adhere to the same, we are of the opinion that the ground upon which they rest is the above provision of the constitution, that "no person, for the same offense, shall be twice put in jeopardy of life or liberty." There is no violation of this provision in trying a person for a higher offense, who has been previously tried for a lower degree of the same offense, if the former trial did not jeopardize life or liberty. We therefore adjudge, in this case, that the defendant, (appellee,) having been convicted of an aggravated assault, fined and imprisoned upon the judgment of the justice of the peace, a trial upon the indictment afterwards for assault with intent to kill for the same offense, would have put him a second time in jeopardy, within the meaning of the constitution, and that the demurrer to the plea of former conviction was properly overruled. Affirmed.

HUNDLEY v. FARRIS.

(Supreme Court of Missouri. March 23, 1890.)

CLAIMS AGAINST DECEASED PARTNER—FIRM AND PRIVATE CREDITORS.

Under Rev. St. Mo. 1879, § 658, providing that "all contracts which, by the common law, are joint only, shall be construed to be joint and several," demands against a partnership are several as well as joint; and, under sections 184, 212, providing for the classification of all demands against the estate of a decedent, and the payment of the demands so classified "pro rata," according to classification, a demand against a partnership is entitled to share equally with the individual debts of one of the partners, in the administration of his estate.

Appeal from circuit court, Buchanan county; JOSEPH P. GRUBB, Judge.

This case was submitted to the trial court on an agreed statement of facts, the substantial parts of which are as follows: "During the year 1882, and thereafter, up to the time of the death of Madison S. Farris, the said Madison S. Farris and Michael Farris were partners, doing business in Missouri under the firm name of M. S. Farris & Co.; that during the time they were so in partnership, to-wit, on the first day of February, 1884, said firm borrowed from plaintiff, for use in their business as such partners, the sum of ten thousand dollars, and gave their note therefor, payable to plaintiff one day after date, which note is on file with the transcript from the probate court of Buchanan county, sent up in this case; that on said note there was paid, September 14, 1884, \$3,075.83, and on July 1, 1885, \$1,234.70, which said payments were made by Michael Farris, as administrator of the estate of M. S. Farris & Co., and as dividends on claims allowed by the probate court; that said Michael Farris, as surviving partner of said firm, was appointed and qualified as administrator of said partnership estate within one year before January 30, 1884, and the balance due on said note, no payments having been then made, was duly presented and allowed by the probate court of Buchanan county, Missouri, against said partnership estate; that John Farris was duly appointed and qualified as administrator of the individual estate of Madison S. Farris by said probate court, and within one year after the grant of letters of administration on said individual estate this said note was presented for allowance against said individual estate, subject to the dividend so paid; that said John Farris had already paid, of individual claims allowed against said individual estate within said first year of his administration other than the one in controversy, nearly all the money realized from the assets of said estate, and there is not sufficient of said assets to pay in addition on the claim in contest a per cent. thereof equal to the per cent. already paid on said other individual claims so allowed; that the individual estate is not sufficient to pay more than fifty cents on the dollar of the individual claims allowed within the first year against said individual estate, exclusive of the note or claim in contest in this suit; that the part-

nership assets have been about exhausted, and will not pay more than 50 per cent. on partnership demands; that the partnership estate of said M. S. Farris & Co. is not sufficient to pay more than fifty per cent. of the claims allowed against said partnership estate; that this claimant has received his full *pro rata* of the assets of said partnership estate, the assets of said partnership estate being fully exhausted; that said Madison S. Farris died in 1884." The court thereupon found for plaintiff for the amount of his demand as a claim of the fifth class against the estate of Madison S. Farris, but subject to the prior payment of the individual debts of that estate. Plaintiff appeals, on the ground that the allowance of the demand should have been general, and permitted to share equally in the individual estate with the other demands against it.

James W. Boyd and *A. D. Kirk*, for appellant. *B. R. Vineyard*, for respondent.

BAGLAY, J., (after stating the facts as above.) We have in Missouri the following statutes bearing more or less directly on the questions involved in this case, (Rev. St. 1879:) "Sec. 658. All contracts which, by the common law, are joint only, shall be construed to be joint and several. Sec. 659. In case of the death of one or more of the joint obligors or promisors, the joint debt or contract shall and may survive against the heirs, executors, and administrators of the deceased obligor or promisor, as well as against the survivors. Sec. 660. When all the obligors or promisors shall die, the debt or contract shall survive against the heirs, executors, and administrators of all the deceased joint obligors and promisors. Sec. 661. In all cases of joint obligations and joint assumptions of copartners or others, suits may be brought and prosecuted against any one or more of those who are so liable." "Sec. 666. It shall be lawful for every creditor of two or more debtors, joint or several, to compound with any and every one or more of his debtors for such sum as he may see fit, and to release him or them from all further liability to him for such indebtedness, without impairing his right to demand and collect the balance of such indebtedness from the other debtor or debtors thereof, and not so released; provided, that no such release shall impair the right of any debtor of such indebtedness, not so released, to have contribution from his co-debtors, as is by law now secured to him." These sections are contained in the general law regarding contracts and promises, (chapter 19, Rev. St. 1879; chapter 39, Rev. St. 1889.) By those governing the administration of estates, it is further provided that all demands against the estate of any deceased person shall be divided into six classes, (Rev. St. 1879, § 184; Rev. St. 1889, § 183;) and paid in the order in which they are classed; that no demand of one class shall be paid until all previous classes be satisfied, and, if

there be not sufficient to pay the whole of any one class, such demands shall be paid in proportion to their amounts, (Rev. St. 1879, § 212; Rev. St. 1889, § 209;) and that "any person having a demand against an estate may establish the same by the judgment or decree of some court of record, in the ordinary course of proceeding, and exhibit a copy of such judgment or decree, and shall also exhibit copies of all judgments and decrees rendered in the life-time of the deceased to the probate court," (Rev. St. 1879, § 191.) We think the legislative intent to have demands against a partnership allowed an equal share with those against the individual in administering the estate of any one of the partners is made sufficiently clear by the statutes mentioned to obviate the necessity of entering on a discussion of the relative priorities of individual and partnership demands against the firm and individual estates as a part of the general American common law. The latter subject is yet one of great difficulty, in spite of the learning that has been so often brought to bear to elucidate it. Happily our own statutes and former rulings have made it measurably clear that with us demands against a partnership are several, as well as joint, both at law and in equity, and that the partnership creditor may resort to the separate estate of a partner on an equality with the separate creditors in such a case as is here presented. We fully approve the views expressed in *Shackelford's Adm'r v. Clark*, 78 Mo. 491, in relation to this general subject, and consider them as pointing logically to the result we announce. See, also, *Eaton v. Walsh*, 42 Mo. 272.

The trial court evidently felt itself bound to follow the ruling of the Kansas City court of appeals in *Level v. Farris*, 24 Mo. App. 445, which is not in harmony with the conclusion we have reached. The judgment is reversed, and cause remanded for further proceedings, in conformity to this opinion; all the judges assenting.

JACKSON v. McLEAN'S EX'RS.

(Supreme Court of Missouri. March 10, 1890.)
CONTRACTS—PUBLIC POLICY—EQUITY—ACCOUNTING.

J. and M. entered into a partnership for the construction of a railroad, and in their own names, and the names of their clerks, as stockholders, formed a railroad corporation, the capital stock of which was to be used and controlled by J. and M. to accomplish the ends of the partnership. The corporation then issued its bonds, and executed a deed of trust on its franchise and property to secure them. Afterwards the corporation, under the direction of J. and M., entered into a contract with the partnership by which the latter agreed to construct the road, and the corporation agreed to give the partnership therefor all the bonds, stock, donations of land, subscriptions, and subsidies that might come into its possession. Held, that the contract was contrary to public policy and void, and a court of equity will not compel an accounting by one of the partners to his co-partner of the profits realized thereunder.

BAGLAY, J., dissenting.

Appeal from St. Louis circuit court; GEO. W. LUBKE, Judge.

John M. Dickson, for appellant. *Rowell & Ferriss*, for respondents.

BRACE, J. This is an action, in the nature of a bill in equity, for the settlement of partnership accounts. A demurrer to the bill was sustained, the bill dismissed, and judgment rendered for the defendants, from which plaintiff appeals. The bill, which is very lengthy, in substance charges that in March, 1885, the plaintiff and the said James H. McLean entered into a copartnership agreement to build two railroads in the state of Illinois, to be operated together when completed as one continuous line, and for this purpose to form railroad corporations under the laws of Illinois; the capital stock to be owned by plaintiff and the said McLean in equal parts; the said McLean to furnish the means necessary for the construction of the first 25 miles, and the plaintiff to take charge and direct the construction thereof. That said corporation so to be organized should issue bonds to be secured by mortgage or deed of trust on all its property and franchises; and, on the completion of the said first 25 miles, first mortgage bonds, or the proceeds thereof, to the amount of \$15,000 per mile, and stock to the amount of \$16,000 per mile, should be delivered to said partnership, when there should be a statement and settlement of the accounts of said partnership to that date, and in such settlement the said McLean should receive from the proceeds of said bonds, or in bonds themselves, at his option, at a valuation of 85 cents on the dollar, the amount of his cash advances and interest, the remainder of said stock, bonds, and the proceeds thereof, to be equally divided between plaintiff and the said McLean. It was further agreed that all donations of lands and subscriptions to said railroad from cities, towns, townships, counties, or persons should inure to the benefit of, and become the property of, said partnership, and to be accounted for in said settlements. In pursuance of said agreement, the said partnership firm, in the name of plaintiff and certain clerks and employees of the said McLean, as stockholders, was incorporated, under the laws of the state of Illinois, as the Carbondale, Metropolis & Paducah Railway Company, with a capital stock of \$1,000,000, "to be used and controlled by plaintiff and the said McLean as an adjunct for the accomplishment of the enterprise for which said partnership was formed; and thereupon, by its nominal officers, the said corporation executed its deed of trust conveying all its property and franchises to plaintiff and the said McLean to secure the payment of 1,000 bonds of \$1,000 each; that thereafter said corporation, under the direction of plaintiff and the said McLean, and in aid of their original scheme for making for themselves the entire profit to be earned from the construction of said road, entered into a contract with the said partnership concern, in

the name of certain parties acting for said copartnership concern, by which said concern, in the name of said parties, agreed to construct said railroad for the whole of the bonds, stock, and donations of land, and subscriptions, and all subsidies that might come into the possession of said company; the said McLean to provide the means for carrying on the work of construction, and to handle the bonds at not less than 85 cents on the dollar. That these parties representing said copartnership concern in said contract were financially irresponsible, and signed said agreement at the request of, and as the agents of, plaintiff and defendant's testator. That afterwards the plaintiff and the said McLean, by virtue of said contract, carried on the work of constructing said railroad under said contract until about the 7th of November, 1885, when the plaintiff was by his said partners unwarrantably excluded from the said partnership concern, and from all control of its business. That thereafter 25 miles of said road was approximately completed under said contract. That the assets of said company and of said partnership are in the hands of the said McLean. That by virtue of said contract he has received \$375,000, the proceeds of the sale of the first mortgage bonds of said railroad company, and other large amounts in cash, labor, land, and bonds given as subscription and subsidies in aid of said enterprise; making a large amount in excess of the cost of the construction thereof. That the said McLean has possession of all the books and accounts of said partnership, and has refused to recognize the rights of plaintiff as a partner, or render him any account of his interest in such profits; and prays for an account, the appointment of a receiver, etc.

The profits which the plaintiff in his bill asks the court to take an account of, and out of which he asks that a share be ascertained and rendered him, he alleges, grew out of a contract which he and his partner made with a corporation created by the state of Illinois, of which he and his partner were in fact the owners. Combining within themselves the multifarious relations of stockholders, mortgagees, directors, and officers, with the plenary powers with which these relations invested them, they enter into a contract with themselves to construct a railroad by which all the assets of the corporations are to be transferred to them as a consideration for the construction of the road. As a corporation, they issue to themselves certificates of stock, and issue first mortgage bonds, solicit and obtain subscriptions in money, lands, work, and bonds, from counties, towns, and cities. As directors and officers, they deliver these assets to themselves as contractors. As contractors, they go upon the market, sell a part of the bonds, convert the subscriptions into cash, and make a large profit; and this is the profit which a court of equity is asked to apportion between these schemers. That it will not assist one who, in the operation of such a scheme as this, may have been taken ad-

vantage of by his partner, who may have obtained more than his portion of the common spoil, would seem to be demanded by the plainest dictates of a public policy that would foster ordinary common honesty. As a corporation, these parties owed to the people of the great commonwealth which gave it corporate existence; to the people along its line who gave their means to assist in its construction; to those who might become stockholders on the faith of its value; and to their *cestuis que trustent*, the purchasers of its bonds,—the duty of getting for them the best road possible for the least amount of money. The natural promptings of self-interest to them as contractors, on the other hand, was to get the most money possible for the least road. No fair, honest contract, as a rule, could be expected from such a conflict of duty and interest. Therefore, courts of equity refuse to enforce such contracts, or to assist a party to recover the spoil that may have been secured by the execution of such a contract. Without stopping to inquire, in a given case, whether a fraud has actually been perpetrated or not, the law leaves the parties where it finds them. The conclusion reached by the trial court in this case is, we think, amply sustained by the principles announced and maintained in the cases cited by counsel for the respondent in their brief. The judgment of the circuit court is affirmed. All concur, except BARCLAY, J., dissenting.

CHEW *et al.* v. KELLER.

(Supreme Court of Missouri. March 10, 1890.)

WILLS—CONSTRUCTION—NATURE OF ESTATE—REMAINDERS.

Testator devised all his real estate to his wife for life, with power to convey one undivided half thereof in fee-simple absolute. The will then provided that the other undivided one-half should go in equal parts to certain devisees, "to have and to hold in said parts unto them as tenants in common, to them and their heirs, forever; but the said devisees are not to take possession of their said parts until the death of [the wife] and upon her death [the devisees] shall take said parts so devised; * * * and, in case either of them shall die before [the wife,] then the heirs of such person so dying shall take his or her portion so devised." *Held*, that the devisees took a remainder in fee free from any condition, and, in event of the death of one of them before the wife, his heirs took his portion by descent, and not as purchasers.

Appeal from St. Louis circuit court; L. B. VALLIANT, Judge.

This was an action for specific performance brought by Clara B. Chew and others against John A. Keller. There was judgment for defendant, and plaintiffs appealed.

R. M. Nichols, for appellants. *Boyle, Adams & McKeighan*, for respondent.

BLACK, J. This suit has for its object the specific performance of a contract for the sale of the two-ninths of the undivided one-half of the described real estate situate in the city of St. Louis. The plaintiffs are the vendors, and the defense is that they have no

title to the property; and whether they have any title depends upon the construction to be given to the will of Jesse G. Lindell, who died in February, 1858, the will being dated in January of that year. Jesse G. Lindell left a large landed estate of the assessed value of \$600,000, incumbered by mortgages to the amount of \$55,000. He left a widow, Jemima Lindell, but no children. By his will he devised all of his property, real and personal, to his wife for life, giving to her power to mortgage any of it, to renew mortgages, and to make leases for a term not exceeding 40 years. It then provides: "And I further declare it to be my will that the said Jemima shall have power to dispose of one equal undivided half of all my real estate, in fee-simple absolute, by her will, to whomsoever she may think fit; and, if she shall die intestate, then said equal undivided half of my real estate shall descend to her, the said Jemima Lindell's, heirs at law. And I further devise and bequeath the other equal undivided half of my real estate unto Levin Baker two-ninths thereof, Eliza Lindell one and a half ninth thereof, Mary Lindell one and a half ninth thereof, Sarah Coleman one-ninth thereof, Robert Baker one-ninth thereof, Hetty Collins one-ninth thereof, Peter Lindell, Jr.'s two sons, Jesse and Peter, each one-half of one-ninth thereof, to have and to hold in said parts unto them, as tenants in common to them and their heirs, forever; but the said devisees last named are not to take possession of, or be entitled to enter into possession of, their said parts undivided, of the undivided half of my said real estate, until the death of the said Jemima Lindell; and upon her death the said devisees, Levin Baker, Eliza Lindell, Mary Lindell, Sarah Coleman, Robert Baker, and Hetty Collins, my nephews and nieces, and Jesse and Peter Lindell, my grand-nephews, last named, shall take the said parts so devised to them, respectively, as tenants in common; and, in case either of them shall die before the said Jemima, then the heirs of such person so dying shall take his or her portion so devised." A subsequent clause gives the wife power to sell real estate, to pay off mortgages which may not be renewed or paid by giving new mortgages, and then states: "And, if such sales are made for such purposes, then the real estate remaining after such sales shall pass to, and be devised in, the manner above specified; one-half thereof going to the said Jemima and her heirs absolutely, and the other half thereof to the said other devisees at the death of the said Jemima and their heirs, in the manner and form as above specified." Levin Baker, to whom was devised two-ninths of one-half in remainder, was married, and had one child at the date of the will. He was adjudged a bankrupt in 1876, and his interest in the property in question was sold by his assignee in bankruptcy in 1881, and he died in 1883, leaving a son and two daughters, who are the plaintiffs; the daughters being joined in this suit by their

husbands. Jemima Lindell survived Levin Baker. The claim of the plaintiffs is that, as their father died during the life of Jemima Lindell, they take as purchasers under the will, and not by descent from their father. If this be the true meaning of the will, then they are the owners of the two-ninths of the undivided one-half of the property in suit.

There can be no doubt but Levin Baker took an estate in remainder by the Lindell will, and the first inquiry is whether it was vested or contingent. The vested or contingent character of a remainder is determined, not by the uncertainty of enjoying the possession, but by the uncertainty of the vesting of the estate. Says Kent, a vested remainder is a fixed interest, to take effect in possession after a particular estate is spent. It is the present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines. That distinguishes a vested from a contingent remainder. 4 Kent, Comm. 208; 2 Washb. Real Prop. (4th Ed.) 547. And so it was held by this court in *Jones v. Waters*, 17 Mo. 587. The law favors vested estates, and, where there is a doubt as to whether the remainder is vested or contingent, the courts will construe it as a vested estate. *Collier's Will*, 40 Mo. 287. Adverbs of time, as "when," "there," "after," "from," and like expressions, do not make a contingency, but merely denote the commencement of the enjoyment of the estate. 4 Kent, Comm. (11th Ed.) 230, note; *Doe v. Conditine*, 6 Wall. 458. The expressions that they, Levin Baker and others, are not to take possession of the property devised "until the death of Jemima Lindell," and that "upon her death" the devisees shall take the parts as tenants in common, all relate to the times when the devisees shall have possession, and have nothing to do with the vesting of the estate. There can be no doubt but Levin Baker took a vested fee in remainder. There can be no remainder limited after an estate in fee, though there may be a future use or executory devise. One class of executory devise is where the divisor parts with his whole estate, but, upon some contingency, qualifies the disposition of it, and limits an estate on that contingency. 4 Kent, Comm. 269. Though Levin Baker did take a vested fee in remainder, still it was competent for the testator to limit an estate upon that fee, to take effect in the event that he died before Jemima Lindell, the life-tenant. The words of the will relied upon by plaintiffs for such a conditional limitation in their favor are: "And, in case either of them shall die before the said Jemima, then the heirs of such person so dying shall take his or her portion so devised." The real question is whether the testator used the word "heirs" in this clause of the will for the purpose of introducing new objects of his bounty, so that the per-

sons answering the description of heirs of Levin Baker will take as purchasers, or whether he used the word as one of limitation, as he evidently does in a preceding clause of the same devise. We may here mention, as guides, some of the established rules of construction. The first, and to which the others are aids, is that effect should be given to the intention of the testator, and the words used are to be understood in the sense indicated by the whole instrument. The word "heirs" will be considered as a word of limitation, and not of purchase, unless the will shows clearly that it is used to designate a new class of beneficiaries. 2 Washb. Real Prop. (5th Ed.) 654; *Landon v. Moore*, 45 Conn. 422; *Thurber v. Chambers*, 68 N. Y. 42; *Linton v. Laycock*, 33 Ohio St. 136. So the word "heirs" will be held to mean "child" or "children" when necessary to carry out the clear intention of the testator. *Haverstick's Appeal*, 108 Pa. St. 394. Indeed, these rules apply as well to deeds as to wills. *Rines v. Mansfield*, 96 Mo. 394, 9 S. W. Rep. 798; *Waddell v. Waddell*, 12 S. W. Rep. 349. Again, an estate in fee created by a will cannot be cut down or limited by a subsequent clause, unless it is as clear and decisive as the language of the clause which devises the real estate. *Freeman v. Colt*, 96 N. Y. 68; *Byrnes v. Stilwell*, 108 N. Y. 453, 9 N. E. Rep. 241; *Landon v. Moore*, supra.

In the will before us the testator gives to his wife and her heirs the one-half of his real estate, and to her he gives a life-estate in the whole of his property, with power to renew existing and to make new mortgages, and to make leases not exceeding 40 years in duration. He then disposes of the other half by dividing it into ninths, and here it is well to recall portions of the language used. He says: "I further devise and bequeath the other equal undivided half of my real estate unto Levin Baker two-ninths thereof, Eliza Lindell one and a half ninths thereof, * * * to have and to hold in said parts, unto them as tenants in common, to them and their heirs forever;" but the said devisees "are not to take possession or be entitled to enter into possession" until the death of said Jemima Lindell; "and upon her death the said devisees [naming them again] shall take the said parts so devised to them, respectively, as tenants in common; and, in case either of them shall die before Jemima, then the heirs of such so dying shall take his or her portion so devised." Stronger language could not have been used to show and disclose a purpose and intent to confer upon Levin Baker and the other named persons an absolute and unconditional fee. The estate is given to "them and their heirs forever." This expression, though unnecessary to create a fee, is an appropriate one for that purpose; and that the word "heirs" is here used in its ordinary legal sense, as one of limitation only, cannot be doubted. The testator seems to have supposed it necessary to point out the time when those devisees

should enter into and enjoy possession of the property, and this time he fixes at the death of Jemima Lindell. To his mind this was of prime importance, for he fixes the time by stating it in a negative and affirmative form of expression. With this matter, made so prominent, it was but natural that he should make some provision in case any of the devisees died before the date at which they should take possession, and this, too, without intending to substitute a new class of beneficiaries. When he says, in case either of them shall die before the life-tenant, the heirs of such person so dying shall take his or her portion, he is speaking in affirmation of what he said at the beginning of the paragraph, where he gave to the named persons an absolute and unqualified fee in remainder. The word "heirs" seems to be used in the same sense in both cases. Certain it is we have here a fee created by the use of strong and appropriate words to begin with, and it should not be cut down to a defeasible estate, unless the testator has clearly declared that to be his intention. That intention is not disclosed by the clause relied upon by the plaintiffs, for it must be read in connection with the preceding portion of the same devise. Taking the entire paragraph together, it cannot be said to have been the intention of the testator to bring forward the heirs of Levin Baker as substituted beneficiaries in case he shall die before Jemima Lindell. They are only mentioned as taking by descent from their father, and the will does not contemplate that they are to take as substituted devisees. It may be, and doubtless is, true that much that is said in this will was unnecessary, because the law would supply what is said in several instances; but in construing the will we must take it as a whole, and then determine the intention of the testator. Many arguments may be made on the one side and the other, based upon a consideration of the situation in life of the persons who were made beneficiaries in this will, but, after all, such arguments will be found to be pure speculations and unreliable guides. Counsel for appellants has collected and presented in his able brief a vast number of authorities, and one or two of them may be noticed here, though they have all been examined. In *Tillman v. Davis*, 95 N. Y. 17, the testatrix directed her executors to set off one-half of her estate for the use of her husband during his life, and provided that this half should be divided into seven equal parts, and as to these parts the will says: "I give, devise, and bequeath one of said equal seven parts of one of said two equal parts to each of the following persons and their heirs, [William N. Davis is mentioned as one,] the heirs of any or either of the foregoing persons who may die before my said husband to take the share which the person or persons so dying would have taken

if living." Davis died before the husband of the testatrix, leaving a will whereby he devised his interest in the property so bequeathed to him to his wife, and the wife of Davis came forward as a claimant under her husband's will. It was held to be immaterial whether Davis took a vested or contingent interest, because, whatever it was, it terminated at his death. In that event, says the court, it is quite clear that his heirs were to take by substitution in his place under the will of the testatrix. That case gives support to the construction contended for by the appellants in the case at bar. But it is to be remembered the testatrix constituted her executors trustees, and vested the title in them, with directions to convert the property into money, and distribute the proceeds. Where property is by will vested in trustees, with directions to convert the same into money, the directions for carrying the active trust into execution determine largely the character of the estate which the devisees take. In *Buck v. Paine*, 75 Me. 583, the testator gave the one-half of his estate to trustees, to have and to hold "for the equal use and benefit of my two grandchildren, Thomas and Susan Rich. * * * for the term of three years, at the end of which time the trust shall cease, and each one's share shall then go to said children, respectively." The trustees were given full power to sell and convey. A subsequent clause provides: "If either of said children die before the trust ceases, his or her legal heirs shall be substituted in place of deceased in every respect." Susan died testate within the three years, and the question was whether the estate passed by her will to her devisees. It was held the words of the will created an equitable vested fee in Susan, but subject to a condition, and that her death, during the continuance of the trust, defeated the fee, and the devise only took effect as an executory devise. The opinion in that case gives a concise and very clear statement of the law; but it will be seen the substitutional clause of the will is too clear to admit of doubt, and there is nothing in other parts of the will to modify the clear import of the words used. Enough has been said to verify the remarks made in *Preston v. Brant*, 96 Mo. 556, 10 S. W. Rep. 78, where it is said: "It may be said that, in construing wills, precedents are of but little value, except in so far as they may be like the case in hand, and except in so far as they formulate and lay down rules to be applied alike in the construction of all wills." The circuit court held that Levin Baker took a remainder in fee free from any condition, and this we believe to be the true construction of the Lindell will, and the judgment is therefore affirmed.

BACOLAY, J., not sitting. The other judges concur.

STATE *ex rel.* UNION DEPOT R. CO. *et al.* v. VALLIANT, Judge, *et al.*

(*Supreme Court of Missouri*. March 10, 1890.)

EMINENT DOMAIN—PROHIBITION.

A writ of prohibition will not lie to prevent the circuit court of the city of St. Louis from entertaining proceedings for the condemnation of property on the ground that it had no jurisdiction over the special class of property involved in the proceedings.

Petition for writ of prohibition.

Application of the Union Depot Railroad Company and others for a writ of prohibition against Hon. L. B. Valliant, judge of the St. Louis circuit court.

Frank, Dawson & Garoin, Smith P. Galt, and Hitchcock, Madill & Finkelnburg, for petitioners. *Lubke & Muench*, for respondents.

BARCLAY, J. This is an application for a rule upon respondents to show cause why a writ of prohibition should not issue to prevent the circuit court of St. Louis from further assuming jurisdiction of certain pending condemnation proceedings. The petitioners in this court are the defendants in those proceedings. Respondents are the plaintiff therein, and the circuit judge before whom the matter is pending. They have appeared to this application, resisting the issue of any rule on the showing made. It appears that the Southern Railway Company instituted the proceedings in question in the circuit court of St. Louis, in special term, No. 5, before Judge VALLIANT, to acquire the right to run its cars over the tracks of certain other street railroad companies, defendants, for a distance of several blocks, in the public streets of St. Louis. It invoked the power of eminent domain for this purpose through the usual process of condemnation, claiming the right to do so under the statutes of the state, and ordinances of the city.

That the circuit court of St. Louis has jurisdiction of proceedings to appropriate property to public use in the exercise of the right of eminent domain, in a proper case, is unquestioned and unquestionable; but the substance of the petitioners' contention here, as well as the ground on which they, as defendants, resisted the proceedings in the circuit court, is that the statutes and ordinances do not authorize the exercise of such jurisdiction on behalf of the Southern Railway Company. We are of opinion that the question thus raised is not a proper one for our decision upon this application. Where the action or course which a court is about to adopt is such as it has lawful power to take, it should not, ordinarily, be prohibited from taking it. Whether the particular facts on which the court proceeds in that regard are or are not sufficient to justify its exercise of jurisdiction is a question of law, the solution of which, either way, cannot impair the court's right to apply its judicial power in the premises according to its view of the law, and of the facts before it. For instance,

where a court has jurisdiction to render judgments in ordinary civil causes, it would be manifestly improper to issue a writ of prohibition against it on an application alleging that it was about to pronounce such a judgment on a petition which did not state a cause of action, but which the trial court had held sufficient, or because the latter had ruled, erroneously, that the plaintiff had a legal capacity to maintain the action. A mistaken exercise of a jurisdiction with which the court is by law invested, does not furnish a sufficient basis for a prohibition. Such mistake may be reviewed as other errors,—for example, by appeal,—but not by a proceeding like this. *Mastin v. Sloan*, 98 Mo. 252, 11 S. W. Rep. 558. By these remarks we intend no intimation that the orders of Judge VALLIANT in the condemnation case are in any respect erroneous, for that issue is not now before us. We are merely discussing, in the light most favorable to petitioners, the theory suggested in their present application. The circuit court, in the case in question here, had power to entertain proceedings of the general class to which that case belonged, namely, of proceedings for the condemnation of property to public use. It therefore had jurisdiction of the subject-matter. *Posthwaite v. Ghiselin*, 97 Mo. 424, 10 S. W. Rep. 482. No intimation of any want of jurisdiction over the parties has been made, or need be considered. On the showing made by petitioners the writ now asked could not properly be issued. So we deny their application for a rule; all the judges concurring in these views.

STATE *ex rel.* LAUPHEIMER v. HARRINGTON, Sheriff, *et al.*

(*Supreme Court of Missouri*. March 10, 1890.)

SHERIFFS—FAILURE TO EXECUTE PROCESS AS DIRECTED.

A debtor, being in falling circumstances, undertook, by confessions of judgment, to prefer certain creditors. He employed F. as attorney to prepare the necessary statements, and enter the confessions of judgment, and levy executions for such creditors, among whom was relator. F. entered the confessions in favor of seven creditors, and directed the sheriff to levy the executions, five of them simultaneously, and for the relator last. The creditors were notified, and a few days after relator applied to F. for an order on the sheriff, directing him to levy his execution on certain other property belonging to the debtor. Afterwards, learning that his execution had been levied subject to the other creditors as to the property first levied on, he employed other attorneys, and through them demanded that the sheriff should so amend the return as to show that relator's execution was levied simultaneously with the others. This the sheriff refused to do, and made the sale in accordance with the levies as first made. Held that, by recognizing the authority of F. to enter confession of judgment in his favor, the relator ratified all the acts done in such connection, and was bound by the levies made under F.'s directions.

Appeal from St. Louis circuit court; **SHERARD BARCLAY**, Judge.

Action by the state, on the relation of *William Laupheimer*, against *H. F. Har-*

rington and others, on bond of said Harrington as sheriff. There was judgment for defendants, and plaintiff appealed.

Krum & Jonas, for appellant. *E. T. Farish*, for respondents.

BRACE, J. This is an action on a sheriff's bond. The case was tried before the court without a jury. The finding was for the defendants, and judgment rendered in their favor, from which the plaintiff appeals. The facts are undisputed. On March 4, 1885, Jacob I. Mayer, a merchant in the city of St. Louis in failing circumstances, undertook, by confession of judgment in favor of certain of his creditors, to prefer the payment of their debts out of his property. For this purpose he employed one Nathan Frank to prepare the necessary statements, and obtain for such creditors entry of judgment by confession and levy of execution upon his property. In pursuance of such employment, the said Frank, as attorney for the said Mayer, prepared the necessary papers, and on that day the said Mayer, by means thereof, confessed judgment in the circuit court of the city of St. Louis in favor of the Mechanics' Bank for \$6,744; in favor of B. Lichtenstein et al., for \$10,910; the Fourth National Bank, for \$2,160; M. W. Mendall, for \$2,426; Levi Stern, for \$1,500; S. M. Lederer, for \$2,200; and in favor of the relator, for the sum of \$8,214.80. Executions were immediately issued upon such judgments, and delivered to the said Frank, whose name was indorsed thereupon as attorney for the plaintiffs, and who thereupon delivered the same to the sheriff, with directions to levy said executions upon the property of said Mayer in the following order: The executions in favor of the Mechanics' Bank, Lichtenstein, the Fourth National Bank, Mendall, and Stern, first and simultaneously; then the Lederer execution, subject to these five; then the Laupheimer execution, subject to the others; and immediately thereafter notified the several creditors aforesaid of his action in the premises. A few days afterwards Laupheimer appeared at the office of Frank, obtained from Frank an order upon the sheriff to levy his execution on a trade-mark of the said Mayer, and in a day or two thereafter appeared, and told Frank that he had learned that his execution had been levied subsequent and subject to the executions of the other creditors upon the other property of said Mayer. Upon being assured by Frank that such was the fact, he departed, and thereafter employed Messrs. Krum & Jonas as his attorneys, through whom the following order was procured from Mr. Frank: "To the sheriff of St. Louis—Dear Sir: I simply acted for the time being for Mr. Laupheimer. You are at liberty to follow the instructions of any other attorney he may designate. **NATHAN FRANK, Attorney for Laupheimer.**" Thereafter Messrs. Krum & Jonas represented the said Laupheimer in said judgment and execution; procured their names to be

indorsed on the execution as attorney for Laupheimer in place of Frank, caused the trade-mark of Mayer to be levied on; demanded, before sale of the property, that the sheriff amend his entry of the levy of said execution so as to show that it was simultaneously levied with the other executions; and that the proceeds of the sale of the property levied upon be prorated between the execution of plaintiff and the executions of the other judgment creditors delivered to him at the same time. This the sheriff refused to do; made the sale in accordance with the levies as originally made by direction of Frank; made return of the several executions, showing a sale under the first five executions recited, and that nothing remained to apply upon the plaintiff's execution, which was thereafter returned not satisfied, and the net proceeds of the sale under order of the court upon such return were prorated between said first five executions, he (the plaintiff) getting nothing on his judgment, and he brings this suit against the sheriff. There can be no question that Frank was the attorney of the debtor, Mayer, in the whole matter of attempting to secure his said creditors by confessions of judgments in their favor, and to secure a preference to certain of such creditors over others by having the executions levied in the manner stated. In these matters, so far as the evidence shows, he was not the attorney of the plaintiff, nor of any other creditor in whose favor a judgment was confessed; neither the plaintiff, nor any other of said creditors, were bound by his acts of those of his client in that behalf. There was but one party, and his attorney, to the proceedings, which resulted in the rendition of these several judgments, the issuance of executions thereon, their delivery to the sheriff by that attorney, and the levy made by the sheriff in pursuance of the attorney's directions. When these creditors were then notified what had been done by their debtor for their benefit, they were at perfect liberty to refuse to recognize the whole transaction, treat it as a nullity, and pursue their legal remedies for the collection of their debts, and this course was open to each one of them, whatever course others of them might see proper to pursue; or, upon the other hand, each one of them had the right to sanction and ratify what was done in their behalf, and to receive such benefit as might inure to him from this action of his debtor. But the transaction was an entirety as to each. From the confession to the levy, neither of the beneficiaries thereof could ratify a part and reject a part. The plaintiff could not say: "Your act in confessing judgment in my favor, in causing execution to issue thereon, and to be delivered to the sheriff at the time and under the circumstances, was beneficial to me, and I adopt that part of your act; but your act in directing the order of the levy of such execution is injurious to me, and I reject it." The one must be taken with the other, or the whole rejected. "One who ratifies an act

done in his name, without previous authority, ratifies it as done." *Menkens v. Watson*, 27 Mo. 168; *Story*, Ag. § 250; *Whart.* Ag. § 72. The plaintiff, in ratifying the act of his debtor's attorney in securing the judgment in his favor, in causing execution to be issued thereon, and delivered to the sheriff, also ratifies the levy made by the sheriff in pursuance of the directions of said attorney given him at the time of the delivery of the writs of execution, and the sheriff, in making the sale and accounting for the proceeds in accordance with such levies, has been guilty of no breach of the conditions of his bond of which the plaintiff can complain in respect thereof. All concur, except BARCLAY, J., not sitting.

GERKE v. GERKE.

(Supreme Court of Missouri. March 10, 1890.)

DIVORCE—ALIMONY—AMOUNT—EVIDENCE.

Plaintiff and defendant had been married 33 years, and by industry and economy had accumulated an estate worth about \$12,000. Plaintiff, who was 57 years old, and in delicate health, had always been a faithful wife, but defendant had treated her with great brutality, and had been guilty of adultery. Defendant was 54 years old, and in robust health, and was making money in his business, and the wife had no means of support, and from the condition of her health could not earn anything. Held, that an allowance of \$6,000 as alimony was not excessive.

Action for divorce and alimony, brought by Augusta Gerke against Henry Gerke. There was decree for plaintiff, and an allowance of \$6,000 alimony. From this allowance defendant appealed.

C. A. Schwabe, M. Kinsely, and J. R. Kinsely, for appellant. Lubke & Muench, for respondent.

BRACE, J. This is an appeal from the judgment of the circuit court of the city of St. Louis, in which the plaintiff was, by the decree of said court, granted a divorce from her husband, the said Henry Gerke, defendant, allowed alimony in gross in the sum of \$6,000, \$175 attorney's fees, and, pending the appeal, \$35 per month, to be credited on the alimony in gross. The defendant appeals not only from the allowance in gross, but from the allowance *pendente lite*, gave bond, and has paid nothing on account of alimony pending the appeal to entitle him to a credit on the amount allowed the plaintiff in gross, in lieu of alimony. In his brief he says: "The defendant does not seek to disturb the decree of divorce, but contends that the award of alimony ought to be set aside," and the only question presented is whether the allowance in gross, in lieu of alimony, is excessive. The plaintiff, at the date of the trial, was 57 years old, and in delicate health. The defendant was 54 years old, in robust health, and engaged in a profitable business. They had been married and had lived together as husband and wife for about 33 years. By their industry and economy the defendant had accumu-

lated an estate estimated to be worth from ten to fifteen thousand dollars. The plaintiff had always faithfully demeaned herself, and discharged all her duties to the plaintiff as his wife. Nevertheless the defendant, as the evidence shows and as the trial court found, was not only guilty of indignities to her person, by brutal and unprovoked assaults upon her, but of the highest crime against the marital relation,—that of adultery. They have no minor children dependant upon them for support. The trial court found that the value of the estate, real and personal, of the defendant, was \$18,000. After a careful review of the evidence, we are satisfied that when this suit was commenced the defendant was possessed of an estate of that value. Soon after it was commenced he put incumbrances on it amounting to \$3,200, and on the trial introduced evidence tending to show that he was otherwise indebted in the sum of about \$1,000. The circumstances under which this indebtedness was created, the condition of the defendant's business at the time, its exigencies and previous history, the unsatisfactory explanation given of the consideration therefor, all tended to raise grave doubts in the mind of the trial judge as to its *bona fides*, and the evidence so impresses us; and we have little fault to find with a conclusion drawn from all the evidence that, at the time the decree of the circuit court was rendered, the defendant over and above his indebtedness, was worth about \$12,000. That decree gives the plaintiff a moiety of the defendant's fortune. Is it, under the circumstances, too much? As before intimated, this fortune represents the joint labor, thrift, and economy of 33 years of the married life of the plaintiff and defendant. The one, equally with the other, is the meritorious cause of its existence. By hard work, faithfully performed by each, within their respective spheres, it was saved and laid by, from the rewards of their daily labor. They should have gone down to their graves in its mutual enjoyment. That they have not done so is not the fault of the plaintiff. Without fault upon her part, she has, by the brutal and unfaithful conduct of her husband, been deprived of the fruits of her toil, and thrown upon the world, with nothing but a little household furniture, the value of which is not worth estimating. Her age and the condition of her health are such that she can by her labor do but little towards making a support, and reduces to an inappreciable amount the suggested value of her inchoate right of dower, when considered in connection with the age and health of the defendant. The husband is in possession of all the fruits of their joint labor. He has it invested in real estate, and in a profitable and thriving business. He is in the enjoyment of vigorous and robust health, and "making bushels of money," as he expresses it. Under these circumstances, it did not seem to the chancellor that it was anything but fair and just that the innocent, injured, and comparatively helpless wife should have a moiety of this es-

tate; and now, after the lapse of more than two years, during which time the defendant has refused to pay the moderate alimony, pending his appeal to this court, allowed her by the trial judge, or to contribute anything to her support, but has put her to the expense and delay of prosecuting two actions through the appellate court in order to get anything, do we feel disposed to disturb his judgment? The judgment of the circuit court is therefore affirmed. All concur.

ON MOTION FOR REHEARING.

(March 22, 1890.)

PER CURIAM. The motion for rehearing herein is overruled. Execution on the judgment of the circuit court in favor of the plaintiff (herein affirmed) will be stayed until the said Augusta Gerke shall have executed a conveyance in due form of law relinquishing to said Henry Gerke all her inchoate dower interest in his estate, and deposited the same in the office of the clerk of the St. Louis circuit court for the use of the said Henry Gerke, and if he shall thereupon, or within 20 days after such conveyance shall have been so deposited, pay to the said Augusta Gerke, or into said circuit court for her use, the sum of \$2,000, then a further stay of execution upon said judgment shall be allowed the said Henry Gerke for six months from the date of such payments, for the remainder thereof, with interest, and when the full amount of said judgment shall be paid then the said conveyance shall be delivered to the said Henry Gerke.

CORRIGAN *et al.* v. TIERNAY *et al.*

(Supreme Court of Missouri. March 22, 1890.)

REFORMATION OF DEED—MISTAKE.

Where a man purchases land with the intention of having the deed made to himself and wife as joint grantees, so as to convey an estate by the entirety, and so instructs the conveyancer, but through mistake the deed is made to the wife alone, a court of equity will, after the wife's death, vest the title in the husband, though the deed, when made, was read to him, and he thought it was sufficient to convey an estate by the entirety.

Error to St. Louis circuit court.

A. R. Taylor, for plaintiffs in error. *R. M. Nichols*, for defendants in error.

BLACK, J. This was an action of ejectment for a lot having a front of about 22 feet by a depth of 137 feet, in St. Louis. The defendant Patrick Tiernay answered by way of a general denial, and then set up an equitable defense, praying for affirmative relief. Issues of fact were submitted to a jury, and on the incoming of a verdict the court made a decree divesting the plaintiffs of the title, and investing the same in defendant. The evidence is not preserved in the record before us, and the only question for our consideration is whether the decree is warranted by the pleadings. The answer of Patrick Tiernay sets up these facts: That his wife, Catherine, died in December, 1885; that the plaintiffs are her children by a former marriage; that

in June, 1879, he became desirous of acquiring a home for himself and wife by having the title vested in them as an estate of entirety; that at the last-mentioned date he purchased the property described in the petition, it then being a vacant lot, from one Smithwick, and paid therefor out of his own funds the sum of \$300; that he directed Smithwick to make the deed to himself and wife as joint grantees; that Smithwick or his agent, through some mistake or misapprehension, caused to be executed to defendant a deed describing the grantees therein as "Catherine Tiernay, wife of Patrick Tiernay;" that he was unable to read writing, or to read the deed, and requested the same to be read to him; that, upon hearing it read, he understood and was advised that the property was conveyed to his wife and to himself, and that the survivor would inherit the entire estate; that thereupon he caused the deed to be recorded, and with his own funds erected a house on the lot at a cost of \$3,800; that he did not know that the property had been conveyed to his wife until after her death, and when this suit was brought; that he never agreed that the property should be conveyed to her alone, and never intended it as an advancement; and that his wife, during her life, made no claim to the property. The plaintiffs went to trial on this answer, without having demurred to it, and without having made any motion to require the defendant to make it more specific and definite; so that the objections that the answer does not show who read the deed to defendant, or who advised him that the property was thereby conveyed to himself and wife, must be disregarded. As the case is presented on this record, we must assume that every allegation was proved by the evidence offered on the trial.

The point pressed upon our attention is that, according to the answer, Patrick Tiernay had full knowledge of all of the facts, and the mistake was simply a mistake of law, in supposing the deed would convey the title to him and his wife jointly. It is a well-established general rule that a court of equity will not grant relief against a mistake of law, unmixed with any mistake of fact. *Price v. Estill*, 87 Mo. 378; *Norton v. Highleyman*, 88 Mo. 621. There are, however, some exceptions to this general rule. Cases arise where there is a mixed mistake of law and of fact, in which relief will be granted. Thus in the case of *Griffith v. Townley*, 69 Mo. 13, an administrator sold land of his intestate, supposing that it was the fee that he was selling, and the purchaser supposed that it was the fee that he was buying. It transpired that nothing passed by the sale but the equity of redemption. It was held there was such a mutual mistake of fact and law as entitled the purchaser to relief. See, also, *Cassidy v. Metcalf*, 66 Mo. 519. But it is not necessary to a disposition of the case in hand to follow out the many distinctions taken in the class of cases just mentioned. If an agreement is what the parties thereto in-

tended it should be, equity does not interfere, because the parties did not understand its legal effect. "The principle underlying the rule is," says Mr. Pomeroy, "that equity will not interfere for the purpose of carrying out an intention which the parties did not have when they entered into a transaction, but which they might or even would have had if they had been more correctly informed as to the law." 2 Pom. Eq. Jur. § 843. A different case is presented where the instrument, as it is reduced to writing, fails to express the contract which the parties actually entered into. In such cases equity will reform the contract, and this, too, though the instrument fails to express the contract which the parties made by reason of a mistake of law. Says the author last named: "In short, if a written instrument fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant its relief, affirmative and defensive, although the failure may have resulted from a mistake as to the legal meaning and operation of the terms or language employed in the writing." Id. § 845. Now, the answer of Tiernay states that he was desirous of acquiring a home by having the title vested in himself and wife as an estate by the entirety. The legal effect of a conveyance to husband and wife is to create such an estate, and the survivor takes the whole. *Garner v. Jones*, 52 Mo. 68; *Modrell v. Riddle*, 82 Mo. 31. The answer discloses the fact that Smithwick resided in the state of Kansas, but had an agent in St. Louis; and it then states that defendant "directed the said grantor, Smithwick, through his agent in St. Louis, to make the deed of said property to Catherine Tiernay and defendant as joint grantees; that thereupon, through some mistake or misapprehension of said Smithwick or his agent, the said grantor executed and delivered a deed to defendant to the said premises, * * * describing the grantees as Catherine Tiernay, wife of Patrick Tiernay." Here is enough to show that the contract which the defendant made was that the deed should be made to himself and wife as grantees. This contract the deed does not express, and it is competent for a court of equity to make it express the real contract. It matters not that the defendant heard the deed read, and supposed and was advised that it created an estate in himself and wife with survivorship. It does not create such an estate, and therefore is not the contract which defendant made. The title should be in the defendant Patrick Tiernay, and we see no objection to the decree investing the title in him. The judgment is affirmed. All concur.

O'BRIEN v. WESTERN STEEL CO.

(Supreme Court of Missouri. March 10, 1890.)

MASTER AND SERVANT—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

In an action for damages for the death of plaintiff's son, caused by defendant's defective

elevator, it appeared that the elevator was managed by an operator in the engine-room; that deceased got on to descend from the top story of the building, and, as it approached the first floor, leaned forward to step off, when the operator suddenly reversed the motion, sending the elevator up again, thus crushing deceased between the elevator and the second floor. It further appeared that from his position in the engine-room the operator could not see the elevator; that the duties of deceased were in the factory yard, and did not require him to go upon the elevator; that at the time of the accident he had left his work, and gone up to the top story of the factory, to get a drink of ice water; that he had done this several times before, and knew of the peculiar construction and management of the elevator; that there were stairways for the use of employes, and the elevators were used only for freight. *Held*, that an instruction directing a verdict for the defendant was not erroneous.

Appeal from St. Louis circuit court; SHEPARD BARCLAY, Judge.

This action was brought by Margaret O'Brien against the Western Steel Company for damages for the death of her son William O'Brien, an employe of defendant. There was judgment for defendant, and plaintiff appealed.

T. B. Childress, for appellant. *Cunningham & Elliot*, for respondent.

BRACE, J. This is an action to recover damages by a mother for the death of her minor son, William O'Brien, an employe of the defendant, who was killed in an elevator on defendant's premises. At the close of the plaintiff's testimony the court gave an instruction that the plaintiff should not recover. She thereupon took a nonsuit, with leave. Her motion to set aside the nonsuit having been overruled, and judgment rendered for the defendant, she appeals. Plaintiff's cause of action is made to appear by the following averments contained in her amended petition: "That on the 5th day of August, 1886, about 11 o'clock in the night-time, the said William O'Brien, being in the employ of the defendant, as aforesaid, and being on said elevator, descending from the fourth or top floor of said building to the first floor thereof, and the said elevator having descended nearly to the first or ground floor of said building, and having stopped for an instant, and the said William O'Brien having stepped to the front of said elevator, to a position from which he could step therefrom to the ground or first floor as soon as said elevator should reach said first floor, and the person managing, operating, and running said elevator not being able to see said William O'Brien on said elevator from where he was compelled to stand in order to manage and operate said elevator, owing to the negligent and improper construction thereof, and not knowing that said William O'Brien was standing on said elevator, near the front thereof, ready to step therefrom when it reached the first floor of said building, suddenly reversed said elevator, and started it upwards, and that said William O'Brien was then and there and thereby caught between the platform or floor of said elevator and the

arch of the opening or entrance to said elevator, and was then and there so crushed and injured between the platform or floor of said elevator and the said arch that he died almost instantly therefrom. That the death of said William O'Brien was caused by the fault and negligence of the defendant in not having said elevator so constructed and arranged that the person employed to manage, operate, and run said elevator, whilst managing, operating, and running the same, could see on to the said elevator from the point where he had to stand when operating, managing, and running the same, and could see and know when any person was on said elevator when it reached the first or ground floor of said building and was near to the front of said elevator floor; all of which said defendant might and would have had, by the use of reasonable and ordinary care and diligence."

It does not appear, from the pleadings or evidence, when or by whom the elevator in question was constructed, or to whom it belonged. It only appears that at the time of the accident, and for some time prior thereto, the defendant was in possession of the premises, operating the elevator, for the purposes of its business, in transporting material (coke, coal, ore, iron, etc.) to and from the several floors of the building in which it was situated; that, for the purposes of this business, it was not necessary that any person should be transported on it; that there were stairways in the building for the use of those who desired to go up or down, from one floor to another; but that for some months previous to the employment of the plaintiff's son, and during the time of his employment, the elevator was frequently and continuously used by the defendant's employes in going from one floor to another. The elevator was a double one, having two cages; one going up as the other came down. The cages were open platforms, and moved in a well or shaft inclosed by brick walls, having arched openings on each floor; was operated by steam, and managed by the operator from the engine-room, adjoining the shaft on the ground floor, by means of a crank. From his position at the crank, through a window in the wall, he could see only a part of the platform of the cage on which the accident happened as it passed between the first and second floors. Owing to obstructing machinery in the engine-room, he could not see that part between the center of the platform and the front, towards the arched opening of the first floor.

About five weeks before the accident, William O'Brien, plaintiff's son, became an employe of defendant. His duties were, in connection with another employe, to unload "rail butts from trucks brought to his post, and which were thereafter, on buggies or barrows," wheeled to the hoist by other employes, and carried thereupon to their appropriate floor. With these butts, before they reached, or after they were reloaded on, the buggies, he had nothing to do. His post was

outside the building, and his duties did not require him to enter the same, or go upon the elevator. Before the accident he had frequently visited the engine-room, and had ridden upon the elevator. At the time of the accident the workmen on the several floors were, by an arrangement of their own, furnished with ice, to go into their water, at their own expense. The deceased and his comrade had made an arrangement for their ice water with the workman on the fourth floor. On the night of the accident the deceased and his comrade had separately gone to the fourth floor for a drink of water, as they had done for about a week before the accident. After getting their drink, they remained on the fourth floor about 10 minutes, then entered the cage, gave the signal for lowering, and as they descended the deceased stepped to the side, and near the edge of the platform, next to the opening on the first floor,—his comrade just behind him. When they had passed the arch of the opening on the first floor the deceased leaned forward, projecting his head about 3 inches into the archway, preparing to step off when the cage should reach the ground floor. When the platform of the cage reached within about 18 inches of the ground, however, its motion was suddenly reversed. The cage went up, catching the deceased's head between the platform and the arch, crushing it down on the platform, and inflicting injuries from which he directly died. The operator of the elevator, from his position at the crank in the engine-room, could not see the space on the platform of the cage occupied by the deceased; and his companion, at the time he reversed the motion, says he did not know that anybody was on it, and reversed it because the other cage was wanted below. If the platform had descended to the level of the ground floor, as was the custom for it always to do before that time, that the deceased would have gotten off safely there can be no question. He was on the elevator, not as an employe of the defendant, discharging duties within the scope of his employment, but, at best, under an implied license, for his own pleasure and convenience. He was familiar with its construction and operation, and, when he went upon it, accepted whatever risk there was incident to such construction and operation. It did not become the duty of the defendant to change either the one or the other by reason of the fact that the deceased and other employes of the defendant, for their own convenience, were impliedly permitted to ride upon it; such implication arising simply from the fact that they so used it without remonstrance. The only duty that such use could impose upon the defendant would be to operate its elevator in its business with ordinary care. In view of such use, a failure to so operate it would be an act of negligence, and a breach of duty, for the consequences of which the defendant might be held liable. The petition, however, states no cause of action against the defend-

ant for any act of negligence in operating the elevator. So that branch of the subject need not be further considered, so far as the rights and the duties of the parties in this action are concerned.

The act of negligence charged is in the plan upon which the elevator was constructed; and the important preliminary inquiry, what was the proximate cause of the death of the plaintiff's son? may obviate the necessity of any extended discussion of that plan, or its supposed connection with the injury. Obviously, two concurrent acts produced that death,—the act of the deceased in placing himself in an attitude to step off the elevator, and the act of the operator in suddenly reversing its motion. Conceding that the evidence does not warrant an inference that the deceased was guilty of negligence in placing himself in the position he did at the time, and under the circumstances, then, if his death was the result of any negligent act, it was that of the operator in reversing the motion of the elevator, and that negligent act was the proximate cause of his death. This act being the immediate cause of the injury complained of, if it was contributed to in any manner by the supposed defect in the plan of construction, that defect, at best, could only be a remote cause, and would not support plaintiff's action. There was in fact, however, no defect shown in the plan or the construction of the elevator to contribute to the death of plaintiff's son. It was safe and sufficient, not only for all the purposes of defendant's business, but for all the uses to which it was put by the defendant's employes, if operated with ordinary care. The negligence, if any, that caused the death of the deceased, was in the operation of the machine, and not in its plan or construction. The allegations of the petition were wholly unsupported by the evidence, both as to the alleged act of negligence and as to the proximate cause of the death of William O'Brien, and at the close of plaintiff's case the court could not do otherwise than instruct that she could not recover; and there was no error in its refusal to set aside the nonsuit taken by reason of such instruction. All concur, except BARCLAY, J., not sitting.

ROE v. CITY OF KANSAS.

(*Supreme Court of Missouri*. March 23, 1890.)

DEFECTIVE SIDEWALKS—EVIDENCE.

1. Where a city opens a sidewalk to public travel, it is bound to keep every portion of it in repair.
2. The refusal of the court below to strike out incompetent evidence is not reversible error, where the facts sought to be proved thereby have been established by other and competent evidence.

Appeal from circuit court, Jackson county; J. H. SLOVER, Judge.

R. W. Quarles and W. A. Alderson, for appellant. Crittenden, McDougal & Stiles, for respondent.

SHERWOOD, J. Action for damages caused

by falling on a trap-door placed in the sidewalk. It was charged in the petition and was established at the trial that the hinges on the door had been broken, and that it was in such a condition that, by stepping upon some parts of it, it would tip up. It was in this way that the accident to plaintiff occurred. This defect in the door had existed for some months, and the injuries to plaintiff were of a permanent nature. The jury brought in a verdict giving damages at \$5,500, and defendant appeals. Error is assigned but upon two points: (1) The refusal of the court to strike from the testimony of respondent's witness Zeno R. Brown that "from the appearance of the iron of the door hinges * * * I would judge the hinges had been broken for some time," and "the doctor saw her, and pronounced her nose broken." (2) The court erred in giving instruction No. 1 in behalf of the respondent.

As to the first assignment, it is sufficient to say that no exceptions were saved to the action of the court in refusing to strike out the testimony asked to be stricken out; and that if the testimony was obnoxious to criticism, as being incompetent, the same facts were established by competent evidence, and so the incompetent evidence did not hurt.

The first instruction asked by plaintiff is the following: "The jury are instructed that in this case the plaintiff seeks to recover damages for injuries alleged to have been received by her on account of a defect in a sidewalk on Wyandotte street, in said city, which it was the duty of the city to keep in repair. Her claim is based upon the negligence of the city in not repairing the defect, and her injury resulting therefrom. The city by its answer denies both the negligence and the injury. Under the evidence, it is for you to determine both of these questions. It was the duty of the city to keep the sidewalk in repair; the plaintiff had the right to presume that this duty had been performed, and that the sidewalk was in safe condition for the use of the public." We find nothing objectionable in this instruction. It is urged, however, that the words, "to keep the sidewalk in repair," meant "all the sidewalk," and therefore the instruction was erroneous. But this is stretching the instruction beyond legitimate limits. How wide the sidewalk was at the point the injury to plaintiff occurred does not appear. Conceding, as was decided in *Tritz v. City*, 84 Mo. 632, that the same rule ought to apply to sidewalks as to streets, still it does not appear that the sidewalk was of sufficient width for the use of the public, unless the defective portion thereof was taken into the account, and, if this was so, then the instruction was correct in any event; and it was the duty of the complaining defendant to disclose the error in the instruction, if error there was, by disclosing the width of the sidewalk. But it seems to us there is an obvious difference between a sidewalk, considering the uses to

which it is ordinarily applied, and a street. Over the sidewalk, and the whole of the sidewalk, pedestrians pass continuously; but this is not necessarily so of a street, which, for the most part, is used only by teams. The court went too far in the *Tritz Case*, and we are of opinion it should no longer be followed. Moreover, that case was overruled in the recent case of *Walker v. City*, 12 S. W. Rep. 894. Judgment affirmed. All concur.

SCHMIDT *et al.* v. NEIMEYER *et al.*

(*Supreme Court of Missouri*. March 22, 1890.)

TAX-SALES—BONA FIDE PURCHASERS.

Defendants in a tax-suit received no personal service of the summons, and put in no appearance. An order of publication was made on the false return of the sheriff that defendants could not be found. The judgment which was entered for a sum in excess of that recited in the order of publication was vacated on motion at a subsequent term. *Held*, that the title of purchaser under the execution sale, without notice of the irregularities, was good. *SHERWOOD, J.*, dissenting.

Error to St. Louis circuit court; *AMOS M. THAYER*, Judge.

This is an action of ejectment. It is conceded that plaintiffs' title would prevail but for the interference of a sheriff's deed made under execution in a back-tax suit, which forms the basis of defendants' claim. Plaintiffs question the validity of the proceedings in the tax-suit. They made a successful motion in the trial court to set aside the judgment therein. That motion was filed at a term long subsequent to the execution sale. Defendants' grantor, who purchased at the sale, was a stranger to the record, and, until then, to the title. Plaintiffs were defendants in the tax-suit, and, as such, a summons issued against them when it began. The sheriff's return thereon was that they could not be found. Upon that an order of publication was made under section 3496, (Rev. St. 1879,) the court being satisfied that the ordinary process of law could not be served upon them. No appearance was made on the part of defendants, and in due course a judgment was entered against the property in question for the amount of the delinquent taxes. Under the judgment the execution sale took place on which defendants' title rests. The circuit court declared the law to be that plaintiffs could not recover. After the necessary steps for a review, the plaintiffs appealed.

Kehr & Tittman, for plaintiffs in error.
E. P. Johnson, for defendants in error.

BARCLAY, J., (after stating the facts as above.) 1. The questions involved in this appeal have been determined by former decisions of the court. It has been held that an order of publication, regularly made, cannot be attacked collaterally, as against an innocent purchaser thereunder, by showing that it was predicated on an untrue suggestion to the court. *Payne v. Lott*, 90 Mo. 676, 3 S. W. Rep. 402. In this case the basis of the order was the sheriff's return, that defendants

could not be found. We see no sufficient reason for disturbing the ruling made in the opinion cited. Practical hardships frequently arise in applying the rule that parties to a cause are concluded by the returns made by law officers upon process therein, but probably greater hardships and uncertainties in the administration of justice would follow its abrogation. If a return be false, the remedy lies against the officer who made it; but parties who may have acted upon it, as in the case at bar, innocently, are protected by it.

2. The fact that the judgment was vacated by the trial court, on motion at a subsequent term, does not affect the rights of a purchaser (without notice of irregularities) at the sale under an execution on the judgment, where the latter is not wholly void. This was expressly determined in *Jones v. Driskill*, 94 Mo. 190, 7 S. W. Rep. 111, which is decisive here.

3. If, as plaintiffs contend, the tax judgment was entered for a sum in excess of that recited in the order of publication, it would not be void for that reason. Until attacked directly and vacated for such error, the judgment would be good collaterally. *Allen v. Ray*, 96 Mo. 542, 10 S. W. Rep. 153. These are the only points made against the validity of the tax-sale. The trial court appears to have made no error. We agree to affirm its judgment, except *SHERWOOD, J.*, who dissents.

ROBERTSON v. DRONE.

(*Supreme Court of Missouri*. March 22, 1890.)

EJECTMENT—INSTRUCTION—JUDGMENT.

1. In ejectment the only question was the location of a boundary line. The jury found for plaintiff, and that "the Ross survey is the correct line, being seven and nine feet south of the hedge as shown by the evidence." There was nothing in the petition to show where the boundary was, or ought to be. *Held*, that a judgment for the land described in the petition, and for possession "not further south than the boundary line in said verdict described," was too vague and indefinite.

2. Plaintiff's right to recover, on the evidence, depended on the establishment of the Ross line as the true dividing line. The court instructed that if the jury believed that the survey made by Ross was substantially correct, and in accordance with the old survey made by Kirtly, they should find the Ross line to be correct. *Held* error, there being nothing to warrant the declaration, as a matter of law, that the Kirtly survey was the true dividing line, and defendant not having conceded it to be the true line.

Appeal from circuit court, Saline county; *J. P. STROTHER*, Judge.

Geo. L. Hays and *Boyd & Sebree*, for appellant. *Davis & Wingfield*, for respondent.

BRACE, J. This is an action in ejectment, the only question at issue being the correct location of the boundary line between plaintiff, who is the owner of the E. $\frac{1}{2}$ of the N. E. $\frac{1}{2}$ of section 6, township 50, range 23, and the defendant, who is the owner of the E. $\frac{1}{2}$ of the S. E. $\frac{1}{2}$ of the same section. The jury returned the following verdict: "We, the jury, find for the plaintiff, and find that the

Ross survey is the correct line, being seven and nine feet south of the hedge as shown by the evidence, and also give one cent damages to the plaintiff." Upon this verdict the court rendered the following judgment: "That the plaintiff recover of defendant the possession of the lands described in the petition, to-wit: The east half of the north-east $\frac{1}{4}$ of section 6, township 50, range 23, in Saline county, Mo., lying south of the hedge, with one cent damages, without monthly rents and profits, and that the plaintiff recover from the defendant the costs of the suit; and the court doth further order that an execution issue to restore to said plaintiff the possession of said lands and tenements, or so much thereof, not further south than the boundary line in said verdict described, as said defendant shall be found in possession of at the time of the execution of said writ, and for costs of this court."

The plaintiff, in his petition, sued simply for the possession of the E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 6, township 50, range 23. There was nothing in the petition to indicate where the boundary line between his land and that of the defendant was or ought to be located, and the judgment of the court that he recover the lands sued for, as described in the petition, would afford no guide to the officer executing the writ as to what land in possession of defendant was to be delivered into the possession of the plaintiff. The directions to restore the plaintiff to the possession of so much of said lands, not further than the south boundary line in said verdict described, as said defendant shall be found to be in possession of, might, perhaps, have been complied with, if the verdict had fixed any definite line as the south boundary line of plaintiff's premises, but the verdict leaves the line indefinite, being "seven and nine feet south of the hedge as shown by the evidence;" but where seven and where nine feet does not appear. It is possible the court might, upon this verdict, in the light of the evidence, and the issues thereupon submitted to the jury in the instructions, have entered a judgment definitely describing the strip of land to be recovered; but the judgment is as vague and indefinite as the verdict, and not susceptible of intelligent execution.

On the trial of the cause the following instruction was given, in which, also, there was error: "The jury are instructed that where there are conflicting surveys they must take into consideration all the evidence concerning the correctness of said surveys, and the history of the same, as detailed in the evidence; and if, under all the evidence, the jury believe that the survey made by Ross was substantially correct, and in accordance with the old survey made by Kirtly, then the jury will find the line established by Ross to be correct; and, if the jury find that said line falls south of the hedge in question, then the finding must be for the plaintiff, unless they find the hedge an agreed line, as elsewhere instructed." The right of the plaintiff to

recover on the evidence depended upon the establishment of the fact that the line of the survey made by Ross was the true dividing line between plaintiff's and defendant's land. This instruction assumes that an old survey made by Kirtly established the correct line, and, in effect, tells the jury that, if they find that the line of the Ross survey and the line of Kirtly's survey correspond, then they have found the true line, and must find for the plaintiff. There is nothing in the evidence that would authorize the court to declare, as matter of law, that the line of Kirtly's survey was the true line between these half sections, nor anything from which the conclusion can be deduced that the defendant conceded that such line was the true line. For this error the judgment would have to be reversed, and the cause remanded for new trial, even if the judgment were not defective in the respect mentioned; and it is, accordingly, so ordered. All concur.

STATE *ex rel.* LOVE v. HANNIBAL & ST. J. R. Co.

(Supreme Court of Missouri. March 10, 1890.)

RAILROAD COMPANIES—TAXATION FOR PAST YEARS
—STATE BOARD OF EQUALIZATION—ROAD TAX.

1. Act Mo. 1871, pp. 56-59, creating a state board of equalization to adjust and equalize the valuation of railroad property, and authorizing them, on "the evidence produced before them," to increase or reduce the aggregate valuation of any railroad property as "they may deem just and right," does not require them to base their valuation on any other evidence than the report of the company's officer; nor does it require them to preserve the evidence in the record of their proceedings.

2. Section 8 of this act, providing for taxation for past years, on the valuation to be adjusted and equalized by such board, of property which "shall have been subjected to taxation" prior to the passage of the act, but shall not have been assessed, refers only to such property as before the passage of the act was subject and liable to taxation, but has escaped it through inattention of the owner or inadvertence of the county officers.

3. The fact that the board fixes the same valuation for past years as for the year in which the assessment is made does not raise such a suspicion that it has acted arbitrarily and without evidence as will overcome the legal presumption that it has honestly discharged its duties.

4. Const. Mo. 1875, prescribing a limit to taxation, applies only to taxes for years subsequent to its adoption, and does not affect the validity of levies made after its adoption for years prior thereto.

5. Act Mo. 1868, p. 151, repealing former acts relating to taxes for maintenance of public roads, provides in section 7 that county courts may borrow money on the credit of the county for the purpose of opening and repairing public roads, and levy a tax to meet the interest thereon. Section 27 provides that, for the purpose of opening, repairing, and improving roads, and in order to raise the necessary funds, the county courts shall levy a special tax, which shall be known as the "road tax," said levy to be made as the county revenue is levied; and that all property subject to pay a county tax shall be made subject to pay a road tax. Subsequent acts classify all taxes into state, county, township, school, and municipal taxes. *Held*, that the road tax is a county tax, within the meaning of the special charter of defendant company, (Act Mo. 1847, p. 157, § 4,) exempting said company from payment of county taxes.

Appeal from circuit court, Caldwell county; J. M. DAVIS, Judge.

Strong & Mosman and Thos. E. Turney, for appellant. Crosby Johnson, for respondent.

BRAOE, J. This is an action, brought in the name of the state, at the relation of the collector of Caldwell county, to recover certain taxes assessed and levied against the property of the defendant in said county for the years 1867, '68, '69, '70, '71, '72, '73, '74, '75, '76, and '77, with interest, and penalties for the non-payment of the same. The plaintiff recovered judgment for the amount of the road tax for all of said years except the year 1873, and for the amount of the school taxes for the years 1867 to 1872, both inclusive; the whole aggregating, with costs, the sum of \$78,121.12. The court found for the defendant as to all the taxes for the year 1873, and as to all other taxes for other years sued for, except the items stated. The taxes for which judgment was recovered were upon the defendant's real estate and road-bed, together with the side tracks and station-houses appurtenant thereto, situate in said county. The errors assigned, and for which it is contended the judgment should be reversed, will be noticed in the order in which they are urged by counsel.

1. It is conceded by counsel that it was shown by competent evidence that the road and school taxes for the years 1867 to 1872, inclusive, were levied in pursuance of the valuation placed upon defendant's property in said county by the state special board of equalization for railroad property, created by act of the general assembly. Sess. Acts 1871, pp. 56-59. But it is contended that that evidence, consisting in part of the journal of the proceedings of said board, also shows that the valuation of defendant's property made by its president was increased by the board without notice,—arbitrarily, and without hearing any evidence. It appears satisfactorily from the evidence that the board met and continued in session at the time and place when and where the assessment was made as required by law, of which time and place it was the duty of the defendant to take notice; that they took up the return made by the defendant of its property, and made this assessment "after mature deliberation." The only ground for the contention that they made the increase without evidence is that the record of their proceedings does not show affirmatively that such increase was made upon any other evidence than the return of defendant's officers. The law did not require that the evidence upon which they based their valuation should be preserved, or upon what evidence it should be based. Upon "the evidence produced before them," they were required to increase or reduce the aggregate valuation of any railroad company as "they may deem just and right." Section 7, p. 57, *supra*. There is no foundation for the contention that there was no evidence before them upon which to base

an increase. They had the report of the defendant of its own valuation of its property, and of every other railroad company in the state, as a basis for equalization,—for increase or reduction to such a standard as to them might "seem just and right." What other evidence they may have had in regard to the value of defendant's property does not appear upon the face of the record of the board, nor was it necessary that it should so appear. *Hannibal & St. J. R. Co. v. State Board*, 64 Mo. 294. That the board fixed the same valuation upon defendant's property for the precedent years that they did for 1872 may raise a suspicion in the minds of counsel that they acted arbitrarily and without evidence, but such a suspicion, surely, ought not to be permitted to overcome the legal presumption that these sworn officers, acting in a *quasi* judicial capacity, honestly discharged their duties; and against any mere mistake of their judgment no court can give relief except by a direct review of such judgment in a manner provided by law. We find no error in the ruling of the court that the taxes were legally assessed in this respect, if the defendant's property was subject to taxation for the years for which they were so assessed.

2. It is contended that the defendant's property is not liable for the school taxes for the years 1867-1872, for which plaintiff recovered judgment, for the reason that, although subject to taxation for school purposes for those years, (*Livingston Co. v. Railroad Co.*, 60 Mo. 516,) yet, not having been subjected to taxation for such purposes, by appropriate legislation, prior to the act of March 10, 1871, it could not be subjected to taxation, under the provisions of that act, for those years. For support of this contention, reliance is placed on the language of the third section of said act, and upon the decision in *State v. Railroad Co.*, 77 Mo. 202. Said section reads as follows: "Sec. 3. In case any such railroad or other property of any such company, heretofore specified, shall have been subjected to taxation, prior to the passage of this act, for any year for which it shall not have been assessed and paid taxes, then," etc. In *Livingston Co. v. Railroad Co.*, *supra*, in construing this section in an action for taxes levied under the same act against the property of defendant in that county, the court, per NAFTON, J., uses this language: "This section does not undertake to subject to taxation property which at the date of the ordered assessment was not liable to taxation, but merely to declare that, in case property which has been subject to taxation prior to the passage of the act has escaped taxation either through the inattention of the owner or of the county officers, those back taxes shall be assessed and collected." School taxes for the same years were included in the action in that case, as in this; and that case would seem to be decisive of the question, unless the contention can be maintained upon the authority of the case in 77 Mo. 202, in which, in effect, it

was held, in favor of a subsequent purchaser, that a lien in favor of the state could not be created against the property *in specie* of the defendant railroad company, for taxes for the years preceding the levy and assessment under that act, whose capital stock during those years had been subjected by appropriate legislation to taxation, upon the principle that it was not to be held that the legislature intended to favor double taxation, and that, having provided for the taxation of the capital stock during those years, the property of the company *in specie* could not be subjected to a lien attempted to be thereafter created for such taxes upon the property *in specie*. The case at bar is to be distinguished from that in this: that the capital stock of the defendant during those years was neither subject to nor subjected to taxation for school purposes for the reason that, by legislative enactment, its capital stock was exempt from taxation for such purposes, and its property *in specie* was subject to taxation therefor, as will more fully appear in the subsequent discussion of another branch of the case, and was subjected thereto by the general legislation providing for the levy and collection of taxes upon such property *in specie*. Sess. Acts 1852, p. 15, § 3; Gen. St. 1865, c. 11, p. 95, § 1, and c. 46, pp. 262, 268, § 21 et seq. Consequently, there is no question of double taxation in this case, the vital one, which lay at the root of the controversy in that case, and which led to the distinction made between property subject to and property subjected to taxation.

3. The fact that these school taxes were levied after the constitution of 1875 went into effect, and that the rates for the years for which they were levied were in excess of the limit prescribed by that constitution, would in no way affect the validity of the levy, if they did not exceed the limit of taxation authorized by law for such purposes at the time when such taxes ought to have been levied. The *nunc pro tunc* levy provided for by law speaks as of the date when it should have been made. The limitation of the constitution operates only on taxes for years subsequent to its adoption.

4. It is contended that the defendant is not liable for the road taxes for the years 1867-72, for the same reasons for which claim is made that it was not liable for the school taxes, hereinbefore considered; but, further, that it is not liable for road taxes for any of the years for which plaintiff recovered judgment; and this claim will now be considered. The defendant was incorporated in the year 1847. By its charter, its capital stock was exempted from all state and county taxes. Sess. Acts 1847, p. 157, § 4; Sess. Acts 1837, p. 252, § 24. In consideration of a grant of lands made by the state and accepted by the company, by act of the general assembly approved September 20, 1852, (Sess. Acts 1852, p. 15, § 3,) it became bound, in each year after its completion, to "pay into the treasury of the state a sum of

money equal to the amount of the state tax on other real and personal property of like value," upon the actual cash value of all its property *in specie*. By virtue of this legislation, while the capital stock, *eo nomine*, remained and still remains exempt from state and county taxes, its tangible property became and is subject to state taxes, but not subject to county taxes. Railroad Co. v. Shacklett, 30 Mo. 550; State v. Railroad Co., 37 Mo. 265; State v. Railroad Co., 60 Mo. 143. It is not exempt, however, from municipal taxes imposed by authority of the state, (City of St. Joseph v. Railroad Co., 39 Mo. 476,) nor from school taxes imposed by like authority, (Livingston Co. v. Railroad Co., 60 Mo. 516;) and the question now presented for consideration is whether the road tax sued for is within the meaning of the term "county taxes," as used in the act of 1837, supra, incorporating the Louisiana & Columbia Railroad Company, to all the rights, privileges, and immunities to which the defendant became entitled by the act of 1847, supra. At the same session of the general assembly at which the Louisiana & Columbia Railroad Company was incorporated, the act of 1835, by which provision had been made for assessing, levying, and collecting a road tax upon real estate, (Rev. St. 1835, p. 544, §§ 30-33,) was repealed, (Sess. Acts 1837, p. 110;) and no general act has been found in the statutes from that date until 1851 providing for a property road tax, as distinguished from other county taxes. From the organization of the state government, the county courts of the state have been charged with the duty of opening and keeping in repair the public highways, (Rev. Laws 1825, p. 688; Rev. St. 1835, p. 546; Rev. St. 1845, c. 151, p. 960; Rev. St. 1855, c. 137, p. 1367; Gen. St. 1865, c. 52, p. 289;) and to some extent they have always been a charge upon the general revenue of the county. In 1835 provision was made (Rev. St. 1835, p. 558) for the apportionment and distribution of the road and canal fund to the several counties, and thereafter, for many years, this fund was regularly distributed to the counties at stated periods; and the compulsory labor of the residents of the road-districts, supplemented by payments, in certain instances, authorized to be made out of the county treasury, were the means thereafter provided by law for opening and keeping in repair the public highways of the state. The burden of erecting and maintaining bridges on such roads, when the cost exceeded \$25 or \$50, has always been borne by the general county revenue fund, except in so far as it was relieved by private subscription. Rev. St. 1835, p. 106; Rev. St. 1845, c. 22; Rev. St. 1855, c. 22; Gen. St. 1865, c. 53. By act of the general assembly approved March 3, 1851, (Sess. Acts 1850-51, p. 277, § 14 et seq.,) the property of residents of road-districts liable to work on the road was subjected to a road tax to be levied by the county court. This act was amended and carried into Rev. St. 1855, p.

1876, § 47 et seq. In 1865 the operation of this act was extended, and the county courts were authorized to levy a special tax for the improvement of roads upon property subject to pay a state and county tax, (Gen. St. 1865, p. 290, § 6.) and to borrow money on the credit of the county, and issue bonds for that purpose, and levy a special tax for the payment of accruing interest thereon, (section 7, Id.) and, in addition, county courts were authorized to levy a road tax upon all property subject to taxation in an amount not exceeding 30 per cent. of the amount of the state tax, (section 26, Id.) This act was amended in 1868 by an act then passed repealing the law of 1865, by which the county courts were authorized to borrow money on the credit of the county for the purpose of opening and improving public roads, and to levy a sufficient amount of revenue to pay the interest accruing thereon, and, if necessary, to levy a special tax for the payment of such interest, (Sess. Acts 1868, p. 151, § 7;) and by the same act, in addition, it was provided (section 27, Id.) that, "for the purpose of opening, repairing, and improving roads, and in order to raise the necessary funds to pay the expenses of any or all of said opening, repairing, or improvements, the county courts of the various counties shall levy a special tax not exceeding four mills on the dollar of the taxable property of the county, and all property taxable by law, which shall be known as the 'road tax,' said levy to be made at the time and in the same manner as the county revenue is levied; and hereafter all property, whether belonging to non-residents or others, subject to pay a county tax, shall be made subject to pay a road tax," etc. This law, in the main, was in force when the act of 1871 was passed, providing for a uniform system of assessing and collecting taxes on railroads, (Sess. Acts 1871, p. 56,) by which the special state board of equalization created by that act were required to "apportion the value of all lands, workshops, depots, and other buildings belonging to each railroad company to the counties, cities, or incorporated towns in which such lands, workshops, or depots and other buildings are situate, and the aggregate value of all other property of each railroad company * * * to each county, city, or incorporated town in which such road shall be located, according to the ratio which the number of miles of such road completed in such county shall bear to the whole length of such railroad," (section 8;) and after making provision for the levy of state taxes on such property, (section 11.) The action of the board was to be certified to the clerks of the county courts of the several counties; and the county courts were authorized to levy for all county purposes, on such proportionate value so certified, such taxes as may be authorized by law, at the same time and at the same rate as may be levied on other property. Section 12. Upon such proportionate value, provision was also made for the levy

of school taxes. Section 13. The act then provides for the enforcement of the payment of the state, county, and school taxes thus to be levied. Section 14 et seq. The act of 1871 was amended by an act approved March 24, 1873, (Sess. Acts, 63,) in which provision was made for the levy of municipal township taxes, and the mode of levying and collecting municipal taxes was more specifically defined. The several taxes, as classified under this law, were state taxes, county taxes, municipal township taxes, school taxes, and municipal taxes; and this classification has since been maintained. Sess. Acts 1874, p. 130; Sess. Acts 1875, p. 119; Rev. St. 1879, § 6879. During the years 1874, '75, and '76, Caldwell county was under the township organization act. By the law then in force, in counties thus organized, a road tax was authorized to be levied upon all "real and personal property in the township made taxable by law, for state and county purposes." Sess. Acts 1873, p. 108, §§ 7-21, and Sess. Acts 1875, p. 149, § 2. In the year 1877, Caldwell county had resumed its normal county organization. By the general road law then in force, it was provided that there should be set aside an amount "from the general county revenue sufficient for road purposes, to be called 'the road tax,' " etc. Sess. Acts 1877, p. 398, § 20.

At the time the defendant received its charter exempting it from all state and county taxes, and for 10 years prior thereto, the general revenue fund of the county had been charged with the payment of certain expenses incurred in the opening and improving of public roads; and, so far as any tax was raised for such purpose, it was raised as a county tax, for that in common with all the other purposes of county government. So far as defendant's property is concerned, this continued to be the law for nearly 20 years afterwards. The law provided for the levy, upon such property, of taxes only for state, county, and municipal purposes. From two of these its property was exempted. Of these two, one—the county tax—included such money as it was then found necessary, and as was then being raised, for road purposes by taxation. The legislature, in exempting it from county taxes, necessarily exempted it from road taxes. The defendant, by its acceptance of the act of 1852, relinquished its exemption from state taxes on its property *in specie*, but has never relinquished its exemption from county taxes. While the county courts, since 1865, by law, have been authorized to levy a road tax, *eo nomine*, upon property, to be applied exclusively to road purposes, yet that does not change its nature as a county tax. The only classification possible for such a tax, whether from a consideration of the legislation providing for it in the various road laws, to which reference has been made, or the various acts providing for the assessment and levy of taxes upon railroad property, is as a county tax for road purposes. The legislature has never undertaken

to lift the burden of maintaining the public roads from the counties, and to place it upon the state treasury, to be met by a levy of state taxes to sustain it. The tax is levied, collected, and disbursed by the county authorities. Its rate is uniform over the whole county, but may be varied in different counties. It is for a purpose that has always been recognized in the legislation of the state as a county purpose,—as a county burden, to be met by a county tax; and, as such, there can be no doubt that it comes within the exemption conferred by the legislature upon defendant in respect of the property upon which such taxes were levied in this case. Besides, as we have seen by the various laws authorizing it, whether in the shape of a county road tax or a township road tax, its levy was limited to property subject to pay a state and county tax; and, as defendant's property was not subject to pay a county tax, it could not be made a charge upon it. If the foregoing conclusions are correct, the result must be that the judgment of the circuit court in favor of the plaintiff for the school taxes ought to be sustained, and for the road taxes ought to be reversed. The judgment of the circuit court will therefore be reversed, and the cause remanded, with directions to the circuit court to enter up judgment for the plaintiff, in accordance with this opinion, for the school taxes and penalties sued for in the first six counts of the petition, and for the defendant as to all other taxes sued for. All concur.

SILVER v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri. March 10, 1890.)

DRAW-BRIDGE—OBSTRUCTION OF NAVIGATION.

1. A bridge company built a draw-bridge over the Missouri river, under authority of Act Cong. May 11, 1872, which provided that such bridge should not interfere with the free navigation of the river; that, if built as a draw-bridge, it should be a pivot draw-bridge, with the draw over the main channel of the river at an accessible and navigable point, with spans of certain length on each side of the pivot pier, and that the piers should be parallel to the current. The bridge company built their bridge with two draw-rests, one above and the other below the pivot pier, and 140 feet distant from it. Afterwards the bridge company leased the structure to the defendant. Three years after, plaintiff's boat, while attempting to go through the draw during a high stage of water, was driven against one of the piers by the current, and sunk. The plaintiff charged that the piers were not parallel to the current, and that the draw-rests above the bridge caused a cross-current, which drove the boat against the pier. *Held* that, if the bridge was so built that the piers were parallel to the usual and ordinary course of the current, it was a sufficient compliance with the act, and this question was properly one for the jury.

2. The burden of proof is on the plaintiff to show that the draw-rests were not necessary or lawful structures in the operation and maintenance of the bridge.

3. Since the act authorizing the bridge authorized the maintenance of such structures as were necessary to the operation of the bridge so long as the free navigation of the river was not obstructed, in the absence of testimony showing that the draw-rests were unauthorized or dangerous structures, the question as to their character should not be submitted to the jury.

4. And the plaintiff, in order to recover, must

show that defendant had notice or knowledge of the fact that the piers of the bridge were not parallel to the current of the river; but such notice or knowledge may be shown by facts and circumstances, and not necessarily by direct evidence. *BAROLAY, J.*, dissenting.

5. When the act of congress under which a draw-bridge was built provides that, where any litigation arises from any obstructions or alleged obstructions to the free navigation of the river, the cause may be tried in the district court of the United States, etc., such provision does not divest the state courts of jurisdiction of such causes.

Appeal from circuit court, Lafayette county; *RICHARD FIELDS*, Judge.

This action was brought by David H. Silver against the Missouri Pacific Railway Company for damages for the loss of his steam-boat, caused by injuries received while passing through a bridge over the Missouri river, leased by the defendant. There was judgment for plaintiff, and defendant appealed.

T. J. Portis and *W. S. Shirk*, for appellant. *Cosgrove & Johnson* and *Draffin & Williams*, for respondent.

BLACK, J. The plaintiff brought this suit in the Cooper circuit court to recover damages for the loss of his steam-boat, occasioned by injuries received while passing through the bridge over the Missouri river at Boonville. The plaintiff recovered a judgment on the second trial in the Lafayette circuit court for \$14,000. The act of congress of May 11, 1872, (17 U. S. St. at Large, 99,) authorized the Boonville Bridge Company to build a bridge for the use of railroads over the river at Boonville, under the limitations therein provided. The act then provides, among other things, "that said bridge shall not interfere with the free navigation of said river beyond what is necessary in order to carry into effect the rights and privileges hereby granted." It is further declared that if the bridge is built as a draw-bridge it "shall be constructed as a pivot draw-bridge, with a draw over the main channel of the river at an accessible and navigable point, and with spans of not less than 160 feet in length in the clear on each side of the central or pivot pier of the draw, * * * and the piers of said bridge shall be parallel with the current of the river." It is further declared "that any bridge constructed under this act, and according to its limitations, shall be a lawful structure," and "that the structure herein authorized shall be built under and subject to such regulations for the security of the navigation of said river and lake as the secretary of war shall prescribe; and the said structure shall be at all times so kept and managed as to offer reasonable and proper means for the passage of vessels through and under said structure, and the said structure shall be changed at the cost and expense of the owners thereof, from time to time, as congress may direct," etc. The bridge was built in 1873 by the Boonville Bridge Company as a draw-bridge, and the spans conform in length to the act of congress. There are also two "draw-rests,"

as they are called, one above and the other below the pivot pier, each at a distance of 140 feet from it. They are wooden structures, filled with stone, and rise above the surface of the water, and are 24 or 25 feet wide; the length does not appear to be given in the evidence. After the bridge was built by the Boonville Bridge Company, it was leased to the Missouri, Kansas & Texas Railway Company, and by that company leased to the defendant. The admission in the case is that defendant has maintained and controlled the bridge without change in the construction of the piers or draw-rests since December, 1880. The plaintiff's boat attempted to go down stream through the draw on the 30th June, 1883, at a very high stage of water, and was thrown over against the stone pier, south of the pivot pier, and received injuries from which she became disabled, and sunk in less than an hour. The substantial charges relied upon as grounds of recovery on the trial are that the piers of the bridge were not parallel with, but diagonal to, the current of the river; that the up-stream draw-rest was not authorized by the act of congress; that these obstructions caused a cross-current to flow towards the south or Boonville shore; and that the plaintiff's boat was thrown against the south shore pier by reason of these obstructions and cross-current. The answer set up mismanagement and contributory negligence on the part of the servants of the plaintiff in charge of the boat.

The evidence for the plaintiff tends to show that the channel of the river is along the south or Boonville shore for a considerable distance above the bridge; that it begins to leave that shore about 300 yards above the bridge, and goes in a north-east direction, striking the Howard county shore about one mile below the bridge. Many witnesses testified that there has been no change in the current since the bridge was built, and that the piers and draw-rests are not, and never have been, parallel with the current. Some of them say the current runs diagonally between the piers, and others a little quartering. A county surveyor testified that the bridge did not stand at right angles with the current by 10 or 11 degrees. There is also evidence tending to show that the effect of the water striking the draw-rest at an angle is to create a cross-current towards the Boonville shore, and that this cross-current makes it difficult to go through the draw with a steam-boat. The evidence introduced on the question of contributory negligence, and in refutation of it, tends to show that to go down stream through the draw it is necessary to go out from the south shore some distance above the bridge, and then get in line with the draw when open, and to steer close to it. On the other hand, the evidence of the engineers who built the bridge is that they placed floats in the water, and in this way got the line of the current, and placed the bridge at right angles to this line, and that the piers are, and always have been,

parallel with the current. Their evidence is supported by that of many other persons, some of whom are river men, and accustomed to direct boats through the draw. The plaintiff offered no evidence tending to show that the draw-rests were not necessary parts of the bridge. For the defendant, William Sooy Smith, a civil engineer of vast experience in building bridges of the character of the one in question, testified: "I think the draw-rests were a necessary part of the bridge, to protect the bridge; and they are everywhere used in navigable streams, almost without exception. I do know of a few exceptions. I shall say at least nine-tenths of the large bridges have such protections; they serve as a directrix to aid the boat in passing through. Without such protections the boat might run under the bridge, and the top hamper be cut away. They keep the boat from drifting under the bridge." The evidence of many other experienced persons is that the draw-rests are a protection to the boats and to the bridge, and also protect the pivot pier from drift-wood. It seems the draw does not rest upon these wooden structures when it is open, save in case of undergoing repairs. The plans of this bridge were approved by the secretary of war.

1. It is unnecessary to set out the many instructions given and refused. The substance of those given for the plaintiff is that, if the piers were not parallel with the current, or if the upper draw-rest was not a necessary part of the bridge, then, and in either event, the act of congress furnished no justification for the maintenance of the bridge and draw-rest. The defendant insists that the evidence offered by the plaintiff to show that the piers were not originally parallel with the current is unreliable, unworthy of credence, and not sufficient to support the verdict. While the evidence produced by the defendant is direct to the point that the piers were and are parallel to the current, still there is much evidence of a contrary character. It is enough to say that this question was properly submitted to the jury. We may add, however, that the spirit and fair meaning of the bridge act can only be ascertained by reading its provisions in the light of the subject-matter of which the act treats. The course of the current of the river varies to some extent at different seasons of the year, and it was impossible to place the piers so that they would be at all times in an exact line with the current. If located fairly, and substantially parallel with the usual and ordinary course of the current, that is sufficient.

2. The next contention is that there is no evidence tending to show that the up-stream draw-rest was not a necessary part of the bridge. This objection is met by plaintiff with the argument that there is nothing in the act of congress expressly granting the right to build the draw-rests, and the burden of the proof is upon the defendant to show that they were necessary parts of the bridge; and it was for the jury to say whether they

believed the defendant's witnesses. The vice of the argument lies in the statement that the burden of proof was upon the defendant. The great mass of the commerce of the Missouri valley is carried up and down and across and beyond the river by means of railroads. It is common information that the commerce floated on the river is but a drop in the bucket. Congress has recognized this existing state of affairs, and has exercised its power, and granted the right to railroad and other corporations to build numerous bridges over the river. Some of them are draw-bridges, and others have continuous spans. Bridges built under and pursuant to the terms of these acts are lawful structures. An act of congress authorizing a partial obstruction of navigation will not, however, protect an impediment not contemplated by the statute; and any excess in the exercise of the powers granted, by which navigation is impaired, becomes a nuisance *pro tanto*. *Missouri River Packet Co. v. Hannibal, etc.*, R. Co., 79 Mo. 478; Gould, Waters, § 134. Now, in looking to the pleadings from the petition to the reply, we find it to be admitted that the bridge in question was built by authority of the act before mentioned. The terms and conditions of that act are as well known to the plaintiff as to the defendant, and when the plaintiff seeks to recover on the ground that the terms thereof have been exceeded, it devolves upon him to show that the bridge does not conform to the requirements of the law. In other words, the burden of proof is upon him in this as in other cases. The act of congress does not make any mention of draw-rests, but it says the bridge shall not interfere with the free navigation of the river beyond what is necessary in order to carry into effect the rights and privileges thereby granted. This declaration, as well as the grant of the right to build the bridge, carries the right to maintain such structures as are essential parts of it. It may be that the bridge could be operated without these rests, and it may still be that they are proper parts of it. If they serve as a protection to the draw when open, and to the boats themselves when passing through, they are not illegal structures, but are within the fair contemplation of the act. Now we agree with the suggestions made in respondent's brief, that the true character of these rests can be inferred from other facts in evidence, and that it was not necessary for the plaintiff to call witnesses who could speak as experts; but the facts must be such as tend to show that the structures were not essential parts of the bridge. We find no such facts put in evidence by the plaintiff. The evidence for defendant is to the effect that they not only protect the bridge and the draw, but that they also protect the boats. Other bridges are built with like structures, and it is in evidence that all of the draw-bridges over the Missouri river have and use them. Congress, in granting the right to build this bridge, must have contemplated that it would

be constructed with the customary attachments. There is in our judgment no evidence showing or tending to show that these draw-rests were unauthorized structures. There was no evidence upon which to submit this issue to the jury, and the defendant's fourteenth instruction should have been given.

3. As the cause must be remanded for the reasons just stated, it is necessary to dispose of another question, and that is whether it was incumbent upon the plaintiff to show notice to, or knowledge by, defendant that the piers were not parallel with the current. There can be no doubt but a lessee or grantee of premises is liable for the continuance of a nuisance which was created before his occupancy. But the continuance must be with notice or knowledge of the nuisance; and it has been generally held that an action cannot be maintained against him until he has been notified of the existence of the nuisance, and requested to abate it. Gould, Waters, § 392, and cases cited by appellant; *Notes to Plumer v. Harper*, 14 Amer. Dec. 333. But it is well settled in this state, and we believe it to be the better doctrine, that a request to abate is not necessary. It is enough to show that the grantee or lessee had notice or knowledge of the existence of the nuisance. This much, however, must be shown. *Pinney v. Berry*, 61 Mo. 359; *Dickson v. Railroad Co.*, 71 Mo. 576; *Wayland v. Railroad Co.*, 75 Mo. 548. The plaintiff here contends that notice of the existence of a nuisance to a lessee is not required in case of an obstruction in a highway, and he cites *Missouri River Packet Co. v. Hannibal, etc.*, R. Co., 1 McCrary, 282, 2 Fed. Rep. 285. In that case the claim of the plaintiff was that the piers of the bridge and certain pontoons along the shore were obstructions to navigation. The point seems to have been made that it was necessary for plaintiff to show notice to abate; and the court said the rule requiring notice to abate, before an action for damages can be maintained, does not apply to the case of an obstruction to a navigable river or other public highway. We have seen that notice to abate is not necessary in any case under our ruling. Besides, it does not appear that the defendant in that case used the bridge as a lessee only. *Nichols v. City of Boston*, 98 Mass. 39, was an action for obstructing plaintiff's dock, and depriving him of the use of his wharf. The obstruction complained of was occasioned by a ferry-boat pressing against a line of piles. The piles were in the same condition when the city purchased the property, and the case was likened to that of one who acquired land on which a nuisance existed. The bridge in this case was built in 1873, and it passed into the hands of the defendant as lessee in December, 1880, and this accident occurred in June, 1883. No complaint seems to have ever been made that the piers of the bridge were not parallel with the current. Indeed this complaint was not made in the original

petition filed in this cause. We are of the opinion that the plaintiff, to recover, must show that defendant knew or had notice that these piers were not parallel with the current; but we are also of the opinion that it is not necessary to show such knowledge by direct evidence. The knowledge may be inferred from other facts and circumstances; but that defendant did have such knowledge or notice should be found as a fact by the jury.

4. The defendant insists that it is not liable if the piers when built were parallel to the current. The court so directed the jury by instructions given at the request of defendant, and the question is not before us. It matters not that refused instructions assert the same proposition.

5. The question is made in the motion in arrest of judgment that the state courts have no jurisdiction of the subject-matter of the action. This claim is based upon the clause in the bridge act which says: "And in case of any litigation arising from any obstruction, or alleged obstruction, to the free navigation of said river, the cause may be tried before the district court of the United States of the state of Missouri in which any portion of said obstruction or bridge touches." 17 U. S. St. 99. This clause is the same as that considered in the case of *Missouri River Packet Co. v. Hannibal, etc., R. Co.*, 79 Mo. 478, where it was held the state courts had jurisdiction in these cases. No authority is cited to show error in that ruling, and we adhere to what was then said upon that question.

For the reasons before stated the judgment is reversed, and the cause remanded.

BARCLAY, J., is of the opinion that it is not necessary to a recovery by the plaintiff that he show notice to or knowledge by defendant of the nuisance. In other respects he concurs. The other judges concur.

In re HENDERSON.

(*Supreme Court of Tennessee*. Feb. 13, 1890.)

MISCONDUCT OF ATTORNEY—DISBARMENT.

In a suit to obtain a decree for sale of certain land, it appeared that there was a prior lien on it to secure payment of rents to a receiver. The complaint asked to have this removed, alleging that it was obtained by the receiver for his personal security merely, he having been directed by the attorney for complainant in the suit in which he was appointed not to collect any rents from the owner, or force him to do anything, and that the receiver had been discharged on a report which stated that he had taken no steps as receiver. What purported to be a copy of this report was produced by the attorney, showing the facts above stated, but omitting, after the statement that he had taken no steps as receiver, the qualification, "except to obtain * * * a lien on certain property * * * to secure the payment of any rents that may be found due * * * on the property in controversy in this cause." Held that, as the full report showed that persons not parties to the present suit were interested in the lien, the attorney, in presenting a mutilated copy, was guilty of an attempt to mislead the court, such as authorized his disbarment.

On rule to show cause.

John L. Kenedy, for defendant.

TURNER, C. J. On a day of the present term, this court, of its own motion, made a rule on Mr. Henderson to show cause why he should not be stricken from the roll of attorneys. That order was predicated upon the following facts: In the case of *Swan v. Spurr*,¹ tried and disposed of at the present term, it appears that said Henderson, as solicitor, had in a suit in the chancery court obtained a decree to sell property, the proceeds of that sale being the subject-matter of litigation in the cause we have named. In the former suit a decree of this court was referred to, and a copy proposed to be filed on or before the hearing. The copy filed is as follows: "James F. Stokes, Adm. Orange Swan vs. R. B. Castleman et al. This cause was this day heard upon the report of the clerk and receiver, which is in the words and figures following, to-wit: 'To the Honorable Supreme Court, sitting at Nashville: I would respectfully report that as receiver in this cause, under the direction and instructions from complainants' counsel to W. I. Freeman, then my chief deputy, not to collect any rent from defendant McFarland, or force him to do anything in the matter, that I have taken no steps in the matter of said receivership. Having tendered to this court my resignation as clerk of this court, I would also respectfully tender my resignation as receiver in this case, and submit this as my final report. Feby. 5, 1885. NATHANIEL BAXTER, Jr., Clerk.' Which said report, being seen and understood by the court, is in all things confirmed, and the court is pleased to accept the resignation of said receiver. The clerk certifies this to be a true and perfect copy of extracts," etc.

A reference to the report, as embraced in the decree extracted from, shows that the report contained, after the words, "I have taken no steps in the matter of said receivership," "except to obtain from said McFarland, on November 8th, 1884, a lien on certain property conveyed to G. B. Elliott by said McFarland, to secure the payment of any rents that may be found due from said McFarland on the property in controversy in this cause," and exhibits said lien as follows: "Whereas, certain property was conveyed to me by G. B. Elliott by a deed on its face absolute, reference being here made to said deed, which is duly registered in Book 68, page 425, a written defeasance being given by said Elliott to the effect that said property was held as security to indemnify M. B. Howell for any amount that might be charged against him for rents. Now the said G. B. Elliott is hereby further directed to hold said property as security for the rents due by me to N. Baxter, Jr., clerk of supreme court, for rents accruing since the case of *Swan vs. Castleman* was appealed to the supreme court,

¹ No opinion filed.

and said Baxter directed to collect rents from me. W. R. McFARLAND." This was accepted in these words: "I accept the foregoing as part of the defeasance to said deed. G. B. ELLIOTT. Witness: M. B. HOWELL."—And marked, "Filed Nov. 8th, 1884." The copy procured by Henderson was filed in the case of *Spur, Trustee, v. McFarland et al.* The purpose of that bill was to sell the property, on which the lien to Baxter had been given, to satisfy the decree in *Swan v. McFarland et al.*, which had been transferred to complainants. It charged that there were obstacles and embarrassments in the way of a sale of the property which should be removed. After specifying certain of these obstructions and embarrassments, it proceeds: "And when said cause of *Swan vs. Castleman et al.* had been removed to the supreme court, the defendant N. Baxter, Jr., former clerk of said court, was appointed receiver in said cause, and, after the cause had been pending in the supreme court about four years, said defendant Baxter, as such receiver, in his final and only report in the cause, stated to the court that complainants' counsel in said cause had expressly instructed and directed him, the said Baxter, receiver, not to collect any rents from said defendant McFarland, or force him to do anything, and not to take any steps in the matter. The said report of said Baxter, as such receiver, was confirmed by the supreme court on 27th day of February, 1885, and he was then discharged from said receivership; and although he was, as above shown, expressly directed not to collect any rents from said McFarland, and not to take any steps as such receiver, yet in November, 1884, seeing that there was an attempt on the part of complainants' counsel in said cause to hold M. B. Howell, the former receiver, while said cause was pending in the court, personally liable for the rents of the property in question in said cause, said defendant N. Baxter became apprehensive that an attempt would also be made (said express instructions of complainants' counsel to the contrary notwithstanding) to hold him, the said Baxter, as such receiver, personally liable for such rents; he states he also obtained a defeasance or lien to the effect that said defendant Elliott should hold said Cherry-Street lots, conveyed to him as before stated by defendant McFarland, to indemnify the receiver against personal liability on account of the non-collection of any such rents. Such having been the motive and intention of said defendant Baxter in obtaining such lien or defeasance, if any in fact were given, and he having been discharged by decree of the supreme court from such receivership, without in any way being held for rents in said cause, complainants aver that they have the right to have said deed to said defendant Elliott set aside, and such defeasance or lien, if any, removed as an obstacle in the way of the sale of said lots; and complainants aver that they have the right to recover the entire proceeds of such

sale in part satisfaction of the judgment of the supreme court. Certified copy of said report and judgment will be filed, if necessary, as evidence on behalf of complainants, on or before the hearing of this cause." This bill is signed "S. I. HENDERSON, Solicitor for Complainants."

We have thus fully shown the parts of record making the predicate of the rule to show cause, etc. The answer is that he is not conscious that he has deceived the chancellor; that it has not been his intention to practice a deceit; that he had learned that McFarland had given the indemnity on the land to secure the clerk of the supreme court against personal liability for failure to collect rents, etc., and from information received from Howell & Baxter he was fully convinced the security was wholly to secure Baxter against personal liability; that Baxter's answer is "that a lien was taken for his own personal benefit, and not at the instance, nor for the benefit, of any of the parties to said cause of *Swan v. Castleman et al.*" He believed the extract embraced everything material or in any way necessary to be brought to the attention of the chancellor for a proper understanding of that branch of the case, in order to secure a full, fair, just, and adequate decree from the chancellor. He believes if the whole of said decree had been before the chancellor, the decree would have been the same. His theory of the case was that, when Stokes, adm'r, etc., assigned the judgment, it gave to Spur, trustee, etc., the liens of the judgment and execution on the realty of McFarland, which liens would have been anterior to any lien in favor of Baxter, but was willing to remove any question with Baxter by showing that he had been excused from collecting rents, and had been discharged without any effort to hold him liable, and therefore could have no lien according to the intention of the parties making the defeasance, as he understood that intention. He submits that the facts and pleadings presented to the chancellor were not misleading in the view he (Henderson) took of the real merits of the controversy.

Are these answers sufficient to discharge the rule? We think not. As we have seen, the bill, in support of which the extract from the decree of this court was used in evidence, sought to remove incumbrances. Instead of stating the lien to Baxter in terms, it gave it the construction that it was solely for Baxter's personal security, when a correct and perfect copy would have shown that it was for the rents due Baxter, clerk of supreme court, accruing since the case had been appealed. It certainly impressed the mind of Mr. Henderson, as it did us, and just as we did, heretofore and now, interpret the instrument, that Baxter's purpose was to indemnify himself. He saw that the whole report would show an incumbrance in favor of parties not before the court by his bill, and that he could avoid that discovery by leaving off the material qualification of the receiver's report that

he had taken no steps in the matter of the receivership. To do this, he cut in two a sentence to make a qualified report an unconditional one. To intensify the evidence of his purpose, he passes over the lien which is embodied in the report, and immediately follows and explains the qualification of the report, to the tender of the receiver's resignation. The mutilated extract supports the theory and allegations of the bill. The decree in its integrity overturns them. As intimated by Judge BAXTER, the question was one for the courts. No court can construe any decree by a detached part of it, upon a given subject-matter. Mr. Henderson must have contemplated and passed upon the effect of the whole, and the effect of a part, and concluded to pursue the policy of mutilation. He carefully carried out his plan by reading the parts he wanted to a young man in the office, who copied as Henderson read. There is no solution of his conduct, except upon the theory of a studied and matured purpose to mislead. That the chancellor may have found other grounds upon which to base his decree, and that he was not misled thereby, does not relieve of the intent to deceive. The fact that lawyers might differ is a stronger reason for submitting the construction to the courts. It is impossible for us to believe that these important omissions were innocently made, with no purpose to deceive or mislead, especially when we remember no party was before the court who had any interest in keeping the lien alive, but, on the contrary, with one indifferent, and the others interested in vacating it. The facts make the purpose too plain and palpable to allow us to entertain a doubt of its bad faith.

The conclusion is painful, but imperative. Too much is staked upon the honesty and good conduct of lawyers for courts to wink at flagrant misconduct. They are trusted by the community with the care of their lives, liberty, and property, with no other security than personal honor and integrity. It behooves the courts and the profession to see that their brotherhood keeps clean records. Mr. S. I. Henderson has been guilty of such acts of immorality, impropriety, and unprofessional conduct as are inconsistent with the character and faithful discharge of the duties of the profession. The rule is made absolute. His name is stricken from the rolls, and he will not be permitted to practice the profession in any court of record in this state.

STATE, to Use of COTTON *et al.*, v. ATKINSON *et al.*

(Supreme Court of Arkansas. March 29, 1890.)

SHERIFFS—ACTIONS ON BOND—CUSTODY AND SALE OF ATTACHED PROPERTY—PLEADING.

1. A sheriff cannot be held guilty of a breach of his bond in failing to sell attached property in his possession under an order of condemnation directing such sale, unless a legal demand has been made on him for an execution of the order.

2. A special execution, under an order of con-

demnation, for the sale of attached property in the possession of a sheriff whose term has expired, should run to his successor. *Mansf. Dig. Ark. § 3081*, providing that where an officer has levied on goods under an execution, and his term shall expire before a sale thereof, he shall have power to do all things in relation to such execution and sale as if his term had not expired, applies only where such officer's duties under a writ are incomplete when his term expires.

3. Where such special execution is issued to the ex-sheriff, his failure to execute it is no breach of his bond.

4. Nor can his indorsement thereon be considered an official return.

5. In an action on a sheriff's bond, to recover damages for the loss of plaintiffs' judgment by the sheriff's failure to safely keep the property attached to satisfy it, the complaint alleging such neglect, and setting forth the amount of the judgment and the value of the attached property, which exceeds the judgment, is sufficient, though it does not state that plaintiffs lost their debt by such neglect.

Appeal from circuit court, Sebastian county; R. B. RUTHERFORD, Judge.

This action was brought in the name of the state, for the use of Cotton & Perry, against H. J. Falconer, as sheriff of Sebastian county, and his bondsmen, to recover damages for the alleged failure of the sheriff to safely keep a certain saw-mill boat upon which he had levied an attachment in favor of said Cotton & Perry. Falconer died, and the suit was discontinued as to him, and prosecuted against his bondsmen alone. The complaint sets forth the election of Falconer as sheriff, and the execution of his bond, with the other defendants as sureties; the institution by Cotton & Perry, in the proper court, of their action by attachment against the Western Lumber Company as defendant; the issuance of an order of attachment; the seizure by the sheriff, under said order, of "one saw-mill boat, saw-mill, and appurtenances;" the final determination of said action in a judgment for the plaintiffs; and an order sustaining the attachment, and directing the sale of said attached property by the sheriff, at auction, on a credit of three months, "first giving notice of the time, place, and terms of sale, according to law." The complaint further states that the defendant H. J. Falconer, as sheriff, "did not obey the order and judgment of this honorable court in this behalf adjudged, and did not sell the said attached property, * * * but neglected, failed, refused, and omitted altogether to sell the said property * * * as directed." The complaint then alleges that on or about the 31st day of March, 1885, a *venditioni exponas* "execution issued out of said court, directed to defendant H. J. Falconer, ex-sheriff," commanding him to sell said boat, saw-mill, and appurtenances as adjudged and directed, etc.; that the said writ was delivered to said Falconer as ex-sheriff, and he returned thereon that the same was unexecuted, because the custodian to whom the property named therein had been delivered, by order of plaintiff's attorneys, had before the date of said writ removed the said property out of the state of Arkansas, and into the Indian Territory, where the

same then was. It is then alleged that so much of the said return as stated that said property had been delivered to the custodian by order of plaintiff's attorneys was false. The complaint then, after stating that plaintiffs' judgment remains unpaid, alleges, in substance, the following breaches of the official bond of the defendant, H. J. Falconer: (1) "The sheriff, after having attached sufficient property to satisfy, discharge, and pay off the plaintiffs' said debt and judgment, illegally, and without lawful excuse, failed to sell the said attached property * * * as directed and commanded by the judgment of the court." (2) That he did not safely keep the property attached by him at the suit of plaintiff. (3) That he "did not obey the order, mandate, and judgment" of the court made on the 29th day of May, 1884, by selling said attached property. Defendants demurred to the complaint, and their demurrer was sustained. *Cotton & Perry* appeal. *Mansf. Dig. Ark. § 3081*, provides that, "where an officer shall have levied upon any goods * * * by virtue of any execution, and the term of service of such officer shall expire * * * before the sale thereof, such officer shall nevertheless have power to do and perform all things in relation to such execution, and the sale of such property, * * * as if his term of service had not expired. * * *"

Robert Toomer, for appellants. *Clendenning & Reed*, for appellees.

PER CURIAM. It is difficult to ascertain from the complaint what the pleader intended to allege as a breach of the bond. If it be that the sheriff failed to sell the attached property in obedience to the order of condemnation, it is no breach. The sheriff would not be in default in failing to sell the condemned property until a legal demand had been made upon him for the execution of the order of condemnation, as by delivery to him of a special execution for the sale of the property, or a copy of the order of condemnation. He may make a valid sale in pursuance of the order without either, but he is entitled to the writ, or a copy of the order, for his guidance; and, unless he waives it, there is no neglect of duty on his part in failing to make the sale.

But the special execution should run to the sheriff in office at the time of its issue. It is only where an officer's duties under a writ remain incomplete at the expiration of his term that he has power to execute it after its expiration. *Mansf. Dig. § 3081*. The special execution was improperly issued to Falconer after his term expired. He was not authorized to execute it, and his failure to do so was no breach of his bond. *Johnson v. Foran*, 58 Md. 148; *Kent v. Roberts*, 2 Story, 602, 603. For the same reason, his indorsement upon it cannot be considered as an official return.

But, it is alleged, he failed to safely keep the attached property, by which it may be presumed that the pleader intended to charge

that he released it. It further alleges the amount of plaintiffs' judgments, and the value of the property released, which exceeded the judgment, but does not allege that plaintiff lost his debt by reason of the release; and the question is presented whether this sufficiently charges any damage. It is the duty of the sheriff to hold attached property subject to order of the court, and any dereliction in this behalf is a violation of his duty. When a judgment plaintiff proves a breach of duty, the law presumes that he has been damaged in the full amount of his judgment, if it does not exceed the value of the property released; and it devolves upon the defendants to prove circumstances of mitigation to reduce the amount. This is a rule of public policy which is generally approved. *Sedg. Dam. 509*, (513); *Faulkner v. State*, 6 Ark. 150; *Hootman v. Shriner*, 15 Ohio St. 43. A complaint was held good in the case of *Adams v. State*, 6 Ark. 497, which alleged a failure by the sheriff to sell property levied upon, although it was not alleged that the plaintiff thereby lost his debt. When the complaint is interpreted by the rules of our Code pleading, as announced in *Bush v. Cella*, 12 S. W. Rep. 783, we think a breach of the bond is sufficiently charged. The judgment will be reversed, and the cause remanded, with instructions to overrule the demurrer to the complaint.

JONES v. ST. LOUIS, I. M. & S. RY. CO.

(*Supreme Court of Arkansas. March 8, 1890.*)

STOCK-KILLING CASES—EVIDENCE OF VALUE.

1. In an action for the value of a horse killed in Arkansas, evidence of the value of the horse in Michigan was properly rejected, where the absence of a local market was not disclosed by the case, nor any reason given why such evidence was competent.

2. If, after evidence is rejected as incompetent, proof is made which shows its competency, it should again be offered.

Appeal from circuit court, White county; **M. T. SANDERS**, Judge.

Action by R. D. Jones against the St. Louis, Iron Mountain & Southern Railway Company, claiming \$2,000 damages,—\$1,000 for the value of a colt killed by defendant's train, and \$1,000 damages for not posting notice of the killing as required by the statute. Judgment for plaintiff on a verdict for \$400, and plaintiff appeals, alleging error in the exclusion of certain evidence.

W. R. Coody, for appellant. *Dodge & Johnson*, for appellee.

HEMINGWAY, J. For an injury to property, the owner is entitled to be compensated, by a recovery against the wrong-doer, to the extent of his injury. If personal property be damaged to the extent of destruction, its owner may have compensation by a recovery of its value at the time and place of its destruction. The correct rule for measuring the damage is found in a statement of the right, and about it there is no room for difference.

But difficulty in applying the rule, in different cases, has arisen, in determining what evidence is competent to prove the value of property destroyed. To establish value, as to prove other facts, the law requires the best evidence that can be had. In most cases, this rule would require proof of value in the market at the time and place of the injury; for, if the property was held for sale, this shows the extent of the loss in not being able to sell it, and, if it was held for use, this shows what it would cost to replace it. But, while the principle which exacts the best evidence is general, what constitutes the best evidence varies with the circumstances of the different cases. There may have been, in a particular case, an injury to property of a kind not sold, and therefore without market value at the place of injury. Still, it had a value there, either for its utility, or because it might be transported and sold at distant markets; and, as all rules of evidence are adopted for practical purposes in the administration of justice, they should not preclude a recovery because a loss occurred at a place where there was no market for the particular kind of property. The law accomplishes no such result, but accords to the party injured the right to recover the amount of his loss, and exacts no more in proof of the amount than the best evidence of which his case is susceptible. This implies that proof of the market price at other points may be admitted, but does it imply that proof may be admitted of the market price at any or all distant points at which there may be a market? This conclusion would be as unreasonable as that the absence of a local market should exclude all proof of value. It would not be contended that, in an action by a farmer in one of our western states for corn destroyed in his barn, it would be competent to prove the value of corn in Dublin, or that, in trover for furs converted in Alaska, it would be competent to prove the value of similar articles in Berlin or Rome. If such proof tended in some slight degree to establish value, other and better proof is, in the nature of things, to be had, tending more nearly and directly to that result. As the aim of the law is, in such cases, to ascertain value, courts should not admit proof of it which is to a great extent misleading, when it is susceptible of the proof, without the misleading elements, that is manifestly to be had. So we find it established that, where value cannot be fixed by the proof of local markets, it may be done by proof of value at the nearest point where similar property is bought and sold, with such addition or deduction for cost of transportation, and the hazard and expense incident thereto, as may be necessary to determine its actual value at the place of the injury. If it was held for sale, the amount of recovery should be a sum which would have been realized upon a sale, and in such case there

v.18s.w.no.9-27

should be a deduction from its value in the distant market; while, if it was held for use, the recovery should be of a sum sufficient to replace it, and there should be an addition to the price in the distant market to meet the cost and hazard of transportation. *Coolidge v. Choate*, 11 Metc. 79; *Grand Tower Co. v. Phillips*, 23 Wall 471; 2 Suth. Dam. 373. In what we have said, we have not attempted to formulate a rule of universal application; for there are states of case in which courts, in order to ascertain actual value, and arrive at a just finding, have adopted a different rule for the admission of evidence, not violating, but really conserving, the principles that we have announced. Thus, in the case of *Harris v. Railway Co.*, 58 N. Y. 660, which was an action for killing a race-horse on the isthmus of Panama, the court held that proof of the value of the horse in San Francisco was admissible; it appearing that there was no local market for such animals, and that it was being transported to San Francisco when killed. So, in other cases, it is held that proof of distant markets may be received when they and the local market are interdependent or sympathetic. 2 Whart. Ev. § 1290.

The absence of a local market was not disclosed by the state of the case when the court suppressed the depositions; nor did it appear that the market value of similar animals in Leslie, Mich., had any reasonable or satisfactory tendency to prove the value of plaintiff's animal when and where it was killed. No such deduction could be drawn from the relative situation of the two places, or from their ordinary business intercourse. It follows that the depositions were irrelevant and incompetent.

If, for any reason not apparent, they were competent, the plaintiff should have advised the court of the reason, with an offer to prove it on the trial. If he had done so, the court would, doubtless, have admitted the depositions, when proof revealed their competency. As plaintiff failed to do this, the court could determine the question of relevancy only in the light of the depositions excepted to and the pleadings; and, as they disclosed no relevancy, it was right in sustaining the motion to suppress. If, in the progress of the trial, plaintiff made proof in connection with which the depositions became competent, he should then have offered them in evidence. This he failed to do. If he had done so and the court had excluded them, we would be called to decide whether they were competent, in connection with the proof that there was no market for the injured animal at the place of its injury. But the circuit court did not rule on that state of the case, and it is not before us for review.

No other ground of reversal is urged; and, as there was no error in the court's action in this regard, the judgment will be affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. RUDDELL.
(*Supreme Court of Arkansas. March 8, 1890.*)

ACCEPTANCE OF DEED.

Certain citizens entered into a bond to furnish a right of way to defendant railroad free of charge. They obtained a deed from plaintiff running direct to defendant, conveying a right of way, but subject to certain conditions to be performed by it. Defendant refused to accept the deed when tendered by the citizens. Subsequently it built its road across this land. *Held*, in an action for breach of the conditions of the deed, that defendant was not obliged to notify plaintiff that it would not accept the deed, and that its failure to give such notice raised no presumption of acceptance.

Appeal from circuit court, Independence county; J. W. BUTLER, Judge.

Dodge & Johnson, for appellant. *Robert Neill*, for appellee.

BATTLE, J. Certain citizens of Batesville, in this state, agreed with the St. Louis, Iron Mountain & Southern Railway Company that, if it would extend its railway beyond Batesville to Cushman, they would procure for it the right of way for such extension, and executed to it a bond, and thereby obligated themselves to perform their agreement to pay all expenses of obtaining the right of way. Among these citizens was D. C. Ewing. They selected a committee to secure the right of way, and Ewing was made chairman. W. B. Ruddell owning land through which the line of the extension would, probably, be located, the committee applied to him for the right of way over his land. At the instance of the committee, he finally executed a deed, in which he undertook to convey to the railroad company the right of way over his land on the following conditions: he should have all the timber on the right of way: the track should be located on the side of a hill: his fence, if interfered with, should be placed in good order, and above overflow: the railroad company should pay all damages to his crop caused by it while its road was in course of construction: all water should be so "turned" as not to damage his land: and the company should make two crossings across its roads over his land at points convenient to him and his tenants; and delivered it to Ewing. Ewing handed it to W. S. Thompson, who was at that time an agent of the company for the purpose of receiving and transmitting deeds to right of way to the company's chief engineer at St. Louis, Mo. When Ewing handed to Thompson the deed, he (Thompson) informed him that he did not believe the company would accept it, but that he would submit it, which he did, and the company declined to accept it on account of its conditions. Thompson informed Ewing of such refusal, and requested him to get another deed, which Ewing made an effort to do, and failed. The railroad company built its road over the land of Ruddell, but failed to comply with the conditions of the deed; and afterwards Ruddell brought this action to recover the damages caused by such non-compliance.

There was no controversy about the fore-

going facts on the trial. Nearly all of them were proved by plaintiff. Evidence was also adduced tending to prove that the deed was never returned, or offered to be returned, to Ruddell; that the work on the road over plaintiff's land was commenced about four or five weeks after the deed was made; that, about this time and afterwards, Thompson and plaintiff had conversations about the construction of the road, and nothing was said about a refusal to accept the deed; that plaintiff never heard of a refusal to accept until after the commencement of this suit; and that it was after the railroad company had taken possession of the right of way when Ewing requested him to give another deed.

The court gave to the jury, at the instance of plaintiff, among other instructions, the following, against the objection of the defendant:

"(1) The jury are instructed that this is an action for damages growing out of alleged violations of stipulations and conditions contained in a deed of conveyance from plaintiff to defendant for a right of way for defendant's railroad, which deed the plaintiff alleges was by him executed and delivered to defendant through its agents.

"The defendant, by its pleadings, denies that the plaintiff conveyed to defendant a right of way, and denies that plaintiff executed and delivered to defendant a deed containing all or any of the covenants set forth in the complaint, or any deed whatever of such right of way.

"It will be a question for the jury to determine—*First*, whether the plaintiff did execute such deed; and, *second*, whether he delivered or caused it to be delivered to defendant's agent or agents.

"To make a deed valid and binding upon the parties, there must be a delivery to the grantee.

"It will be for the jury to determine, from all the evidence in the case, whether there was a delivery of the deed in question in this case, and, in considering and determining this matter, the jury are directed to look at all the facts and circumstances in the case, the action of the parties, their conduct with reference to the subject-matter of the alleged deed in question, and as to which of the parties or their agents retained and kept possession and control of the paper after its execution by plaintiff. But the act of delivering the possession of the deed to the hands of defendant's agent would not be conclusive evidence of an acceptance of it by defendant."

"(11) The jury are further instructed that, if a deed is found in the grantee's hands, a delivery and acceptance will be presumed; and in this case, if the jury find that the deed in question was executed by plaintiff, and by his direction and act placed in possession of defendant's agent, authorized to procure such deed, at or near the day of the instrument's date, and thereafter the instrument remained in possession of the defendant's agents up to this date, without any offer on part of de-

fendant through its agent to return the instrument to the grantor, an acceptance of the instrument on the part of the defendant will be presumed; but such presumption may be rebutted by other evidence, and the facts and circumstances proven in the case."

And refused to give, among others, the following, asked for by defendant: "If, therefore, you believe from the evidence that said Ewing knew or was informed by Thompson at the time he received the deed that he (Thompson) was unwilling or unauthorized to accept the deed for the defendant company in the shape such deed was then in, then the plaintiff will be as much bound by such knowledge or information as though he himself had possessed it. Also, would the plaintiff be bound by any subsequent knowledge or information said Ewing may have had or received from defendant's agents of its continued refusal to accept said deed."

The jury returned a verdict in favor of plaintiff. Judgment was rendered accordingly. The defendant moved for a new trial on the grounds the court erred in giving instructions, at the request of plaintiff, over its objections, and in refusing to give instructions asked for by it, and the verdict was contrary to the evidence. The motion was overruled, and he saved exceptions, and appealed.

Appellee contends that appellant accepted the deed in question, and thereby entered into a contract with him to perform the conditions annexed to the grant of the right of way. His claim of the right to recover was based upon the supposed duty of the appellant to notify him of the non-acceptance of the deed, in the event it was rejected. Upon this theory he recovered judgment. Was it the duty of the appellant to notify him of its non-acceptance? The answer to this question depends upon the answer of another: Who offered the deed to appellant?

Certain citizens of Batesville entered into a bond to appellant, and thereby, for a valuable consideration, obligated themselves to procure, at their own cost, the right of way from Batesville to Cushman for appellant, free of all charge or expense to the railroad company. In an effort to perform their contract they procured the deed from appellee. Instead of having the right of way conveyed to them, and then conveying to appellant, they caused the appellee to convey directly to the railroad company. In discharge of their obligation, in part, they tendered the deed to appellant. The tender was an offer of the citizens to perform their contract with the appellant. The railroad company having their obligation to procure for it the right of way free of all charge, and being unwilling to assume the expense of performing the conditions in the deed in order to secure free of all charge, refused to accept their offer. There was no duty to notify any one of the refusal, except those who had made the offer. No one else was

entitled to or had the right to expect notice. Consequently, appellee had no right to presume that the deed was accepted because he had not received the notice from appellant. No right could accrue to him because of appellant's failure to do an act that it was under no obligation or duty to perform. It should have given notice to the citizens, which it did.

We think the judgment should be reversed, and the cause remanded for a new trial, and it is so ordered.

SCOTT v. PATTERSON et al.

(Supreme Court of Arkansas. March 15, 1890.)

REAL-ESTATE AGENT—COMMISSIONS—APPEAL.

1. Where a real-estate agent, employed to sell land, introduces the owner to a purchaser, and negotiations are commenced through such introduction, the agent is entitled to his commissions, though a sale is not effected at first, and the owner declares the transaction off, but afterwards makes the sale himself, without the aid of the agent.

2. The findings of fact of the court, sitting as a jury, where the evidence is conflicting, will not be disturbed if there is evidence to support them.

Appeal from circuit court, Sebastian county; GEORGE A. GRACE, Special Judge.

F. A. Youmans, for appellant. B. H. Tabor, for appellees.

HUGHES, J. Appellant employed appellees, as real-estate agents, to sell for him a tract of land; gave them the numbers of the land, the price and terms, which were \$10 per acre, one-third cash, and the balance, in equal payments, in one and two years. Scott, the appellant, and owner of the land, was introduced by the appellees to Mrs. Humphries, the prospective purchaser, and negotiations were pending between her and Scott for about a week without any agreement. Afterwards they met at the office of appellees for the purpose of determining the matter. They failed to agree, and appellant informed Mrs. Humphries that he considered the trade off. Afterwards, Scott contracted to sell the land to Vaughan & Hatchett, and sent a deed to be signed and acknowledged by his wife. Upon the return of the deed, Vaughan & Hatchett made objections to the title, and declined to consummate their agreement to purchase. Pending their consideration whether they would accept the deed, Scott met Mrs. Humphries, and informed her that he had sold the land. She expressed regret that she had not purchased it, whereupon Scott told her that if Vaughan & Hatchett did not take it he would give her the preference. Soon afterwards, Scott sold her the land for all cash; and he and Mrs. Humphries went to the office of appellees, and procured them to prepare the deed. After the deed was prepared and delivered, and the consideration had been paid, appellees demanded commissions for the sale. Scott refused to pay commissions, offering to pay for preparing the deed, and appellees brought this suit.

The appellant, in his testimony, after

stating other facts, said: "Mr. Parker said, in my presence, that he had done all he could to sell her the land, [meaning Mrs. Humphries,] and that he was unable to do so, and that he would turn her over to me; that I might sell her the land, if I could. We met at the office of Patterson & Parker according to agreement. She would not close with me, and I considered the trade off. Patterson & Parker were present while Mrs. Humphries and I were talking about the matter. After this, I contracted to sell the land to John Vaughan." And in the cross-examination appellant said: "I did not have anything to do with selling the property until after Patterson & Parker had declined to have anything more to do with the property." Appellees testified, in substance, that they had no information that negotiations were broken off between Scott and Mrs. Humphries after they had failed to agree at their office; that there was merely a lull in the trade; that Scott never took the property off their books, and never revoked their authority to sell; that they had no knowledge of the attempted trade with Vaughan & Hatchett.

The court, sitting as a jury, found the facts to be: *First.* That defendant [appellant] employed plaintiffs [appellees] to sell a piece of land on Mazzard prairie. *Second.* That plaintiffs entered the numbers on their books, and the price, which was \$1,840,—one-third cash, and the balance to be paid in two installments, all to be paid by May, 1889. Interest at ten per cent. per annum. *Third.* That the plaintiffs and defendant, co-operating, endeavored to sell to the final purchaser, whom plaintiffs found and introduced to defendant. *Fourth.* That a sale was finally made to the same party that plaintiffs had introduced to defendant, but was first agreed to between purchaser and defendant, and plaintiffs were notified of the same, and made out the final papers, and aided in closing up the transactions. Said sale was for \$1,200 cash. *Fifth.* That plaintiffs had no notice of any termination of negotiations with the purchaser, nor of any attempted trade between defendant and Vaughan. *Sixth.* That the plaintiffs were the procuring cause of the sale, and acted in good faith throughout. *Seventh.* That the negotiations had been pending, and had not been broken off, until final sale. *Eighth.* That the amount of commissions due plaintiff was five per cent. on first thousand dollars of purchase money, and 2½ per cent. on the remainder, being \$55." Upon the facts as found the court declared the law to be "that a real-estate agent or broker employed to sell land, and who is the procuring cause of a sale, while negotiations were still pending, and acts in good faith, is entitled to his commissions, although the owner aided in the transaction, and finally himself made the agreement with the purchaser." Whereupon the court gave judgment for the appellees for \$55 and costs. Appellant excepted at the time to the finding of facts and the

declarations of law by the court, moved for a new trial, which was denied, and they excepted and appealed.

As there is conflict in the testimony as to material facts, we cannot disturb the findings of facts by the court, sitting as a jury. We cannot say they are without evidence to support them.

Was the law correctly declared? In *Tyler v. Parr*, 52 Mo. 249, it was adjudged that "the law is well established that, in a suit by a real-estate agent for the amount of his commission, it is immaterial that the owner sold the property, and concluded the bargain. If, after the property is placed in the agent's hands, the sale is brought about or procured by his advertisements and exertions, he will be entitled to his commissions; or if the agent introduces the purchaser, or discloses his name, to the seller, and, through such introduction or disclosure, negotiations are begun, and the sale of the property is effected, the agent is entitled to his commissions, though the sale may be made by the owner." See the cases cited in the opinion; also *Lincoln v. McClatchie*, 36 Conn. 136; *Lloyd v. Matthews*, 51 N. Y. 124. Finding no error therein, the judgment of the circuit court is affirmed.

BOWDEN *et al.* v. BLAND *et al.*

(Supreme Court of Arkansas. March 15, 1890.)

REFORMATION OF DEED—CURATIVE ACTS.

1. Where a husband and wife join in a conveyance of the wife's land, but, by mistake of the parties and of the draughtsman, the deed is so worded as to purport to convey only a dower interest, and the deed is properly executed and acknowledged, a court of chancery has no power to reform the deed to make it convey the fee.

2. Laws Ark. 1883, Act 69, substantially re-enacted in 1885, p. 191, provides that all deeds and other conveyances recorded prior to the 1st day of January, 1883, purporting to have been acknowledged before any officer, and which have not been invalidated by judicial proceeding, shall be held valid to pass the estate which such conveyance purports to transfer, although such acknowledgment is defective. Another curative act, passed March 14, 1883, (Laws 1883, Act 79,) provides that all conveyances authorized by law to be recorded, or which have been recorded, the proof of execution whereof is insufficient because the officer certifying such execution omitted any words in his certificate, shall be as valid as though the certificate of acknowledgment or proof of execution was in due form. *Held*, that these statutes have no application to this case, as they operate only on the ceremony of the execution of conveyances.

Appeal from circuit court, Drew county; C. D. Wood, Judge.

W. S. McCain and Wells & Williamson, for appellants. *Harrison & Harrison*, for appellees.

HUGHES, J. Appellants brought an action of ejectment for an undivided one-seventh interest in the Wiley place, in Drew county, alleging that the plaintiff's ancestor, Catherine Bowden, inherited a one-seventh interest in the land from her father, Edward Wiley, who died seised of the land; that plaintiffs inherited from said Catherine, and that de-

defendants are in possession under a deed made in 1882, by Catherine's husband, Jesse Bowden, Sr., tenant by the curtesy, to one Bowling, under whom defendants (appellees) claim by mesne conveyances; that Bowden, the tenant by the curtesy, is dead, and that defendants (appellees) refuse to surrender; pray judgment for possession, and for rents and profits. Defendants answered, admitting the above facts, but stating as a defense that Catherine Bowden, the maternal ancestor of the plaintiffs, intended to join her husband in the deed to Bowling as a grantor in fee, but that, by mistake of the parties and the draughtsman who prepared the deed, it was so worded as to purport to convey only a dower interest in the land upon her part. They pleaded the statute of limitations, which, however, is not insisted on in the brief of counsel, and will be treated as waived. They made their answer a cross-complaint, averred that the plaintiffs, as heirs of Jesse Bowden, had inherited from his estate assets equal in value to their interest in the land in controversy; that they had made valuable improvements upon the land; pleaded a counter-claim; prayed that plaintiffs' complaint be dismissed, and that their title be quieted. The cause was transferred to equity. Appellants demurred to the cross-complaint and counter-claim. The demurrer was overruled, and they excepted. The appellants then filed their separate answers to the counter-claim and cross-complaint of appellees; and the chancellor, having found the facts alleged in the answer to be true as to the intention and purpose of Mrs. Catherine Bowden in the execution of the deed to Bowling, dismissed plaintiffs' complaint, decreed reformation of Mrs. Bowden's deed, and that the title of appellees be quieted. Appellants prayed an appeal, and brought the cause to this court.

The main question presented in the case is, has a court of chancery the power to reform the deed of a married woman made in 1882? The deed of Mrs. Catherine Bowden is not defective in execution or acknowledgment. It is executed in good form, and properly acknowledged. But it is the deed of the husband, in fee, to the wife's land, in which the wife joined, purporting only to relinquish a right or possibility of dower. In *Martin v. Hargardine*, 46 Ill. 322, it was adjudged that "where the husband and wife joined in the execution of a mortgage which, by mistake, described the wrong tract of land, a court of chancery has no power to correct the mistake so that the relinquishment of dower shall apply to land not described in the mortgage, although such land was intended by all the parties to be described therein." At common law a married woman had no power to convey her land except by fine and recovery, and it is only by statutory enlargement of her powers that she can now do so. "The conveyance of a *feme covert*, except by some matter of record, was absolutely void at law." 2 Kent, Comm. 151. "If there is a defect in the wife's conveyance rendering it void at

law, it is equally so in a court of equity; and the latter tribunal has no jurisdiction to cure it, or compel a conveyance from her in due form. It is so, even though the purchase money has been paid." 1 Bish. Mar. Wom. § 599; *Leonis v. Lazzarovich*, 55 Cal. 52; *Drury v. Foster*, 2 Wall. 24; *Knowles v. McCamly*, 10 Paige, 342; *Gebb v. Rose*, 40 Md. 387; *Townslley v. Chapin*, 12 Allen, 476. By a decided weight of authority, it is well settled that a court of chancery cannot reform the deed of a married woman, not acting as a *feme sole*. It is well settled in this state that a court of equity will not decree specific performance of a married woman's agreement, in writing, to convey her land. *Milwee v. Milwee*, 44 Ark. 112; *Rockafellow v. Oliver*, 41 Ark. 169; *Felkner v. Tighe*, 89 Ark. 357; *Wood v. Terry*, 30 Ark. 385; *Rogers v. Brooks*, Id. 612; *Stidham v. Matthews*, 29 Ark. 650.

This being true, a court of equity could not decree that the intention of a married woman, not expressed in her deed, to convey the fee in her lands, should be enforced. Do the curative acts of 1883 and 1885 make this deed of Mrs. Bowden effective? The first was passed March 8, 1883, (Act 69,) and was substantially re-enacted in 1885 (Acts, p. 191) as "An act for the better quieting of titles," and is as follows: "All deeds and other conveyances recorded prior to the 1st day of January, 1883, purporting to have been acknowledged before any officer, and which have not heretofore been invalidated by any judicial proceeding, shall be held valid to pass the estate which such conveyance purports to transfer, although such acknowledgment may have been on any account defective." The second of these acts, passed 14th March, 1883, (Act 79,) is entitled "An act to cure defective acknowledgments," and is as follows: "All conveyances and other instruments of writing authorized by law to be recorded, or which have heretofore been recorded, in any county in this state, the proof of execution whereof is insufficient because the officer certifying such execution omitted any words in his certificate, * * * shall be as valid and binding as though the certificate of acknowledgment or proof of execution was in due form." In *Johnson v. Parker*, 11 S. W. Rep. 682, Chief Justice COCKRILL, delivering the opinion of the court, said: "In the case of *Johnson v. Richardson*, 44 Ark. 365, we ruled that these provisions of the statute validated a previously defective acknowledgment of a relinquishment of dower, and that no vested right was disturbed thereby. In that case, however, the certificate of the officer showed that the wife had made an effectual effort to relinquish dower, and the curative acts were permitted to supply the defect in the certificate. * * * But, when the acknowledgment is in form for that purpose, the fact that the wife joins in the deed with her husband, as grantor, is sufficient to bar her dower, even though there is no clause in the deed expressly relinquish-

ing it. It was so determined in *Dutton v. Stuart*, 41 Ark. 101. If she join with her husband in the conveyance as a grantor, her estate passes. * * * The deed is sufficient to pass her title, right, or interest, whatever it may be, provided, only, the requirements of the statute as to acknowledgment are observed. [A deed of general warranty purports to convey a perfect title or estate.] * * * Our statutes were designed to operate upon the ceremony of the execution of conveyances, which is wholly within the control of the legislature; and, as was said in *Richardson's Case*, *supra*, the power which prescribed the forms to be observed in the executions of conveyances has said that a non-compliance with them shall be excused, and the contract made by the parties shall have effect according to its purport." But, as the deed does not purport to convey the fee, but only a dower interest, and is not defective either in execution or acknowledgment, the curative acts do not apply. There is nothing for them to operate upon. It therefore follows that the chancellor erred in overruling appellants' demurrer to the cross-complaint of the appellees. The decree is reversed; and, as there seems to be an agreement of counsel, implied from their briefs in the case, that the appellees are entitled to betterments, the clerk of this court is directed to ascertain and state the value of the same.

RHODES et al. v. ANDREWS.

(*Supreme Court of Arkansas. March 29, 1890.*)

TENDER—PAYMENT INTO COURT—COSTS.

Under *Mansf. Dig. Ark. § 5179*, providing that judgment shall be entered for the party entitled thereto on the face of the pleadings, though a verdict has been found against him, plaintiff is entitled to judgment for the amount admitted to be due and paid into court by defendant, and costs till the time of deposit, though there has been a verdict for defendant.

Error to circuit court, Nevada county; **C. E. MITCHELL**, Judge.

Trover by **C. A. Andrews** against **Rhodes & Reed** for the value of six bales of cotton. Defendants denied the conversion, but admitted an indebtedness to plaintiff of \$39.28, which they paid into court. The jury found for defendants at the trial, and the court entered judgment for plaintiff for the amount tendered, with costs to the time of deposit, whereupon defendants bring error. *Mansf. Dig. Ark. § 5179*, provides that "where, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so entered by the court, though a verdict has been found against such party."

Smoot, McRae & Arnold, for appellants. *Sanders & Watkins*, for appellee.

PER CURIAM. Section 5179, *Mansf. Dig.*, authorized the rendition of judgment for the plaintiff for the amount paid into court by the defendant, and admitted to be due by his an-

swer. The defendant was liable for the costs incurred prior to the payment of the amount into court. Affirmed.

LOGAN et al. v. LEE.

(*Supreme Court of Arkansas. March 29, 1890.*)

FORCIBLE ENTRY—DEFENSES.

It is no defense to an action for forcible entry, where defendant entered into possession by means of threats amounting to force, that he was entitled to the possession under a lease from the owner; the remedy of such action being designed to protect the actual possession, whether right or wrong.

Appeal from circuit court, Miller county; **C. E. MITCHELL**, Judge.

This was an action of forcible entry by **J. E. Logan**, **W. E. Hamilton**, and **W. B. Hamilton**, from whom Logan had purchased the premises in controversy, against **Richard Lee**, who claimed under a lease from one who claim to be the owner at the time of the alleged entry. The court instructed the jury that, if defendant took possession of the premises under a lease from the owner, then his possession was rightful, and their verdict should be for him. There was a verdict for defendant, and plaintiffs appeal.

Byrns & Jones, for appellants. *Scott & Jones*, for appellee.

PER CURIAM. When the defendant returned to the premises in question, he found the plaintiffs' vendor in the peaceable possession through his agent, **Roberts**, who forbade his entry. Through threats which amounted to force, he entered into possession. The remedy adopted in this suit was designed to protect the actual possession, whether right or wrong. *Johnson v. West*, 41 Ark. 540. Whatever the defendant's rights under his contract of lease may be, he cannot litigate them in this action. The first instruction given at the instance of the defendant was erroneous, and the judgment must be reversed, and the cause remanded for a new trial.

MEMPHIS & L. R. RY. CO. v. SHOECRAFT.

(*Supreme Court of Arkansas. March 29, 1890.*)

LIMITATION—RAILROAD COMPANIES—KILLING STOCK.

1. Where plaintiff, in reply to plea of the statute of limitations, alleges that suit had been theretofore brought and dismissed, the burden is upon him to show the truth of his allegation.

2. In an action against a railroad company for killing stock, the uncontradicted testimony of defendant's witnesses that the killing was unavoidable is sufficient to rebut the statutory presumption of negligence.

Appeal from circuit court, Monroe county; **M. T. SANDERS**, Judge.

Action by **George Shoecraft** against the **Memphis & Little Rock Railway Company** for injuries to stock. There was judgment for plaintiff, and defendant appeals.

U. M. & G. B. Rose, for appellant. *H. A. Parker*, for appellee.

PER CURIAM. The complaint in this cause was filed March 7, 1885. The answer, pleading statute of limitations, was filed April 2, 1885. The complaint was amended September 18, 1885, by alleging that suit was brought on this cause of action November 13, 1883, and dismissed April 9, 1884. The amended answer, filed March 20, 1888, denied the bringing and dismissal of the previous suit. There was no proof on the point, and the court should have instructed the jury that upon the evidence the action was barred by the statute. Upon the facts, the proof was wholly insufficient to warrant a recovery by plaintiff. The only suggestion of negligence on the part of defendant was that growing out of the statutory presumption. The testimony of witnesses, who are uncontradicted, and not even cross-examined, overcome this presumption, and show the killing of the cattle to have been unavoidable. Reverse.

FECHEIMER et al. v. ROBERTSON et al.

(Supreme Court of Arkansas. March 29, 1890.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—MORTGAGE BY INSOLVENT.

An insolvent firm executed two mortgages on its entire stock to two of its creditors, whose claims were past due, and delivered them to the latter's attorney, and then executed a third mortgage to all its other creditors. The attorney took possession, and sold enough goods to satisfy the first two mortgages, and delivered the remaining property to the creditors in the third mortgage. There was no agreement for the intervention of a trustee, nor were any of the mortgagees answerable for the proceeds of sales to any one but the mortgagors. Held, that the transaction was not an assignment.

Appeal from circuit court, Lee county; M. T. SANDERS, Judge.

Cohn & Cohn and *McCullough & McCullough*, for appellants. *U. M. & G. B. Rose*, *E. D. Robertson*, and *H. N. Hutton*, for appellees.

SANDELS, J. The three instruments executed by Johnson & Bolick are in form mortgages. The first was executed to H. T. Simon, Gregory & Co; half an hour later, the second to Goodbar, White & Co.; and, on the following day, the third to C. R. Ryan & Co. and other mercantile firms, being all the remaining creditors of the grantors. The entire property of the firm was conveyed. The liabilities mentioned in the instruments exceeded the nominal value of the property. The execution of the three was determined upon in advance of the making of either. The two firms first provided for were represented there by attorney, who had their demands for collection. None of the creditors named in the third instrument were present or represented. In examining the list of creditors, the attorney of the first two firms found that there was due Day, Horton & Bailey \$5.20, and said that he usually represented that firm, and assumed to do so on this occasion. Upon the delivery of the first two instruments, the attorney took possession

of the property for Simon, Gregory & Co. and Goodbar, White & Co. He proceeded to sell, under direction of the instruments, until he had realized enough to pay the claims of said two first creditors, when he surrendered possession of the remainder of the assets to the agent of the creditors accepting the provisions of the third deed. Meantime, and while said attorney had possession of the property conveyed and the money derived from the sales, appellants, creditors of Johnson & Bolick provided for in the third deed, sued out an attachment, and garnished him. He answered, denying possession of any money or property belonging to Johnson & Bolick, and on final hearing was discharged by the court. In all the deeds, after the description of the property conveyed is given, the language employed is as follows: "Yet this sale and transfer is upon condition that whereas, said firm of Johnson & Bolick is indebted to [naming the parties and the sum due,] now, if said firm shall pay, or cause to be paid, the sum of money above mentioned, then this conveyance to be void; otherwise, to remain in full force and effect. The said grantees shall take immediate possession of said property, and for that purpose may designate an agent, and shall proceed to sell the same at private sale, at cost, for cash, for a period of two months, and collect the notes and accounts, and shall apply the proceeds arising from such sales and collections to the payment of their debt, [or debts,] after paying the necessary costs of the execution of this trust. If, at the expiration of said time, any portion of said debt shall remain unpaid, the said grantees shall sell at public auction, for cash, the balance of said property, or so much thereof as may be necessary for the payment of their debt, on ten days' notice in some newspaper published in Marianna, Arkansas, and the remainder of said property, or remainder of the proceeds of the sale of same, they shall turn over to the grantors herein, Johnson & Bolick, after defraying all costs of executing this trust." In the last deed, the words, "and the remainder of said property, or the remainder of the proceeds of the sale of the same, they shall turn over to the grantors herein, Johnson & Bolick, after defraying all costs of executing this trust," are omitted. G. A. Bolick testified that he was one of the firm of Johnson & Bolick; that the firm was insolvent, and further stated: "At the time of the execution of said deeds, and prior thereto, during the negotiations in regard to the matter, we [Johnson & Bolick] declared and expressed to the agents and attorneys of Simon, Gregory & Co. and Goodbar, White & Co., and Day, Horton & Bailey, that we desired and intended to immediately execute the second deed similar to the first, conveying to them the same property, subject to the first deed, and also to execute the third deed to all our other creditors, conveying to them the same property, subject to the other two deeds, so that we could thereby close out and dis-

continue our said business, so as to enable us to embark in some other employment to support ourselves and families."

The plaintiffs have appealed, and insist that the transaction constituted an assignment, and that the deeds, requiring a disposition of the property different from that prescribed by the assignment statute, are void. The case of *Richmond v. Mississippi Mills*, 52 Ark. —, 11 S. W. Rep. 960, was very similar to the one at bar in many of its facts. The instruments adopted to effect the conveyance are substantially the same. The confidence of the mortgagors that no surplus would result to them in this case is apparent from the deeds, as also from their testimony. The purpose was to devote the property to the payment of debts. This may be accomplished by either a mortgage or an assignment. The question is have the grantors, by stipulation in the deeds, or by their agreements and acts, impressed the character of a trust for creditors upon this transaction? In *Richmond v. Mississippi Mills*, supra, it is said: "A deed of assignment contemplates the intervention and agency of a trustee, though none need be named in the deed. *Burrill, Assignm.* § 3; *Burrows v. Lehndorff*, 8 Iowa, 96. Hence conveyances directly to creditors in payment or by way of security for their own debts solely are not, generally, assignments for the benefit of creditors." *Richmond's* agreement that Taylor should assume charge for himself and 12 others not represented or consulted, and that a man suggested by *Richmond* should be manager for all, together with many other circumstances indicating the intention of the parties, made it clear that the transaction in that case was an assignment. In *Winner v. Hoyt*, 66 Wis. 227, 23 N. W. Rep. 380, the six mortgages executed with the agreement that *Hoyt* should take the property and sell for the benefit of all made the transaction an assignment. In *Re Hurst*, 7 Wend. 239, the confession of judgment, with the agreement that various creditors should be paid out of the sum confessed, was held an assignment. In *Dickson v. Rawson*, 5 Ohio St. 218, it was held that, where the mortgages were to pay the debt of the grantees, and to pay \$500 to *Graff* as indemnity for his suretyship to *Harris* for the mortgagor, the instrument was an assignment. Why? Because in every case it was shown, either by stipulation in the instrument or by independent agreement at the time, that a person was contemplated and intended to be assignee or trustee for the benefit of some or all of the creditors of the grantor beside himself. The test is this: can other creditors call the grantee or person stipulated for by the grantor to account for the proceeds of the property? If they can, then the conveyance is not solely for the benefit of the grantees, and conveyances of this kind would constitute an assignment. If the grantees or the parties to whom, by arrangement with the grantors, the property is given, are not liable to account to other

creditors for the proceeds of sales, then there is no trustee and no assignment. In *Richmond v. Mississippi Mills*, supra, it is further said: "We do not hold that the giving of one or more mortgages, the confession of judgments, or other means adopted to give security or preference, constitute necessarily, or even ordinarily, an assignment. But we do hold that where one or more instruments are executed by a debtor, in whatever form, or by whatsoever name, with the intention of having them operate as an assignment, and with the intention of granting the property conveyed absolutely to the trustee, to raise a fund to pay debts, the transaction constitutes an assignment." And, further, in the same case: "There was ample evidence to establish the fact that it was the intention of the parties that the various instruments should operate as an absolute conveyance of the property to raise a fund to pay debts, and that Taylor, either personally, or by *Wylie Hatley*, should be the trustee for the execution of the trust. The orders drawn on *George Taylor & Co.* ignored the other mortgagees. It was to the trustee that they were directed." In this cause there was no agreement or arrangement, express or implied, for a trustee. The first two creditors were present by their attorney, and a delivery to him was a delivery to them. They were not accountable to any other creditor, under the terms of the deed or agreement of the parties, for any part of the money received from sales of property. When they received enough to satisfy their claims, they delivered all remaining property to the creditors named in the third deed, and they in turn represent all the indebtedness of *Johnson & Bolick*, and are not answerable to any one for the proceeds of sales, except the mortgagors. Affirm.

DAILEY *et al.* v. CAIN.

(Court of Appeals of Kentucky. April 13, 1890.)

STATUTE OF FRAUDS—MARRIED WOMEN—ENFORCEMENT OF LIENS.

1. A contract to board a person for life, and one to let him retain property until he is reimbursed from the rents for the cost of an improvement, are not within the statute of frauds, as they may be performed within a year.

2. Where a person makes improvements on land of a married woman, which forms no part of the homestead, by reason of her having induced him to think that he had bought it from her, equity will give him a lien thereon for the value of the improvements, though she is not bound by her contracts.

3. In such case it is in the discretion of the chancellor to order that a certain amount of the land be sold, and that, if this be not sufficient, more be then sold.

Appeal from circuit court Marion county.

"Not to be officially reported."

Samuel Avritt, Geo. Avritt, and C. S. Hill, for appellants. *S. A. Russell, J. D. Belden, and J. D. Fogle*, for appellee.

HOLT, J. June 20, 1887, the appellee, Patrick Cain, gave to the appellant Nancy Ann Dailey, who is the wife of her co-appel-

ant, Dan Dailey, a check for \$1,000; and the three parties then executed a writing reciting that the money was given to her in consideration of past services rendered by Dailey and wife to Cain, also because of his having theretofore lived with them, and that he was to continue to do so as long as he desired. About the same time, Cain furnished to Mrs. Dailey the most of the money necessary to pay for a cow. She also selected some furniture, and he paid for it. He also, during the summer of the same year, built a dwelling-house costing about \$630 upon a lot of Mrs. Dailey's, which, while it adjoins the one upon which she lives, is yet a separate lot of the town. The appellee brought this action to recover the cow and the furniture, claiming they belonged to him, and also to subject the entire property of Mrs. Dailey to the repayment to him of the \$1,000 and the \$630, upon the ground that he had bought the entire property verbally of Mrs. Dailey; he supposing, as he claims, that the \$1,000 was in payment of it, and that she refused to convey to him. The lower court rejected the claim of the appellee as to the \$1,000 and the cow, but gave him the furniture and a lien upon the lot upon which the house was erected by him for the \$630; he claiming that it cost him something more than that sum. Dailey and wife have appealed. They insist that Mrs. Dailey, who appears to control the affairs of the Dailey family, bought the furniture, and that it therefore belongs to her, although it is conceded that the appellee paid for it. He contends that she merely selected it for him; also, that he bought the entire Dailey property, and built the house as his own upon one of the lots. They contend, however, that the improvement was made under an agreement that he was to erect the house and have the rents of it until he was reimbursed its cost, or until his death, when it was to belong to Mrs. Dailey; she in the mean time getting no rent for the ground.

It is insisted that this alleged contract was not within the statute of frauds, and it is true that one which may or may not be performed within a year does not fall within the statute. Therefore, a contract by A. to board B. during life is not within it, as the latter may die within a year. Nor is an agreement that one is to retain property until he is reimbursed the cost of an improvement from the profits, because this may take place within a year. The time of performance, in such cases, is uncertain and contingent. *Bull v. McCrea*, 8 B. Mon. 423; *King's Ex'rs v. Hanna*, 9 B. Mon. 370.

It appears that shortly before the time of the transactions above named the appellee had suddenly acquired what was to him a fortune. He had drawn something over \$5,000 of pension money. He had for several years stayed occasionally at the house of the appellants. He worked upon turnpikes and railroads when able to do so, and when not at work it was one of his stopping places. It is impossible, after a careful read-

ing of the evidence, which is very contradictory, to tell even approximately how much of the time from the period when he first began stopping there until he quit, in 1887, he was at the house of the appellants. As illustrative of the wide difference between the parties, the appellants claim that he came to their house in 1879, and that from that time until 1887 he stayed there more than one-half of the time. He, upon the other hand, says that he never went there until several years after 1879, and that in all he never stayed there over four weeks. Both parties are probably mistaken as to the time he stayed there. Many witnesses, however, testify that he was there so often that they thought it was his home. He was sick there, and also often spent his time there when on "sprees," which were so frequent during some of the years that they nearly ran together, and made a continued "drunk." During these times Mrs. Dailey waited upon him, attended to his clothing and washing; and, in short, he stayed there as one of the family. During these years, however, he at times stayed at two other places,—Mrs. Sullivan's and Mrs. Murphy's; and all three of these families appear to have become very greatly attached to him when he obtained his pension money. There is testimony tending to show that there was a struggle between them as to which should have possession of him. The evidence, however, shows that he spent much of his time, when not at work, at the appellants. He often said he intended, when he got his pension money, to recompense Mrs. Dailey for her kindness to him; and the evidence fails to support his claim that he was drunk, and did not know what he was doing, when he gave her the \$1,000, and signed the writing relative to it. He likely forgot its import. He says that some time after the time when it was executed he learned of its execution and of the payment of the money, but he then thought it all related to the purchase of the property.

It is somewhat difficult, owing to the conflict of testimony, to arrive at the justice of the matter; but, upon a review of all of it, the chancellor did not, in our opinion, err in holding that the \$1,000 was not in fact paid as purchase money for the property. The appellee unquestionably believed, however, that he had bought it. He undoubtedly erected the house under this belief; and the appellant Mrs. Dailey, by her own conversation and conduct, induced this belief. She told the cashier of the bank where the check was paid, and when it was paid, that she had sold her property to the appellee; and he subsequently informed the appellee of this statement by her. There is evidence showing that there was a mortgage upon the property, and that she applied to the appellee for a loan of money to discharge it. He refused, but told her he would buy the property; and she subsequently talked of it as if he had bought it. He says she told him so. He undoubtedly believed it, and she induced this opinion

upon his part. Acting upon this belief, and *bona fide*, he made the improvement; and, if he were not now to be reimbursed out of the property to the extent that the building of the house increased the vendible value of the lot, the conduct of the appellant Mrs. Dailey would work a fraud resulting in her own advantage. In our opinion, the evidence shows an understanding between them that he had bought the property; and he, having acted in good faith upon it in making the improvement, should be reimbursed out of it. He used his means in increasing the value of the property, and Mrs. Dailey will be so much the gainer, and unjustly, unless it be liable for the increased value; and this, too, by reason of her own representations to the appellee. It does not matter that he knew she was a *feme covert*, and that he is therefore presumed to have known she was not bound by her contract. Equity will not allow her to profit by reason of the honest belief of the appellee as to his rights, induced by her conduct and representations. It was held in the case of *Hawkins v. Brown*, 80 Ky. 186, that a party who held under a conveyance from a *feme covert*, but which was not binding upon her, was entitled to be reimbursed for his improvements made in good faith; she having actively participated in the making of the sale. In this instance the female appellant induced the appellee to make the improvement by making him believe he had bought the property of her; and, unless he can now look to it for reimbursement, he will, in effect, be defrauded by her conduct. The appellants had no homestead right in the lot upon which the house was built. The judgment, as we understand it, only gives a lien upon it for the value of the improvement, and not upon all of the property of Mrs. Dailey. It is a separate lot from that upon which the Daileys live. Before the appellee built the new house they lived, and yet live, in a house upon the other lot. They were separated by a division fence, and there was then a log house upon the lot upon which the new house was built. The amount allowed the appellee for the making of the improvement was not, in our opinion from all the evidence, in excess of the increase in the vendible value of the lot arising from it.

The chancellor had a discretion in directing the manner of the sale; and it was not error upon his part to order a certain portion of the lot to be first offered, and then, in case it did not bring the necessary sum, to offer a certain number of feet front more, and to thus proceed until the necessary sum was bid, or the entire lot sold.

The judgment does not allow the appellee interest upon the value of the improvement, but gives him the rents that had accrued from it. The rent of the mere ground without the improvement would undoubtedly have been inconsiderable, and whether the furniture belonged to the one or the other party was a question of fact, upon which the chancellor has passed; and his conclusion is, in our

opinion, sustained by the weight of the evidence.

It seems to us the justice and equity of this case has been reached by the judgment below as nearly as it is possible for human judgment to do so, in view of the conflicting character of the testimony; and it is affirmed.

OWENTON, S. & B. L. TURNPIKE ROAD CO.
v. SMITH.

(Court of Appeals of Kentucky, March 25, 1890.)

CORPORATIONS—SUBSCRIPTIONS TO STOCK.

An incorporator of a turnpike road company who takes an active part in effecting a change in the route of the road, and after the change is made promises to pay his subscription to the stock of the company, cannot repudiate his subscription on the ground of the indefiniteness of the object of incorporation as expressed in the articles.¹

Appeal from circuit court, Owen county.
"Not to be officially reported."

Action by the Owenton, Squiresville & Ball's Landing Turnpike Road Company against J. V. Smith. There was a judgment for defendant, and plaintiff appeals.

J. W. Greene and Thos. R. Gordon, for appellant. *Montgomery, Lindsay & Botts*, for appellee.

BENNETT, J. The appellee and others, as is alleged, incorporated themselves, under chapter 56 of the General Statutes, into a company for the purpose of constructing a turnpike road from, at, or near Kemper's Stop, on the Owenton & Gratz Turnpike Road, by the way of Squiresville, to Adam's Ferry and Springpoint, on the Kentucky river. Said company was incorporated as the "Owenton, Squiresville & Adam's Ferry Turnpike Road Company." The appellee, in addition to being one of the incorporators of the company, subscribed the sum of \$250 as stock in said company. The subscription paper, which he signed, in connection with others, set out the style of the company, and, in detail, the object of the subscription, which was the construction of a turnpike road as above set forth. Afterwards, additional articles of incorporation were filed in the county court, by which the name of the company was changed to that of the present name, and the amount of the capital stock was increased from \$15,000 to that of \$20,000.

It is alleged that this change made no change in the route of the road, or of its general plan of construction, except to make a deflection of about a half mile at the terminus of the same, which was more convenient and desirable. It is alleged that the appellee was not only desirous of this change, but was active in effecting it, and, after the change was made, he, knowing of the same, promised to pay said subscription, and that

¹ Stockholders and organizers of a life insurance company are estopped as against policy holders, to set up the illegality or irregularity of the corporate organization. *McDonnell v. Insurance Co.*, (Ala.) 5 South. Rep. 120, and note; *Aultman v. Waddle*, (Kan.) 19 Pac. Rep. 730, and note.

others paid their subscription on the faith of the appellee's said promise to pay his. It is also alleged that, after the additional articles were adopted, slight change was made as to the place of the construction of the road by the written request of the appellee and others. So we see that a change, in the first place, was effected by the active co-operation of the appellee; in the second place, by the written request of the appellee; in the third, afterwards, he repeatedly promised to pay his subscription. Now, there is no statute, no public policy, that makes these acts and promises of the appellee void or non-effective. On the contrary, they were all effective, and bound him to the changes made, and to pay the subscription.

But it is, again, contended that, owing to the indefiniteness of the object of incorporation as expressed in the articles, the appellee was not bound to pay the subscription. Section 17 of chapter 56 provides, in substance, that the franchise attempted to be granted cannot be declared null, etc., except by a direct proceeding for that purpose. Section 18 provides, in substance, that no persons acting as a corporation under this act shall be permitted to rely as a defense upon a want of a legal organization of such corporation, and that no person having contracted with said corporation shall be permitted to rely upon such defense. Here the object of the incorporation was plainly, inferentially set forth, at least, in the articles; and the subscription list, which the appellee signed, explicitly set forth said object. Besides, the object was made definite by the location and almost completion of the road. So we think that the articles of incorporation are not void on account of indefiniteness as to the object, etc. On the contrary, the object, by the articles, is reasonably manifest. Besides, the object was made certain by the acts of the parties, including the appellee, and it is too late for him to repudiate his subscription. The judgment is reversed, with directions for further proceedings consistent with this opinion.

BROWNING et al. v. MULLINS et al., (two cases.)

(Court of Appeals of Kentucky. March 20, 1890.)

CORPORATIONS—BONDS—ULTRA VIRES.

Where a turnpike company issued bonds, secured by a mortgage on its road, for money borrowed to extend and complete its road, stockholders who have acquiesced therein until the money was expended cannot be heard to complain for the first time, upon suit to foreclose the mortgage, that the bonds were unauthorized and *ultra vires*.

Appeal from chancery court, Pendleton county.

"Not to be officially reported."

Two actions by M. Mullins and others to foreclose a mortgage given by the Falmouth & Milford Turnpike Road Company. P. C. Browning and others, a part of the stockholders of the company, resisted the foreclos-

ure, and now appeal from the judgments entered in favor of plaintiff.

John H. Barker and E. W. Hines, for appellant. L. T. Applegate, for appellees.

BENNETT, J. In 1856 the legislature chartered the Falmouth & Milford Turnpike Road Company. There was no organization under this charter until 1879, when a president and directors were elected, and entered upon the discharge of their duties. The road, by the terms of this charter, was to be constructed from Falmouth, Pendleton county, to Milford, Bracken county. By an act approved April 9, 1880, the company was given the power to extend the road to some point in the Robertson county line. Said amendment authorized the company, for the purpose of completing and extending the road, etc., to borrow money, and issue bonds for the payment of the same in denominations of \$250, \$500, and \$1,000, bearing interest at not exceeding 7 per cent. per annum, payable annually. Said bonds to be due and redeemable in five years from their date, but payable, at the option of the company, in three years from their date. The company issued 27 bonds for \$250 each, due and redeemable in three years from date, with interest at 7 per cent., payable annually, and, if not paid in 90 days after maturity, the debt itself became due and payable. The road, etc., were mortgaged to secure the payment of these bonds. Money was borrowed from the appellee Mullins on these bonds and mortgage, and used in completing the construction of said road as extended. The bonds were not paid at their maturity, and the appellee instituted suit thereon to recover judgment, and to foreclose said mortgage to satisfy said judgment.

The appellants, as a part of the stockholders in said company, by their petition to be made parties, which was treated as their answer, resisted the payment of said bonds upon the grounds that the issuance of the same was unauthorized by the charter itself; that the company never authorized it; that the stockholders never authorized it; that the amendment was passed without the authority of the company or stockholders, and the same was not ratified by either of them. The appellants say that they did not authorize said amendment, nor did they expressly or impliedly ratify the same. But they do not say what proportion of the stockholders they are. Whether they are the majority or not does not appear from the pleadings. If a majority of the stockholders consented to said amendment or ratified the same, it is all that is required in this state. It does not appear that they did not. But, from the fact that the appellants expressly confine their dissent to themselves, and the other stockholders have acquiesced all this while, and are still acquiescing, it is presumed that they did consent to the amendment. Besides, it appears that they are the majority. Also, the matter of issuing the bonds and giving the mortgage were made public; and the ap-

pellants knew of the same shortly after they were issued, if not before then. Also, the money arising from the sale of said bonds was used in constructing said road for their benefit, which fact the appellants knew; but they suffered the same to be done without a murmur. Even now they hold on to the property, extension and all, acquired by the expenditure of the appellees' money. If the enterprise had been a success, there would have been no word of complaint from them. If there had been complaint made as soon as the alleged wrongful acts were discovered, the appellee Mullins might have been able to place himself *in statu quo*, but it is too late now. Consequently, the complaint of the appellants, made at this late day, cannot be heard.

The bonds, being payable and redeemable in 3 years from their date, instead of 5 years from their date, and the same being payable and redeemable in 90 days after the maturity of the interest, if the same was not paid within said time, were contrary to the provisions of the amended charter, and consequently *ultra vires*. But, the money received thereon having been expended in constructing the road for the appellants' benefit, and they having acquiesced therein until the same was expended for their benefit, and placed beyond the reclamation of the lender, it is too late for them to refuse to pay the same. Therefore the chancellor did right in subjecting said road to its payment by virtue of the mortgage, but payable in five instead of three years from date. We are also of the opinion that it was right to adjudge that the appellants pay the receiver, etc. The judgment on both appeals is affirmed.

SMITH v. PRICE.

(Court of Appeals of Kentucky. March 25, 1890.)

EJECTMENT—CONVEYANCE PENDING SUIT.

The right to recover in ejectment is not affected by plaintiff's having parted with his title after the action was brought.

Appeal from circuit court, Barren county.
"Not to be officially reported."

Ejectment by Joel T. Price against John Smith. There was verdict and judgment for plaintiff. Defendant appeals. For former report, see 7 S. W. Rep. 918.

Lewis McQuown, for appellant. W. P. D. Bush and Finley F. Bush, for appellee.

PRYOR, J. The former opinion in this case reversed the judgment below for the reason that the appellee, between the date of the filing of the original petition and the filing of his amended petition, had parted with his title to the land, and therefore could not maintain his ejectment. The original petition failed to describe or identify the land so that a judgment could be properly rendered upon it. Under the former rule of pleading the petition would have been good; but the Code, § 125, requiring the land to be so de-

scribed as to be identified, and the plaintiff failing to do this, no judgment could have been rendered. Therefore the necessity of setting the verdict aside, and permitting the amended petition to be filed. Although the petition was defective, the appellant was before the court, and the action pending, when the sale was made by the appellee, although the amended pleading describing the land was not filed until after the title had passed to the vendee of the plaintiff.

The question presented is, could the plaintiff maintain an ejectment when at the time of the verdict rendered the title was in some one else? The issue in such a case is, was the plaintiff entitled to the possession of the land at the time he commenced his action? The amended petition did not present a new cause of action, but only made the original petition more definite as to the land sued for. In *Chiles v. Conley's Heirs*, 9 Dana, 385, it was held that a conveyance of land pending an ejectment does not affect the right of recovery. See *Robertson v. Morgan*, 2 Bibb, 148; *Jackson v. Jeffries*, 1 A. K. Marsh. 83; *Holmes v. Doe*, 2 Bibb, 535. So it is apparent that the sale to Russell after the action had been pending did not affect appellee's right to recover.

There is no ruling of the court prejudicial to the appellant. In fact, the evidence conduces to show title in the appellee; and the judgment is therefore affirmed.

CINCINNATI, N. O. & T. P. RY. CO. v. ADAM'S ADM'R.

(Court of Appeals of Kentucky. March 20, 1890.)

DEATH BY WRONGFUL ACT.

1. Gen. St. Ky. c. 57, § 3, providing that "the widow, heir, or personal representative" of one whose life is lost by the willful neglect of another may sue the person causing the death, limits the right to the widow and children, or to the administrator for their benefit.

2. Gen. St. Ky. c. 57, § 1, providing that the personal representative of a person not in the employ of a railroad company, and killed by the negligence of its employee, may recover damages for such death, gives no right to an administrator of an employee of a railroad company to recover damages for the negligent killing of such a person by said company, though decedent lives two days after the injuries were received.

Appeal from circuit court, Scott county.
"Not to be officially reported."

Action by the administrator of Luke Adam against the Cincinnati, New Orleans & Texas Pacific Railway Company to recover for the negligent killing of his intestate. There was a verdict and judgment for plaintiff. Defendant appeals. Gen. St. Ky. c. 57, § 3, provides that "the widow, heir, or personal representative" of one whose life is lost by the willful neglect of another may sue the person causing the death.

C. B. Simrall and J. E. Cantrill, for appellant. Owens & Finnell, for appellee.

BENNETT, J. The appellee brought this action against the appellant to recover dam-

ages caused, as is alleged, by the gross and willful negligence of the appellant's section boss, consisting in suddenly stopping the speed of a hand-car on which the intestate, who was one of the appellant's employes, and other employes, including the said section boss, who had the said car in charge, were riding and returning from their work on the appellant's road for it, whereby said intestate was thrown from said car and killed. It is alleged that said intestate was unmarried and had no children. The allegations as to negligence were denied. Also, the right to recover at all, the intestate being an employe of the appellant, and without widow or child, was put in issue. But the lower court sustained the right to maintain the action, and the jury rendered a verdict for the appellee for \$15,000; \$5,000 of which being abated, judgment was rendered for the appellee for \$10,000. The appellant has appealed.

Section 1, c. 57, Gen. St., gives no right to the administrator of the employe of a railroad to recover damages for the negligent killing of such a person by said road. On the contrary, said section expressly denies such right. We have decided within the last two or three years, both in published and manuscript opinions, that under the third section of said statute the right to recover damages for the killing by willful neglect was confined to the widow or children of the intestate, or to the administrator for their benefit; and, if there were no widow or children, nor right of action for the willful killing as aforesaid could be maintained by the administrator.¹ We have read with pleasure the able briefs of counsel, including the present brief, from various parts of the state who had recovered large verdicts under said third section against railroads for the killing of unmarried and childless persons, assailing these opinions, but we see no reason to change our views as expressed in said opinions; and, with all due respect, it is "love's labor lost" to attempt to induce this court, as it is now organized, to take back these decisions. The case is reversed, with directions to dismiss the appellee's petition.

ON REHEARING.

(April 17, 1890.)

BENNETT, J. It is not stated in the opinion that the appellee's intestate was immediately killed by being thrown from the hand-car. The court did not fail to notice the fact that, as is alleged by an amended petition, said intestate lived two days after he was thrown from said car. We decide that, inasmuch as he was an employe of the appellant, performing service on said road as such employe, the first section of chapter 57 of the General Statutes denied to the appellee the right to recover any damages what-

ever for the killing of his intestate by either ordinary or gross neglect. Also, as it was alleged that the intestate left neither widow nor child, the appellee could not recover under the third section of said statute. Suppose that the intestate did live two or any number of days after he received the injury that resulted in death; the said sections, nevertheless, apply. The petition for a rehearing is overruled.

NOBLE v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 23, 1890.)

MURDER—INDICTMENT—BENEFIT OF COUNSEL.

1. An indictment which avers that defendant "feloniously, willfully, and with malice aforethought, did kill and murder F. with a knife," is not defective because it fails to allege the manner in which the knife was used.

2. When the record shows that arguments were made to the jury both for the state and the defense, it will be presumed that the accused was allowed the benefit of counsel.

Appeal from circuit court, Breathitt county.

"Not to be officially reported."

John E. Cooper, for appellant. *P. W. Hardin*, Atty. Gen., for the Commonwealth.

PYOR, J. It would be extremely technical to hold that the failure to allege the manner in which the knife was used, whether by a thrust, blow, or stab in the body of the deceased, rendered the indictment defective. That the defendant "feloniously, willfully, and with malice aforethought, did kill and murder Martin Fugate with a knife," etc., was a direct and specific charge, apprising the accuse of the nature of his offense, and and the mode of committing it.

It appears from the record before us that the accused was the aggressor; and, having taken the life of the deceased, and been convicted only of voluntary manslaughter, he ought not to complain. There is no self-defense in this case, but a killing resulting from the wrongful act of the appellant; and, with instructions that embrace the law of the case, we perceive no reason for reversing the judgment.

It is said in argument that the accused was not represented by counsel. The record shows that arguments were made to the jury both for the state and the defense, and we must presume that the accused was allowed the benefit of counsel. Judgment affirmed.

CHAMBERLAIN et al. v. BALLINGER.

(Court of Appeals of Kentucky. April 15, 1890.)

PARTITION—JURISDICTION.

Civil Code Ky. § 499, subsecs. 1, 10, provides for the filing of petitions for partition in either the county or circuit courts, and that actions for division of land shall be tried as ordinary actions, but without a jury. Plaintiff in partition alleged that there was a verbal agreement between himself and a deceased co-tenant, under whom defendants claimed, that the land should be divided in a particular manner. He alleged his willing-

¹ See *Henderson's Adm'r v. Railroad Co.*, 5 S. W. Rep. 875; *Jordan's Adm'r v. Railway Co.*, 11 S. W. Rep. 1018; *Givens' Adm'r v. Railroad Co.*, 13 S. W. Rep. 267; *Henning's Adm'r v. Leather Co.*, Id. 550.

ness to abide by the agreement, to which defendant acceded, and the division was thus made. Held, that the court of common pleas of Knox county was not deprived of jurisdiction because of its lack of equity powers, as there was no equitable issue involved.

Appeal from court of common pleas, Knox county.

"Not to be officially reported."

Petition for partition by W. R. Ballinger against N. A. Chamberlain and others. Judgment for petitioner, and defendants appeal.

Wilson & Rawlings, for appellants. *Jas. D. Black* and *N. B. Hays*, for appellee.

LEWIS, C. J. In this case appellee filed his petition in the Knox county court for division of a tract of land which descended from his mother to himself and appellants, children of his deceased sister. Subsequently, by agreement of all parties, the action was transferred from the county court to the Knox court of common pleas, where the judgment appealed from was rendered. Subsection 1, § 499, Civil Code, provides: A person desiring a division of land held jointly with others may file, in either the circuit or county court of the county in which the land lies, a petition containing a description of the land, statement of the names of those interested, with prayer for division. And subsection 11 provides in express terms for removal of such action on motion of either party to the circuit court for trial. But it is urged as sufficient ground for reversal that the common pleas court, having no equitable jurisdiction, could not take cognizance nor render judgment in the case, because there was a previous verbal agreement between appellee and his sister, before she died, that the land was to be divided in a particular manner. Subsection 10 provides that an action for division of land between joint tenants shall be tried and decided as an ordinary action, but without the intervention of the jury; and it would thus seem clear the court trying this case had jurisdiction. It is true appellee set up in his petition the agreement between himself and sister, whereby she was permitted to erect valuable improvements upon a certain portion of the main tract, which she might and did use before death of their mother, with the understanding that they were not to be taken into account in the division when it was made. Appellee stated in the petition his willingness to abide by that agreement which appellants readily assented to because greatly to their advantage, and the division was accordingly made with reference to quantity and value, without at all estimating value of the improvements which were situated on the portion of the tract allotted to appellants. There was therefore no equitable issue involved in the case, and the common pleas court had jurisdiction.

There is nearly always discrepancy in testimony regarding value of property, and, while several witnesses testified the portion of land allotted to appellee was more valuable than that allotted to appellants, others testi-

fied to the contrary. But the report of commissioners selected for their intelligence and sworn to faithfully and impartially make division of land, and having their attention particularly and critically directed to the task, is always entitled to more weight than the opinions of witnesses, who often make mere cursory examination of the land, and sometimes are controlled by prejudice. And it is therefore proper to abide by such report unless the commissioners have made mistake in quantity, or decidedly erred in judgment. We perceive no reason for disregarding the decision made by the commissioners, and the judgment must be affirmed.

BIRD v. BANK OF WILLIAMSTOWN.

(Court of Appeals of Kentucky. March 29, 1890.)

VENDOR AND VENDEE—DEFICIT—APPEAL.

1. In an action on notes for unpaid purchase money of land, when the defense is a deficit in the quantity of the land, and one surveyor testifies that there is a deficit, and another testifies to the contrary, and there is no evidence to show which is the more accurate, a judgment for plaintiff will not be disturbed on the ground that it is not supported by the evidence.

2. When defendant testifies that at the time he verbally purchased the land it was understood that a right of way of a railroad through it was to be surveyed as part of his purchase, the right of way will not be held to be a deficit, though the deed contains a warranty of title, and says nothing about the right of way.

Appeal from circuit court, Grant county.

"Not to be officially reported."

H. Clay White and *John J. Landram*, for appellant. *Geo. C. Drane*, for appellee.

HOLT, J. The sale of the 100 acres of land to the appellant, T. A. Bird, by the assignor of the note sued upon by the appellee, and which was given for part of the purchase money, was by the acre. The defense as to the balance due upon the note is an alleged deficit of 8½ acres in the quantity of land, and which was purchased at \$75 an acre. It appears that the vendor, Northcott, owned what was known as his "Home Place," supposed to contain 75 acres, and through it at the time of the sale ran the Cincinnati Southern Railway. He also owned other land adjoining. The appellant, who then lived several miles away, went and looked at the home place, and verbally purchased it. When he did so he saw the railroad running through it, and he says he then agreed that its right of way was to be counted as a part of the purchase. Northcott subsequently refused, however, to let him have the land unless he would not only take the home place, but enough of the adjoining land to make in all 100 acres. To this he assented, and on February 15, 1887, Northcott executed to him a title-bond, stipulating that notes for the unpaid installments of purchase money were to be executed by the appellant on the 1st of March following, and delivered to Northcott whenever a general warranty deed should be made to the land, possession of it to be given

on March 15, 1887. On March 1, 1887, the notes were executed and delivered to Northcott, and a deed of the character denominated in the bond made by him to the appellant, who accepted it, and had it recorded. The contract was therefore no longer executory, but an executed one. The appellant claims that the deed was accepted under certain circumstances, and by virtue of certain promises of the vendor, but this is not shown by competent testimony. The latter is dead, and the appellant is not, therefore, a competent witness to prove his statements. The abatement in price now claimed is for an alleged deficiency of three-fourths of an acre in the quantity, and also for three and one-eighth acres which Northcott conveyed to the railway as a right of way in 1875, and which by the terms of the deed is to revert whenever it ceases to be used as a public highway.

The appellant having accepted the deed, the burden of showing the deficiency is upon him. So far as the alleged deficit of three-fourths of an acre is concerned, the testimony is, at least, in equipoise. The vendor had the land surveyed, and the surveyor testifies, in substance, that there is no such deficiency. The vendee had it surveyed by a different surveyor, and he testifies to the contrary. The one survey is not shown to be more accurate than the other. Under these circumstances, the judgment of the chancellor should not be disturbed upon this ground, nor can it be because of the right of way granted to the railroad. The deed to the land embraced by it does not convey the absolute estate. It provides: "The estate herein granted shall revert to the grantors, their heirs and assigns, whenever the grantees or their assigns cease to use, occupy, or control the same for railway, turnpike, or other public highways." The appellant says that when he verbally purchased the home tract alone, it was the understanding that the railroad right of way was to be surveyed to him as a part of his purchase, and that when the last trade was made nothing was said about it. It is true a covenant of warranty in a deed binds the grantor for quiet enjoyment by the grantee, and protects the latter against incumbrances affecting the title, or that he may be compelled to remove to possess and enjoy the estate. But if a public highway be upon land at the time of the purchase, the purchaser should be presumed to know of its existence, and to buy with an expectation and knowledge of any inconvenience arising from its existence. *Butt v. Riffe*, 78 Ky. 352. It is perfectly evident from the appellant's own testimony that he knew when he made his purchase that the railway company had the right of way through the land. The railroad was then being operated over it; and aside even from the understanding, when the verbal purchase of a part of the land was made, that the land embraced by the right of way of the railway should be surveyed to the vendee, it should be so counted, because he knew of the existence of such right when he

purchased, and could as well be heard to complain of the then existence of an ordinary public road over the land. Judgment affirmed.

CLEMENTS v. WATERS *et al.*

(Court of Appeals of Kentucky. April 8, 1890.)

EXECUTION—DISCOVERY—APPEALABLE ORDERS.

1. Under Civil Code Ky. § 439, which provides that after a return on an execution of "No property" by the proper officer an equitable action may be brought for discovering and subjecting any property of the debtor, the equitable action may be maintained after a return of "No property," though there was property liable to the levy.

2. A controversy between creditors as to the priority of their executions on certain land is one involving the title to land, under the statute allowing appeals in such cases irrespective of amount, though the land has been sold by order of court pending the action.

Appeal from circuit court, Washington county.

"To be officially reported."

J. W. S. Clements, pro se. C. C. McChord, for appellees.

HOLT, J. The appellees, Waters & Haydon, having a return of *nulla bona* as to a judgment in the quarterly court against their debtor, J. S. McIntire, filed a transcript of the proceedings in the circuit court, sued out execution there, as provided by section 723 of the Civil Code, and it was also returned "No property." The debtor was then the owner by inheritance from one Linton of an undivided interest in some land situate in the county to which the execution had issued, but it was not levied upon it. It does not clearly appear that Linton had the legal title to it; but, as this seems to be conceded in argument, we will assume it, and it of course follows that the undivided interest of the debtor was in fact liable to levy under the execution. The appellees then brought this action under section 439 of the Civil Code, which provides: "After an execution of *feri facias*, directed to the county in which the judgment was rendered, or to the county of the defendant's residence, is returned by the proper officer, either as to the whole or part thereof, in substance no property found to satisfy the same, the plaintiff in the execution may institute an equitable action for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the same to the satisfaction of the judgment; and in such actions persons indebted to the defendant, or holding money or property in which he has an interest, or holding evidences or securities for the same, may be also made defendants." They sued out an attachment, garnishing, in the hands of Linton's administrator, whatever might be coming to the debtor. Subsequently they sued out a second one, and it was levied upon his undivided interest in the land. After all this had been done, the appellant, J. W. S. Clements, sued the debtor, obtained a judgment, and had an

execution levied upon this landed interest. He then purchased it from the debtor for his debt and something additional, and obtained a deed. Before he did so, however, he had actual notice that the attachment of the appellees had been levied upon the land. He was a *lis pendens* purchaser. He then made himself a party defendant to this action, claiming the land, and that the appellees had no lien upon it. This contention is based upon the idea that, as the undivided interest of the debtor in the land was in fact liable to execution, the appellees had no right to bring this action, and could therefore acquire no lien by virtue of it.

While the litigation was in progress, it was found, in a suit that had been brought to settle the Linton estate, that McIntire owed it a certain sum; and, there being no personal estate coming to him, his interest in the land was sold for the purpose of paying it, bringing, however, more than the amount of this indebtedness. The lower court decided that, after paying what the debtor owed the Linton estate, the appellees should be next paid; and their debt being less than \$100, they now contend that no appeal lies from that judgment to any court, as the statute limits the right to an appeal in actions for the recovery of money or personal property to cases where that sum or more, exclusive of costs, is involved. The land was, however, converted into money by the court pending the litigation. At its inception the land was involved, the appellant was claiming it, and the subsequent action of the court in selling it should not abridge the right of a party to an appeal, which may be taken without regard to amount, if the title to land be involved. As land cannot be levied on under an execution from a quarterly or justice's court, the statute authorizing the filing of a transcript in the circuit court of the proceedings in those courts showing a return of "No property," and the issuance then of an execution by the clerk of the circuit court, is a very proper one. It saves the cost and trouble of a second suit. The creditor is not allowed, therefore, to resort to an equitable action upon his judgment to reach the land of his debtor until he has failed to make his debt by suing out execution from the circuit court in the manner provided by the statute. He must in such a case exhaust all of his legal remedies. He cannot, upon a return of "No property" on execution from a justice's or a quarterly court, merely bring an equitable action in the circuit court to subject land to the payment of his debt, to which his debtor has the legal title, for the reason that it is liable to execution. The object of the section of the Code above cited was to give relief to the creditor where all the ordinary remedies had been resorted to without avail. Until this be done, it would be useless and unreasonable to oppress the debtor, and consume the time of the courts with equitable actions. The creditor may, of course, resort to them in the lower courts to reach any means of the debt-

or over which such courts have jurisdiction; but he cannot appeal to the circuit court for relief in this way until he has exhausted all his legal remedies. This was held in the case of *Weatherford v. Myers*, 2 Duv. 91. This, however, is a different case. Here the creditor in the proper manner sued out his execution from the circuit court, and it was returned "No property" before he brought his equitable action. The fact that it could have been levied upon the undivided landed interest of the debtor in the Linton estate does not prevent the appellees from maintaining this action. It is not shown that they procured a false return upon the execution, or had anything to do with it in any way. They exhausted all their legal remedies. When they had done so, they had a right to bring this action. They had complied with the statute, and done all within their power to make their debt, before resorting to an equitable action. They had a right to act upon the return of the officer. The Code expressly provides that when the execution is returned "No property found," the creditor may resort to his equitable action to subject any "equitable or legal interest and all other property" of the debtor to the satisfaction of the judgment. He is not required to know that the return of the officer is true. In this instance it is not even shown that the appellees knew the land of their debtor was liable to execution; and it would not do to hold creditors to knowledge upon this subject. The appellees by their suit acquired a lien upon the land superior and elder to the execution levy of the appellant, who, as to his purchase, was a *lis pendens* purchaser, and the judgment is affirmed.

JONES v. MOTLEY.

(Court of Appeals of Kentucky. April 5, 1890.)

CONSTRUCTION OF DEED—DESCRIPTION.

In trespass *quare clausum fregit*, plaintiff and defendant claimed under a common grantor, who had owned a tract which included a parcel of bottom-land. He conveyed the tract to C., who conveyed it to defendant. The deed to C. contained a reservation of "the bottom at the ford of the creek, which bottom is now under fence, and supposed to contain nine acres, more or less." In fact the fence included only five acres, but there was a strip running along the edge of the creek outside of the fence, and containing one and a quarter acres. C. testified that he never considered this strip as belonging to him. Held, that the words "now under fence" should be considered as descriptive, merely, and not as limiting the boundary of the reservation.

Appeal from circuit court, Warren county.
"Not to be officially reported."

Action for trespass *quare clausum fregit* brought by W. S. Jones against G. W. Motley. There was judgment for defendant, and plaintiff appealed.

Dulaney & Mitchell, for appellant. *John M. Wilkins* and *T. H. Hines*, for appellee.

PRYOR, J. The appellant, Jones, instituted an action of trespass *quare clausum fregit* against the appellee, Motley, alleging a forcible

ble entry upon his land, and removing therefrom several parcels of fence, the property of the plaintiff; leaving his crop exposed, and otherwise injuring his possession. The appellee admits the entry and removal of the fence, but pleads that in the year 1886 the appellant removed his fence from off his (appellant's) land, and placed it on the land of the appellee, and that he had the right to remove it, if done in a peaceable manner.

The action involves a question of title that should have been determined by some other arbitrator than the defendant himself; and the latter had no right to assert his ownership by tearing down appellant's fence, and exposing his property to the depredations of stock, or otherwise injuring him. Both of these parties, the appellant and the appellee, claim to hold under and from a common vendor. C. P. Martin was the owner of a tract of 25 acres of land, known as the "Mill Tract," through which ran Ray Forks creek. A part of this 25 acres was bottom-land, and lies north of the Bowling Green and Scottsville road, and west of the Ray Forks creek. There is no part of the main tract (25 acres) north of this big road but this bottom-land. In April, 1869, Martin sold this tract of land to the Claypools, and made them a deed containing this reservation: "But it is further understood that the party of the first part reserves out of said boundary the bottom on Ray Forks at the ford of the creek, which bottom is now under fence, and supposed to contain nine acres, more or less. The party of the first part further reserves a passway for stock to the creek aforesaid, should he ever need it, said passway to run along the line of Hardcastle." In the year 1870, Martin sold the land reserved in his deed to the Claypools to one Taber, and the latter sold to Jones, the appellant. In the conveyance to Taber the land sold is all that part of the mill tract which then belonged to Martin.

This entire controversy is to be settled by the construction given the conveyance from the common vendor, Martin, to the Claypools. The latter had purchased all the 25-acre tract but the bottom north of the Bowling Green and Scottsville road and west of Ray Forks creek. The passway reserved on the Hardcastle line has no connection with the controversy, as the right to the passway is not involved, nor is it near the bottom-land in controversy. The bottom-land reserved in the deed to the Claypools was supposed to contain nine acres, more or less; and, if the description given was the bottom-land north of the big road, there would be no trouble in determining that the entire bottom was reserved. But it is insisted by the appellee, Motley, and so adjudged by the court below, that the language of the conveyance, "which bottom is now under fence," confines the reservation to that part of the bottom-land that was actually inclosed, and that Taber, who purchased of Martin, and Jones of Taber, acquired no greater right than Martin, their vendor, had. It is manifest that all the title

Jones, the appellant, had, he derived through Martin, but we think it equally plain that the reservation was of the entire bottom west of Ray Forks creek and north of the Bowling Green and Scottsville road, confining the reservation made by Martin to the bottom within the fence; and there is a small strip of land from the ford of the creek, where the road crosses, between the fence and the creek, of some 15 or 20 feet, and continuing around to the north of the inclosure, where the strip widens, making something over an acre of the bottom outside of the old fence. The appellant moved the old fence out on this uninclosed part of the bottom, and it was this part of the fence the appellee pulled down. The part of the bottom outside of the fence is about one and a quarter acres, and that inclosed by the old fence is five acres two roods and four poles; making in all about seven acres of land. The reservation supposed there were nine acres, more or less; and it is scarcely reasonable that, in judging of the quantity of land with a fence around it, the parties would have fixed the quantity at nine acres when there were only five acres. They were, no doubt, estimating the entire bottom; and, when including this narrow strip outside of the inclosure, they might well have supposed there were nine acres when it turns out there were only seven acres. Besides this was all the bottom or land north of the Bowling Green and Scottsville road and west of the creek; and there was no reason for confining the reservation to the actual inclosure, and to leave the bottom-land as it was,—fenced up, with no outlet to the creek. Besides, the reservation says, the bottom on Ray's Fork at the ford of the creek, which bottom is now under fence." Now, the bottom was not at the ford, if you confine it to the inclosure, because there was several feet of vacant bottom between the ford and the old fence. The one view of the question is about as technical as the other. The mention of the fence was a mere description of the bottom reserved, and was not intended as a boundary; nor does the fact that a passway was used around this fence between that and the creek affect this question. Taber has closed that up; and, if not, the passway that was looked to by Martin was on the Hardcastle line. The question of a passway was in Martin's mind when he was conveying to the Claypools; and, if the small strip of land between the old fence in the bottom and the creek was conveyed to the Claypools, you then find Martin, who was looking for ingress and egress to and from the creek on the other part of his land, placing the property he has reserved in a condition where he has no outlet whatever to the creek without the consent of his vendees. Martin, the common vendor, says he sold the reservation of the bottom north of the Bowling Green and Scottsville road to Taber, and Taber sold to Jones. Claypool, who was one of the purchasers from Martin or from his brother, who bought from Martin, lived on the land, or

was in the possession of the 25 acres out of which the reservation was made; and he says that he claimed no part of the bottom north of the big road, and, if he owned it, he did not know it. So Martin, the owner of the entire 25 acres, and one of the vendees from him of all but the reservation, both testify on the subject; and, if this small strip of land passed by the deed to the Claypools, they would have known something of the boundary, and it would have been alluded to, at least, by the parties, in consummating the trade. Excluding, however, all this testimony, and with the plat of this 25 acres and that of the reservation before us, and there can be no doubt that the mention of the fence was simply to identify that particular bottom sold. It would scarcely be held that the sale of an island with a fence around it did not pass the space intervening between the fence and the water, where the fence was located, so as to be beyond the reach of a rise in the creek or river; and, when the chancellor places himself in the position the parties Claypool and Martin occupied with reference to this land transaction, it will be difficult to hold that the purport of Martin's deed was to convey to the Claypools this small strip of land from the ford to the extreme north end of the bottom, or that such was the intention of the parties.

The law announced by the court below is correct; that is, "that a conveyance of land, nothing appearing to the contrary, should be construed on the idea that the parties thereto were present on the land at the time of the conveyance, and were acquainted with all the facts and surroundings." Adopting this rule, and regardless of any evidence outside of the various deeds and the plats, and the judgment should have been for the plaintiff. The judgment is therefore reversed, and remanded for a new trial consistent with this opinion.

CARLIN v. BAIRD.

(Court of Appeals of Kentucky. April 10, 1890.)

WILLS—TESTAMENTARY CAPACITY—APPEAL.

1. On the contest of a will, which disinherited testator's daughter in case she should marry B., it appeared that testator threatened to disinherit and whip her if she persisted in receiving B.'s attentions; that his opposition to B. was based solely on his supposed thriftlessness and indolence, regarding which the evidence conflicted; that the will was made by testator on being informed of a clandestine meeting between B. and his daughter on the previous evening; that he was then a bed-ridden invalid, subsisting mostly by whiskey and morphine, but not taking the latter in quantities sufficient to affect him mentally. The draughtsman and subscribing witnesses, and a majority of the 20 witnesses, testified that testator was competent. Adversely it was shown that he had not attempted to revoke a previous will, which provided for the daughter, until he executed the one in controversy; that on that day and the previous one he was drowsy, and had said that he had to take morphine to ease his misery. The daughter and a disinterested person who had seen him on that day considered him incompetent. *Held*, that a finding against the validity of the will would not be disturbed on appeal.

2. Where no exceptions have been taken during trial, an objection that the verdict is contrary to law is too general to be considered on appeal.

Appeal from circuit court, Spencer county.
"Not to be officially reported."

Fairleigh & Strauss, and *W. H. Anderson*, for appellant. *G. G. Gilbert*, for appellee.

HOLT, J. The writing offered as the will of Edward T. Carlin was executed by him in the proper manner on July 16, 1888, and he died a few days thereafter. He left a widow and four children. He had advanced to his children, save his daughter, Lula, who was his youngest child, \$1,000 each. His estate amounted to about \$7,000 or \$8,000. By the paper in contest his widow was to have the use of it during widowhood, the daughter Lula was to have \$1,000 to equalize her in advancements, and the remainder of the estate was to be divided equally among the four children; provided, however, if Lula married one Kelly Baird she was not to have the \$1,000, or any part of the estate, save \$5. She was single at the time of the execution of the paper, but married Baird before her father died. She and her husband assail it upon the ground of incapacity in the maker to execute it, and also upon the ground that it is the product of undue influence. The jury in the circuit court found against it, and the other parties, who would take under it if it were sustained, have appealed.

The sole question presented is whether the verdict is wholly unsustained by the evidence. Not a single exception was taken during the trial. The only ground upon which a new trial was asked is that "the verdict of the jury is not sustained by sufficient evidence, and is contrary to law." The words "contrary to law" amount to nothing. They are too general. Any error of law committed during the trial must not only be excepted to at the time, but it must be pointed out in the grounds for a new trial with such a degree of particularity as is reasonably calculated to call the attention of the court to it, else it will not avail upon an appeal. *Railroad Co. v. McCoy*, 81 Ky. 408. Under our present law the same effect is to be given by this court to a verdict in a will case as in any other action. The judgment is not therefore to be reversed by this court because the evidence may merely preponderate against it. If the testimony be conflicting, then, as the jury are the triers of the facts, their finding must be sustained, in the absence of legal error committed upon the trial.

It is unnecessary to recite all the circumstances appearing in the record. It appears, however, that about two years before the execution of the paper in contest Baird began paying his attentions to his now wife, and they became attached to each other. The father was violently opposed to his daughter receiving the addresses of her now husband, the reason being that he thought him thriftless and lacking in industry. There is some conflict in the testimony whether this opin-

ion of the testator was well founded. In any event, no other objection to Baird's character seems to have been raised or to have existed. The father threatened to disinherit the daughter, and even to whip her, although she was then grown to womanhood, going so far as to make preparation to do so upon one occasion, in the absence of her mother, if she did not refuse to receive the attentions of her lover. Through persuasion, and perhaps fear, she appears at one time in 1887 to have agreed to give him up; but, meeting him shortly after at a Sunday-school convention, their relations were renewed; she then, unbeknown to her father, taking a ride with Baird, and thereafter they met each other occasionally clandestinely, at a house of a neighbor. Such a meeting occurred on the night before the making of the paper in contest. The father learned of it the next morning. He was also then informed by his son, who does not appear to have been moved by a brotherly affection for his sister, that she had taken the ride with her now husband when attending the Sunday-school meeting. The testator at once sent the son for the person who wrote the paper now in contest, and for the two other persons who witnessed it, and it was at once executed. The maker was at the time an invalid, and for the most part confined to his bed. He was taking morphine, but, as appears from the evidence, not in quantities sufficient to affect him mentally. He was, however, living principally upon it and whisky. Twenty odd witnesses were introduced upon the trial. By far the greater number of them say that he was competent to make a will. The draughtsman of the paper in contest so testifies, and the two subscribing witnesses, who appear, however, not to have talked with him any at the time of the execution of the paper, say they "think" he was competent to make a will. Other witnesses testify that he was a man of purpose and fixed opinions; that he had by his own exertions accumulated his estate; that his business capacity was at least fair, if not above the average; and that, when the paper in contest was executed, he, in their opinion, understood it, and knew what he was doing. By far the greater number of the witnesses testify to this effect. Upon the other hand, however, it is shown that he had made a will in 1884, under which his daughter Lula was entitled to a full share of his estate. It does not appear that it had been destroyed or attempted to be revoked in any way until the execution of the paper now in contest. One witness testifies that he was drowsy on the day the latter writing was executed. Another that he was so on the day before, and that he said he had to take morphine to ease his misery. His daughter, the appellant, says that he was not competent to make a will. A disinterested witness, who saw him the day the paper in contest was executed, says that, if allowed to take into consideration the provisions of the paper in contest, and all of the surrounding circum-

stances, he was not, in his opinion, competent to make it. In addition to this the jury had a right to take into consideration the character of the paper. It was *prima facie* unreasonable and unnatural in its provisions as to his youngest daughter. It strikes the mind as being the product of an unbalanced mind. They had a right to determine whether this circumstance was sufficiently accounted for by the testimony. It was a fact thrown into the scale, to be weighed by them. They had a right to consider it upon the question whether the maker had such an aversion to the now husband of his daughter as to unbalance his mind as to his duty towards her. We cannot therefore say that there was no evidence warranting the finding of the jury. There was testimony upon both sides. This court will not set aside the finding because the weight of the testimony merely may seem to it to be against it. Unquestionably there was evidence introduced which required the trial court to submit to the jury the question of will or no will; and, it having been determined by them upon conflicting testimony, it would be an unwarranted invasion of their province to disturb the verdict.

Judgment affirmed.

CRUTCHER v. MUIR'S EX'R.

(Court of Appeals of Kentucky. April 12, 1890.)

MORTGAGES — ABSOLUTE DEED — STATUTE OF FRAUDS.

An assignor for the benefit of creditors who joins his assignee in a *prima facie* absolute deed of land, the legal title to which is in the assignee at the time, occupies the position of vendor, and cannot, under the statute of frauds, (Gen. St. Ky. c. 22, § 1,) change the operation of such deed into a mortgage by evidence of a parol agreement, in the absence of fraud and mistake.

Appeal from circuit court, Jessamine county.

"To be officially reported."

B. A. Crutcher, R. F. Peak, and C. J. Bronston, for appellant. Bronaugh & Bronaugh, for appellee.

LEWIS, C. J. In 1877 appellant made an assignment for benefit of creditors to Young, who in February, 1878, conveyed the lot of land in controversy to Samuel Muir, in consideration of \$2,000, appellant and wife uniting in the deed, which contained a clause of special warranty only. Title of the lot was previous to the assignment in one Smith, to whom appellant had conveyed, reserving in writing right to redeem upon payment of a debt he owed; and part of the purchase money received of Muir was, according to a previous agreement for conveyance of the lot by Smith to Young, used to discharge that debt, the residue being applied to pay other creditors of appellant. This action was brought by appellant in December, 1886, against the executor and devisees of Samuel Muir, to enforce an alleged verbal contract for redemption of the

lot, and for reconveyance upon payment of the \$2,000, and balance of another debt of \$500, which had been partly paid by Young as assignee. It is not alleged that the whole amount of the two debts had, when the action was commenced, been paid, but appellant stated in his petition an offer to pay what was still due. It is, in our opinion, sufficiently proved that there was, before conveyance of the lot to Muir, a verbal agreement made between him and appellant, whereby he was to reconvey whenever the two debts were paid off by rents of the property or otherwise. Several witnesses, including Young, testified substantially or directly that it was made; and besides the property, instead of being exposed to public sale by the assignee, was, with knowledge and consent of appellant, sold at less than what the witnesses testify was at the time its actual value. It is, however, proper to say that Muir, after receiving title and possession, paid to the wife of a former owner of the lot several hundred dollars for relinquishment of her dower. But that fact, though it may have been considered at time of sale, is not sufficient to countervail the evidence mentioned. The agreement thus alleged and proved would, if in writing, unquestionably have the effect to change the operation of the deed in question, though absolute in terms, into a mortgage. And if now treated otherwise it is because it comes within section 1, c. 22, Gen. St., which provides that no action shall be brought to charge any person upon any contract for sale of real estate, unless the contract or agreement, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith. There is a marked distinction between a legal title to real estate acquired under circumstances that devolve a trust upon the holder in favor of a person other than the immediate grantor, and that conveyed by an absolute deed from the vendor to purchaser. An action for equitable relief may be brought and maintained in the first-mentioned case without either charging a person "upon a contract for sale of real estate," or contradicting or varying the terms of a deed under which the legal title is held, though the result may be to change a conveyance absolute on its face into a mortgage or deed of trust, or divest the holder of title altogether. Consequently an agreement upon which claim for relief is in such case founded, may, though not in writing, exist and be enforced without violation of the statute referred to, and be established by parol, notwithstanding the general rule of evidence mentioned. The case of *Williams v. Williams*, 8 Bush, 241, was where the legal title to land was acquired by the holder by purchasing at execution sales and otherwise, under a verbal agreement between him and the owner of the land, that it should be held as security for money advanced, and that the latter shall have the right to redeem. There it was held the agreement, though not in writing, could be proved by parol, and

enforced so far as to require the holder of the legal title upon payment of the money for which it was held as security, to reconvey the land to the original owner. The doctrine there recognized and applied was in accordance with the previous cases of *Martin v. Martin*, 16 B. Mon. 8, and others cited, where equitable relief was upon similar grounds sought and granted. On the other hand, in the case of *Thomas v. McCormack*, 9 Dana, 108, referred to with approval in *Williams v. Williams*, the only question was whether a conveyance by McCormack to Thomas of a lot of land, absolute on its face, should on the facts there presented be deemed, nevertheless, a mortgage. And this language was used: "There being no written memorial of any condition or defeasance, neither the public interest, nor the established principles of equitable jurisprudence, will allow a court of either equity or law to admit parol testimony in opposition to the legal import of the deed and the positive denial in the answer, unless a foundation for such evidence had been first laid by an allegation and some proof of fraud or mistake in the execution of the conveyance, or of some vice in the consideration." The case of *Harper v. Harper*, 5 Bush, 176, was where the vendor, debtor, sought to enforce an alleged parol agreement, whereby the vendee, creditor, agreed to reconvey the land upon payment of the consideration of the conveyance which was absolute in its terms. But it was expressly held that no trust was created, and the parol conditional agreement was within the express prohibition of the statute referred to, and the case of *Thomas v. McCormack* was cited and followed. Appellant in this case, though not holding at the time the legal title, which was in Young, assignee, did have the beneficial interest in the lot, and, becoming a party to the deed to Muir, occupies substantially the attitude of vendor, and consequently cannot now be permitted to set up a parol agreement made at the same time, that contradicts and essentially varies the terms of the deed that, without condition or reservation, passed the absolute title. And as the agreement is denied by appellees, and no fraud or mistake in the execution of the deed is alleged or proved, the relief sought must be denied. Judgment affirmed.

PRINCE v. ANTLE et al.

(Court of Appeals of Kentucky. April 12, 1900.)

JUDGMENT—COLLATERAL ATTACK.

Plaintiff in ejectment cannot question a judgment regularly entered in a suit for a division of lands, wherein plaintiff's interest in the lands in dispute was allotted to defendant, as plaintiff's vendee.

Appeal from Louisville law and equity court.

"To be officially reported."

Isaac R. Greene, for appellant. *N. G. Rogers*, for appellees.

BENNETT, J. The appellant in 1869 owned one-sixth remainder interest in a tract of land in Jefferson county, Ky., and his five sisters owned one-sixth each in said tract, their father owning the curtesy therein. The appellant's interest in said land, in a certain action against him for debt, was in said year attached, upon the ground that he was a non-resident of this state. Judgment was obtained for the sale of said interest, and it was sold in 1871, and John G. Antle became the purchaser. The sale was confirmed, and the deed was made in said year. The appellant in said action was only before the court by warning order. It appears that the order of warning was not in the name of the commonwealth of Kentucky, nor in any language equivalent to being in the name of the commonwealth of Kentucky. It is therefore contended that this defect in the order of warning rendered all subsequent proceedings, including the sale of the land and the confirmation of the sale, absolutely void; consequently, the appellant had the right to disregard the proceedings and sale of his said interest, and resort to this action of ejectment for the recovery of it.

It is unnecessary, in this case, to pass upon the question as to whether or not, by reason of said defective order of warning, the sale, etc., of said interest was void, and consequently could be disregarded, and action be brought to recover the possession of said interest. The reason why it is unnecessary to pass upon said question is that, after said sale and confirmation, the tenant by the curtesy having died, the sisters of the appellant, together with their husbands, said Antle being one of them, brought an equitable action against the appellant for the purpose of having said land divided among them. The appellant was, in this action, proceeded against as a non-resident, and was properly proceeded against as such. It was sought in said action to have the appellant's interest in said land allotted to said Antle, as the appellant's "vendee." The court did adjudge that said Antle was the vendee of the appellant's interest in said land, and allotted the same to him, and a deed was made to him accordingly. The appellees claim under that deed. The court in said action had jurisdiction of the thing, and the appellant was before the court by constructive service of process. All the proceedings were regular and jurisdictional in this action. The appellant's interest in said land was allotted to Antle, as the appellant's vendee, and he or his wife have held the possession of it ever since, claiming it as belonging to him or her. Suppose that Antle was not, in fact, the appellant's vendee; that the proceedings, so far as the sale of the land was concerned, was utterly void, and passed no title to him whatever,—yet the court, in an action thereafter instituted against the appellant, adjudged that the said

interest belonged to said Antle. That judgment stands in full force, and as long as it stands in full force it is binding on the appellant.

It is well settled that only a void judgment can be disregarded in a collateral proceeding. Even if the judgment is never so erroneous, it is binding on the parties to it as long as it stands unreversed, and estops the parties from calling in question said judgment in any collateral proceedings; but not so as to a void judgment. The latter may be disregarded in a collateral proceeding, because it is regarded in law as non-existent, and therefore estops not the parties to assert contrary to its provisions in a collateral proceeding. Suppose Antle, in the action for a division, had based his right as vendee upon a forged deed, or upon a verbal sale, which is void, and the court had allotted the land to him upon such evidences, no one will contend that the allotment would have been void. It is clear that it would have been binding on the appellant as long as he permitted it to stand in full force. In the case supposed, if it had appeared in the case that the deed was forged or the sale was verbal, and the court had, nevertheless, rendered judgment sustaining the sale, and allotting the land to Antle, the judgment would have bound the appellant as long as he permitted it to stand in full force, and it would stand in full force against him until it was set aside by a direct proceeding, such as the law directs. The judgment is affirmed.

GOOSLING et al. v. SMITH.

(Court of Appeals of Kentucky. April 17, 1890.)

PUBLIC LANDS—ENTRIES—TITLES DERIVED FROM STATES.

1. Gen. St. Ky. c. 109, provides that any person obtaining an order from the county court for that purpose may by entry in the surveyor's book, appropriate the land his entry calls for; that the surveyor shall survey the entries in the succession in point of time in which they are made; that such survey must be made within six months from the date of entry, and a plat and certificate thereof recorded; and that "every entry, survey, or patent made or issued under this chapter shall be void so far as it embraces lands previously entered, surveyed, or patented." *Held*, that the provision for surveys in the succession in point of time in which entries are made does not invalidate a survey made before entry, or give one, by virtue of entry merely, a right to appropriate land which appears by the records to have been surveyed for another previously.

2. As the statute also provides that the register of the land-office may receive plats and certificates after the expiration of six months from the date of the survey, a valid patent may be issued after that time, and entries and surveys made by another within that time are void.

Appeal from circuit court, Pike county.

"To be officially reported."

Action to recover land by Jacob Smith against John Goosling and others. Judgment for plaintiff, and defendants appeal.

P. A. Cline, A. J. Auxier, W. Mayo Connolly, Richard M. Ferrell, and J. S. Cline, for appellants. *R. T. Burns and Stewart & Stewart*, for appellee.

LEWIS, J. To recover the three tracts of land in controversy, appellee relies on a patent for each issued July 2, 1885, upon entries dated January 5, 1885, surveys made February 2, 1885, and plats and certificates of survey recorded February 9, 1885. Appellants, Goosling, McCoy & Goff, rely as defense to the action upon patents for the same tracts issued to Goff, May 12, 1887, surveys having been made in his name December 30 and 31, 1884, and January 1, 1885, though entries do not appear to have been made upon the surveyor's book until February 6, 1885. By section 2, c. 109, Gen. St., it is provided that a party obtaining an order of the county court, authorizing him to enter and survey vacant and unappropriated land, may, by an entry in the surveyor's book of the county describing the same, appropriate the quantity of land it calls for in one or more parcels, as he may think best, not exceeding 200 acres in any one county. By section 3 it is provided the surveyor shall survey the entries in the succession in point of time in which the same are made, bounding the same by plainly marked trees, stones, or stakes, noting where it binds on a water-course, or the marked line of another survey, giving names. Such survey must be made within six months from and after the date of entry, and a plat and certificate of the survey must be made out by the surveyor and recorded in his books, and the original thereof, and a copy of the order of court under which it is made, must be deposited in the register's office within six months after survey is made; in which case legal title of the land bears date from time of making the survey, but, if done after expiration of that period, the legal title shall take effect from date of the patent. The provision for survey of entries successively in point of time in which they are made was not, we think, intended to invalidate a survey which precedes entry of the same land, nor to give to one party, in virtue of his entry merely, a prior right to appropriate land which appears from the plat and certificate recorded in the surveyor's book to have been already surveyed for another; for the statute provides that "every entry, survey, or patent made or issued under this chapter shall be void, so far as it embraces land previously entered, surveyed, or patented." The language quoted precludes necessity of concurrence of entry, survey, and patent by and for one party, in order to render void subsequent entry, survey, or patent of the same land for another, but in express terms makes the existence of either sufficient. While, therefore, a party who makes the first entry of land then subject to entry may, if necessary, enforce by judicial proceedings his right to have survey first made, nevertheless, if there has been already either an entry or survey made of the same land by another, his entry, survey, and patent are, in the meaning of the statute, to be treated as void. It thus results that, as the record stands, appellant Goff must be regarded as

having legal title to the three tracts of land, which took effect from May 12, 1887, date of his patent, and that the one issued to appellee, though older in date, is void.

But the lower court assumed in instructions to the jury that, although Goff had the oldest survey, his patent could not avail, because not issued within six months from such survey. The statute does not make the right to a patent depend upon the plat and certificate being filed within six months from date of the survey; on the contrary, it provides expressly that the register of the land-office may receive plats and certificates after expiration of that period, and as a necessary consequence issue a valid patent. In this case the entries and surveys were made by appellee before expiration of six months from the entries and survey of Goff, and, whatever might have been the effect if done afterwards, they were void, and, being so, could not afterwards operate to give validity or vitality to the patents issued July 2, 1885. Wherefore the judgment is reversed, and cause remanded for a new trial, and further proceedings consistent with this opinion.

KENTUCKY CENT. R. CO. v. WAINWRIGHT'S ADM'R.

(Court of Appeals of Kentucky. March 20, 1890.)

DEATH BY WRONGFUL ACT.

In Kentucky an action cannot be maintained by a personal representative for negligence resulting in the death of an intestate, leaving neither a widow nor children.

Appeal from circuit court, Pendleton county.

"Not to be officially reported."

G. C. Lockhart and L. T. Applegate, for appellant. Wm. Goebel, for appellee.

PRYOR, J. It is needless to discuss or determine the questions raised by counsel in this case, as the intestate whose death is alleged to have been caused by the willful neglect of the railroad company left neither widow nor child surviving him. No cause of action was in his personal representative, as has been repeatedly held by this court. Judgment reversed, and remanded for proceeding consistent with this opinion.

WILLIAMS v. SAMUELS.

(Court of Appeals of Kentucky. March 22, 1890.)

HOMESTEAD—VENDOR'S LIEN.

Plaintiff conveyed land to defendant's husband, reserving a lien for unpaid purchase money. The vendee conveyed part of the land to one A. in exchange for other land, and died, leaving defendant and his infant children residing on the land received on exchange as a homestead. Held, that A.'s right to have the land taken in exchange subjected to the payment of the lien was superior to defendant's right to a homestead therein.

Appeal from circuit court, Magoffin county.

"To be officially reported."

Action by John Samuels against Ann Will-

iams and others, to enforce a vendor's lien for unpaid purchase money. There was a judgment for plaintiff, and defendant Williams appeals therefrom.

John W. Howard and A. H. Howard, for appellant. Wm. Cromwell and D. D. Sublett, for appellee.

BENNETT, J. The appellee, John Samuels, conveyed by deed a tract of land to Chandler Williams, husband of the appellant. A lien was retained on the land to secure the payment of the unpaid purchase money. Said Williams in his life-time sold portions of this land to different persons. He conveyed one portion to Daniel Adams in exchange for another piece of land which said Adams conveyed to him. Said Williams died intestate, leaving the appellant, his widow, and infant children residing on the land received in exchange as a homestead. The appellee, Samuels, after the death of Williams, instituted suit in equity against the appellant and said children for the purpose of enforcing his lien on said land for the payment of said purchase money. Said Adams appeared in said case by cross-petition, and set up the fact that the land he swapped to said Williams for a portion of the tract sold by the appellee to Williams, and upon which he was seeking to enforce his vendor's lien, was in the possession of the appellant and said children as widow and heirs of said Williams, and the same was liable for said debt, and, as he, in case the land that he received from Williams was sold to satisfy appellee's lien, would have the right to the land that he exchanged for it, the court, to prevent a multiplicity of actions, should sell the land received in exchange by Williams, instead of the portion of the land that Williams conveyed to him. The appellant resisted this manner of proceeding upon the ground that, as said land was unincumbered with any lien at the time her husband received a conveyance from Adams, and as her homestead right in said land attached while it was in that condition, it could not be sold to satisfy said debt.

The negative answer to this proposition is beyond any real ground of controversy. The appellee's debt subsisted at the time Williams acquired the title by the exchange to this land. Therefore it was, in the hands of the appellant and said children, subject to said debt. The appellee was not confined to the property upon which he held a lien, even if said lien did not attach to this property, for the payment of his debt. All the property that Williams died possessed of that was subject to his debts was subject to the appellee's debt, notwithstanding that he held a lien on a portion of it for the payment of said debt, which debt was older than said Williams' right to a homestead in said land. Consequently, it was subject to said debt. It is true that ordinarily the chancellor, in order to save the appellant's right to a homestead, would compel the appellee to exhaust his lien on the land upon which it was reserved be-

fore subjecting any part of the land taken in exchange. This is upon the principle that where a person has right to subject two pieces of property or two funds to the payment of his debt, and the subjecting of one of the pieces or one of the funds to the payment of said debt will interfere with the intermediate rights of third persons, and the subjecting of the other, without greater inconvenience or hazard, will not interfere with such intermediate rights, it is the duty of the chancellor to compel the person to exhaust this latter property or fund before resorting to the former. But this equitable rule does not obtain in this case, for the reason that a resort to the land on which the appellant reserved a lien, instead of that taken in exchange, would be entirely equitable as between the appellant and said Adams; for, surely, it will not be contended that Adams' right to have said land taken in exchange subjected to the payment of said debt is not superior to the appellant's right to a homestead therein. The land that he took in exchange was subject to the appellee's lien, and was not subject, as against said lien, to Williams' homestead, and Williams exchanged this land to Adams without having lifted this lien, which it was his duty to do; and, if the land should be subjected to said lien by reason of his failure to do so, there is no good reason why Adams should not recover the land that he conveyed in exchange as free from the homestead right as was the land which Williams conveyed to him. The consideration given in exchange, was land,—thing for thing; and, if Adams should lose the thing that he received by any adverse and paramount right to that of Williams, and if Williams should be bound to make good the loss, Adams, if the thing given to Williams in exchange was in the possession of Williams or his heirs, could recover it as the specific consideration which he had given for the thing conveyed to him, and which he had lost, by paramount right. The judgment is affirmed.

BEHAN *et al.* v. WARFIELD.

(Court of Appeals of Kentucky. April 17, 1890.)

FRAUDULENT CONVEYANCES—APPEAL—OBJECTIONS NOT RAISED BELOW—EVIDENCE.

1. In an action to set aside a conveyance as in fraud of creditors of the grantor, where the grantee's answer raises the single issue of the validity of the conveyance, it cannot be objected for the first time on appeal, that plaintiff did not take a preliminary step necessary to authorize the bringing of the action.

2. The fact that the grantee died pending the action, and that some of her devisees, who were made parties, are infants, does not give them the right to raise such objection on appeal, where their guardian *ad litem* merely adopts the decedent's answer.

3. The facts that the grantee was the grantor's mother and a non-resident; that the recited consideration was one-third only of the fair value of the property; that the conveyance was made after suit brought against the grantor; that the grantor exercised control over and improved the property after the conveyance; and that neither grantor nor

grantee testified in the case,—show that the conveyance was fraudulent.

Appeal from circuit court, Breckenridge county.

"To be officially reported."

Geo. W. Williams & Son, for appellants.
John Allen Murray, for appellee.

HOLT, J. The appellee, Thomas W. Warfield, having a return of *nulla bona* upon an execution issued from a quarterly court against Marion J. Behan, brought this action, assailing a conveyance of a house and lot by the debtor to his mother, Clarinda Behan, as fraudulent, and seeking to subject the property to the payment of his judgment. The lot was purchased by the debtor after the creation of the appellee's debt, and it is evident the conveyance to the mother was fraudulent. It was made after the suit had been brought in which the judgment was obtained, and 10 days before it was rendered. The grantee was the mother of the debtor, and a non-resident of the state. The consideration recited in the deed to her is only one-third of the fair value of the property; and after it was made the son exercised control over it as before, even to the extent of improving it considerably. Neither of them have testified in the case; and this silence, in view of the circumstances just alluded to, is significant upon the question of fraud.

The appellee, upon the bringing of this action, sued out an attachment, but without executing any bond; and it was levied upon the house and lot. The averments of the petition are not sufficient to authorize an attachment under the provisions of our Code of Practice; and it is evident it was issued under the belief that the return of "No property" upon the quarterly court execution authorized it. It is well settled that a creditor, where his demand is a purely legal one, as is the case here, cannot invoke the aid of a court of equity to assail a conveyance by his debtor as fraudulent unless he first obtains a judgment upon his debt and a return of *nulla bona*, or else sues out an attachment against the transferred property as provided by our Code, in case he chooses to proceed against it at the outset, and without waiting to get the return of "No property." He may pursue either course, but must follow one of them. The reasons for this rule have been so often stated by this court that they need not be repeated. *Martz v. Pfeifer*, 80 Ky. 600; *Kyle v. O'Neil*, 10 S. W. Rep. 275.

Section 722 of our Civil Code provides, however, that land cannot be levied on or sold under an execution from a quarterly court; and the reason of the above rule, therefore, requires that, if a creditor wishes to base a suit in equity to set aside a conveyance of land as fraudulent upon the ground that he has obtained a return of *nulla bona*, it must be upon an execution under which land could have been levied upon and sold. If, therefore, his judgment be in the quarterly court, he must, after an execution issued upon it

has been returned "No property," obtain a transcript of the proceedings, file them in the clerk's office of the circuit court, and have an execution issued from there as provided by section 723 of the Code, and returned "No property." He may then, but not until then, if he be proceeding upon the ground that he has a return of *nulla bona*, assail a conveyance by the debtor of his land. He may, of course, without obtaining such a return upon an execution from the circuit court clerk's office, proceed by garnishment to subject to the payment of his debt any property of the debtor over which the quarterly court has jurisdiction; but, if he would subject land which the debtor has fraudulently conveyed, and wishes to proceed upon the ground that he has a return of *nulla bona*, then he cannot do so unless the execution so returned was one under which land could have been levied on and sold. It is therefore urged that, as only personalty could be seized under the appellee's execution, the clerk of the circuit court had no power to issue an attachment without bond, and that it and the levy under it are void. In short, that the circuit court had no jurisdiction to annul the conveyance to Mrs. Behan, and order a sale of the lot, because there was no such return of *nulla bona* as authorized the suit. This objection is now for the first time made. It was not presented in any way in the lower court. The answer of Mrs. Behan put in issue the validity of the conveyance to her. It made no other question. The case was tried out upon this single issue; and it was decided by this court, and properly, as we yet think, in the case of *Barton v. Barton*, 80 Ky. 212, that where this is done the question cannot, for the first time, be raised in this court whether the creditor has taken the preliminary step which authorized him to present the question to the debtor or his grantee for issue. If the result had been adverse to the appellee, he would have been bound by it. The appellants cannot be permitted to rely for protection upon the decree if favorable to them, but, if unfavorable, to now, for the first time, question it because a step was not taken by the appellee which was necessary to enable him to present a question which they, without objection, put in issue, and contested up to judgment. The parties were before the court. The attachment was levied upon the property, and, as said in the case last cited: "Here the court had jurisdiction to adjudge whether a conveyance or transfer of property was fraudulent, provided certain steps had been taken; and a failure to raise the question as to whether such steps had been taken is akin to submission of the person to the jurisdiction where there has been no service of process, which may in all cases be done when the subject-matter may otherwise be inquired of by the court."

It matters not that Mrs. Behan died during the pendency of the action in the lower court, and that some of her devisees, who were made parties, are infants. She had, by

her answer, accepted the issue. By so doing, she had already waived any question preliminary to it. They stepped into her place as to the further prosecution of the issue. Their guardian *ad litem*, by his answer, merely adopted the one she had filed, and which invited the court to hear and determine the validity of the conveyance to her. Having done so, it is too late upon an appeal to say, for the first time, that the opposing party had not put himself in a position to present the question. Judgment affirmed.

MORRIS et al. v. APPERSON et al.

(*Court of Appeals of Kentucky*. March 30, 1890.)

LANDLORD AND TENANT—ADVERSE POSSESSION.

Lessees who, while holding under the lease, obtained a tax-deed of the demised premises, cannot question the title of their lessors.

Appeal from circuit court, Carter county.

"Not to be officially reported."

Suit by B. F. Morris and others against Lewis Apperson and others. Plaintiff appeals.

Roe & Roe, for appellants. *L. Apperson* and *R. D. Davis*, for appellees.

PRYOR, J. In this case there is no question except such as arises from the testimony. The law and facts were submitted to the court, and there was no separate finding; but, if there had been, it appears that these parties entered under the title of Apperson, Sr.; or, if not, that Morris took a lease from his executors after his death, and held the land for them. Besides, the one party exhibits a title, and the other none, except a tax-deed obtained while they were in possession and holding for Apperson. The appellants are in no condition to question the title of the appellees.

Judgment affirmed.

CAVANAUGH v. BRITT.

(*Court of Appeals of Kentucky*. April 19, 1890.)

FRAUDULENT CONVEYANCES—LIMITATION OF ACTIONS.

Gen. St. Ky. c. 71, § 6, art. 3, limits the time for bringing an action for relief from fraud to 10 years from its perpetration, but section 21, art. 4, provides that where the doing of an act necessary to save a right is suspended by some lawful restraint the time covered by the restraint shall not be estimated in the application of any statute of limitations. Held that, where a judgment debtor pending appeal superseded the judgment, the judgment creditor had 10 years from the disposal of the appeal in which to bring an action to set aside a fraudulent conveyance by the debtor.

Appeal from Louisville law and equity court.

"Not to be officially reported."

Lane & Burnett, for appellant. *Andrew A. Huggan* and *J. R. Doughan*, for appellee.

HOLT, J. The appellee, Joseph Britt, obtained a judgment in the Jefferson court of common pleas on May 1, 1872, against John Cavanaugh, the husband of the appellee,

Catharine Cavanaugh. An appeal was taken to this court, and the judgment superseded. The appeal was dismissed in 1878. The mandate of this court was filed in the lower court on April 6, 1878. An execution was sued out upon the judgment, and returned "No property," on May 2, 1878. November 5, 1878, the husband made a conveyance of all his property to the appellant. It was a sweeping transfer. No property was described. It conveyed, or at least attempted to convey, to her all the property of her husband of every description. The recited consideration is "love and affection." This action was brought by the appellee on December 7, 1887, to set aside the deed as not only voluntary, but actually fraudulent, and to subject to the payment of the judgment four lots of land which the debtor owned at the time of its rendition, and which are now claimed by the appellant under the deed from her husband. The appellee proves that he had no knowledge of its existence until during the year before the bringing of this action. The answer set up several defenses. It avers payment of the appellee's debt. There is no evidence whatever to support this plea. It also avers that the deed was made for not only a good but a valuable consideration. The circumstances tend to show that it was not only constructively but actually fraudulent. There was no valuable consideration to support it, and it was at best a voluntary conveyance.

The appellee also relies upon not only the five but the ten years' statute of limitation as to actions seeking relief from fraud, and whether the conveyance to her is protected by the lapse of time is the only real question in the case. Under our law, an action for relief on the ground of fraud or mistake must be commenced within five years after the cause of action accrues; and section 6, art. 3, c. 71, of the General Statutes, says: "In actions for relief from fraud or mistake, or damages for either, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake; but no such action shall be brought ten years after the time of making the contract or the perpetration of the fraud." The first clause of this section relates to the five-years limitation statute. The cause of action accrues upon the discovery of the fraud or mistake by the creditor, or when it should have been discovered by him, by the exercise of ordinary diligence. *Dye v. Holland*, 4 Bush, 635. The five-years provision in the statute merely perfects the first clause of the section above cited, and fixes the limitation as five years after the discovery of the fraud, or when, by the exercise of ordinary diligence, it ought to have become known to the creditor. As the testimony shows that the appellee had no knowledge of the conveyance until a few months before he brought his action, the five-years plea of limitation does not apply. The mere fact that the deed was of record is not sufficient notice to affect him. He was an ante-

cedent creditor; and, as decided by this court in the case of *Ward v. Thomas*, 81 Ky. 452, actual and not constructive notice, merely, was therefore necessary to bind him. Such a creditor is not required to keep watch over the public records as to any voluntary conveyances his debtor may make to protect his debt from being barred by time. He has a right to regard his condition when the debt was created as continuing, and to look to the property he then owned for payment, so far as voluntary or fraudulent conveyances are concerned. The legislature have seen fit, however, and no doubt wisely, to provide that an action to set aside a conveyance as fraudulent against antecedent creditors is barred in 10 years after its execution, regardless of the time when the creditor may discover the fraud. This applies to cases of constructive as well as actual fraud. The legislature intended to quiet old transactions, and to fix a time beyond which the parties would not contend as to when the fraud was discovered. It would be unreasonable to suppose, however, that it intended, when it so limited the time, that the creditor should be barred of his action at the end of it, if during that period some other provision of law had prevented him from bringing it. In the case now before us the debtor superseded the judgment. It remained so until April, 1878. The effect of this was to deprive the appellee of the right to bring any suit looking to the collection, or even the protection, of his judgment. The superseding of it prevented any step in that direction. This resulted from the act of the debtor. The law gave him the right to thus stop his creditor from proceeding to collect his demand; and it would be unreasonable to suppose that the debtor could exercise this right, and that one holding under a fraudulent or voluntary conveyance from him could then claim that the time during which the creditor's right to sue was thus suspended should be estimated as a part of the period of limitation. This would bar the creditor as to a right by the lapse of time, when during that time he was forbidden by law from exercising that right, and would have been in contempt of court if he had attempted to do so. It was decided by this court in the case of *Johnson v. Williams*, 82 Ky. 45, that after a judgment has been obtained and superseded by the debtor the creditor has no right to bring an action upon his judgment, and protect it by suing out an attachment against the debtor's property. He has no right to harass the debtor with another suit while the judgment is thus suspended and in question. The appellee was entitled to 10 years within which to bring his action. This means that he has that period within which he is free to do so; and it cannot be supposed that such a solecism exists in the law as to say that one must exercise a right within a certain period, or he shall be barred from doing so, when during that same time the law forbids the exercise of the right. Moreover, section 21, art. 4, c. 71, provides:

"In all cases where the doing of an act necessary to save any right or benefit is restrained or suspended by injunction or other lawful restraint, vacancy in office, absence of an officer, or his refusal to act, the time covered by the injunction, restraint, vacancy, absence, or refusal to act shall not be estimated in the application of any statute of limitations." In the case of *Phillips v. Shipp*, 81 Ky. 486, cited by appellant's counsel, the judgment sought to be enforced against property in the hands of a voluntary grantee had not been superseded upon the appeal from it; and the question now before us was not, therefore, presented in that case. The appellee brought this action within 10 years from the time the appeal from his judgment against John Cavanaugh was disposed of in this court; and the plea of the 10-years statute cannot, therefore, be sustained.

The appellee has a cross-appeal from an order of the court rejecting an amended petition assailing the conveyance to the appellant as void for uncertainty. It is unnecessary, however, to consider it, owing to the conclusion arrived at upon the main appeal; and it is therefore dismissed. The judgment is affirmed.

CHENAULT *et al.* v. COMMONWEALTH.

(*Court of Appeals of Kentucky*. April 17, 1890.)

RECEIVING STOLEN GOODS—INSTRUCTIONS.

On trial of two defendants for grand larceny in stealing ginseng exceeding \$10 in value, which was in two sacks, the only evidence that defendants stole or received the ginseng knowing it to have been stolen was the testimony of a witness that he had purchased ginseng from each of them on different occasions, paying each, less than \$10 therefor, though the aggregate exceeded that amount. Gen. St. Ky. c. 20, art. 11, § 8, provides that receivers of stolen goods, knowing them to have been stolen, "the stealing whereof is punished as a felony or misdemeanor," shall be liable to the same punishment as the person stealing the same. *Held*, that the degree of the offense of receiving stolen goods is determined by the value of what is received; and, as the jury may have inferred either that defendants stole the ginseng, or received it knowing it to have been stolen, defendants were entitled to an instruction applicable to such a state of the case as would reduce the offense charged to a misdemeanor.

Appeal from circuit court, Montgomery county.

"Not to be officially reported."

Indictment of Anderson Chenault and Sanders for grand larceny. Defendants are convicted, and appeal.

Hazelrigg & Chenault, for appellants. *P. W. Hardin*, for the Commonwealth.

LEWIS, C. J. The offense of grand larceny, as charged in the indictment, and of which appellants were convicted, consisted of stealing, and carrying from a railroad depot, ginseng of a value exceeding \$10, which the evidence shows was in two sacks. One of the sacks was found empty, and identified by a witness. But there was no direct evidence connecting either defendant with stealing the sacks from the depot; nor was there

any circumstance from which it can be fairly inferred either that they stole or received from another the identical ginseng knowing it to be stolen, except that one Porter testified he was a dealer in produce, and purchased from each of them, on two occasions, ginseng for which he paid, in the aggregate, to Chenault \$5.60 and to Sanders \$4.50. But Chenault, who is about 12 years of age, testifies the ginseng sold by him he got from another boy, who told him a person whose business is digging herbs wished him (Chenault) to sell ginseng, and gave him 25 cents for doing so. Sanders did not testify.

The jury may have reasonably inferred, from all the circumstances, that appellants either stole the two sacks of ginseng from the depot, or received what they sold to Porter knowing it to be stolen, and with intent to deprive the owner of it. But upon which one of the two theories the verdict is based there is no way to determine, because, there being no direct evidence to support either, they might have adopted one as well as the other. If the two defendants stole and carried the two sacks from the depot, the verdict was proper; for the value of the ginseng contained in the sacks exceeded \$10. But section 8, art. 11, c. 29, Gen. St., provides that "whoever shall receive any stolen goods, * * * the stealing whereof is punished as a felony or misdemeanor, knowing the same to be stolen, shall be liable to the same punishment to which the person stealing the same is by law subjected." The meaning of that section is that the degree of the offense of receiving stolen goods is determined by the value of what is so received, and not by the value of the aggregate quantity originally stolen by another, and divided into small parcels among numerous receivers, not acting in concert with each other. The evidence does not show that appellants either received or sold to Porter in concert or at the same time the parcels of ginseng found in their possession; and consequently, neither of them can be made answerable for what the other received, any more than one of them could have been punished for what the other, acting for himself, might have taken from the sacks while in the depot, but the offense of each is to be measured by the value of what he alone received; and therefore they were each entitled to an instruction applicable to such state of case as would reduce the offense charged to a misdemeanor, as neither of them are shown to have had ginseng amounting in value to \$10. For the error in refusing to give such instruction judgment is reversed as to both, and cause remanded for a new trial.

TATE v. TOWN OF PARKLAND.

(Court of Appeals of Kentucky. March 20, 1890.)

MUNICIPAL CORPORATIONS—BONDS.

Act Ky. April 5, 1888, § 7, authorizes the town of Parkland to issue bonds for the construction of certain streets running through the entire corporate limits, including several hundred

acres of agricultural land not subject to municipal taxation. Held that, as the act, in so far as it subjects agricultural lands to taxation, is clearly unconstitutional, and as the court will not presume that the legislature intended the entire burden of taxation to fall on the town proper, the board of trustees will be enjoined from issuing bonds for the construction of these streets through part of the corporate limits only, but still extending partially over agricultural lands. Town of Parkland v. Gains, 11 S. W. Rep. 649, followed.

Appeal from Louisville chancery court.

"Not to be officially reported."

N. G. Rogers, for appellant. Simrall & Bodley, for appellee.

LEWIS, C. J. It appears that July 5, 1889, a resolution was adopted by the board of trustees for issue of bonds of the town of Parkland to the amount of \$10,000, for the purpose of grading and making Twenty-Eighth street, from the south line of Broadway street to Dumesnil street, and across it and along Amber street to the Cane Run turnpike, and Greenwood avenue from Twenty-Eighth to Thirty-Eighth street, and for levy and collection of tax on the real estate situated in what was called, according to a previous division of territory, the "First District" of the town; and afterwards, the resolution having been submitted to the qualified voters of the town at an election held for the purpose, a majority was cast in favor of it.

This action was brought by appellant, a resident and owner of real estate in Parkland, to enjoin the issue of the bonds, and levy of tax to pay them; but, trial of the action having been had upon the petition, answer, and agreed statement of facts, the injunction was dissolved. And thus arises, on this appeal, the question of power of the board of trustees to issue bonds and levy taxes for the purpose stated in the resolution mentioned. The power exists, if at all, in virtue of "An act to amend the charter of the town of Parkland, Jefferson county," approved April 5, 1888. By section 1 the boundary of the town is made to commence "at a point where the western limits of the city of Louisville intersect the southern line of Broadway street; thence running west to a point two hundred feet east of the center line of Thirtieth street; thence, at right angles, south to a point of intersection with present limits of the town of Parkland, two hundred feet north of Garland avenue; thence west on a line with the northern limits of Parkland to the Ohio river,—the southern boundary being Gelsous lane and Cane Run turnpike." Section 3 provides that, for the purpose of levying and collecting general taxes, the town shall be divided into two districts,—one east and the other west of Thirty-Eighth street,—and the money collected from each shall be kept as a general fund, and expended for benefit and improvement of the respective districts. By section 4, power is given to the board of trustees, for the purpose of grading and making streets, to contract debts and liabilities on behalf of the town beyond the amount of revenue of the

current fiscal year, when approved by a majority of qualified voters. Section 7 provides that, "for the purpose of grading and making Virginia avenue, from the Ohio river to the west line of Twenty-Eighth street, and said Twenty-Eighth street from the south line of Broadway street to Dumesnil street, and thence across Dumesnil and along Amber street to Cane Run pike, and Cecil avenue from Virginia avenue to the north line of Garland avenue, the board of trustees of the town of Parkland shall pass a resolution directing to be issued the bonds of said town of Parkland to any amount not to exceed the sum of \$25,000." To pay principal and interest on such bonds, power was given to the board of trustees to levy and collect tax upon all property in said town taxable for state purposes, and it was further provided as follows: "The whole work and material for grading and making said streets between the points indicated shall be let at one time, to be finished as a whole within a given time, every portion to be graded and made in like manner, constructed of the same kind of material, or, as nearly as may be, the same quality, of uniform width and depth of road-bed, and every part made and completed, as nearly as may be, simultaneously with every other part, so there may be no undue discrimination in the material or work, or in the style or time of construction of one part over another."

It appears that the area of the original town of Parkland was about 113 acres. Subsequently it was increased to about 600 acres; and by the act of 1888 the boundary was so extended as to include about 1,350 acres, much the largest portion of which is land used for agricultural purposes, the owners of which cannot be made liable for municipal taxes levied for any object. In June, 1888, the board of trustees of Parkland passed a resolution for grading and making all the streets mentioned in section 7, to the full length therein described, to be paid for by proceeds of municipal bonds authorized to be issued to the amount of \$25,000. But an injunction was obtained preventing such issue of bonds and levy of taxes within the present limits of Parkland to pay the principal and interest, in each of two actions brought by Gains and Brown, respectively; and in each action judgment was rendered, affirmed by this court, perpetuating the injunction. Gains was at the time resident outside the original boundary of Parkland, and his land was used for agricultural purposes only; but Brown resided and owned property inside the limits of what is called "Parkland Proper;" that is, inside the original boundary. In the opinion of this court delivered in those cases, (see 11 S. W. Rep. 649,) it was held, as to Gains, that, according to repeated decisions, he could not be made liable for any part of the tax proposed to be levied under the act of April 5, 1888, because such taxation, being municipal in its character and object, would involve taking his property for a use he has no greater

or other interest in than any other farmer of Jefferson county. It was held, as to Brown, that to enforce collection of the tax would impose a burden on those residing within the limits of Parkland proper greatly more than, and different from, what was intended by the act they should bear; for as said: "The intention was to impose the burden upon all, and, as much of the property has been released, the entire act in reference to the issue of bonds must fail." By the present plan it is proposed to grade and make the same streets mentioned in the act of 1888, but not their entire length; and the bonds to be issued for the purpose amount to only \$10,000. Still the improvement will be extended beyond the limits of Parkland proper, and over land used for agricultural purposes, and therefore not subject to taxation for such purpose; and consequently, although perhaps the burden will not fall, proportionately, as heavily upon those who reside within Parkland proper, and therefore subject to municipal taxation, as was the case under the former plan, yet it will be different from, and greater than, was intended by the legislature; and we see no escape, in this case, from the conclusion arrived at in the Cases of Gains and Brown. It is true the general power to tax for ordinary municipal purposes is given by section 4 of the act, and taxation might be imposed for improving streets within the town of Parkland. But the power attempted to be conferred by the act goes beyond the amount arising from annual and ordinary taxation, and to provide for the excess by bonds to be paid for in part, and perhaps greater part, by assessing property not taxable for such purpose; and, as enforcement of the provisions of that act involves invasion of constitutional rights to a greater or less extent, it seems to us it is bound to be held void and inoperative. Wherefore the judgment is reversed and cause remanded, with directions to perpetuate the injunction.

BANNON v. ROHMEISER.

(Court of Appeals of Kentucky. March 23, 1890.)

EMINENT DOMAIN—EASEMENTS.

Act Ky. April 13, 1888, closing an alley over which abutting owners have a right of way, is invalid in that it does not provide for compensating such owners, or obtaining their consent to the vacation.

Appeal from Louisville law and equity court.

"To be officially reported."

Action by Elizabeth Rohmelsier against Patrick Bannon. There was a judgment for plaintiff, and defendant appeals.

Lane & Burnett and *John R. M. Polk*, for appellant. *O'Neal, Jackson & Phelps* and *John Coakley*, for appellee.

LEWIS, C. J. Appellant owns a lot of land in Louisville fronting 95 feet on Thirteenth street, extending west 200 feet to an alley 20 feet wide, and another fronting 180

feet on Fourteenth street, extending east to the same alley, both bounded on the south by an alley 40 feet wide that extends from one to the other street. Appellee owns and occupies a small lot likewise fronting on Thirteenth street, and extending to the first-named alley, which lies north of, but not adjoining, the lot of appellant; there being between them a small lot belonging to and occupied by another person. April 18, 1888, the general assembly passed the following act: "That the south ninety-five feet of a certain alley in the city of Louisville running north and south between Lexington and Maple streets and Thirteenth and Fourteenth streets be, and the same is hereby, closed as a public highway." Acting upon the right supposed to be conferred by that statute, appellant soon after the enactment took possession of that part of the 20-foot alley described, commenced the erection of a building thereon, part of a large structure used in manufacturing and storing sewer-pipes and terracotta goods, and had dug a cellar in the alley, and progressed with the building thereon two stories high, when, April 21, 1888, appellee instituted this action, and obtained an injunction against obstruction of the alley; and by the judgment appealed from that injunction was made perpetual, and appellant commanded to restore, within 20 days, the alley to its former condition.

That part of it authorized by the act to be closed binds wholly upon land owned by appellant, and the only other injury or inconvenience that can result to appellee besides the possible damage from impediment of surface drainage, easily removed, consists in being denied egress from rear of her premises to the 40-foot alley, and thence to either of the two streets named. But neither of the two alleys has been improved, and both remain in their natural state; and the evidence shows the 40-foot alley has for some time, without protest or objection from appellee, been used by appellant as a receptacle for materials connected with his business, so as to partially obstruct it. Besides, connection by it with Fourteenth street, which is occupied by railroad tracks, is practically of no value, while curb-stones have, by authority of the city, been placed across it, along Thirteenth street, rendering outlet by that way impossible for vehicles. And so outlet by another alley, connecting the two streets north of the 40-foot alley, and but little further than it from appellee's lot, is almost entirely used by her and others occupying lots north of appellant. Nevertheless, title to the lot now occupied by her, as has been repeatedly held by this court, carries with it the right to the common and unobstructed use of the contiguous highway so far as may be necessary for affording her certain incidental easements and services, and a convenient outlet to other streets; and of this right the legislature cannot deprive her without her consent, or a fair compensation in money. *Railroad Co. v. Applegate*, 8 Dana, 289; *Uni-*

versity v. City of Lexington, 3 B. Mon. 27; *Gargan v. Railroad Co.*, 12 S. W. Rep. 259. And, as said, substantially, in the last-cited case, her property might be increased in value by obstructing or closing the 40-foot alley. Still, if the right of ingress or egress is taken from her, wholly or partially, so as to work an injury, it is taking private property without first making just compensation. By its charter, "the city of Louisville may at any time institute suit in the Louisville chancery court for the purpose of closing up any of its streets or alleys dividing any of the lots or squares thereof, and to such suit all the owners of ground on the square or lot shall be made defendants; and, if such defendants are competent to act for themselves, and shall consent to the closing up prayed for, then the court shall render a decree accordingly. But, without such consent, said court shall hear proof made by the parties, and, if satisfied that the closing up would be beneficial to said city, and not injurious to any party not consenting, shall render a decree closing up such street or alley." But although, whether formally dedicated to public use or not, the alley has been occupied and used as a highway by appellee and others owning adjacent lots long enough to have acquired the right to use it without obstruction, appellant did not proceed to have it closed in the mode provided for by the charter. On the contrary, his only right to close or obstruct is in virtue of the act mentioned, which not only precludes any inquiry whether injury would be done thereby, but absolutely denies right of appellee to the easement, an incident of her title to the lot. There is, therefore, no escape from the conclusion the act is invalid, and that the judgment must be affirmed.

HINES v. COMMONWEALTH.

(*Court of Appeals of Kentucky*, March 20, 1890.)

DYING DECLARATIONS—PAROL EVIDENCE.

1. Where a dying declaration is made and reduced to writing and sworn to by the declarant, but the accused procures the rejection of the writing, he cannot object to oral testimony detailing what the deceased then said, provided it be shown that the statements were made under conditions rendering them admissible as a dying declaration.¹

2. Where an injured person makes statements at different times all may be proved, if made under a sense of impending death.¹

Appeal from circuit court, Jefferson county. "To be officially reported."

Appeal by Charles W. Hines from his conviction of homicide.

J. C. Wickliffe and *Frank Hagan*, for appellant. *P. W. Hardin*, Atty. Gen., for the Commonwealth.

¹On the general subject of dying declarations as evidence, see *Bryant v. State*, (Ga.) 4 S. E. Rep. 853, and note; *Boyle v. State*, (Ind.) 5 N. E. Rep. 223, and note; *Starks v. State*, (Miss.) 6 South. Rep. 848; *Pulliam v. State*, (Ala.) Id. 839; *Jones v. State*, (Ark.) 12 S. W. Rep. 704; *Shell v. State*, (Ala.) 7 South. Rep. 40; *Archibald v. State*, (Ind.) 23 N. E. Rep. 753.

HOLT, J. Whether the accused was in fault as to the homicide for which he was tried was a question for the jury. They were the triers of this issue, and they have found against him under instructions from the court not open to objection, and which were fully as favorable to him as he had a right to demand. The only ground urged by his counsel for a reversal is that testimony detailing statements of the deceased as to the circumstances attending the difficulty in which he was shot by the accused, and which was offered as proving dying declarations, was incompetent. The record shows that the commonwealth first introduced a witness, who, after proving that the accused made the statement when he was *in extremis*, and under a sense of impending death, detailed it to the jury, the accused objecting because his statement as to how the difficulty occurred, made at another time and to another party, had been reduced to writing by a notary, and sworn to by the deceased. The statement made to this first witness was not reduced to writing. It related to the immediate circumstances attending the tragedy. Subsequently the state introduced the notary, but he was unable to prove that the deceased made the statement, which he had reduced to writing, under a belief of impending death. He testifies that the deceased said nothing upon this subject in his presence. The accused objected to the introduction of the writing, and at his instance it was excluded. Another party, who was with the deceased just before the notary came to take the statement, testified that just before the coming of that officer the deceased said there was no hope for him; that he was then dying, and would not live out the day. This party remained and heard the statement made by the deceased to the notary as to the circumstances of the killing; and, the written statement having been excluded by the court as incompetent, this bystander was permitted to prove what the deceased then said to the notary relative to the killing. The evidence of this last witness was not excepted to by the accused. But if it had been he could not, in our opinion, be heard to complain of its introduction. It is clear that the two statements of the deceased, as proven by the witnesses, were made under the conditions upon the part of the declarant as to life or death which warrant the admission of such statements as dying declarations. There is no question as to their competency upon this score. Neither can there be as to the circumstances detailed because they constituted the *res gesta* of the homicide. The authorities are not altogether in harmony, whether, if a dying declaration, when made, be reduced to writing, parol evidence may be given as to the declaration, although the writing be within the power of production by the party offering the oral evidence. Wharton says, however: "If the declaration of the deceased, at the time of his making it, be reduced into writing, the

written document must be given in evidence, and no parol testimony respecting its contents can be admitted. And if a declaration, *in articulo mortis*, be taken down in writing, and signed by the party making it, the judge will neither receive a copy of the paper in evidence, nor will he receive parol evidence of the declaration." 1 Whart. Crim. Law, § 679. Russell says: "If the statement of the deceased was committed to writing, and signed by him at the time it was made, it has been held essential that the writing should be produced if existing, and that neither a copy nor parol evidence of the declaration could be admitted to supply the omission." 2 Russ. Crimes, 762. It seems to us that where a dying declaration is made and reduced to writing, and sworn to by the declarant, as in this instance, it, under the rule that the best evidence the case admits of must be produced, should, if within the power of the party, be produced. But where the accused for any reason procures the rejection of the writing, as he did in this case, it does not lie in his mouth to object to oral testimony detailing what the deceased then said, provided it be shown that the statement was made under the conditions necessary to render a statement admissible as a dying declaration.

The statement proven by the first witness and that by the last one were substantially the same. The accused was not therefore prejudiced by proving both; but, in any event, we think both were competent. The first one was not reduced to writing; and where an injured party makes statements at different times we see no reason why all may not be proven, if all be made under a sense of impending death. If in accord, they serve to show the truth of the statement; and if not, then the accused will be benefited by the contradiction. In either case they aid to elucidate the truth. In Russell on Crimes, (page 763,) it is said: "It is no objection to the admission of a dying declaration that the deceased made a subsequent statement to a magistrate, which was taken down in writing, and is not produced. In the case of *Rex v. Reason*, [1 Strange, 499,] three several declarations had been made by the deceased in the course of the same day at the successive intervals of an hour each. The second had been made before a magistrate and reduced into writing, but the others had not. The original written statement taken before the magistrate was not produced, and a copy of it was rejected. A question then arose whether the first and third declarations could be received, and PRATT, C. J., was of opinion that they could not, since he considered all three statements as parts of the same narrative, of which the written examination was the best proof; but the other judges held that the three declarations were three distinct facts, and that the inability to prove the second did not exclude the first and third, and evidence of those declarations was accordingly admitted." If, however, the objection

to the evidence were well grounded, and if exception to its admission had been taken throughout, yet the complaint of the accused could not avail him in this court because its admission was not made a ground for a new trial. Judgment affirmed.

GRUBBS et al. v. MARSHALL et al.

(Court of Appeals of Kentucky. March 29, 1890.)

WILLS—ACKNOWLEDGMENT.

Under Gen. St. Ky. c. 113, § 5, which provides that if a will is not "wholly written by the testator the subscription shall be made or the will acknowledged by him in the presence of at least two credible witnesses," the witnesses need not be present together when the acknowledgment is made.

Appeal from circuit court, Boone county.

"Not to be officially reported."

O'Hara & Bryan, for appellants. Warren Montfort, for appellees.

LEWIS, C. J. Andrew Garkin, whose will is in dispute, was unable to do it himself, and consequently his name was subscribed by another, though he made his mark thereto. And, because the two subscribing witnesses were not together present when either his name was written or mark made, it is contended there was not such an execution as satisfies the statute. Section 5, c. 113, Gen. St., is as follows: "No will shall be valid unless it is in writing, with the name of the testator subscribed thereto by himself, or by some other person in his presence and by his direction; and moreover, if not wholly written by the testator, the subscription shall be made or the will acknowledged by him in the presence of at least two credible witnesses, who shall subscribe the will with their names in the presence of the testator."

There is some confusion in the testimony as to whether the testator made his mark before it was acknowledged in the presence of the witness whose name first appears, or not until he acknowledged it in the presence of the other one, which was at a different time and place. But we think the proper effect of the evidence, and what the witnesses intended to testify, is that he did actually make his mark before acknowledging the will, in presence of the first, and some addition to or tracing of the mark was afterwards made in presence of the second, witness. However, it does not seem to us material whether he did actually make his mark in presence of the first witness or not; for it is shown his name was then subscribed by another in his presence and by his direction, which the statute makes equivalent to an actual subscription by the testator himself, and, although the second witness could not nor did testify he saw the name subscribed by such other person, he stated the testator made or retraced his mark. And as both of them testified the testator acknowledged the will, respectively, in their presence, we think the law was substantially complied with as to the manner of its execution; for it is not required, nor do we see why

it should be treated as indispensable, for subscribing witnesses to be present at the same time and place when the will is acknowledged, if it be in fact done in presence of each of them. *Maupin's Ex'r v. Wools*, 1 Duv. 223.

Although the testator was upwards of 80 years old when the will was executed, we think the evidence sustains the verdict of the jury that he was at the time possessed of testamentary capacity, and disposed of his estate without undue influence.

There is seeming inequality made between the children of his first and second wives; but he gave in the will the reason therefor, which is entirely consistent with testamentary capacity,—in fact, evidence he possessed mind and memory sufficient to make his own will. It is, however, urged he entirely pretermitted one of his grandchildren. But, even if such had been the case, we would not be authorized to decide that fact alone sufficient to counterbalance the convincing testimony of his capacity which the record presents.

There is no evidence any person exercised or had influence over him, or that he was controlled or induced by any other than his own will and desire to dispose of his property in the manner he did do; and therefore, even if the lower court did refuse to instruct as fully and clearly on the subject of undue influence as might otherwise be required, appellant was not prejudiced.

The record of litigation between the testator and children by his second wife in relation to personal estate left by her could not serve to illustrate the issue of this case, and therefore was properly excluded. Judgment affirmed.

RUHRWEIN v. GEBHARDT.

(Court of Appeals of Kentucky. April 17, 1890.)

NEW TRIAL—TIME OF MAKING MOTION.

Under Civil Code Ky. § 842, providing that motions for new trial shall be made within three days after the verdict or decision is rendered, the making of a motion for judgment *non obstante verdicto*, when the verdict is general, does not give the party making it a right to move for new trial within three days after such motion is decided against him, and more than three days after the rendition of the verdict, as, under section 836, which authorizes a judgment against the verdict only when the pleadings entitle the other party to it, such judgment may be rendered by the court of its own motion.

Appeal from circuit court, Kenton county.

"To be officially reported."

Action by Karl Gebhardt against William Ruhrwein. Verdict for plaintiff, defendant's motion for new trial denied, and he appeals.

Orlando P. Schmidt, for appellant. Tidale & Gray, for appellee.

BENNETT, J. The appellee sued the appellant to recover the possession of about four feet of land situated in the city of Covington. The appellant put in issue the appellee's right to said land. The case was tried by a jury, which resulted in a verdict for the appellee

for a part only of the land in controversy. The court having overruled the appellant's motion for a new trial, he has appealed to this court.

The verdict of the jury was rendered on the 26th day of May. On the same day the appellant moved the court to render judgment for him notwithstanding the verdict of the jury. This motion was not acted upon until the 1st day of June thereafter, at which time the motion was overruled. On the day after, the appellant made a motion, and filed written grounds, for a new trial, which motion was overruled. The motion not having been made within three days after the verdict was rendered, it, according to the 342d section of the Civil Code, came too late. But it is contended that the appellant's motion, which was entered on the day the verdict was rendered, to enter judgment for him notwithstanding the verdict of the jury, saved the appellant's right to enter a motion for a new trial until within three days after said motion was decided against him. Under said section 342 of the Civil Code, the motion and written grounds for a new trial must be made within three days after verdict or decision is rendered. As said by this court in the case of *Insurance Co. v. Kiernan*, 83 Ky. 468, the word "decision" evidently refers to decisions by the court where the law and facts are submitted to it, and that judgment need not be rendered on the verdict of the jury in order to entitle the party to make a motion and file grounds for a new trial. The return of the verdict into court, and the reception of it by the court, is all that is necessary in order to entitle the party to make his motion and file grounds for a new trial. This he is required to do within three days after the verdict has been rendered, etc. If he fails to make the motion within said time, such failure is fatal to his right to maintain an appeal upon any of the grounds that are required to be presented by motion as the basis of obtaining a new trial, and as having the action of the court thereon reviewed by this court.

In the case *supra*, it was also decided that a motion made by one of the parties to have judgment rendered for him on a special finding of the jury, which motion was not acted on by the court until long after the lapse of the three days, did not relieve said party from the necessity of making his motion and filing his grounds for a new trial within three days after the special finding in order to save his right to an appeal. It is true that since said decision the legislature, by an amendment to the Code, has authorized the making of the motion and filing the grounds for a new trial within three days after the rendition of the judgment on a special finding by the jury; but that amendment does not apply to a case like this one. In this case there was no special finding. Instead, there was a general verdict rendered upon the issue made by the pleadings; and it was the duty of the appellant to have made his motion and filed his

grounds within three days after the verdict was rendered in order to save his right to proceed for a new trial. Section 386 of the Civil Code only authorizes a judgment to be rendered against the verdict of the jury in the single instance of the pleadings entitling the party applying for it to it. In such case there is no need of a motion for a new trial in order to bring the case to this court for the purpose of authorizing this court to review the case upon the "pleadings, verdict, and judgment; and, if the pleadings and verdict authorized the judgment rendered, it will be affirmed without regard to the rulings of the court at the trial further than they appear in the judgment." *Harper v. Harper*, 10 Bush, 451. By said section the party whom the pleadings entitle to a verdict may obtain it by motion, or the court may render such judgment on its own motion, notwithstanding the jury has rendered a verdict for the opposing party to the action. This, as said, the court may do of its own motion; and the motion of the party who is entitled to it is not at all essential in order to enable the court to render such judgment. The only purpose that such motion can serve is to call the attention of the court to the state of the pleadings, and make known to it the party's desire for a judgment notwithstanding the verdict of the jury. But, as said, the court may render such judgment upon its own motion; and it is not necessary for the party to make a motion for a new trial within three days after the rendition of the verdict in order to entitle him to maintain an appeal to this court to test the question whether or not the judgment is authorized by the pleadings. But in all cases where the law requires a motion to be made, and the reasons for a new trial to be filed, to authorize this court to review the action of the lower court thereon, such motion must be made and the reasons must be filed within three days after the verdict was rendered. The making of the motion for judgment notwithstanding the verdict saves the party no right whatever to make a motion and file grounds for a new trial beyond the three days provided by the Code after the rendition of the verdict. The pleadings and verdict in this case authorized the judgment, and the errors complained of could only be reviewed by this court upon motion and grounds filed within three days after the verdict was rendered, and the action of the lower court thereon. The judgment is affirmed.

JOHNSON *et al.* v. ELKINS *et un.*

(Court of Appeals of Kentucky. April 17, 1890.)

FRAUDULENT CONVEYANCE—PENSION.

1. Rev. St. U. S. § 4747, providing that no money shall be liable to seizure by any legal process while "in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner," does not exempt the money after it reached the pensioner; and where lands conveyed to a wife are paid for by a third person with proceeds of a check made payable to the husband for

pension money, and indorsed by him, the transaction is a voluntary conveyance, and the land is liable for the husband's debts.

2. Code Prac. Ky. § 667, provides that "every process in an action * * * shall be directed to the sheriff of the county," and, if he be interested in the suit, then to the coroner. Held that, where an execution was directed to the sheriff of another county, but, there being none at the time in the county, it was received and returned by the coroner "No property found," there was no return of *nulla bona* upon which to base an action to set aside a fraudulent conveyance.

Appeal from circuit court, Larue county.

"To be officially reported."

H. S. Johnson and John W. Gore, for appellants. D. H. Smith, for appellees.

HOLT, J. The appellants, having a judgment in the Green circuit court against the appellee David Elkins, sued out an execution to the county of Larue, where the debtor then resided. It was directed to the sheriff, but, there being none at the time in the county, it was received and returned by the coroner "No property found." This action was then brought in the Larue circuit court to subject to the payment of the judgment a tract of land of 68 acres, situate in said county, which had been conveyed to the wife of the debtor Elkins by one Noe. The petition avers that the land was in fact paid for by the debtor, and that it was conveyed to the wife to defraud his creditors. The copy of the execution which issued to Larue county shows, at least *prima facie*, that the appellants' debt was created before the land was purchased. It bears interest according to it from October 14, 1887, and the purchase was not made until November 1, 1887. It appears that the land was paid for with pension money of the debtor, drawn from the United States government. The money itself never came to his hands. The check for it did, and was indorsed by him to one Hoover, who, for the debtor, drew the money upon it, and out of it paid Noe for the land. It is now claimed that the money, when paid to Noe, was in the course of transmission to the pensioner, and, being therefore exempt from seizure for the debts of the pensioner by the United States statute, it was no fraud upon his creditor to invest it in the land, and have the deed taken to the wife. Section 4747 of the Revised Statutes of the United States provides: "No sum of money due or to become due to any pensioner shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the pension office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner." It has been repeatedly decided by this court that after the money reaches the hands of the pensioner it is no longer exempt. Roblon v. Walker, 82 Ky. 60; Hudspeth v. Harrison, 6 Ky. Law Rep. 304. In the last-named case it was held that the fact that land was purchased with pension money did not exempt it from liability for the pensioner's debts. In the case of Sims v. Wal-

sham, 7 S. W. Rep. 557, the money itself did not come to the hands of the pensioner, but a check did; and he transferred it to another person, with directions to draw the money, and pay it to his sons, to be, and which was, used by them in paying for land, which was conveyed to them. It was held that the land, so held by them by voluntary conveyance, was liable for the pensioner's debt.

These cases are decisive of this one, so far as this question is concerned. Another one presents itself, however, which doubtless controlled the lower court in dismissing the action of the appellants. A creditor may sue in equity to set aside a conveyance of land by his debtor as fraudulent, upon a return of *nulla bona* upon an execution issued from a court having jurisdiction to sell land; or he may do so without it, provided he sues out an attachment upon any of the grounds mentioned in our Code of Practice, and in conformity to its provisions. He may adopt either course, but one or the other must be pursued. Martz v. Pfeifer, 80 Ky. 600; Kyle v. O'Neil, 10 S. W. Rep. 275. In this instance the averments of the petition are not sufficient to sustain the action upon the last-named ground.

It is evident the action is attempted to be based upon the return of "No property" upon the execution which issued to Larue county. By section 667 of the Code of Practice every process in an action must be directed to the sheriff of the county. If he be a party to the suit, or interested in it, then it must be directed to the coroner; or, if he be interested, then to the jailer; or, if all these officers be interested, then to any constable; and a summons or an order for a provisional remedy may, at the request of the party in whose behalf it is issued, be directed to any one of the officers above named, if he be not a party to nor interested in the action. It was held in the case of Menderson v. Specker, 79 Ky. 509, that an attachment must be executed by the officer to whom it is directed, and that it cannot be executed by any officer to whom it might have been directed, as is specially provided by section 47 of the Code as to a summons. The word "process," as used in the Code, includes an execution. It was so decided in the case of Gowdy v. Sanders, 11 S. W. Rep. 82, where it is also held that an execution from a circuit court or a court of like jurisdiction must be directed to the sheriff, unless he be a party to the action, or interested in it, and that it must be directed to the officer by whom it is to be executed. The return by the coroner, therefore, upon the appellants' execution is a nullity. He had no right to handle it. It was not directed to him, and could be executed only by the officer to whom it was directed. It results, therefore, that there was in fact no return of *nulla bona* to support this action. This objection has not been waived by the appellees. It was raised in the lower court, and insisted upon in the answer. It is therefore available here, and the judgment must be and is affirmed.

· **POWERS v. COMMONWEALTH.**

(Court of Appeals of Kentucky. April 19, 1890.)

INTOXICATING LIQUORS—PUBLIC STATUTES—POLICE POWER.

1. A statute which forbids any person to sell or give away intoxicating liquors within a certain county is a public statute, though of local application, and need not be specially pleaded in an indictment.

2. A law forbidding the giving of intoxicating liquor by one person to another is within the police power of the state.

3. Defendant invited an acquaintance into his house three or four times, and there gave him a drink of liquor. On a few occasions he invited another acquaintance, who was working for him, when in his house, to take a drink, and occasionally the party suggested it himself. All the drinking was done in the family room, and when the parties were there by defendant's request. *Held*, that this was within the exception to Act Ky. March 14, 1888, making it unlawful for any person to sell or give liquors within the county of R., which provides that the act shall not apply to those who give or furnish liquors to their invited guest at their own household.

Appeal from circuit court, Rowan county.

"To be officially reported."

Wood & Day, for appellant. *P. W. Hardin*, Atty. Gen., for the Commonwealth.

HOLT, J. The act of the legislature of March 14, 1888, provides: "It shall be unlawful for any person or persons to sell, barter, give, loan, or traffic in spirituous, vinous, or malt liquors, in any quantity whatever, within the county of Rowan. * * * This act shall not apply to the procuring or use of wine for sacramental purposes, or to a regular, resident, practicing physician, who in good faith prescribes the same as a medicine to his patient or patients. Nor shall this act or its provisions apply to those who give or furnish spirituous, vinous, or malt liquors to a member or members of their own family, or their invited guest, at their own household."

The appellant complains of a conviction under this law upon three grounds. It is urged, first, that the indictment is under a special statute, and is therefore defective in not specially pleading it. It is not, however, a private statute, but a public one of local application. Wharton says in volume 1, § 866, of his work upon Criminal Law, in speaking of indictments under penal statutes: "It is not necessary, however, in such an indictment, to indicate the particular section, or even the particular statute, upon which it is founded. It is only necessary to set out in the indictment such facts as bring the case within the provisions of some statute which was in force when the act was done, and also when the indictment was found."

He next contends that the statute is unconstitutional in so far as it deprives a person of the right to give liquor to another, because by doing so it denies him the use of his property. If the sale may be forbidden, equally so may the gift of it. The law has the public welfare in view, and one may be

as injurious to the public as the other. It has long been the recognized and unquestioned law of this state that one cannot give liquor to a minor. The legislature may, looking to the public health, or its peace or morals, and in the exercise of the police power, forbid not only the sale, but the gift, of any article calculated to injure these public interests. The citizen acquires his property subject to this right upon the part of the law-making power. The individual right is thus qualified to secure the protection of the public. It is upon this ground that the supreme court of the United States hold in *Mugler v. Kansas*, 128 U. S. 623, 8 Sup. Ct. Rep. 273, and other cases, that state legislation may constitutionally forbid the manufacture or sale of liquor for general use as a beverage within the state, and because such legislation is calculated to protect the public against the recognized evils resulting from the excessive use of ardent spirits. It is the use of the article which is injurious; and it is, of course, equally so whether it be by sale or gift.

The evidence in this case shows, however, that the appellant was not trafficking in liquor. He was not selling it or giving it away generally or to any one, save at his own home. There is no conflict in the testimony. It appears that upon three or four occasions he invited a gentleman into his dwelling-house, and there, upon each occasion, invited him to take a drink of liquor with him, and they did so. Another acquaintance of the appellant had been absent from the locality for some time; and upon his return they met in the street near the appellant's house, and the latter invited him into his house, and when there invited him to take a drink with him. Subsequently this same party was doing some work for the appellant; and while so engaged the latter, upon a few occasions, invited him, when in his house, to take a drink with him, and occasionally the party suggested it himself. This was all the evidence in the case. All of the drinking was done in the family room of the dwelling-house of the appellant, and when the parties were there by his invitation. The statute was not intended to embrace such a case. In fact, the exceptions in the statute embrace this case. The two parties to whom the liquor was given by the appellant should be regarded as the guests of his household. They were there by his invitation. They were at the time being entertained by him as his friends and guests, and the giving of liquor in such social intercourse, by one at his own house, was not intended to be interdicted by the statute. The peremptory instruction asked by the appellant directing the jury to find in his favor should therefore have been given; and the judgment is reversed, with directions to award the appellant a new trial, and for further proceedings consistent with this opinion.

JACKSON v. STATE.

(Court of Appeals of Texas. Feb. 15, 1890.)

BURGLARY—EVIDENCE.

1. On a trial for burglary, it appeared that defendant was staying at the house of K., that he had previously worked at the burglarized premises; that at sundown, on the evening before the night of the burglary, he was seen with K., in an empty wagon, going in the direction of the place burglarized; that the next morning, at sunrise, K., who was then with another person, sold the wheat stolen, taking in part payment a sack of flour. The purchaser of the stolen wheat did not identify defendant as the person with K., but other witnesses, who knew defendant, testified that they met him and K. in a wagon, in which was a sack of flour, between 9 and 10 o'clock of that morning. One of the sacks stolen from the burglarized premises was shortly afterwards found in defendant's house, and he did not attempt to explain its possession. *Held*, that the evidence showed a conspiracy between K. and defendant, and warranted a conviction.

2. Evidence of what occurred at the finding of the sack in defendant's house was admissible, though defendant was not present.

3. As a conspiracy between K. and defendant was shown, evidence of the finding of some of the stolen property at K's house shortly after the burglary was admissible against defendant, though neither he nor K. was present.

4. Where the sack found at defendant's house was brought into court and examined by witnesses while under examination, and such witnesses differed as to the existence of certain marks thereon, by which it was identified, it was proper to allow the jury to inspect it.

Appeal from district court, Parker county; J. W. PATTERSON, Judge.

James Jackson appeals from a conviction of burglary.

J. M. Richards and G. A. McCall, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. This is the second appeal in this case. On the former appeal the judgment was reversed and the cause remanded on account of certain defects in the charge of the court, which were pointed out. Jackson's Case, 12 S. W. Rep. 701. On the second trial the learned judge corrected his charge in these particulars; and, though several objections are again strenuously urged to the charge, we will, without discussing them, say that, in our opinion, they are not well taken, and that the charge, as now presented, is a sufficient exposition of the law applicable to the facts. But one special instruction was asked by the defendant in addition to the general charge, and it was given.

Appellant has been tried for and convicted of burglary. A strong criminative fact against him was the finding in his house, a few days after the burglary, of one of the seamless sacks identified by the state's witnesses as one of the sacks containing the wheat stolen from the burglarized house. The burglary was committed on the night of August 20th, and the sack was found in defendant's house on August 28th following, or seven days thereafter. At the time it was found the defendant had been arrested, and was in jail. He has never attempted to explain his possession of the sack. His wife stated that it was his, (defendant's;) that he had had it

for several months, and that he had brought it home filled with peaches from Edwards' place, while he was working at Edwards'. Had this been the only criminative or inculpatory fact against the defendant, there might have been some question as to the sufficiency of the evidence to support a conviction for burglary. "Mere possession of stolen goods, without other evidence of guilt, is not to be regarded as *prima facie* evidence of the burglary. But, where goods have been feloniously taken by means of a burglary, and they are immediately, or soon after, found in the actual and exclusive possession of a person who gives a false account, or refuses to give any account, of the manner in which the goods came into his possession, proof of such possession and guilty conduct may sustain the inference not only that he stole the goods, but that he made use of the means by which access to them was obtained. There should be some evidence of guilty conduct besides the bare possession of stolen property before the presumption of burglary is superadded to that of larceny." Whart. Crim. Law, (8th Ed.) § 813; Whart. Crim. Ev., (9th Ed.) § 763; 2 Amer. & Eng. Cyclop. Law, 694. In Georgia, and perhaps in some of the other states, it is held that recent possession by a person who is unable to account for his possession raises a presumption of guilt, and would authorize the jury to find a verdict of guilty. Lundy v. State, 71 Ga. 360. With us the rule is the same as in theft; that is, that, to warrant an inference of guilt of theft from the circumstance of possession of recently stolen property, such possession must be personal and exclusive, must be unexplained, and must involve a distinct and conscious assertion of property by the defendant. Field's Case, 24 Tex. App. 422, 6 S. W. Rep. 200; Morgan's Case, 25 Tex. App. 513, 8 S. W. Rep. 487; Jackson's Case, supra. And this seems to be the rule in Alabama. White v. State, 72 Ala. 195.

In this case defendant did not explain, nor attempt to explain, his possession, though his wife did, or attempted to do, so for him. What are the other inculpatory and criminative facts? One Kilby, a brother-in-law of defendant, was implicated in the burglary; and the evidence of Kilby's guilt, as shown by the record, is, to our minds, overwhelming. Defendant was staying at Kilby's house. He had previously worked at Edwards' place during the harvest, and knew the premises. At sundown on the evening of August 20th he was seen in an empty two-horse wagon, with Kilby, going in the direction of Edwards'. The next morning, at sunrise, Kilby and another party are at the mill, where Kilby sells the stolen wheat, and takes in part pay a 100-pound sack of flour. The purchaser does not know or identify defendant as the man who was with Kilby; but several witnesses met Kilby and Jackson (this defendant) as they were returning from Weatherford, between 9 and 10 o'clock A. M., after the sale of the wheat, in a two-horse

wagon, and one testifies that he saw the sack of flour in the wagon, and that Kilby told him they were going to have biscuits, and asked him to come over and see him. These witnesses knew Jackson, (this defendant,) and identified him as the party with Kilby. In addition to these facts, one of the seamless sacks which contained a part of the wheat stolen from the burglarized house was, as we have seen, found at defendant's house. This sack was fully and completely identified by the alleged owners, and other witnesses for the state. We think the evidence amply sufficient to show a conspiracy and acting together as principals by Kilby and defendant in the criminal enterprise, and to warrant the inference that defendant was a party to, and guilty of, the burglary.

But it is insisted that the court erred in allowing evidence to go to the jury of the finding of the sack, and what transpired at the time, the defendant not being present. This evidence was admissible and legitimate, as a circumstance tending to connect defendant with the burglary; the sack being one of the fruits of the crime. *Burrill, Circ. Ev. 445-447*. For the same reason, it is objected that the court erred in allowing evidence of the finding of some of the stolen sacks at the house of Kilby several days after the commission of the burglary, when neither Kilby nor defendant was present; and the additional objection urged to this evidence is that the sacks were found after the conspiracy, if any had ever existed, between Kilby and defendant had been consummated, and that no act or fact connecting Kilby with the same, done or ascertained after the consummation of the conspiracy, could be used as evidence against or affecting this defendant. As stated above, the evidence, in our opinion, amply establishes the conspiracy and acting together of the parties in the crime. The sacks found at Kilby's were fruits of the crime; and "any fact or circumstance which would tend to prove the guilt of the co-defendant would also tend to prove the guilt of the defendant, and would be admissible against him." *Pierson's Case, 18 Tex. App. 524*.

But again, on the trial the sack found at defendant's house was claimed by several witnesses to be marked with the initials of Edwards' name, viz., "N. G. E." "W'F'r'D."—an abbreviation for the town of Weatherford; and the letter, E, on the edge of the mouth of the sack, was claimed to have been worked with thread by Mrs. Edwards. Edwards testified that when he purchased the sacks, in Dallas, they were full of corn, and that the party from whom he purchased them marked his (Edwards') initials, and the abbreviation for Weatherford, with lamp-black, upon them. It was proved that, after the sack was found at Jackson's, his wife (Mrs. Jackson) had washed it, and almost obliterated these letters in lamp-black; and Varner, the constable, testified that when he found the sack at Jackson's he saw the letter, E,

in thread, near the mouth, and commenced picking it out with his knife, when he was stopped by Moreland, who also testified to the same fact. On the trial the witness Edwards and two or more other state's witnesses swore that they could still see these initials and marks on the sack. Defendant had the sack put into the hands of other witnesses, who examined it carefully; and they swore that they could see no letters, or anything like letters, on it. The prosecution then proposed to let the jury examine and inspect it for themselves, and this the court permitted, over defendant's objections. It is insisted that "there was an irreconcilable conflict in the evidence as to the marks on the sack, and that the jury ought to have decided the same on the evidence of the witnesses, and not from a personal examination and inspection by the jury themselves." The testimony of the witnesses concerning the sack was all before the court, and in the presence of the jury, and was heard by them. The sack itself was before them when the witnesses were testifying about it. This is not like the case of "a view" by the jury when neither the court nor the parties were present, and which proceeding would be illegal, and might be prejudicial to the rights of a defendant. *Smith's Case, 42 Tex. 444*. On the contrary, everything about and concerning the matter transpired in the court, at the trial, and in the presence and hearing of the court, counsel, parties, and jury. They all saw and heard what the witnesses had to say; and the parties fully examined and cross-examined them in connection with the sack, which was exhibited, examined, and inspected by the witnesses when testifying.

This identical question came up in *Wynne v. State, 56 Ga. 114*, when there was a conflict between witnesses as to the physical appearance of a pistol and cartridges used in the difficulty about which the trial was being had. The court say: "We think that the court should have permitted the jury to have and inspect the pistol. * * * We can see no objection to the pistol being exhibited to the jury, and inspected by them." All materials in any way part of the *res gesta* may be produced in evidence on the trial. *Whart. Crim. Ev. (9th Ed.) § 812*, and note; *McDonel v. State, 90 Ind. 320*; *Hart v. State, 15 Tex. App. 203*; *Levy's Case, 12 S. W. Rep. 596*. Mr. Wharton says: "As we have seen, it is one of the necessary incidents of bringing into court instruments by which an act is alleged to have been done that such instrument should be tested in open court. It is only where this is done by the jury after retiring, when parties have no opportunity of revising the process, that objection can be made. When the process is conducted openly, as part of the trial of the case, it is a valuable auxiliary in the discovery of truth." *Whart. Crim. Ev. (9th Ed.) § 814*, and note. Under the circumstances exhibited in the bill of exception, we see no error in allowing the jury to examine and inspect the sack for

themselves. We think it was legitimate to permit them to do so, in order that they might, with the sack before them, see and determine the conflict in the evidence concerning the letters, marks, and figures upon it.

We have examined this record materially, in the light of the able brief and oral argument of counsel for appellant, and have been unable to find any error of sufficient importance to demand or require of us a reversal of the judgment; and it is therefore affirmed.

CALCASIEU LUMBER CO. v. HARRIS.

(*Supreme Court of Texas. April 15, 1890.*)

RAILROAD COMPANIES—USE OF RIGHT OF WAY.

Rev. St. Tex. art. 4216, which forbids railroad companies to use or occupy any part of the right of way over which their respective roads pass for any other purpose than the construction and keeping in repair of their roads, and which is part of an act conferring on railroad companies the power to take and hold the fee in lands, (articles 4211, 4212,) and providing (article 4206) that the "right of way" acquired by condemnation "shall not be so construed as to include the fee," does not apply to land owned by a railroad company in fee, though its road is built thereon.

Appeal from district court, Travis county.
Sheeks & Sheeks, for appellant. *Osceola Archer*, for appellee.

STAYTON, C. J. The nature of this action, and averments of appellee's petition, are thus stated, with substantial accuracy, in brief of counsel for appellant: "On the 17th day of September, 1887, J. C. Harris sued the Calcasieu Lumber Company in the district court, alleging that it was a corporation, duly incorporated under the laws of Texas, February 16, 1884, for the purpose of carrying on the business of buying and selling and dealing in lumber and building material, with its domicile and principal office in Austin, Travis county, Tex. That the Houston & Texas Central Railway Company was a duly-incorporated railway company. That a line of the road runs through the town of Manor, in said county of Travis, and had run through there ever since September, 1885, and long before then. That it had a right of way at Manor two hundred feet wide. That on September 14, 1885, the Calcasieu Lumber Company 'did willfully, knowingly, and unlawfully construct buildings along the line of said railway, on the said 200 feet of right of way, at the town of Manor, to be occupied by it and its employees for the purpose of carrying on its own private business as a dealer in lumber and building material, and has ever since then used and occupied and still occupies it for that purpose, which business is not, nor has it ever been, necessary for the transaction of the legitimate business operations of said railway, nor necessary for the shelter of their employees, or for the construction and keeping in repair the railway, but is an obstruction and hindrance to the railway traffic carried on by the citizens of Manor and other places over and with the railway company. That

petitioner is, and has been for four years, a citizen of Manor, engaged in the business as dealer in lumber and building material. Has all of his lumber, etc., conveyed to Manor over that railway. His yard for stacking, etc., is north of the railway track about 200 feet. His lumber, etc., is thrown from the cars close to the road-bed, where it remains till he can haul it on wagons to his yard. That defendant has unlawfully, willfully, and knowingly taken possession of, occupied, and used continuously since September 14, 1885, all that part of the right of way of said railway lying between the town of Manor and the road-bed in and around the depot of said town of Manor; the same consisting of a strip lying adjoining the road-bed, about 500 feet long and 100 feet wide, and is still illegally in possession of said land, and so using it that petitioner cannot have free access to his lumber, etc., when unloaded from the cars, so as to be able to haul and transport it to his yard and place of business, by which he has been damaged, obstructed, and hindered by defendant in transporting his lumber, prevented from having free access thereto, inconvenienced in his business, prevented from expanding and enlarging his business by the acts of defendant in using, enjoying, and building upon the said premises or strip of land 500 feet long by 100 feet wide, in the sum of \$50 per month, since September 14, 1885, in the sum of \$1,200, for which he sues.' He prayed for judgment for \$1,200; judgment ejecting defendant from the land, requiring the removal therefrom of all buildings, lumber, and building material, and perpetually enjoining and restraining defendant from ever occupying or using said premises in the future for a lumber-yard or any other purpose, 'but that said premises, etc., be allowed to remain vacant for the use of the public, so that free access may be had to and from said railway by the public in carrying on business with said railway; and for general and special relief, and for costs.' Appellant answered by: (1) Demurrer. (2) General denial. (3) That the land held by it was the property, in fee-simple, of the Houston & Texas Central Railway Company, and defendant held the same under a lease given it by the railway company; that the property of said railway company was in the hands of receivers legally appointed by the United States circuit court at Galveston; that defendant had leased said land from them also, by reason of which defendant was entitled to the possession of said land; that Harris had no interest whatever, or right of way, or any other easement or right thereon, as is alleged in the petition. The court overruled defendant's demurrer. Case was tried by a jury; verdict for plaintiff as follows, in effect: '* * * We, the jury, find for the plaintiff, and assess his damage at thirty-seven dollars and fifty cents.' Judgment was rendered against the Calcasieu Lumber Company for \$37.50, with interest at 8 per cent., and costs. Then the court proceeded to enter a

decree restraining defendant from ever occupying any part of the premises alleged to be the right of way, and ordering defendant to remove its office, lumber-shed, and 300,000 feet of lumber and building material, within 20 days, or the sheriff should do so at the costs of said Calcasieu Lumber Company."

Appellee bases his right to maintain this action on the following statute, which is a part of the general railroad law: "Such corporation shall have the right to erect and maintain all necessary and convenient buildings and stations, fixtures and machinery, for the accommodation and use of passengers, freights, and business interests, or which may be necessary for the construction or operation of its railway; but no railway company shall have the power, either by its own employes or other persons, to construct any building along the line of their railroad to be occupied by their employes or others, except at their respective depot stations and section-houses, and at such places only such buildings as may be necessary for the transaction of their legitimate business operations, and for shelter for their employes; nor shall they use, occupy, or cultivate any part of the right of way over which their respective roads may pass, with the exception aforesaid, for any other purpose than the construction and keeping in repair their respective railways." Rev. St. Tex. art. 4216. Articles 4211 and 4212 give to railway companies the power to purchase such lands as may be necessary to accomplish the purpose of incorporation, and to take, hold, and use voluntary grants of real estate to aid in the construction of their roads; and the subsequent article provides for the alienation of such as may not be necessary for its use. Article 4180 provides for the acquisition of right of way or other land necessary to such corporations through the exercise of the power of eminent domain; and article 4206 provides that "the right of way secured or to be secured to any railroad company in this state, in the manner provided by law, shall not be so construed as to include the fee-simple estate of lands, either public or private." Some time prior to March 30, 1871, James Manor conveyed to the Houston & Texas Central Railway Company a strip of land 200 feet wide through a survey of land owned by him. The deed by which this was done conveyed to the railway company the estate in fee to this strip of land, on which its railway seems to be constructed near its center. Appellant held a part of that strip on the north side of the railway, at the town of Manor, under leases, as alleged in the answer, and was using it for a lumber-yard for a distance of about 300 feet westward from the company's depot, but not in such manner as to interfere with the operation of the railway. The court instructed the jury to find for appellee if they believed from the evidence that appellant occupied the company's right of way, and thereby interfered with the business of appellee, and refused the following charge: "If the

Houston & Texas Central Railway Company owned the land in fee-simple, and the defendant occupied the same under a lease or contract from the said railway company, the defendant is not liable to the plaintiff for damages for so occupying or using said land."

The question arises whether article 4216 has any application to land in which a railway company owns an estate in fee, even though its railway may be built upon it. There is nothing in that article which evidences an intention to provide a police regulation looking to the safety of travel, or other like matter to which such regulations may properly apply. The statute confers the right on such corporations to own the fee in lands whether these be necessary to the operation of the company's business or not, though in the one case they are required to alienate them, but in the other not. There is nothing in the article evidencing an intention to take away from a railway company, so long as it owns the fee in land, the rights and powers usually incident to such ownership; and the power of the legislature to do this may be questioned, unless in a case where this may become necessary as a police regulation. The ownership of land, when the estate is a fee, carries with it the right to use the land in any manner not hurtful to others; and the right to lease it to others, and therefore derive profit, is an incident of such ownership. No such rights, however, exist as to a right of way acquired by condemnation, or by a conveyance made by the owner which only conveys an easement. Where property is taken for a public use the owner is not divested of any right further than is necessary for the public purpose; hence the statute to which we have referred announces the rule of law that the title acquired through compulsory takings for public use "shall not be so construed as to include the fee-simple estate in lands." The rule stated in the statute is but the enunciation of the rule existing without the statute, which was thus well expressed by the supreme court of Pennsylvania: "The power [to take private property for public use] arises out of that natural principle which teaches that private convenience must yield to the public wants. This public intent must lie at the basis of the exercise, or it would be confiscation and usurpation to exercise it. This being the reason for the exercise of such a power, it requires no argument to prove that after the right has been exercised the use of the property must be held in accordance with and for the purposes which justified its taking; otherwise, it would be a fraud on the owner, and an abuse of power. Hence it is that no one can pretend that a railway company may build private houses and mills, or erect machinery not necessarily connected with the use of their franchise, within the limits of their right of way. If it could, stores, taverns, shops, groceries, and dwellings might be made to line the sides of the road outside of the track, a thing not to be thought of under the terms of the acqui-

sition of the right of way. * * * When, therefore, the * * * railroad company, under its charter, and the promoter of the private railroad under the act of 1832, were authorized to take private property for the use of their roads, the rights they acquired were a right of way, and facilities necessary to the efficient use of the right. They were not empowered to use the exclusive right of way granted to each for any other independent purpose than that for which it was granted. The fee remained in the private owner, and, outside of the authorized use, which must be public, or incidental to the public use, the proprietary right is in the original owner." *Lance's Appeal*, 55 Pa. St. 25; *Proprietors v. Railroad Co.*, 104 Mass. 1. The statute relied upon is carried into the Revised Statutes from the act of February 7, 1861, (Pasch. Dig. art. 4930,) where it was found in immediate connection with what is now article 4206, Rev. St., which declares that "the right of way" acquired through condemnation "shall not be so construed as to include the fee-simple estate in lands either public or private." We have here a definition of the words "right of way" as used in the original act, of which the article now in question was a part, and in clear connection with the subject-matter, as in all other respects. The fair conclusion is, that the same words used in the same law descriptive of a thing or right have the same signification. The words "right of way," if not defined, are expressive of the very nature of the right ordinarily held by railway companies in the lands over which their roads run; a right to use the land only for railway purposes; an easement. The statute in question prohibits railway companies from erecting along their lines, except at enumerated places, buildings even for the comfort of their employees, and limits their right at the places named to such buildings as may be necessary for the transaction of their legitimate business operations, and for shelter of their employees; and it declares that they shall not "use, occupy, or cultivate any part of the right of way over which their respective roads may pass," etc. It is true that the words "right of way" have become descriptive of the land over which a railway runs, to the extent to which the easement extends; but, looking to the entire act, we are of opinion that the prohibition was made for the benefit and protection of the land-owner, and for no other purpose, and that it has no application in cases in which a railway company owns an estate in fee in the land.

Appellee has no cause of action against appellant on account of its occupation of land owned by and leased from the railway company so long as such use does not create a nuisance directly affecting him. That the use to which appellant had appropriated the land creates such a nuisance cannot be claimed. It may be that he could conduct his business more conveniently if the railroad company's property was not used as it has been; but, if

that be a lawful use, the inconvenience resulting from it does not give cause of action. If the railway company held only an easement, the owner of the fee might have ground for complaint; but, even then, we do not see that appellee would have cause of action against appellant. If the railway company fails to furnish to him proper facilities for running his lumber from the place where it unloads it, as far as it owns and controls the land, he may have cause of action against the company, but not against appellant.

We have not deemed it necessary to consider other questions of law or fact insisted on in the case, but may suggest that the railway company would seem to be a necessary party to an action such as this, which seeks to interfere with the company's right to use its own property. What has been said is sufficient to indicate our view of the law of the case, which leads to a reversal of the judgment. It is therefore ordered that the judgment of the court below be reversed, and the cause remanded.

BURK *et al.* v. GALVESTON COUNTY.

(Supreme Court of Texas. Feb. 21, 1890.)

COUNTY TREASURERS—ACTION ON BOND—EVIDENCE.

1. Const. Tex. art. 7, § 5, provides that the available school fund shall be distributed to the several counties and applied as may be provided by law. *Held*, that a suit on a county treasurer's bond for misappropriation of such a fund is properly brought in the name of the county, rather than that of the state.

2. A county treasurer's bond, which is in the language prescribed by statute for bonds given by him for the available school fund, and complies in all other respects with the bond required to be given to secure that fund, is not defective for failure to recite, in terms, that it is the available school fund that it is intended to secure.

3. An objection that the bond, if construed to embrace the available school fund apportioned to the county by the state, should not be held to secure so much of the available fund sued for as was not derived from the state, but from county securities, as the law requires one bond for the county school fund, permanent and available, and another for the state available fund, is untenable. Following *Kempner v. County of Galveston*, 11 S. W. Rep. 188.

4. The sureties on the bond cannot defend on the ground that the county represented, and they understood, their liability to be different from that incurred according to the terms and legal effect of the bond.

5. The Texas Statutes (Sayles, Civil St. art. 8724,) require the state superintendent to issue to the county treasurers certificates for the amount of the available school fund, which certificate shall be signed, countersigned, attested, etc. The county treasurers are required to indorse on the certificates the amounts paid, and to deliver duplicate receipts, and, when the whole amount is paid, to deliver the certificate "to the collector, in whose hands it shall be a voucher * * * in his settlement with the comptroller." Defendant treasurer used, in the place of the duplicate receipts, coupons, in the form of orders, attached to the certificate. *Held*, that the delivery of these coupons was not conclusive evidence of receipt of the funds, and it was error to charge that if the coupon, in a particular instance, was delivered, it made no difference, as to the liability of the treasurer's sureties, what disposition the collector made of the money.

6. If, however, the money was delivered to the

treasurer, or disbursed by his authority, the instruction was harmless.

7. The coupon was proved to have been delivered, thus establishing *prima facie* the payment. The collector testified that all the installments for that year were paid. The only opposing evidence was that of the treasurer, who did not directly contradict the payment, but said that the collector told him that the coupon "was there to my credit, and that he would take it and cash it, but at the settlement which he made with the county that warrant was not settled for, and no account of it was given." The settlement referred to was an attempted settlement of his own account after the treasurer had abandoned the country, without having settled. *Held*, that the actual payment to the treasurer of the sum represented by the coupon was sufficiently shown.

8. Evidence tending to show that part of the school fund for a certain year was not paid to the treasurer, and that the taxes were not collected therefor, till after the expiration of his term of office, but that the treasurer, during his term of office, gave vouchers therefor to the tax collector for advances made to him; that the tax collector used the vouchers in his settlement with the comptroller, and used the taxes afterwards collected to reimburse himself for the advancements,—was properly excluded, as the sureties cannot defend on the ground that the tax collector advanced the school fund and received the vouchers before he collected the taxes for the fund, and did not reimburse himself till after the treasurer's term of office expired.

9. It is also immaterial that the money was not charged to the treasurer on the collector's books till after the expiration of the treasurer's term of office.

10. Plaintiff was properly allowed to read in evidence the deposition of the state comptroller to prove the amount of funds apportioned to the county and received by the treasurer, and also attached certified copies of certificates and vouchers; the latter tending to show that the full amount of the apportionment evidenced by the certificates was received by the treasurer.

11. The sureties were properly charged with interest from the date when the treasurer's successor qualified, rather than from the 1st day of the next succeeding January.

Appeal from district court, Galveston county.

James B. & Charles J. Stubbs, for appellants. *Geo. Mason, and H. D. Cavin, Co. Atty.*, for appellee.

HENRY, J. This suit was brought by the county of Galveston against *W. J. Burk*, a former treasurer of the county, and the sureties on his official bond, to recover for a conversion of funds belonging to the county available school fund; said fund being composed in part of apportionments of the state available school fund apportioned to Galveston county by the state board of education, and in part of the interest upon the invested proceeds of the lands granted to said county by the state for public school purposes. The bond sued upon is conditioned as follows: "Now, therefore, if said *W. J. Burk*, as such county treasurer, will safely keep and faithfully disburse the school fund according to law, and pay such warrants as may be drawn on such fund by competent authority, then the said obligation to be null and void; otherwise, to be and remain in full force and effect." The plaintiff recovered judgment for \$2,041.67.

The defendant excepted to the petition on the ground that the available school fund apportioned to the county by the state belonged

to the state, and not to the county. The language of the constitution in regard to this fund is: "And the available school fund herein provided shall be distributed to the several counties according to their scholastic population, and applied in manner as may be provided by law." Section 5, art. 7. We think the suit was properly brought in the name of the county. *Simons v. County of Jackson*, 63 Tex. 428; *Kempner v. County of Galveston*, 73 Tex. 216, 11 S. W. Rep. 188.

It is urged that the bond sued upon does not show on its face that it was given to secure the available school fund, and that the court erred in not sustaining defendant's exception taken to plaintiff's petition for that cause. The condition of the bond is in the language prescribed by the statute for bonds given by the county treasurer for the available school fund, and complies in all other respects with the bond required to be given to secure that fund. Article 989, Rev. St. It was unnecessary for it to recite, in terms, that it was the available school fund that it was intended to secure.

Defendant excepted to the petition on the ground that, if the bond should be construed to embrace the available school fund apportioned to the county by the state, then it should not be held to include so much of the available fund sued for as was not derived from the state but from the county securities, because the law requires "one bond to be given for the county school fund, permanent and available, and another for the state available school fund." This objection is not tenable, as was decided by this court in the case of *Kempner v. County of Galveston*, 73 Tex. 216, 11 S. W. Rep. 188.

The defendant pleaded that plaintiff represented to the defendant sureties that the bond sued on was intended only to cover and secure the apportionment of the available school fund made by the board of education of the state to the county, and that the sureties so understood their liability. The court properly sustained exceptions to this defense. The parties to it cannot be heard to dispute their liability upon the bond according to its terms and legal effect. The following provisions of law applicable to the transactions involved in this suit were in force when they occurred,—quoted from *Sayles' Texas Civil Statutes*: "Art. 3724. The state board of education shall, on or before the fifteenth day of July of each year, make an apportionment of the available school fund among the several counties of the state * * * according to the scholastic population of each, and the state superintendent shall deliver an abstract of such apportionment to the comptroller, and to each county judge, * * * a statement of the amount apportioned to their county; * * * and he shall issue to the county treasurer of each county * * * a certificate for the amount of the available school fund so apportioned to his county, * * * which certificate shall be signed by the governor as president of the board of edu-

cation, countersigned by the comptroller of public accounts, and attested by the secretary." "Art. 3740e. Upon receipt of the certificate from the state board of education, duly countersigned by the comptroller, showing the *pro rata* of the available school fund to which his county is entitled under the apportionment, the county treasurer shall present the same to the collector of taxes for his county, who shall pay the same, from time to time, out of the school taxes in his hands. Art. 3740f. The county treasurer shall indorse the amounts so paid by the collector on the certificate, and shall also execute and deliver to the collector duplicate receipts for such payments; and when the whole amount of such certificate shall have been paid, the county treasurer shall deliver the same to the collector, in whose hands it shall be a voucher for so much money in his settlement with the comptroller of public accounts." Plaintiff was properly permitted to read in evidence the deposition of John D. McCall, state comptroller, to prove the amounts of school fund apportioned to Galveston county by the board of education that were received by Burk as treasurer, and attached certified copies of certificates and vouchers; the copies of the vouchers, with the receipts of the treasurer indorsed thereon, being attached to show that the full amount of the apportionment evidenced by the certificates had been received by the treasurer.

It appears that to the certificate required by article 3724 to be issued as evidence of the amount of the available school fund to which the county was entitled the comptroller attached four coupons, each for one-fourth of the whole amount to which the county was entitled. These coupons or orders had the form of receipts to be signed by the county treasurer indorsed upon or attached to them, and seem to have been used and executed instead of the duplicate receipts prescribed by article 3740(f). The copy of the certificate for the year ending August 1, 1885, is in the following words and figures: "The State of Texas. Department of Education. Austin, August 1st, 1884. To the County Treasurer of Galveston County: Your county is entitled to two thousand six hundred and fifty dollars, the same being the amount of available school fund apportioned to your county for support of public free schools for the scholastic year ending August 31st, 1885. Section 47, School Law for 1884, provides for the payment of this certificate." This certificate was signed by the governor, and attested by the secretary of the board. The record contains also a copy of the certificate issued for the year ending August 1, 1887, similar in all respects to the one copied, except that the amount is blank, which, we presume, was caused by an omission made in copying it. To each certificate four coupons were attached, all in the same form. One of them reads as follows: "No. 4. The State of Texas. \$564.06. For Galveston County. The collector of taxes will pay to county

treasurer five hundred and sixty-four and 06-100 dollars, being installment No. 4 on department of education certificate No. 62 for school fund due for year ending August 31st, 1887, and return this coupon, with county treasurer's receipt thereon, as soon as paid, to be credited on current account. W. J. SWAIN, Comptroller." Indorsed on the back: "Received payment of this coupon from tax collector this _____ day of _____, 188-. W. J. BURK, County Treasurer, Galveston County." N. Weekes, the tax collector, testified that warrants were drawn upon him in favor of the treasurer, by the comptroller, in the form of coupons as shown above; that he paid two of them, for \$662.50 each, for the year ending August 31, 1885, in cash, to Mr. Burk, or his representative on his order, and that he receipted for them. He testified further as follows: "Referring now to those for the year ending August 31, 1886; I turned the originals into the comptroller's office in the settlement of my accounts. I received the originals from treasurer Burk. They were orders on me, in his favor, drawn by the comptroller. One was settled at the time, and the other three were left to his credit against school warrants. I paid for him at his request." "These were for the year ending August 31, 1886. I paid the money on those orders to said Burk's order. Of those for the year ending August 31, 1886, three of them were deposited by Burk with me, as an individual matter between himself and myself. He asked me to take them and hold them, and pay the school warrants. The fourth coupon for that year (1886) was brought in some time before the 1st of November, and it was charged to my account. Mr. McCarty paid it at my request. That was satisfied over the counter. It was satisfied by Mr. McCarty, I suppose. I knew nothing about that personally, but did afterwards. I only know that at first there was a debt against me of so much cash. Three of them were satisfied by means of warrants of teachers. I presume that the first coupon for that year ending August 31, 1886, was satisfied either in cash or in warrants paid up to that time." "The other three were left with me as a credit against his warrant, just as were the other four for the next year left subsequently. Burk receipted the coupons on the back, in the blanks provided for that purpose, and handed them over to me." W. J. Burk testified as follows: "The circumstances attending the coupons for the year ending August 31, 1886, were: Three coupons were paid by Mr. Weekes or the bank. The other one, Mr. Weekes told me, was there to my credit, and that he would take it and cash it; but, at the settlement which he made with the county, that warrant was not settled for, and no account of it given. This was one-fourth of the apportionment for the year ending August 31, 1886." The defendant offered to prove by the witness Weekes "that the state available fund for the year ending August 31, 1887, amounting to

\$2,256.26, was not charged to Burk as county treasurer or otherwise, by the collector, until after Burk's successor had qualified, nor were the taxes collected with which to pay the comptroller's draft for that apportionment until after Burk's term of office had ended, and his successor had qualified; also, that he did not, in fact, ever pay to Burk the sums called for by said drafts, but that he received them from Burk with his [Burk's] receipts indorsed thereon, and held them as collateral security for advances made to or for Burk by Weekes in pursuance of a private arrangement between them; that Weekes reimbursed himself out of taxes thereafter collected, and by charging Burk in January, 1887, on the collector's books, after he had ceased to be treasurer, with the amounts of the drafts or coupons which he [Weekes] retained out of taxes collected by him, and in the latter part of January, 1887, transmitted the coupons to the comptroller as credits on his account as collector; that the taxes were not collected with which to pay these drafts or coupons until after Burk's term of office had expired." The court excluded the evidence. It is insisted that it was wrongfully excluded, and that it should have been admitted "for the purpose of explaining and contradicting the said undated receipts given by Burk, copies of which are annexed to the comptroller's deposition, and to show that, while Burk may have used the drafts as security for loans, yet the same were not paid to him, nor charged to him on the collector's books, nor any taxes collected for or appropriated to the payment of the drafts so deposited with Weekes in an unofficial capacity, until long after Burk's term of office had ended, and that such charge or payment so made at that time was not such payment as would render the sureties liable therefor; that is to say, they were not responsible under the bond for any payments made Burk after he had ceased to be treasurer."

If the collector paid to Burk, during his term of office, money, or if he, at his request, paid school vouchers that were drawn against the fund during Burk's term of office, and Burk gave him receipts therefor, to be used in his own settlement with the comptroller, the fact that the collector had not then received the taxes, nor that he did not receive all of the money until after Burk's term of office had expired, furnished no reasons for his not reimbursing himself for the amounts paid when the collections were subsequently made. While the collector was not required by the law to make payments upon the school apportionment before he had collected the money from the tax-payers, it still did not forbid his doing so; and the treasurer cannot be held discharged from his obligation to account for the money simply because it was advanced to him, or disbursed for proper purposes by the collector, after it was due, but in advance of its collection from the tax-payers. The evidence rejected did not tend to show that Burk had used the drafts as se-

curity for loans. It does not matter at what time money paid Burk was charged to him on the collector's books.

Appellant complains of the following charge given by the court: "If you believe from the evidence that Burk, during his term of office, delivered to N. Weekes, state and county tax collector, the coupons for the apportionment for the year ending August 31, 1886, then it would make no difference, as to the liabilities of the sureties on Burk's bond, what disposition or application said Weekes made of the money for which said coupons were drawn, and Burk and his sureties would be liable therefor." It is complained that this charge is wrong, "because it made the liability of the sureties depend, not upon the receipt of money by Burk, but upon the delivery by him to the collector of receipts or vouchers. In other words, the possession of the draft or 'coupon,' as it was called, by the drawee, was, by the charge given, made conclusive evidence of its payment by him; or, rather, under the charge, if Burk delivered it up, and failed to get the money for it, still his sureties would be liable."

Appellant also complains of the court's giving the first and refusing the second of the following charges. The charge given and objected to is in these words: "If you believe from the evidence that, before the expiration of his term of office, Burk delivered the coupons or drafts by the comptroller in favor of Burk as county treasurer, on the state tax collector for the apportionment of the year ending August 31, 1887, to N. Weekes, collector of state and county taxes, with instructions to pay warrants which were presented to him, (Weekes,) which had been approved by County Judge AUSTIN, then it would make no difference as to the liability of the sureties whether Weekes had in his hands funds derived from state taxes with which to pay such coupons at the time of such delivery or not, nor whether the money itself was paid into Burk's hands or not, nor whether Weekes gave Burk credit for the amount of such coupons before or after Burk's term of office expired; and such transaction between Weekes and Burk would be equivalent to a payment of such amount to Burk as county treasurer, and he and the sureties on his bond would be liable therefor." The charge requested and refused reads: "If the jury believe from the evidence that the collector did not pay to the defendant Burk \$660.40, the amount of one of the coupons representing the apportionment for the second year, or that ending August 31, 1886, or pay school warrants therewith, then you will credit the said amount of \$660.40 against the amount claimed by plaintiff." The questions raised by these charges require a construction of the statutes above quoted with regard to the effect to be given to the certificate showing the amount of school fund apportioned by the board of education to the counties, and of the coupons at-

tached thereto by the comptroller. We think it is plain that it is the "certificate" signed by the governor and attested by the secretary of the board of education, and then sent to the county treasurer, that becomes the representative of the fund until it is collected. The law requires that payments to the treasurer shall be indorsed on this certificate, and that, "when the whole amount of such certificate shall have been paid, the county treasurer shall deliver the same to the collector, in whose hands it shall be a voucher for so much money in his settlement with the comptroller." If the surrender of this certificate, made under the circumstances of this case, had been the issue, the charge now complained of, that it made "no difference as to the liability of the sureties on Burk's bond what disposition or application Weekes made of the money," would have been proper, because such delivery of the certificate, if made without receiving the money, would have been a violation of the undertaking in the bond to "safely keep and faithfully disburse" the fund. We do not think, however, that such dignity or effect can be properly attached to the "duplicate receipts" that the law requires the collector to give to the treasurer "for such payments." We are not able to attach any other effect to what are described in the proceedings in this case as "coupons" than that they have been adopted by the comptroller as convenient substitutes for the receipts prescribed by law. They are doubtless useful and convenient in practice, and may very well serve the purposes intended as receipts. We see no objection to their being so used. But by giving to them the form of an order for money, and attaching them as coupons to the certificate, they cannot be made to take the place of the certificate, or to have attached to them the dignity given by the statute to it. They can only be used as substitutes for the receipts required by the law, and can serve no other or higher purpose than would the receipts prescribed by law, if given. It is not difficult to conclude that the statute does not attach to them any greater dignity than usually attaches to receipts. When given they become evidence of the payment of the amounts that they call for, but by no means conclusive evidence, and it is permissible, as in all other cases, to contradict or vary their effect by other evidence. We think the charge complained of was erroneous, as it gave to them a greater dignity than the law does.

If, however, the evidence shows that the money itself came to the hands of the treasurer, or that it was properly disbursed, by his authority, in the payment of school warrants, the charge, though erroneous, would not injure the defendant, and the error should be disregarded as immaterial. If, on the other hand, the record contains any evidence that tends to show that the treasurer did not himself, or through an authorized agent, receive the whole of the fund, either

in money or in school warrants, that the coupons or receipts called for, there would be such probability that the verdict may have been influenced by the erroneous charge as to require the reversal of the judgment. The only question, in this aspect of the case, arises with regard to the payment to Burk of the coupon for \$660.40, representing part of the apportionment for the year ending August 1, 1886. It is contended by appellant that the evidence shows that that coupon was never paid to Burk. It is not contended that he did not give to collector Weekes a receipt for it. That is *prima facie* evidence, at least, of its payment to him. Weekes, as we have seen, testified that all four of the vouchers for that year were paid to Burk. The evidence of the witness is not as clear on the subject as could be desired, but still it supports and sustains the voucher. Burk himself, as we have seen, testified on the subject; and his was the only evidence that it is contended tends to disprove the payment of the money to him. The question for him to meet was, did the collector pay to him that coupon? If he did not, it was for him to say that he did not. Instead of doing that, his only testimony on the point was: "The other one [the coupon in question] Mr. Weekes told me, was there to my credit, and that he would take it and cash it; but, at the settlement which he made with the county, that warrant was not settled for, and no account of it given." The settlement with the county here referred to was an attempted settlement of his own account after the witness had abandoned the country, without having settled or made a report. While the purpose of the testimony was, no doubt, to cast doubt upon or to deny the payment by the collector of the coupon, it does not directly nor in effect do so. It was the proper thing for the witness to do, and not difficult, if he knew the fact, for him to say that the coupon was never paid to him. It may have been paid to him, and still not be shown in the settlement made of his accounts in his absence. The settlement may have been incorrect, without proving, or tending to prove, that the money was not paid to him. The correctness of the settlement is not the issue under the charges in question. We conclude that the court did not commit error in giving or refusing charges on the subject for which the cause ought to be reversed. We think that the evidence shows that Burk, during his term of office, voluntarily gave to the collector of taxes receipts for all of the available school fund apportioned to Galveston county by the board of education, and that the amounts were either paid to him in money, or disbursed, by his direction, in the payment of school warrants drawn against the fund.

We find no error in the charge of the court directing interest to be calculated from the date that Burk's successor qualified, instead of from the 1st day of the next succeeding January. The judgment is affirmed.

KEMPNER et al. v. GALVESTON COUNTY.

(Supreme Court of Texas. March 11, 1890.)

COUNTY TREASURERS—LIABILITIES—INSTRUCTIONS.

1. Where, under authority from the county treasurer to the county tax collector, a bank cashier, to hold and disburse the county funds, the latter reports the collection of county funds to the former, and gives him a check therefor, and receives from the treasurer a receipt and the check to be deposited in the cashier's bank and to be paid out on county warrants, the treasurer is chargeable with the money, and is estopped to deny its receipt as against the county.

2. Where the court, at defendants' request, instructs the jury to allow them all credits admitted by the petition, and the latter admits more than are found by an auditor, an instruction to allow all reported by the auditor, none of the latter being excepted to, is unnecessary.

Appeal from district court, Galveston county.

McLemore & Campbell, for appellants.
Geo. Mason and E. D. Cavin, Co. Atty., for appellee.

GAINES, J. This is the second appeal in this case. The opinion upon the former appeal is reported in 73 Tex. 216, 11 S. W. Rep. 188. A brief statement of the case will assist in showing the questions now presented for our determination.

At the general election held in 1884, W. J. Burk was elected treasurer of Galveston county. Within the time prescribed by law, he gave the bond required by article 988 of the Revised Statutes to secure the performance of his duties as such treasurer. In May, 1886, one of the sureties upon that obligation made application to the commissioners' court to be relieved of further liability thereon; and thereupon Burk executed a new bond, with appellants as his sureties, which was approved on the 12th day of that month. This suit was brought, upon the latter obligation, to recover of appellants damages for moneys and securities, belonging to the county, alleged to have been received by Burk in his official capacity, and alleged not to have been paid or properly accounted for. Since the reversal of the judgment upon last appeal, Burk was made a party defendant, and there was a judgment against him as well as his sureties; but the latter only have appealed. It is alleged in the petition that Burk failed to make the reports required of him by law, and that on this account it was impossible to state specifically the date and amount of each payment made to him; but it was averred that at the time of the execution of the bond sued on he had on hand \$32,470.07 of the county funds, and that subsequent to that date, and during his term of office, he received, in the aggregate, the further sum of \$114,019.85. All these were alleged to be moneys not belonging to the available school fund. There were also allegations by which it was sought to charge the defendants with certain securities belonging to the permanent school fund, but that branch of the case would not be considered in determining this appeal. It was ad-

mitted in the petition that Burk was entitled to credits amounting to \$135,668.76. During the course of the proceedings the court appointed an auditor to state the account between Burk and the county. The auditor heard the evidence, and filed a report containing an account stated in accordance with the order of the court. The debits and credits shown by the report corresponded approximately with those alleged in the petition, except as to the bonds belonging to the permanent school fund. It was partially itemized. The plaintiff excepted to so much of the report as refused to charge Burk with the value of these bonds, and to an item of \$126 not charged as a debit by the auditor. Debits in the report amounting to more than \$100,000 were excepted to by defendants. The case was submitted to a jury; and the contention upon the trial seems to have been mainly concerning certain sums of money claimed to have been received by Burk from N. Weekes, the tax collector of the county, during Burk's term as treasurer. For the plaintiff, Weekes testified, in effect, that appellants were directors of the Island City Savings Bank, and that he was the cashier, and that appellants became sureties on Burk's second bond with the understanding that he was to keep his account with that bank. Witness also testified that there was an understanding between him and Burk that he was to take control of the money coming to Burk as treasurer, and to pay it out on such warrants as were approved by Burk, and that, in pursuance of such understanding, he paid off the warrants as they were presented, holding them as so much cash against Burk; that he would then give Burk a check on the bank for the amounts which had been collected by him, due the county, and that Burk would transfer the check to him by indorsement, and receipt to him for the fund. Among the sums for which a check was so given, and for which Burk so receipted, was one of \$18,413.23, of the date of the 16th of June, 1886.

The first assignment of error in appellant's brief relates to this item of alleged indebtedness. At the request of plaintiff's counsel the court gave to the jury the following charge: "If you believe from the evidence that N. Weekes, under instructions from the defendant Burk, paid county warrants and obligations to the amount of \$18,413.23, and that on June 16, 1886, the said Weekes gave said Burk as county treasurer the check of said Weekes as tax collector, drawn upon the Island City Savings Bank, for said amount of \$18,413.23, and that said Burk indorsed said check, and returned the same to said Weekes, and gave said Weekes his receipt for said amount, and that defendants are allowed credit in this suit for the amount of said warrants and obligations, to-wit, \$18,413.23, then you are charged that that was a good and lawful payment of that much money to said Burk as county treasurer." On the other hand, the court refused to give the follow-

ing counter-charge asked by counsel for the defendants: "The jury are charged that one of the items of the account of the county of Galveston, plaintiff, is a claim for \$18,413.23, which is said to have been paid to defendant Burk on June 16, 1886, and this amount constitutes part of the account as sued for in this proceeding, and, if the jury find from the evidence that the said amount of \$18,413.23 was not paid to Burk in any manner, then the jury will find for the defendants; and in this connection the jury are charged that this item of \$18,413.23 cannot be sustained as a charge by the evidence that county warrants were turned over to that amount by N. Weekes in his settlement with the county commissioner's court of Galveston county, as testified to in this case, as made after November 30, 1886." The giving of the charge requested by plaintiff, and the refusal of that requested by defendants, are both complained of in the assignment mentioned. In support of the assignment, it is insisted, in the first place, that the charge given was erroneous "because there was no evidence that Weekes paid warrants and obligations to the extent mentioned under instructions from Burk." This is not supported by the record. Weekes himself testified that "the understanding was that he [Burk] was not to check the money out of the bank; but he put it to his credit as county treasurer in the bank, and it was to be paid out on county warrants and other vouchers drawn against him as county treasurer." It is further contended that, although Weekes may have given Burk a check for the sum named in the charge, and Burk may have given him a receipt therefor, no money having actually passed between the parties at the time, there was no payment. It is also insisted that, since the petition charges that Burk received the money, and seeks to hold him responsible only on that ground, unless it was actually paid to him by Weekes, it cannot be charged to him in this action; and it is also claimed that, although Burk has received credit on the books of the county for this money, yet he should not be charged with it. But we cannot agree that such is the law. It may be that it was not contemplated that a county treasurer should discharge the functions of his office through an agent, and, least of all, that he should intrust the keeping and disbursement of the funds committed to him to another officer, through whom the bulk of the moneys belonging to the county were to be received. But we think that, if there was any impropriety in the arrangement, neither Burk nor his sureties are in any position to claim immunity from its consequences. They should not be permitted to take advantage of the wrong, if wrong it were. The testimony leaves no doubt of the fact that Burk made Weekes his agent for the safe-keeping, in part at least, of the county funds. Indeed, this seems to have been the condition upon which the appellants became sureties upon the bond. We do not say that an authority given by Burk

to Weekes to hold and disburse the funds would alone render Burk and his sureties liable for all money belonging to the county which came into Weekes' hands as tax-collector; but we do say that when, in pursuance of such authority, Weekes reported the collection of money to Burk, and gave him a check therefor, and Burk gave him a formal receipt for the amount, and transferred to him the check, Burk should be held chargeable with the money, and should be precluded from denying its receipt. Under the agreement which existed between the two, whenever Burk gave Weekes a receipt for money, when no money in fact passed, Weekes should be considered as holding the fund as the agent of Burk. We think it follows from what has been said that the charge given by the court at the request of counsel for appellee was not erroneous. We think it substantially in accordance with the charge, which was held correct upon the former appeal, and in accordance with the principles announced in *Burk v. Galveston Co.*, ante, 455, (decided on a former day of this term.) It follows also that the charge requested by appellants was properly refused. If the intention was to have the jury instructed that Burk could not be charged with the \$18,413.23 unless the money was actually paid into his hand, it was clearly erroneous. Viewed in its least objectionable light, it was calculated to mislead the jury upon the question of the actual payment of the money.

The second assignment of error is as follows: "The court erred in refusing to give the charge and charges asked by counsel for defendants, wherein it was asked that the jury be instructed as to the issues between the plaintiffs and defendants over the several items of charges against the defendant Burk as stated in the account of the auditor, because the matter of accounting between the plaintiff and defendants had been referred to an auditor, and the auditor's report was conclusive except as to matters put in issue by exceptions to the report. The plaintiff was bound, and so were the defendants, by the items not excepted to, and the only issue was upon and under the exceptions; and it was error in the court to ignore the auditor's report, and allow the jury to arrive at a verdict on issues entirely foreign to the issues, made over exceptions to the auditor's report." It is doubtful whether the assignment is sufficiently specific to demand consideration. But we find in the record a special instruction requested by defendants and refused by the court, which presents the question suggested in the assignment. It is as follows: "The jury are charged that the plaintiff, by its counsel, has undertaken to establish by the evidence the several items of account as found by the auditor against the defendant Burk, and the defendants, by their counsel, have undertaken to disprove certain items of account as found by the auditor; and it is the duty of the jury to determine from the evidence whether the plaintiffs have established

to their satisfaction the correctness of the items as found by the auditor, or whether, on the contrary, the defendants have disproved the correctness of any item or items of account as found by the auditor; and according to such result the jury should find their verdict on the account sued on." In *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. Rep. 75, it is said: "The purpose of the appointment [of an auditor] is to have an account so made up that the undisputed items upon either side may be eliminated from the contest, and the issues thereby narrowed to the points actually in dispute." The items of an account in an auditor's report not excepted to by either party are conclusive; but, as to such as are excepted to, the report is without effect. *Dwyer v. Kalteyer*, supra, and cases there cited. Upon the trial of this case the plaintiff introduced in evidence the debits in Burk's account as found by the auditor, to which no exception had been taken, and also all the credits; none of the latter having been excepted to. No other part of the report was before the jury. Under this state of the case the court could properly have given two instructions upon the auditor's report, and upon request should have given them. One was that the jury should take the items of debit in the account which had not been excepted to, and had been read in evidence, as conclusive; the other, that they should allow all credits reported by the auditor. The omission of the first, obviously, did not harm appellants; and the second was rendered unnecessary by a special charge, given at their request, which directed the jury to allow all credits admitted in the petition. The sum of the credits admitted in the petition exceeded by a small amount the sum of the credits found by the auditor. The court, in its general charge, left the issues of fact, as to the disputed items in the account reported by the auditor, to be determined by the evidence adduced upon the trial, without respect to the auditor's report, as it should have done.

The third assignment of error is as follows: "The verdict of the jury was contrary to the evidence in this: that the defendants were allowed in the pleadings of plaintiff, and in fact on the trial, a credit of \$135,688.26, for moneys properly paid out as received, and the evidence on the trial failed to show the receipt by defendant Burk of said amount from any and all sources for which said Burk and his sureties were liable in an accounting with the plaintiff the county of Galveston; and the court erred in not granting a new trial on the grounds stated in the motion therefor, to the effect 'that the verdict of the jury was not supported by the evidence.' And the verdict of the jury was contrary to the law as given in charge and the evidence applicable, because the evidence was that after April, 1886, the tax collector, Weekes, did not have money to his credit sufficient to meet the checks drawn by him and delivered to Burk, and Burk returned to him (Weekes) as an ordin-

ary person, and not as cashier of any bank. And for this the court below erred in not setting aside the verdict." We think there was evidence before the jury sufficient to show that Burk was properly chargeable with the receipt of moneys in an amount sufficient to warrant the verdict, after deducting the admitted credits. The assignment does not point out any specific sum with which he was improperly charged. The contention that, when Weekes gave him the checks, he did not have on hand money to his credit in the respective banks sufficient to meet them, is not supported by the record. In course of his examination, in answer to the direct question, "Did you have funds in the bank at the time?" he answered: "When I drew those several checks, at the time of the respective payments, I had money sufficient in the banks to meet those checks when I delivered them to Mr. Burk." It may be inferred that when the checks were given, he had paid some of the county's obligations, vouchers for which were presented to the commissioners' court, and assisted in making up the sum of the credits allowed in the petition. But we apprehend that a payment of the warrants, under such circumstances shown, made no difference in the liability of the obligors on Burk's bond. It is alleged in the statement under the assignment we are considering, and it is urged in argument, that, of the vouchers Weekes claims to have paid off with the money for which Burk gave him receipts, a number, calling in the aggregate for the sum of \$4,600, were disallowed by the commissioners' court. Of these, according to the testimony of the county judge, "some thirty-seven hundred odd dollars" were "individual checks that Mr. Burk had drawn, purporting to have been drawn as his commissions as county treasurer." The witness further said: "These commissions we had already allowed, and he had gotten credit for them in his report." Three hundred dollars were in checks given the county judge in payment of his salary. The warrants for this part of the judge's salary were allowed Burk as a credit; and the checks, being no more than evidence of a receipt of the money, could not have been allowed again. It is clear that Burk was properly chargeable with the money represented by these checks, and that the commissioners' court properly refused him the double allowance of commissions, and double credit for the amount paid on the county judge's salary. There were some items, of less amounts, of a like character, disallowed, and some others that were not clearly explained; but we are of opinion that it was not incumbent upon the county to furnish the explanation. We think that Burk, having constituted Weekes his agent to keep the money, and having receipted Weekes for it, and given him control over it, became responsible for it, and that, if Weekes misapplied any part of it, that was a matter between him and Weekes, and not between Weekes and the county. That an arrangement by which Weekes was put in

control of the county money for the treasurer, and was charged with its disbursement, rendered Burk liable to account to the county for it, was, in effect, decided in the case of *Burk v. Galveston Co.*, supra. We find no error in the judgment, and it is affirmed.

TEXAS & P. RY. CO. v. JOHNSON.

(*Supreme Court of Texas.* March 7, 1890.)

RAILROAD COMPANIES—RECEIVERS—INJURIES TO EMPLOYEES.

1. Where, in an action against a railroad company for personal injuries, the complaint alleges that plaintiff was in the employ of the receiver of the road, and the answer sets up the discharge of the receiver and redelivery of the property to defendant, and it is admitted that during the receivership all earnings, after paying operating expenses, were applied to improvements on the road, to an amount greater than that sought to be recovered by plaintiff, the pleadings and proof properly present the question whether defendant is liable if the accident occurred under such circumstances as would entitle plaintiff to payment out of the earnings of the road had he recovered judgment pending the receivership.

2. Where the receiver has been discharged by the court appointing him, and the property returned to defendant, the jurisdiction of the court is ended; and an order, in such decree, that the property shall be relieved from any liability on claims not established by intervention in the suit in which receiver was appointed, does not affect defendant's liability for injuries to plaintiff arising from the receiver's negligence, where it has received in improvements earnings out of which plaintiff was entitled to have such damages paid, though his claim is not established by such intervention.

3. The court has no power to require in such decree that claims must be established by intervention within a given time, where that period is not long enough to constitute an equitable bar, since such order is an infringement of the power to fix the limitation of actions, which is vested solely in the legislative branch of the government.

4. Where plaintiff was injured by the derailing of his locomotive at a switch which was defective, in that the spring was not strong enough to throw the point of the switch against the rail, and keep it there, when the position of the lever indicated that this was the position of the switch, and that it was safe to pass it, an instruction that the injury was due to the negligence of fellow-servants, in not placing the rails in a proper position by the unusual means of a maul or axe, is properly refused.

5. It is proper to refuse to charge that plaintiff could not recover on account of any defect in the brakes of the car derailed, where there is evidence that, had such brakes been in good order, the train might have been stopped before plaintiff was injured notwithstanding the defective switch.

6. A verdict for plaintiff, an engineer, of \$15,600 is not excessive, in view of the facts that before the injury, which completely incapacitated him from labor, and rendered him deaf, he was in good health, but 34 years old, and earning from \$165 to \$195 a month.

Appeal from district court, Marion county.

F. H. Prendergast, for appellant. *C. A. Culbertson*, for appellee.

STAYTON, C. J. From December 16, 1885, until October 31, 1888, the Texas & Pacific Railway was in the hands of, and operated by, John C. Brown, as receiver appointed by the circuit court of the United States sitting in the eastern district of Louisiana. Appellee brought this action against the receiver on September 14, 1888, to recover damages

for an injury alleged to have been received by him, through the negligence of the receiver, on January 31, 1888. Being advised that the receiver had been discharged, on December 17, 1888, appellee caused the railway company to be made a defendant. There was a trial which resulted in a judgment in favor of the receiver, but appellee recovered a judgment against appellant for \$15,000. The Texas & Pacific Railway Company answered that the road was in the exclusive management and control of John C. Brown, as receiver, appointed by the United States circuit court for the eastern district of Louisiana, at the time plaintiff was injured; that when the receiver was discharged the property was turned over to defendant by virtue of a decree of the court that appointed the receiver, and by said decree the property was made liable only (1) for all traffic liabilities due connecting lines; (2) for all contracts made by the receiver; (3) for all judgments which may be rendered in favor of persons interested in the cause where the receiver was appointed before February 1, 1889, and free from all other demands or claims; and that the cause should be dismissed. Defendant further answered that plaintiff assumed the risk of the injury he received.

The record shows that on or before May 16, 1888, the receiver made known to the court that appointed him that the objects and purposes contemplated in the several proceedings under which he was appointed had been practically accomplished; that the parties in interest so agreed, and, after settlement with him, and the payment of costs and other liabilities, or provision therefor made, that he should be discharged, and the causes dismissed. The agreements of the several parties to this effect are stated to have been made exhibits to receiver's petition for discharge, which stated that his accounts to the 1st of May were in condition for settlement, which he asked. He further stated that he had an agreement with the reorganization committee as to his compensation, and prayed that he be permitted to "turn over to the proper officer of the Texas & Pacific Railway Company" the property in his hands, but made known to the court that there were unsettled claims, growing out of his conduct of the business, against which he asked protection. On May 16, 1888, the petition was acted upon by the court, which, after directing a settlement to June 1st, stated that "in the mean time the receiver will continue to hold the property under the orders of the court until the 1st of June, 1888, at which time, if this order is not vacated, the railway and its property may be operated by the corporation under such orders as may be made by the court from time to time, and under the supervision and control of the receiver, to the end that the property shall not pass beyond the control of the orders of the court, nor of the receiver, until the accounting takes place with the receiver, and until he is fully protected by the corporation for

causes of action originating against him and against the property pending the receivership." On or before October 26, 1888, the receiver, reciting the former orders, and stating that his accounts had been examined and approved, stated that "no formal delivery of the road and property in his hands had been made to said railway company, and petitioner now asks that he be allowed formally to deliver all property and funds in his hands as such receiver to said railway company, and that he be allowed to account to said company according to his account filed up to the 1st of June, and for all receipts and expenditures by him received and made since the 1st of June. He has carried over to the present books of the company the cash balance, and all other balances of property and assets, as found in his hands by his report to the 1st of June aforesaid, and he is now the president of said railway company, and after his discharge will be in possession of all said company's road, property, and funds as such for said company. Wherefore he asks that he be discharged from his said receivership, and that his bond as receiver be vacated and annulled on payment of all costs legally taxable. But he asks the court to make such orders as will charge the property so turned over in the hands of said railway company and its assigns with all liability for which he as receiver is or might be held personally liable." He further stated that his compensation had been agreed upon and settled to the 31st of October, "at which time he asks that his discharge take effect." This petition was acted upon by the court on October 24, 1888, when the following order was entered: "On consideration of the foregoing petition, it is now ordered, adjudged, and decreed that the prayer of the same be granted, and, accordingly, that John C. Brown, receiver of the property of the Texas & Pacific Railway in the above-entitled causes, be, and he is hereby, directed to make delivery unto said Texas & Pacific Railway Company of all property, funds, and assets in his hands as such receiver, and that he be directed to account to said company according to his account filed and approved up to June 1, 1888, and for all receipts and expenditures by him received and made since the said 1st June, 1888. Such delivery will be made as of October 31, 1888. It is further ordered that said receiver be finally discharged on said 31st October, 1888, from his receivership, on payment of all costs legally taxed, and that thereupon his bond be vacated and canceled. It is further ordered that said property, nevertheless, shall be delivered to and received by the Texas & Pacific Railway Company subject to and charged with all traffic liabilities due to connecting lines, and all contracts for which said receiver is or might be held, made, or in any way was, liable, and subject, also, to any and all judgments which have heretofore been rendered in favor of intervenors in this case, and which have not been paid, as well as to such judgments as may be hereaft-

er rendered by the court in favor of intervenors, while it retains the cases for these determinations on interventions now pending, or which may be filed prior to February, 1889, and upon the condition that such liabilities and obligations of the receiver, when so recognized and adjudged, may be enforced against said property in the hands of said company, or its assigns, to the same extent that they could have been enforced if said property had not been surrendered into the possession of said company, and was still in the hands of the court, and with the further condition that the court may, if needful for the protection of the receiver's obligation and liabilities recognized by this court, resume possession of said property. The bills in this cause will be retained for the purpose of investigating such liabilities and obligations, and for such other purposes as may seem needful. It is ordered that all claims against the receiver, as such, up to said 31st October, 1888, be presented and prosecuted by intervention prior to February 1, 1889, and, if not so presented by that date, that the same be barred, and shall not be a charge on the property of said company. It is further ordered that said receiver advertise in a daily newspaper in New Orleans and in Dallas the fact of his discharge, and a notice to said claimants to make claim within the time aforesaid, to-wit, before the 1st of February, 1889, and that he post a printed notice of similar purport in the station-houses of said railway."

It appears from the testimony of the receiver that in the autumn of 1885 the company became satisfied that it could not longer continue to pay interest on its bonded debt without first expending a large sum of money in renewal of tracks, raising roadway, widening cuts and embankments, putting in new cross-ties, purchasing rolling stock, and motive power, and the renewal of bridges, and other like improvements. To ascertain what should be done, the directors appointed a committee, who, with experts, were directed to examine into the condition of the road, and report that, as well as the sum necessary to place the road in good condition. The result of that report was a determination to cease to pay interest, and to place the road in the hands of a receiver, which was done; it being thought, however, that the road would probably have to be sold to satisfy mortgages, which was obviated, at the end of a receivership lasting nearly three years, by some scheme devised by a board known as the "Committee of Reorganization." While the road was in the hands of receiver, all the earnings and income, after paying recognized operating expenses, were expended in improvements such as have been already referred to, as was also a large additional sum furnished by the stockholders. Money seems, also, to have been borrowed for improvement purposes, a large part of which has been paid. The receiver and railway company both pleaded the full discharge of the former from the

receivership, and alleged that all the property of the company was delivered to it on October 31, 1888, in pursuance of the order before referred to, which was alleged to have been fully complied with; and the latter pleaded that it held the property charged with all liabilities imposed by the order before referred to, but denied that it was liable for the claim of plaintiff unless he had intervened in the suits pending in the circuit court of the United States sitting for the eastern district of Louisiana, in the city of New Orleans, within the time prescribed by the order, and had there established his claim. Appellee was in the employment of the receiver at the time he was injured, and engaged in carrying on the business.

It is contended that the court erred in holding that the railway company would be liable, in a case in which the receiver, before discharge, would have been liable, if, while in his hands, receipts were used in making permanent improvements on the road to an amount more than sufficient to meet the judgment, although the injury occurred while the road was operated by and under the control of the receiver. This, with the third, fifth, and ninth assignments, will present the questions presented by appellant on the first branch of the case. These assignments are that "the court erred in giving special charge No. 2, asked by plaintiff, to the effect that, if the net earnings were used to improve the road and its rolling stock, and the company received said road in its improved condition, then the property in the hands of the company would be liable to the extent of the value of said improvements. This was error, because there was no pleading raising such an issue, and because there was no evidence that there was any net earnings applied to the improvement of the road." "The court erred in refusing special charge No. 3, asked by defendant, to the effect that plaintiff could not recover if, at the time plaintiff was injured, the railway was in the exclusive management of a receiver appointed by the circuit court of the United States." "The court erred in not granting a new trial, because the evidence showed no liability of the defendant that could be enforced in this court, and that the decree of the United States circuit court discharging the receiver protects this defendant against the enforcement of this claim in this court."

There is much reason for holding that a receiver does not sustain to a railway company, where property is placed in his hands by a court having jurisdiction over the property, the full relation of servant to master or of agent to principal; for he is selected by the court, and must act in accordance with its orders. Although charged with a duty to the public which must be discharged through the use of its property, a railway company, under the present state of the authorities, in the absence of some statute so providing, will not be liable for acts of the receiver by reason alone of his relation to it. When its

property becomes liable for his acts, this rests on the existence of some fact other than the mere existence of the receivership and his breach of duty. If, however, it should be made to appear, as is contended was the appointment of the receiver whose acts are in question, that an appointment was collusive, and, in effect, made at request of, and for the benefit of, the company, for the purpose of placing, for a time, its property beyond the reach of some classes of its creditors, then it might with some propriety be held that the receiver was but the servant or agent of the company, for whose acts it would be as fully responsible as though he was appointed by its stockholders or directory. There are facts in the record tending strongly to show that the company was the mover in the matter of receivership, and that its management in the court was through amicable understanding between the company and those adverse to it on the record, with a view to settlement, not through foreclosure, but by dismissal of the suits after such time as its property had been held beyond the reach of some creditors, and had been largely augmented in value by improvements made from earnings. We are not authorized, however, to believe, had this been the case, that the court would have continued the receivership; nor are we authorized to review the action of that court in reference to any matter to which its jurisdiction attached. It may, further, be true, if a railway company permits its property to remain in the hands of a receiver appointed by a court having no jurisdiction over its property, that it ought to be held liable for his acts while in control of the property.

The record shows that the receiver was appointed by a circuit court of the United States for the eastern district of Louisiana, while the property of the Texas & Pacific Railway Company is in Texas, and that the business of the receivership was conducted in that court. We are not informed by the record in what manner jurisdiction was acquired by that court, and it may be that it had none; but, that court having assumed to exercise jurisdiction over the property, we cannot undertake to decide, from the record before us, whether it lawfully did so, and, in the disposition of this case, will assume that the receivership was valid.

Appellee seeks to recover for an injury received by him while in the employment of the receiver, who testified that all the "earnings and increase of the road, after paying operating expenses, * * * were appropriated to the improvement of the road," and, on offer to prove the sum so expended, it was agreed or admitted that "the betterments placed on the road out of earnings of the railway * * * were of value sufficient to more than cover the amount claimed by plaintiff in this suit." Under this admission, it must be held that earnings of the road, while in hands of receiver, more than sufficient to entitle appellee to have the judg-

ment paid out of appellant's property, were used in making improvements. The purpose of the admission was to render other proof on that point unnecessary. The pleadings and this proof and admission properly present the question whether appellant is liable if the accident for which damages are claimed occurred under such circumstances as would have entitled appellee to payment out of earnings of the road, had he recovered judgment pending the receivership.

The question is in no manner complicated by rights or claims of other persons, but rests between appellee and appellant, who has received and retains in betterments a sum which ought to have been paid to appellee, if he was injured under such circumstances as to give right of action against the receiver. That a claim for damages caused by injuries inflicted through the negligence of a receiver, while he is operating a railway, is entitled to payment out of current receipts, is well settled. *Ryan v. Hays*, 62 Tex. 42; *Barton v. Barbour*, 104 U. S. 130; *Kain v. Smith*, 80 N. Y. 470, and cases cited; *Ex parte Brown*, 15 S. C. 518; *Hale v. Frost*, 99 U. S. 389. If such earnings be invested in betterments, which, without sale, are returned to the company, with its other property, at the close of receivership, then the company must be held to have received the property charged with the satisfaction of any claim which the receiver ought to have paid out of the earnings. The principle involved in this is illustrated by many cases. *Ryan v. Hays*, 62 Tex. 42; *Fosdick v. Schall*, 99 U. S. 253; *Barton v. Barbour*, 104 U. S. 130; *Hale v. Frost*, 99 U. S. 389; *Miltnerberger v. Railway Co.*, 106 U. S. 287, 1 Sup. Ct. Rep. 140; *Addison v. Lewis*, 75 Va. 701; *Railroad Co. v. Davis*, 62 Miss. 271; *Burnham v. Bowen*, 4 Sup. Ct. Rep. 675. This general rule seems not to be controverted by appellant's counsel, but it is contended that the decree under which the receivership was closed, and the property returned to the company, relieved it from any liability for any claim not established by intervention in the suit pending in the circuit court of the United States sitting in New Orleans. Both parties pleaded that the receiver was discharged, and the property all returned to the company under the order of October 26, 1888; and that this was the effect of the order there can be no question. This ended the control of the court over the property, and the asserted reservation of the right again to assume control amounts to nothing, in the disposition of this case. The court's custody went with the discharge of its receiver, and return of the property to its owner. Its process cannot run here, and it has no means whereby it could again acquire custody of the property, unless it be true that the jurisdiction of that court is extraterritorial. Such we do not understand its jurisdiction to be. What a circuit court of the United States sitting within the territory where the property is situated might do through an original pro-

ceeding is not the question presented. The property having been released from the custody of the court, which once either rightfully or wrongfully assumed to have possession of it, stands subject to any claim or charge that may rest upon it; and this may be enforced by any court having jurisdiction, through appropriate process, unless the order hereafter to be considered takes away that right. Appellee was not a party to the suit pending in the circuit court of the United States sitting in the eastern district of Louisiana, and its decrees are not binding upon him, whatever may be their effect upon those who were parties.

It is contended, however, that that court had power to require all persons who had claims with which the property once in the custody of the court was charged to present their claims by intervention for adjudication in that court. Whence that power, we know not. Courts may make erroneous rulings which will bind parties to a litigation in which they are made, but they have no power to make laws which will bind strangers to the litigation. Had the receivership not been closed, such an order, in so far as it might be sought to bind appellee through it, would be inoperative, and in conflict with the act of congress passed March 3, 1887, which permits persons having claims against receivers to sue upon and establish them, in any court having jurisdiction, without leave previously given by the court appointing the receiver. The order relied upon, if given effect, would annul the act of congress.

It is contended, further, that not only was it necessary for appellee to establish his claim through intervention, but that such intervention should have been made within the time prescribed by the order, or the claim be forever barred, and no longer remain a charge on the property. It is generally understood that, in our form of government, no other department than that to which the power to make laws is given has such power. Within what time a claim shall be established, or action brought to establish it, must be determined by the law-making power, except in those cases in which, from long lapse of time, courts of equity have felt authorized to refuse to enforce them. The court, in the order referred to, undertook to establish, arbitrarily, a fixed period, which might arrive within as short a period as three months after a cause of action arose, within which it would be barred. The court had no rightful power to make such an order. Looking to the record, it seems to us that no better scheme could have been devised than seems to have been pursued in the cause in which the receiver was appointed, and receivership conducted, to enable a railway corporation, and its creditors secured by mortgage, to operate it for a series of years, and build up a fine property, for their mutual benefit, at the expense of those who were largely entitled to the earnings.

The receivership was established and con-

ducted in a state other than that in which the property was situated. How jurisdiction was acquired, we are not informed. The proceedings might as well have been in Maine, Oregon, California, or Florida, as in Louisiana, so far as the record shows. The property, a long line of railway running across the northern part of this state, was thus operated for nearly three years. A great part of the earnings were appropriated to better the property. A passenger, shipper, furnisher of material, day laborer, or employe, having just claim for compensation or damages, unless this was awarded by the receiver, might sue, if able to bear the expense of litigation, in a place distant from where his evidence of right might be obtained, when, according to the usual practice of the court, his claim, when it suited the convenience of all parties, would be submitted to a master in chancery, and his right thus determined; when, under the act of congress, it was his right to sue in any other court having jurisdiction of his cause, and to have an inexpensive trial in the mode appropriate, under the law, for the trial of his cause. This, too, after the property has passed from the custody of the court, was required to be done by all who then held unadjusted claims, within an arbitrarily fixed period, when the receiver was no longer under the power of the court. The orders seem to have been well adapted to the protection of some interests; but those were the interests of the company, lien creditors, and the receiver, at the inconvenience, if not at the expense, of that class of creditors whose several claims were comparatively small, but were charges to the extent of all betterments made with earnings. This last class of creditors, under the act of April 2, 1887, as well as the act of March 19, 1889, had lien to extent of earnings used in improving the company's property, which could no more be destroyed by the orders relied on than could this action, then pending, thus be abated or rendered fruitless. So much of the order relied on as declared that the property in hands of the company should be held subject to all claims which might have been enforced against it while in the custody of the court, its jurisdiction over the property for the purposes of this case being conceded, was obviously correct, and the company, having so received it, must so hold it. That order, however, is not the true foundation on which the charge or lien rests. It rests on the statute, but, in the absence of this, would rest on the existence of facts which, under general principles applicable, create such a charge or lien; and no order of any court can change the effect of such facts, or affect one not a party to the proceeding in which the order was made. So much of the order as required intervention, and provided a time within which this should be made, was inoperative upon any right of appellee. If the court had power to assume custody of the company's property, a sufficient answer to the claim of appellant, that resort must be had to that court

by appellee to enforce his claim, is that the court has not exercised such a power, and, in effect, has declared that it would not, to enforce any claim not reduced to judgment by intervention in that court, and the property stands subject to any proper process for the collection of judgment.

That a receiver controlling the property of a railway company is, in a limited sense, the representative of the corporation, cannot be denied; for, on account of his conduct, a liability may be fixed upon its property, which earnings while in the hands of a receiver are, as much as is the *corpus* of the property. A judgment against him, in actions of this character, binds such property of the company; and it is not held to be necessary, pending receivership, to join the company as a defendant. A person through whose acts such a liability may be imposed on the property of another, this fixed by judgment against him alone, and enforced through process to which the owner is not a party, is the representative of the person or corporation to the extent of the fund which may be affected by his act, and subjected, through judgment against him alone, to satisfaction of claim thus arising. Current legislation all tends to show that the *consensus* of legislative bodies repudiates the technical holding that a receiver is only the arm of the court, and recognizes the real relation arising from the facts. The act of congress before referred to recognizes the representative character of the receiver. The act of March 19, 1889, (Gen. Laws, 57,) recognizes it, and declares that the discharge of a receiver shall not work an abatement of a suit pending against him, nor affect the right of any one having claim to sue him after discharge. It gives the right to prosecute such an action against the receiver alone, or to join with him the person or corporation whose property was once in his hands as receiver. It further provides that "all parties and corporations whose property has been placed in the hands of a receiver by order of court, and which was not sold by the receiver, and which property has been redelivered back to the original parties or corporation without any sale of said property, shall be liable and held to pay all of the unpaid liabilities of the receiver in causes of action arising out of and during the receivership; and, if there are any suits pending against a receiver, at the date of discharge, on causes of action arising during the receivership, the plaintiff shall have the right to make the party or corporation to whom the receiver delivered the property which was in his hands as receiver a party defendant along with the receiver; and, if any judgment is rendered against the receiver for causes of action arising out of and during the receivership, then the court shall also, at the same time, (if the party or corporation receiving back the property have been made party defendants,) render judgment in favor of the plaintiff, against both defendants, for the amount so found for plaintiff, and all

costs, and plaintiff shall have the right to foreclose his lien on the property delivered back by said receiver to said party or corporation." Such proceedings against one not a representative of the fund, or of the owner of a fund, to be subjected, but once the mere arm or officer of a court, now cut off by discharge, could not be entertained. This act was not in force when the judgment was rendered in this cause, but it tends to show that the legislature recognized the fact that receivers really have a representative character necessary to the prosecution and enforcement, if not to the existence, of rights, which the courts at all times have not fully recognized. In view of the fact that the business and property of large corporations, charged with duties to the public which can be discharged only by the business being conducted, are at this day frequently held for long periods in receiverships, it may be found, in the future, necessary and proper to hold that in such cases receivers are more fully the representatives of such corporations than they have heretofore been held to be.

Objections to the judgment based on the former existence of the receivership, and orders made in discharging that, not being tenable, the only inquiries that remain are whether the facts entitled the appellee to the judgment, and whether errors on the trial were committed as claimed. Appellee was in the employment of the receiver as an engineer, and was injured by derailment of the locomotive on which he was; and the evidence showed very clearly that this was caused by a defective switch. The evidence further tended to show that the train might have been stopped before the locomotive turned over, and thus injured appellee, even after it was derailed, had the air-brakes been in proper condition. It is urged that "the court erred in refusing special charge No. 2, asked by defendant, to the effect that if the wreck was caused by a switch being out of place, and the switch was left out of place by a conductor or brakeman on another train, and such other brakeman or conductor could have properly adjusted the switch, then their negligence would be the negligence of a fellow-servant, and plaintiff cannot recover," and that "the court erred in overruling a motion for a new trial, because the evidence is not sufficient to sustain the verdict; because all the negligence that was shown was the negligence of a fellow-servant of plaintiff, and there was no proof of negligence to make the defendant liable."

The evidence shows that the switch was defective in that the spring was not strong enough to throw the point of the switch to the main rail, and there hold it, when the lever was in proper position to indicate to the engineer that the rails were in proper position for the car to pass. In approaching the switch the engineer saw that the lever was in position, which indicated that the rails were in proper position; but, before reaching the switch, he saw that this was not true,

when he used all the means in his possession to stop the train, but was unable to do so in time to prevent the injury. The errors above assigned are based on the proposition that other employes of the receiver might have placed the rails in proper position by the use of a maul, axe, or some substance which would have kept the rails in proper place, and that for this reason the injury resulted from the negligence of a fellow-servant, and not from a defective switch. The propositions cannot be maintained. If the machinery relied upon by the receiver to keep the rails in proper position was so defective that it did not accomplish that purpose, then he had failed in duty to the employe which fixed liability, and could not be relieved from that by the fact that some other employe, by the use of some unusual means, might have placed and held the rails in proper position. The charge refused was not applicable to the facts proved.

It is urged that "the court erred in refusing special charge No. 4, asked by defendant, to the effect that plaintiff could not recover on account of any defect in the brakes on the car that was derailed." The evidence tending to show that, notwithstanding the derailment, the locomotive and train could have been stopped before the locomotive turned over, and thus injured appellee, had the air-brakes been in order, and also tending to show that the brakes would not work because out of order, the court did not err in refusing to give the charge requested.

It is urged that the verdict is excessive; but, although large, this must be determined by the facts, and due weight given to the finding of the jury. At the time appellee was injured, he was 34 years old, in good health, and endowed with vigorous constitution and fine physical development. He was earning from \$165 to \$195 per month. As the effect of injury received, he has been incapacitated to perform any useful or profitable labor, is bereft of the sense of hearing, is physically a wreck, and can look to a future of suffering such as, with most persons, would make life a burden. Though large, we cannot say that the verdict is excessive; and, finding no error in the judgment, it will be affirmed.

TEXAS & P. RY. CO. v. OVERHEISER.

(Supreme Court of Texas. March 7, 1890.)

MASTER AND SERVANT—NEGLIGENCE—EXCESSIVE DAMAGES.

1. Plaintiff, in attempting to uncouple cars, found the coupling-pin fastened, when he signaled to the engineer to stop the train, which was done. Being still unable to remove the pin, he asked the engineer to give him the slack. The train kept moving slightly, and, after moving along with it for 10 or 12 feet, plaintiff succeeded in pulling out the pin, and, as he stepped out, the leg of his pants was caught by a "sliver" in the rail, causing a car-wheel to run over his foot. Held, that a verdict for plaintiff would not be set aside because of his negligence in stepping between moving cars.

2. Where the evidence shows that the space between the ties inside the rails was filled with

earth, though that outside the rails was not entirely filled in, and where there is no claim that plaintiff was injured because the filling between the ties was incomplete, it is proper to refuse an instruction that plaintiff could not recover if he knew of this defect, and if it contributed to his injury, especially when the court has already fully charged in relation to the doctrine of contributory negligence.

3. A verdict of \$7,500 will not be set aside as excessive, where it appears that plaintiff's foot was cut off crosswise from the instep to the heel; that two operations had been performed; that the wound had not entirely healed nine months after the injury was received; that plaintiff had suffered intense pain; that the leg was scarred and shriveled nearly to the knee; and that the whole of the foot was gone, except the rear part of the heel.

Appeal from district court, Marion county.

F. H. Prendergast, for appellant. *C. A. Culberson*, for appellee.

STAYTON, C. J. E. S. Overheiser sued Brown and Sheldon, as receivers of the Texas & Pacific Railway Company, on July 20, 1887, alleging he was hurt October 30, 1886, by the negligence of the receivers. The receiver was discharged October 31, 1888, and plaintiff made the Texas & Pacific Railway Company a defendant on June 8, 1889. Judgment for plaintiff for \$7,500 against the Texas & Pacific Railway Company. The Texas & Pacific Railway Company appealed. Pending litigation, Sheldon withdrew from the receivership, but it was continued with John C. Brown as sole receiver. The same petitions and orders for the discharge of the receiver appear in this case which appeared in the case of appellant against Johnson, ante, 463, (this day decided;) but the fact tending to show that receivers were appointed at the suggestion for the company do not appear. The deposition of John C. Brown was taken on January 15, 1889, when it appeared that he was in charge of appellant's property as the president of the company. From his evidence it was shown that the net earnings of the road while in the hands of the receiver amounted to more than \$2,300,000, all of which was expended for permanent improvements under the order of the circuit court for the eastern district of Louisiana, sitting in New Orleans. A statement somewhat in detail is given of the bad condition of the road when receivers were appointed, and its good condition when returned to the company; much more than the net earnings having been thus expended. New rails and cross-ties were put in which cost over \$2,300,000.

The Texas & Pacific Railway Company pleaded, under oath, that the receiver had control of the road when plaintiff was injured; that the receiver had been discharged, and delivered all the property in his hands to the Texas & Pacific Railway Company, under the order of the court, charged only with such judgments as may be rendered in favor of persons who intervened in the cause where the receiver was appointed prior to February 1, 1889, and that the plaintiff had not intervened in said cause at all. Demurrer was

sustained to this plea, and this ruling is assigned as error. The other assignments raising the questions first presented are that "the court erred in refusing special charge No. 2, asked by the defendant, to the effect that the jury should find for defendant because it appeared from the undisputed evidence that, at the time plaintiff was injured, the Texas & Pacific Railway was in the hands of a receiver, and said receiver had been discharged, and the property delivered to the defendant, charged with the payment only of judgments in favor of persons who intervened in that court." "The court erred in charging the jury to find against the Texas & Pacific Railway Company, if they find that the betterments placed on the road by Brown, receiver, were of greater value than the amount of their verdict, because such facts do not show a liability on the part of the Texas & Pacific Railway Company, under the order discharging such receiver. The court erred in holding that the Texas & Pacific Railway would be liable at the suit of plaintiff in this court, when the evidence showed that they received the property charged only with the payment of judgments in favor of persons who intervene in the court where the receiver was appointed prior to February 1, 1889." The questions raised by these several assignments were considered in the case of *Railway Co. v. Johnson*, ante, 463, (this day decided,) in which it was held that the rulings complained of were not erroneous, and it becomes unnecessary again to further discuss them.

Appellee was a brakeman in the service of the receiver, and injured while in the act of leaving the track after having gone between two cars for the purpose of uncoupling them. His theory of the case was that he attempted, in the only mode in which it could be done, to uncouple cars; that he went in between the tender and car to uncouple them, but found the pin fastened, when "I signaled the engineer to give me the slack, and the train kept moving slightly. I walked along ten or twelve feet between the cars as they moved, and when I pulled the pin, and went to step out, my left pant leg was caught by something, and to save myself I threw my body outside of the track, and the wheel ran over my left foot." The court had instructed the jury that appellee was not entitled to recover if his own failure to use care contributed to the injury; and, under this state of facts, the court did not err in refusing, practically, to repeat the charge, when requested by appellant, in a form, looking to the evidence in the case, not as appropriate as was the charge given.

The next assignment of error is that "the court erred in refusing special charge No. 5, asked by defendant, to the effect that, if plaintiff was negligent in walking along between the cars while they were moving over a road-bed that he knew was not filled in between the ties, and that such negligence contributed to his injury, then plaintiff can-

not recover." There was some evidence to the effect that the space between the ties from end to end was not entirely filled with earth, but it all tended to show that the space between the rails was; and there was no claim, or evidence sufficient to raise claim, that appellee was injured because the filling between the ties was not complete. His whole case rested upon the proposition that he was caught, while leaving the track, either by a brake-beam claimed to have been defective, or by what is termed a "sliver" on the rail, which witnesses describe as a thin piece of the rail, of some length, split from it from wear, but still attached at one end. There was evidence that such a piece of iron was found in his pants where torn, and on the lower part of the leg. The charge was not strictly applicable to the case; but, had it been, the court had already informed the jury that plaintiff could not recover if his negligence contributed to the injury. In addition to that, at request of counsel for appellant, the court gave the following instructions: "It is the duty of a railway company to furnish a safe road-bed and iron rails, and, if the road-bed or rails were not safe and suitable when plaintiff was hurt, and their defective condition caused plaintiff's injury, then he can recover, unless you find that he knew, or by ordinary diligence could have learned, of the condition of the road-bed and rails; and if he knew, or could have known by ordinary care, of the condition of the road-bed and iron rails, then he cannot recover for any injury caused by such defects." "The jury are charged that if plaintiff was negligent in uncoupling said car, and said negligence contributed to or caused the injury to him, then he cannot recover, although the receiver may have been negligent, also, in not keeping a safe road-bed and iron." In view of the instructions given, the court, with propriety, could have refused to give further charges on the question of negligence, even if such as were requested had been strictly correct, and applicable to the case, and ought to have refused the charge first above quoted.

It is urged that the court erred in not granting a new trial on the ground that the verdict was excessive, and on the further grounds that appellee knew of the condition of the road-bed, when he went between the cars, and was negligent in going between them while moving. The evidence of appellee as to the extent of his injuries is as follows, after stating that the wheel of the tender cut off his left foot cross-ways from the instep to the heel: "I suffered intense pain from the injury for eight months, and still suffer from it. After I was hurt, I was sent to Texarkana, a distance of five miles, where my foot was amputated by Dr. De Loach, the railroad surgeon. That night I was sent to the company's hospital at Marshall, and remained there eight months under the care of the physicians. After I was able to leave the hospital, I went to New Orleans to secure an artificial limb, for which I paid seventy-five

dollars. This did not last long, and I got another one from St. Louis, for which I paid sixty dollars. These wooden feet, which are strapped and laced to the leg, hurt me in walking. I am not using it now, because in spring and summer it hurts me, and chafes the foot. With this exception, I usually wear the wooden foot. My foot is not yet well. There is nothing left but the stub of the heel. Two operations were performed upon it by the surgeons of the company." The plaintiff then exhibited the naked foot and leg to the court and jury. The leg was scarred and shriveled nearly to the knee. All the foot was gone except the rear part of the heel, and it showed signs of not being entirely healed up. For such an injury, we cannot hold that the verdict was excessive.

The facts bearing on question of negligence of appellee in going between the cars appeared from the evidence of appellee, who, after stating what his efforts were to uncouple the cars without going between them, and that in this he had failed, stated that he followed the rules: "I tried to uncouple in that position, but found that the coupling-pin was fast in the draw-head. In such cases, we must go in between the cars, and the rules so say. I signaled the engineer to stop the train so I could go in between the tender and car to uncouple, and he stopped. I went in between the cars, and began to jar the pin. I asked him to give me the slack, and the train kept moving slightly, and, as it moved, I walked along on the track, trying to get out the pin." He then stated that after uncoupling the cars he started to leave the track, when his leg was caught, and, to save himself, threw his body beyond the track, when the cars ran over the foot of the leg caught. This evidence does not show that he went between the cars while in motion, but, in connection with other evidence, shows that slack was called for to enable him to uncouple the cars, which were on a grade, and that they moved slowly for a short distance, while he was engaged in uncoupling. The jury found that he was not negligent in these matters. The court below approved their finding when its correctness was questioned on motion for new trial, and this court, on the evidence, would not be justified in setting the finding aside.

He was not familiar with the side track on which the accident occurred, had not been at that place before, knew not the condition of the rails nor brake-beam, but, when he went on the side track, saw that space between ties, for their entire length, was not filled with earth. Under these facts, we cannot say that he was negligent even if the injury had resulted from the fact that the space between the ties was not entirely filled. The court, under the evidence, might properly have withdrawn from the jury any question as to whether appellee was injured in consequence of defect last named, for the evidence would not, perhaps, have sustained a finding to that effect; but there is no reason to believe

that the jury were in any respect misled by the manner in which the cause was submitted to them.

The evidence, in some respects, was somewhat circumstantial, but we cannot say that it was not sufficient to sustain the verdict; and the judgment will be affirmed.

TEXAS & P. RY. CO. v. GRIFFIN et al.

(*Supreme Court of Texas.* March 11, 1890.)

RAILROAD COMPANIES—RECEIVERS.

Where a judgment is recovered against the receiver of a railroad company for injuries sustained through the negligence of his servants, the company is liable on such judgment after the discharge of the receiver, where it has received, in improvements, earnings, out of which the injured person was entitled to have his judgment paid, though he failed to establish his claim by intervening in the suit in which the receiver was appointed, as the decree ordering that the property shall be relieved from liability on claims not established by intervention in such suit does not affect him. *Following Railway Co. v. Johnson*, ante, 463.

Appeal from district court, Marion county.
F. H. Prendergast, for appellant. *C. A. Culbertson*, for appellees.

STAYTON, C. J. Griffin was injured in January, 1888, by the negligence of the servants of John S. Brown, receiver of Texas & Pacific Railway. In March, 1888, he filed suit against receiver in district court, Marion county, and on June 22, 1888, recovered a judgment for \$4,400. Brown appealed, and this court affirmed the judgment. Griffin sold one-half of the judgment to Loony, Mason, and Culbertson. On December 12, 1888, these four persons sued the Texas & Pacific Railway Company in the district court, Marion county, on the judgment. On January 21, 1888, they recovered a judgment against the Texas & Pacific Railway Company for \$4,605, from which this appeal is prosecuted.

The same defenses were set up by the railway company that were in the case of *Texas & Pacific Railway Co. v. Johnson*, ante, 463, (this term decided;) and the petition of the receiver asking discharge, as well as the orders of the court made therein, offered in evidence in that case, were offered in evidence in this. It was further found in this case that, during the time the railway was in the hands of the receiver, he expended, under the orders of the court that appointed him, in making permanent improvements on the road, from the net earnings, more than \$2,300,000. The character of improvements made are stated in the opinion in the case before referred to.

Assignments of error are: "The court erred in rendering judgment against the Texas & Pacific Railway Company, because the evidence showed that the plaintiff, Griffin, was injured while the Texas & Pacific Railway was under the control of John C. Brown, as receiver, and by the acts of the employes of said receiver. Said road was not under the control of the Texas & Pacific

Railway Company. The court erred in rendering judgment against the Texas & Pacific Railway Company, because there are no facts making the Texas & Pacific Railway Company liable for the acts of the employes of said Brown as receiver. The court erred in rendering judgment against the Texas & Pacific Railway Company, because, under the orders discharging Brown from his receivership, this court has no jurisdiction to determine whether the Texas & Pacific Railway Company are liable for the damage caused by the receiver while operating the railway; and, under said order discharging said receiver, the Texas & Pacific Railway Company became liable only to such persons as may intervene in the cause where the receiver was appointed." It will be seen that these assignments are intended to raise questions considered and decided in the case before referred to; and, as the facts on which their decision rests are in so far the same in the two cases, what was said in that case is applicable to this. We therefore hold that the judgment rendered against the receiver before his discharge establishes the right of appellees to have the same thereby ascertained to be due paid out of the property returned at the close of the receivership, it appearing that, of the net earnings of the road, while in the hands of the receiver, more than \$2,300,000 had been expended in making improvements of which appellant has the benefit. No question is made as to the sufficiency of the fund which ought to have gone to the payment of claims of this character to satisfy all such. On the fund which was thus diverted from the use to which it ought to have been applied by the receiver, Griffin had a lien; and appellant, having received it, is liable for the payment of the sum due him under the general principles of law applicable to the question, as well as under the order of the court through which it received the property from the receiver. So much of that order as declared that the company should hold the property, after discharge of receiver, subject to the payment of such claims as existed against him, was but the assertion of an equitable rule, not dependent for its existence on that order, but on the facts which alone authorize such an order to be made. As we have seen in the case before referred to, the parts of that order which prescribed the manner and the time within which persons holding such claims should enforce them, cannot affect the right of appellees to enforce their claim in any other lawful manner, and within such time as the law has prescribed. The judgment made the basis of this action was rendered against the receiver prior to his discharge. He was then the representative of the company as to the fund out of which its liability now arises, and a judgment against him, in the absence of fraud in its procurement, is conclusive of the right to be paid out of any fund received by the company that would have been subject in his hands to

payment of the claim. The fact that the property of the company was in the hands of the receiver, and managed by him, when Griffin was injured, is a matter of no importance, in view of the fact that the company received from him, when discharged, property in his hands subject to the payment of the debt. There is no error in the judgment, and it will be affirmed.

BROWN v. GAY *et al.*

(*Supreme Court of Texas. March 11, 1890.*)

RECEIVERS—DISCHARGE—ABATEMENT OF ACTIONS.

1. Where a receiver is fully discharged from the receivership, by the court that appointed him, after an action has been commenced against him in his representative capacity, and not for any personal liability, to which the owner of the property has not been made a party, and, under the order of the court, the property in the receiver's hands is restored to its owner free from any further control of the receiver, the owner must be made a party defendant before the trial can proceed, as no judgment can be rendered against the receiver after the termination of his official existence which would bind the owner or the property.

2. An action against a receiver does not abate because the receiver is discharged and the property restored to its owner, but the owner may be substituted as a party, and the action prosecuted against him.

Appeal from district court, Tarrant county.

Finch & Thompson, for appellant. *Ball, Wynne & McCart*, for appellees.

STAYTON, C. J. This action was brought by Nancy J. Gay on February 6, 1888, in her own right and as next friend of her minor child, against John C. Brown, receiver of the Texas & Pacific Railway. The action is founded on claim that John M. Gay, the husband and father, while in the employment of the receiver, was killed under circumstances that made the receiver liable, not personally, but in his official or representative character. On February 25, 1889, appellant filed a first amended original answer, setting up the following defenses, viz.: (1) That it appeared from appellees' petition that appellant was sued as receiver of the Texas & Pacific Railway Company, and that he held his appointment as such by order of the honorable circuit court of the United States, and could not, therefore, be sued without permission of said court, and, further, that it appeared appellant was a resident of Dallas county, and no exception existed allowing him to be sued without the county of his residence; (2) a general demurrer; (3) a general denial; (4) a special answer setting up the final discharge of appellant as such receiver on the 26th day of October, 1888, and his complete relinquishment of all control over said railway and its property on the 31st day of October, 1888, and his unconditional retirement and discharge as such receiver; (5) a further special answer setting out the conditions of the order of his discharge, under and by virtue of which appellees' claim was declared barred unless presented before Febru-

ary 1, 1889, to the honorable circuit court of the United States sitting at New Orleans, state of Louisiana, which appellees had failed and refused to do; (6) a plea of contributory negligence. Attached to this answer, as exhibits, were the petition of the receiver for discharge as well as the order of court discharging him, which were the same as shown in the case of *Railway Co. v. Johnson*, ante, 463, (at the last sitting decided.) On February 26, 1889, appellees filed a supplemental petition excepting to appellant's plea to the jurisdiction, also excepting to the sufficiency of appellant's answer setting up his discharge as receiver, as well as the answer pleading the order of the United States court in bar of this suit. These exceptions were sustained, and on hearing there was a verdict and judgment against the receiver for \$10,000, which the jury apportioned.

There was no error in the court's holding that the action was properly brought, in the first instance, against the receiver, without leave previously given by the court that appointed him, nor was there error in holding that the suit was properly brought in Tarrant county. *Sayles' Civil St. arts. 1468, 1469; Act Cong. March 3, 1887.*

The answer showed that the receiver had been discharged, and all the property theretofore in his hands delivered to the railway company, in pursuance of the order of the court that appointed him; and the order directing this to be done declared that it should remain liable, in the hands of the company, for such claims as were proper against the receivership. The ruling of the court was that this action might be sustained against the person who was receiver at the time the injury occurred, notwithstanding he had ceased to be the receiver, and to control, or have the right to control, any fund out of which the judgment to be rendered could be paid. The act of March 19, 1889, was not in force when that ruling was made; and its provisions are, therefore, not applicable to this case. The only ground on which it can be held that property belonging to a railway or other corporation, or to an individual, can be subjected to a sale under judgment against a receiver, is that he, with reference to the property so controlled by him, and as to the rights growing out of its management, is the representative of the owner. Can it be said that this representative character continues after the court that appointed him has discharged him, and withdrawn from him all control or right to control the property? We think not. Being no longer the representative of the company in any respect, a judgment against him would not bind it or its property. There being no personal liability or fund left in his hands subject to the control of the court that appointed him, a judgment rendered against him as receiver would be fruitless. As said in *Ryan v. Hays*, 62 Tex. 47: "The sole liability of a receiver, except in cases in which he is personally at fault, is official; and when his official character ceases,

and the property through which, alone, his official liability may be discharged, has passed from his hands, in pursuance of the orders of the court that appointed him, and he has been by that court discharged from his trust, then no judgment can be rendered against him; for with the termination of his official existence ends his official liability." *Railroad Co. v. Ormond*, Id. 274; *Davis v. Duncan*, 19 Fed. Rep. 477; *Trust Co. v. Railroad Co.*, 7 Fed. Rep. 537; *White v. Railroad Co.*, 52 Iowa, 97, 2 N. W. Rep. 1016. The plea to which exception was sustained, not only stated facts which, if admitted, showed that no judgment could legally be rendered against the receiver, but stated facts which showed that the Texas & Pacific Railway Company should be made the defendant, as did it state facts which, with some additional facts, would entitle appellees to recover if the injuries resulted from facts that would have authorized a judgment against the receiver had he not been discharged. The plea was a suggestion to the court that the action could not longer be continued against the receiver; and, while the facts stated were not such as to abate the action, they were such that the court should have declined to proceed with the case until the company was made a defendant. This, in analogy to other cases in which a defect of parties arises after action brought, is believed to be the correct practice in cases in which a receiver dies or is removed after action brought against him or by him, or in case a receiver defendant is discharged, and the property in his hands, subject to payment of a judgment to be rendered, is returned by order of court to its owner. *Wilson v. Wilson*, 1 Barb. Ch. 592; *Palmer v. Murray*, 18 How. Pr. 549; *Searcy v. Stubbs*, 12 Ga. 438; *Lehigh Coal & Nav. Co. v. Central R. Co.*, 42 N. J. Eq. 591, 8 Atl. Rep. 648; *Talmage v. Pell*, 9 Paige, 413; *Sheldon v. Adams*, 27 How. Pr. 180; *Rev. St. arts. 1246-1255*. As the case is now presented, the facts alleged in the plea excepted to must be treated as true; and, so treating them, we hold that the court erred in rendering judgment against the receiver. The questions which would arise under the receiver's pleadings as to liability of the company have been considered in other cases. As the proper parties were not before the court to try the merits of the case, we do not now feel that it is necessary to consider the many assignments of error relating to matters occurring on the trial.

The receiver was such representative of the company, when the action was brought, as to make it practically, then, an action against the company; and, for this reason, it would not abate when he was discharged, but might be further prosecuted against the company, if substituted for the receiver, who has ceased to represent it. But, to recover then, it would be necessary for appellee to allege and prove such facts as make property in hands of the company liable to satisfy the judgment to be rendered. The judgment

will be reversed, and the cause remanded; and the parties can then pursue such course as to them seems proper. It is so ordered.

BROWN v. MELTON.

(*Supreme Court of Texas. March 11, 1890.*)

RECEIVERS—DISCHARGE AFTER ACTION BROUGHT.

Where a receiver is fully discharged from the receivership, by the court that appointed him, after an action has been commenced against him in his representative capacity, and not for any personal liability to which the owner of the property has not been made a party, and, under the order of the court, the property in the receiver's hands is restored to its owner free from any further control of the receiver, the owner must be made a party defendant before the trial can proceed, as no judgment can be rendered against the receiver after the termination of his official existence which would bind the owner or the property.

Appeal from district court, Tarrant county.

Action by C. B. Melton against John C. Brown, receiver of the Texas & Pacific Railway Company, to recover for the contents of a lost trunk, and to recover damages for a tort. Defendant appealed.

Finch & Thompson, for appellant. *Ball, Wynns & McCart*, for appellee.

STAYTON, C. J. Appellee brought this action on March 2, 1888, against appellant, who was then, and before that time had been, in possession of the railroad and other property belonging to the Texas & Pacific Railway Company, as receiver appointed by the circuit court of the United States for the eastern district of Louisiana. He claimed that he was a passenger on the railway while operated by the receiver, to whose servants he delivered a trunk and contents of value of \$500, which appellant had failed to deliver on demand, at his destination. He further alleged that, at the railway depot, servants of the receiver assaulted and otherwise maltreated him in such manner as to render the receiver liable to him in damages. He sought to recover on both these causes of action, but stated no fact that would fix personal liability on the receiver. By amended pleadings, appellant set up many defenses to the action which it will not be necessary to state or discuss. Among other things, he alleged that on October 31, 1888, he was fully discharged from the receivership by order of the court that appointed him, and that, under its order, he had delivered to the company all the property theretofore in his hands which the order made liable in the hands of the company for claims that, in manner and within time named, might be established as just claims against the receivership. Certified copies of the orders referred to were made exhibits to this pleading, and appellants asked that the action should not further proceed against him. Exceptions were filed to this pleading, which on hearing were sustained, when a trial was had on the merits, and judgment rendered in favor of appellee for \$2,450. The railway company was not made a party defendant.

It is contended that the matters above referred to were in abatement, and should have been pleaded before a former answer to the merits. This is a mistake. The matter relied on by the receiver as a ground why the action should not longer be prosecuted against him did not go to the abatement of the action, but it did show to the court that a defect of parties had arisen since the action was brought, and since his former answer to the merits was filed, which made it improper for the court to try the cause until the company was made a defendant. The questions arising on this branch of the case were considered in the case of *Brown v. Gay*, ante, 472, (this day decided;) and, for the reasons therein given, we hold that the court erred in sustaining exceptions to the pleading in which appellant set up his discharge and the redelivery of all property to the Texas & Pacific Railway Company. For this ruling the judgment will be reversed, and the cause will be remanded, when the parties may take such steps looking to the further prosecution of the case as to them may seem proper. It is so ordered.

UTZFIELD *et al.* v. BODMAN'S HEIRS.

(Supreme Court of Texas. Feb. 28, 1890.)

TRESPASS TO TRY TITLE—SALE OF LAND CERTIFICATES—EVIDENCE.

1. In a suit for possession of land patented to plaintiffs, as heirs of the heir of B., to whom the certificates were issued, evidence that the widow and administratrix of B. was directed by the probate court to use the land for the support of herself and children, "so long as she might be undisturbed by the course of law and the succession closed;" an unacknowledged instrument, executed by the administratrix and her second husband after the administration was closed, purporting to convey the certificates to one from whom defendants show deeds; and evidence that the land was surveyed and located for some person other than plaintiffs, and that defendants and their vendors have paid the taxes on it,—are not sufficient to show a sale of the certificates, or title in defendants.

2. In such suit, title being shown in plaintiffs, and there being no evidence of an actual sale of the certificates, or of title in defendants, an unacknowledged instrument executed by the administratrix after close of the administration, purporting to convey the certificates to the person under whom defendants claim, is not admissible to show the intention in regard to the certificates.

Appeal from district court, Harris county; JAMES MASTERSON, Judge.

F. F. Chew, for appellants. *F. M. Poland*, for appellees.

HENRY, J. The heirs of A. Bodman brought this suit against Henry Utzfield and others to recover land. Plaintiffs recovered judgment, and T. D. Welch, one of the defendants, prosecutes this appeal. Plaintiffs introduced evidence showing that the lands were patented to the heirs of Austin R. Bodman, and that they were the heirs of Alfred Bodman, who was the son and only heir of the said Austin R. Bodman. The defendants introduced evidence as follows: (1) The originals of said patents. (2) A certified copy

of the field-notes of a survey of two-thirds of a league and labor of land made by George A. Bringham, county surveyor of Harris county, in July, 1841, it being part of the land in controversy. (3) A transcript of proceedings had in the probate court of Harrisburg county, republic of Texas, in the administration of A. R. Bodman, deceased, including petition of Jane D. Bodman, the widow of Austin R. Bodman, filed on the 4th day of November, 1839, alleging that said Austin R. Bodman died on the 7th day of September, 1839, intestate, and that outstanding debts existed against his estate, and praying for letters of administration; the appointment of said Jane D. Bodman administratrix, according to her prayer, on the 20th day of November, 1839; an inventory and appraisal of the property of said estate, containing a receipt from William H. Hunt to A. R. Bodman for the two land certificates on which the patents in controversy were issued, said receipt being dated at Houston on the 23d of May, 1839; also an order dated the 21st day of January, 1841, reciting that the property inventoried was insufficient for the payment of the debts, or the support of the widow, and directing that Jane Bodman, "for herself and children, be empowered to take possession of, use, and dispose of, as well as collect, all personal property and debts due the estate, as well as to use all real estate so long as she may be undisturbed by the course of law and the succession closed;" also an order dated July 19, 1841, in the following words: "The officers of court being the only creditors of this estate, it was, on motion, ordered that all costs due from this succession be remitted, and the estate stand closed." (4) A certificate showing the marriage of Jane D. Bodman to F. P. Morey on the 23d day of July, 1841. (5) The testimony of George H. Bringham to the effect that he, as county surveyor of Harris county, made the survey of the land in controversy for the location of the certificates in August, 1841; that the certificates were handed to him by one William Cook, and that he did not make the survey for the Bodmans; that they had transferred them, but he could not say to whom; that he may have made the survey for Charles Bigelow; that whoever he made it for could not pay for the work in money, but he had to take part of the land for his pay; that he located the land in July or August, 1841. (6) That defendants and their vendors had paid all taxes upon the land up to the year 1887. (7) Deeds connecting defendants with Charles Bigelow.

The defendants offered to read a copy of an instrument dated the 15th day of March, 1842, signed by F. P. Morey and Jane D. Morey, conveying to Charles Bigelow two land certificates recited to be then unlocated, and described so as to show that they were the same certificates that the land in controversy was located under. This instrument was not acknowledged by the makers, but was proved for record by a subscribing w.t.

ness and recorded. Defendants explained that they offered the instrument not as a muniment of title, but to show the intention of the parties to it. Upon the objection of plaintiffs it was excluded. The court charged the jury to find for plaintiffs, and refused all charges requested by defendants.

We think there was no error in excluding the evidence. *Groesbeck v. Bodman*, 73 Tex. 289, 11 S. W. Rep. 322. The evidence showed title in plaintiffs, without there being anything to justify a finding that it had ever been divested out of them or their ancestors. The tendency of the evidence introduced by defendants is to suggest that the land certificates were sold, before they were located, by the widow and administratrix of A. R. Bodman to pay his debts. We do not think, however, that when the circumstances are given their greatest effect they can properly be held to be proof of such sale. If some reliable evidence of an actual sale had been made, they would have tended strongly to support and sustain it. The instrument dated in 1842 weakens, rather than strengthens, the case of defendants. Without being evidence itself of a conveyance, the attempt to make one then suggests that no conveyance of the certificates had been previously made. If defendant's claim could be sustained under any view of the case, it would have to be done on the ground that the certificates had been sold long before the date of this instrument. If there was in fact a sale of the certificates, the evidence of it had been so loosely preserved as to make it impossible to sustain it now, and we are constrained to conclude that the court properly directed the jury to find for plaintiffs. The judgment is affirmed.

COOK et ux. v. HOUSTON DIRECT NAV. CO.
(Supreme Court of Texas. Feb. 28, 1890.)

SHIPPING—INJURIES TO PASSENGERS—DISCRETION OF INFANTS.

1. In an action against a company owning a tug-boat, where the petition alleges that defendant was a common carrier of passengers, and that the child of plaintiffs was killed while a passenger on the boat, an answer averring that the boat was not a passenger boat, and that the employees of the company were forbidden to carry any one as a passenger, is sufficient.

2. When the petition also alleges that the company was guilty of negligence in receiving the child on board of the boat without the consent of plaintiffs, it is error to charge that plaintiffs cannot recover unless the child was a passenger on defendant's boat.

3. If the child was on board with the consent of plaintiffs they cannot recover.

4. If the crew permitted the child to come on board without the consent of plaintiffs, the fact that it was against the orders of defendant, and without the knowledge of the officer in charge of the boat, is not sufficient to relieve defendant from liability.

5. Whether a child who was injured on board plaintiffs' tug-boat, and who was between 13 and 14 years of age, had the intelligence of an ordinary adult to perceive and avoid the dangers of the situation, is a question for the jury.

6. Though the child had not the intelligence of an adult, yet, if she did not act with the ordinary prudence of a person of her intelligence, she is guilty of contributory negligence.

Appeal from district court, Harris county; JAMES MASTERSON, Judge.

Action by William Cook and Josephine, his wife, against the Houston Direct Navigation Company. Judgment was rendered for defendant, and plaintiffs appealed.

B. O'Malley, Gustave Cook, and A. C. Allen, for appellants. *W. U. Shaw*, for appellee.

GAINES, J. This action was brought by appellants to recover of appellee, a corporation, damages for the death of their daughter, Rosa Cook, which was alleged to have been caused by the negligence of the defendant company. The plaintiffs resided in the city of Houston, near a wharf at which a tug-boat belonging to the defendant company was accustomed to lie. Rosa, who at the time of her death, was 13 years and 9 months old, had been in the habit of carrying milk from her parents' residence to the boat, for the use of the captain. On the day of her death, she went about noon to the boat upon the same errand, and the employes of the boat, being at dinner, invited her on board to dine. Her little brother, who happened to be passing near the boat at the time, was also asked to come on board to take dinner. While they were dining the boat was cut loose from the wharf, and moved down the stream, and while it was in motion Rosa was called by one of the crew to take coffee. In passing along the side of the boat she came close to a pile of wood, and placing her hand upon it, one or more billets fell and struck her upon the knee, and precipitated her into the river, where she was drowned.

It was first alleged in the petition that the defendant company was a common carrier of freight and passengers; that plaintiff's daughter, Rosa, was taken on board the tug-boat as a passenger, and that her life was lost while that relation existed between her and the defendant; but it was also alleged that she was received upon the boat against the will of the plaintiffs, as known to the defendant company, and that, under such circumstances, it was an act of negligence. The defendant filed an answer in which, among other things, it was alleged that the boat upon which the accident occurred was not a passenger boat, but merely a steam-tug, engaged in the towing of barges and lighters owned by the company, and that the employes of the company were forbidden to carry any one as a passenger upon the boat without a special pass from the general superintendent of the company; and that, if plaintiff's daughter was taken as a passenger upon said boat, which was not admitted, but denied, she was so received contrary to the rules and regulations of the company. So much of the answer as alleged these facts was excepted to, and the exceptions were overruled.

Appellants' first four assignments of error complain of the ruling of the court in not sustaining the exceptions. We are of the opinion that the allegations excepted to were a sufficient answer to so much of the petition

as alleged that, at the time of the accident, the relation of passenger and common carrier existed between the daughter and the defendant. The petition having based the cause of action upon two grounds, an answer to either was an answer to so much of the petition, and was properly permitted to stand. Upon the trial the defendant offered testimony to prove that the steam-tug was not a passenger boat; that it was against the rules of the company for the employes to carry passengers upon it without a special permit; and that, as a matter of fact, no one was allowed to be carried upon it without such permit. The evidence was admitted over the objection of the plaintiffs, and in its admission there was no error. It is the privilege of every person or company operating water craft to become a carrier of passengers or not as he or they may see fit. It takes a contract either express or implied to establish the relation of carrier and passenger, and we do not see that the employes of a company operating a freight boat, who are expressly forbidden to carry passengers upon it, have any authority to bind the company by such a contract. It is entirely out of the scope of their employment. Cases may be found in which railroad companies have been held bound by the act of conductors of freight trains in taking persons as passengers, although this was prohibited by the regulations of the company. We presume, however, that in such cases it has generally appeared that the conductors had been permitted to make a practice of carrying passengers notwithstanding the rule. We think it was competent in this case for the defendant to show that their boat was but a tug, and not a passenger boat, that its employes were forbidden to carry passengers, and that passengers had never been carried upon it with the consent of the company's representatives. The evidence tended to destroy so much of the plaintiffs' testimony as was offered to show that Rosa was a passenger.

The other assignments of error complain of the charge of the court. They are 13 in number, and all the objections to the charge might have been presented under one assignment alone; therefore they need not be considered in detail. The court charged the jury in substance that, unless they found that plaintiffs' daughter was a passenger on defendant's boat, they could not recover. In this we think there was error. There was no pretense of any express contract of carriage, and we see nothing in the testimony from which such contract should have been implied. It may therefore be doubted whether it would have been error if the court had charged that the plaintiff had no cause of action growing out of the relation of carrier and passenger. But this was not the sole ground upon which a recovery was sought. As before stated, the petition also alleged that the company was guilty of negligence in receiving the child on board the boat without the consent of her parents. Although the defendant company may have owed the

deceased no duty as a passenger, it does not follow that they are not responsible for her death. Every person using dangerous machinery is under obligation to operate it in a careful manner. He may owe no duty to one who has attained the years of discretion, and who voluntarily comes in contact with it, to guard him against dangers that are apparent. But as to children the rule is different. *Evansich v. Railway Co.*, 57 Tex. 123, 126. Not being capable of exercising that degree of circumspection in the face of danger that adults are expected to use, a higher degree of care must be exercised towards them. If it be negligent to leave dangerous machinery in a place where children are likely to tamper with it, without taking precautions to prevent them from injuring themselves, we think it equally negligent to permit them aboard a tug-boat, where there is danger of their being drowned, without taking adequate precautions to avoid all accidents.

The facts of the present case, however, suggest some further questions for consideration. There was testimony that an officer of the defendant company had expressly ordered that the children of plaintiffs should not be allowed to come upon the boat, and it appears that they were upon board at the time of the accident by invitation of some of the crew, but without the knowledge of either the captain, who was absent at the time, or of the pilot who was in charge. The act of inviting them on board was not within the scope of the authority of the company's servants, and if the right of action depended upon the invitation the company should not be held liable. But we think it was the duty of the company not to permit them on board, if their presence there was dangerous. When the company left the management of the boat to its servants the duty devolved upon them, and it cannot be permitted to say that their action in allowing the children on the boat was contrary to orders, and that it is not liable. A master is liable for the wrongful acts of his servant, done within the scope of his authority, although they be done in disobedience of express orders.

We have thus far discussed the case upon the theory that the deceased daughter had not attained to years of discretion. We do not wish to be understood as holding this as a matter of law. In regard to a child of very tender years, it would be the duty of the court to declare that it could not be held in any manner accountable for its conduct. On the other hand it has been laid down "that at fourteen an infant is presumed to have sufficient capacity and understanding to be sensible of danger and to have the power to avoid it, and this presumption ought to stand until it is overthrown by clear proof of the absence of such discretion and intelligence as is usual with infants of fourteen years of age." *Nagle v. Railroad Co.*, 88 Pa. St. 35. Without any disposition to affirm this doctrine, we need only say we are not

called upon to deny it. Whether any arbitrary presumption should be indulged as to capacity at the age of 14 in civil cases, we are not prepared to say. We think, however, that where the age of the minor is between 13 and 14 the question of capacity and intelligence should be left for the determination of the jury. Whether Rosa Cook, at the time she boarded the tug, had the intelligence to appreciate the dangers of the situation, and the discretion and circumspection to avoid them, as ordinary adult persons have, will be a question to be determined. If she had, then the plaintiffs cannot recover. But should this question be determined in the negative the right of recovery will still depend upon the further question whether she was guilty of contributory negligence or not. If, considering her age and discretion, her act in going near the gunwale of the boat and placing her hand upon the pile of wood was such as a similar person of ordinary prudence would not have done, she was guilty of such negligence as would preclude a recovery.

The plaintiffs testify that they forbade the captain to receive the children on board the boat. On the other hand, he testified that he told them not to permit the children to come on board, and that they answered that there was no danger. Should it be found upon another trial that they consented for their daughter to go on board on the day she was drowned, they should not recover. The judgment is reversed, and the cause remanded.

SHANNON v. JONES et ux.

(Supreme Court of Texas. March 4, 1890.)

MALICIOUS PROSECUTION—PROOF OF MALICE—INSTRUCTIONS—DAMAGES.

1. In an action for malicious prosecution, defendant testified that he had had certain singularly marked turkeys in his yard; that his servant informed him that they had flown into plaintiff's yard; that on going to demand their return he was told that she was sick in bed, and that she said that the turkeys in her yard had been sent her by express; that he found on inquiry at the express offices that no turkeys had been delivered to plaintiff; that he had sworn out a warrant against plaintiff after consulting his attorney; that he could not identify the turkeys in plaintiff's yard as his own; and that he had no malice against plaintiff. Plaintiff testified that she was confined to her bed at the time of defendant's visit, and that she had purchased the turkeys from a peddler. The peddler testified that he had sold turkeys to plaintiff. Held, that there was sufficient evidence to support a verdict for plaintiff.

2. Where an officer executed a warrant by merely reading it to plaintiff while confined to her bed, there is an actual arrest.

3. Though plaintiff is formally joined by her husband as a party, a verdict for "plaintiff" is not defective.

4. It is not error to charge that "malice" means wickedness of purpose, or a spiteful or malevolent design against another, or a purpose to injure another, or a design of doing mischief, or any evil design or an inclination to do a bad thing, or a reckless disregard of the rights of others, or an intent to do an injury to another, or absence of legal excuse, or any other motive than that of bringing a party to justice."

5. It is not error to charge that "probable cause means a reasonable ground of suspicion, supported by facts and circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged."

6. Where a statement of the facts shows want of probable cause, the fact that defendant consulted an attorney before acting is not sufficient to relieve him from liability.

7. When the petition alleges that great distress of mind and sickness was caused by the prosecution, and there was no objection to the admission of evidence tending to prove them, it is not error to charge the jury that they can consider the sickness and distress in estimating the damages.

Commissioners' decision. Appeal from district court, Galveston county; WILLIAM H. STEWART, Judge.

Action by Z. T. Jones and Delia, his wife, against A. M. Shannon. The court charged the jury that "probable cause means a reasonable ground of suspicion, supported by facts and circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged." Judgment was rendered for plaintiffs, and defendant appealed.

Davidson & Minor and *W. B. Denson*, for appellant. *Howard Finley* and *Walter L. Wilson*, for appellees.

HOBBY, J. Appellee Delia Jones, joined by her husband, sued appellant for an alleged malicious prosecution instituted by him against her on November 17, 1887. The cause of action is alleged to have consisted in the arrest of the said Delia Jones, brought about by an affidavit or complaint, made on the day stated by A. M. Shannon before S. T. Fontaine, recorder of the city of Galveston, charging her with theft of property under the value of \$20; all of which was charged to have been done by appellant with malice, and without probable cause. It was alleged that appellee was required to appear before the recorder and give bond to await the action of the grand jury of Galveston county, which body, upon a hearing of said charge, found it to be false, and refused to find a bill; and said prosecution there ended. In addition to allegations of injury to plaintiff in her credit and reputation, etc., it was also averred that she had suffered great anxiety and pain of mind and body, and had been forced and obliged to lay out and expend \$100 in procuring her discharge, etc., and by reason of the premises been prevented from following her lawful business, and had otherwise been actually damaged in her credit and circumstances, etc.; laying her actual damages at \$2,500. There was a general demurrer and denial and special denial filed by the defendant, to the effect that whatever he did in the matters referred to in the petition was without malice, and with probable cause for believing the same to be true. A trial by jury in November, 1889, resulted in a verdict for the plaintiff for \$125, actual damages, for which judgment was entered in favor of plaintiffs. This is appealed from

upon the following errors, properly assigned:

The first consists of a criticism upon the court's definition of "malice." It has been said by an eminent text-writer, in substance, that few words within the range of criminal law have been used in such various and conflicting senses as the term "malice." Steph. Crim. Law, 81, cited in Townsh. Sland. & Lib. p. 128, note 1. The definition of this term complained of is sufficiently comprehensive. It is as follows: "'Malice' means wickedness of purpose, or a spiteful or malevolent design against another; a purpose to injure another; a design of doing mischief, or any evil design or inclination to do a bad thing, or a reckless disregard of the rights of others, or an intent to do an injury to another, or absence of legal excuse, or any other motive than that of bringing a party to justice." The foregoing, although not identical in its phraseology with numerous definitions contained in Townshend on Slander & Libel, 128 et seq., embraces substantially several there given. Of that given by the court of "probable cause," it is enough to say that it is in entire accord with the familiar formula of Mr. Justice WASHINGTON in *Munns v. Dupont*, 3 Wash. C. C. 81, and adopted in a great number of cases on this subject since. *Landa v. Obert*, 45 Tex. 544.

There is no merit in the second and third assignments, and the propositions thereunder, complaining that the verdict is not responsive to the pleadings, and does not support the judgment. Two plaintiffs—the husband and wife—are named in the petition. The wife is the real plaintiff, being joined formally by her husband. The verdict is for the "plaintiff;" the judgment is in favor of the "plaintiffs." There can be no sort of doubt that a reference to the petition, which could be made to aid the verdict, showed that the verdict was intended for the plaintiffs. As in this character of suit the husband is required to join the wife, any verdict against the defendant is necessarily in favor of both plaintiffs.

The substance of the fifth assignment is that "the verdict is not supported by the evidence, because it failed to show malice and want of probable cause in the prosecution of appellee; and because probable cause was shown by the testimony of two witnesses besides appellant, all of whom saw the turkeys in appellees' yard, which was not contradicted." A review of the facts of record in the case is indispensable to a proper appreciation of the force of this assignment. The testimony in behalf of the appellant was that he "had in his yard at home a dozen unusually fine and singularly marked gobblers,—very large, white and black, and glossy. Appellees lived adjoining, just across the alley. On returning home one evening, one of his servants informed him that some of his turkeys had gone over into appellees' yard. He sent his servant Amzy Harrell over after the turkeys the next day, and he reported back that Mrs. Jones said they were not there.

Appellant then went over himself, knocked at the door of Mrs. Jones' house, which was opened by a white woman, who said Mrs. J. was sick in bed. "She spoke to me. I told her my turkeys had flown over in her yard, and I had come to get them. She said she had only two turkeys, which had been sent to her by express. I asked her who sent them, and she replied that she did not know; that they were frequently sent to her by express by her mother and others. She could not give the name of the drayman who she said had brought them to her. I told her that was too thin, and she had better send my turkeys home. It was then about dusk." On the following day appellant met an attorney at law in whom he had confidence; stated the case to him fully, and asked his advice as to what he should do. He advised that appellant send an officer out, and have him get the turkeys, or to have Mrs. Jones arrested if he did not get them. Appellant went to each of the express companies, and found appellees had received no turkeys by express. Appellant also made full statement of the case to the city recorder before he made the affidavit, and he gave the same advice as that given by counsel he had consulted. Appellant had never known Mrs. Jones before, and stated under oath that he had no malice against her. Appellant stated that he saw the turkeys at Mrs. Jones' yard the evening he was told about them. They were running about the yard. He could not swear positively that they were his, but to the best of his knowledge and belief they were. Appellee Mrs. Jones testified that on November 16, 1887, appellant came to her door. She was then quite sick,—confined to her bed. "Mrs. Rexar opened the door. He said he came to see if we had any of his turkeys in our yard. I told him I had only two turkeys of my own; they were in a coop in the yard, and he could go and look at them. He went away. Never saw him again. Was arrested the next day by a policeman who came to the house with a warrant, charging me with stealing the turkeys. He read it to me while I was sick in bed." Witness then describes at length the effect upon her, mentally and physically, of the shock. "The officer told me he wanted me or a bond, and if I did not give bond he would haul me to jail. I told him to see my husband, who was working for Lammers & Flint." As to what transpired at appellees' house, and the conversation there had between appellant and appellee, this testimony was corroborated by Mrs. Rexar, who was attending Mrs. Jones. Appellee's examination seems to have been waived, and she entered into bond to await the action of the grand jury of Galveston county. That body convened, and ignored the accusation. Appellee testified that the two turkeys she had in her coop were purchased by her from Mr. Marx, who peddled turkeys. He corroborated her testimony to the effect that she had bought two turkeys from him, and stated that he had fre-

quently sold her turkeys before. W. J. Evans testified to making a coop for appellee about the middle of November, 1887, for turkeys. There were two then running about in her yard, apparently at home. He placed them in the coop after it was finished. The evidence showed that appellee was sick prior to and at the time of the arrest,—suffering from pneumonia; was attended by two physicians, and subsequently grew worse. Under this testimony the verdict of the jury was for the plaintiff for the sum of \$125 damages.

That the question of malice is one of fact, and the existence or non-existence of probable cause are of law and fact, are rules as old as the action out of which they grew. It does not occur to us as at all essential to enter into a discussion of the principles elaborately argued by the appellant's counsel. To do so would be, in a great measure, to reproduce familiar rules and stereotyped phrases, with which cases of this class usually abound. If the facts and circumstances in evidence which were shown to have existed at the time did not authorize the affidavit of theft made by appellant against the appellee, or if they did not afford a basis for a reasonable suspicion or belief that appellee had committed the crime of theft, then it will not be contended as a legal proposition that the proof fails to show that malice and that want of probable cause necessary to sustain the verdict. There is nothing in the evidence of the appellant, as contained in the record before us, which would authorize us to hold that there was any reasonable ground for the belief that the appellee had fraudulently taken the personal property of appellant without his consent, with the intent to deprive him of its value, etc. The information which had been given him as to the manner the turkeys entered Mrs. Jones' yard was that they flew over his fence into the alley which separated his residence from appellee's premises, and that they entered the gate of the latter, which opened into this alley. It would appear from appellant's testimony that, when he visited appellee to inquire about them, and saw what he believed to be his turkeys in her yard, she was not physically in a condition to have taken possession of them. There is no doubt from the evidence that she had been quite sick, having pneumonia, and was attended by two physicians. It was not shown that she was at any time ever seen in possession of them, or that she refused to allow any turkeys of appellant found in her yard to be taken by him, or that she prevented, or attempted to prevent, a recovery by appellant of his property, or that he made any demand or request of her, or asserted any claim to them which appellee refused or repudiated. By no reasonable construction or fair process of reasoning can it be claimed that the facts as testified to established that dishonest purpose,—the fraudulent intent on the part of appellee to take the property in such manner as constitutes theft. There is an entire ab-

sence of these elements essential in the crime of theft, and without which there can be none. In a civil action for the recovery of the property it could not be said, if there had been a verdict for the appellee, that it was unsupported by the evidence. If it be true, then, that the evidence may have authorized the jury to think there was a want of probable cause, nothing further need be said with respect to proof of malice.

The seventh assignment is, briefly stated, that the court erred in instructing the jury that defendant would be liable if he made the affidavit for the arrest. The contention of the appellant, as we understand it, is that there was no actual arrest; that the cause of action consists in the injury sustained by reason of the arrest and confinement under the charge, and where there is no arrest there is no injury. In this case the officer executing the warrant read it to the appellee while she was sick in bed, and told her she would have to give bond or go to jail. Her husband procured the bond for her. "Actual contact is not necessary * * * to constitute an arrest." Add. Torts, § 871.

It is assigned as error that the jury were instructed that they could estimate as actual damages sickness, or increased sickness, if any, and distress of mind caused by the prosecution and arrest; because there were no allegations or legal proof of the same, and they were too remote. The allegations were that "the plaintiff, by reason of the premises, had suffered great anxiety and pain of mind and body," etc.; and, again, that "she suffered great mental pain, caused by the acts of defendant," etc. No special exception was filed to these averments, nor was any objection made to the proof offered as to her sickness at the time of the arrest, and the effect upon her caused by it. The general averments referred to were sufficient to admit the proof in the case, where there was no special exception or objection to the evidence. Had there been an exception sustained on this ground, the petition might have been amended, and if there had been objection made to the testimony when it was introduced, this objection might have been met.

The remaining assignment is that the court erred in instructing the jury as follows: "If you believe from the evidence that the defendant Shannon stated all the facts to a competent attorney at law, who advised the affidavit, and that Shannon in good faith followed the advice of counsel learned in the law, you may take that fact, together with all the other facts and circumstances in evidence, to determine whether or not Shannon was actuated by malice in making the affidavit;" the court, in effect, instructing the jury that, though defendant advised with counsel under the circumstances stated, and, acting upon the advice thus given, in good faith made the affidavit in question, that these facts would not of themselves be a justification of defendant's acts in the premises, but only to be considered with other facts and

circumstances in the case." While there may have been, in some of the cases heretofore, a conflict of opinion as to whether acting upon the advice of counsel by the defendant, after a full statement of all the facts, would constitute a complete defense in suits of this class, the later authorities are to the effect that it is not an absolute or perfect protection; and it is not conclusive upon the question of probable cause. *Ramsey v. Arrott*, 64 Tex. 324. There is no good and sufficient reason for the rule that, if the defendant acts in good faith, upon counsel's advice, in instituting the prosecution, after stating fully the facts, it is a complete defense; because the facts so stated may show in themselves that there was no probable cause. And if it be disclosed by the statement made of all the facts that there was no probable cause for the prosecution, it is unreasonable to say that the mere observance of the ceremony by the defendant of submitting these facts to counsel, who may not see in them the absence of probable cause, and hence advises the arrest, will afford a justification on the ground of probable cause when the facts show its absence. There was no error, we think, because the charge failed to instruct the jury that such advice of counsel, so acted on, after stating all the facts, would be conclusive upon the question of probable cause.

There may have been error in the use of the word "malice," instead of "probable cause," in the charge. That the defendant acted upon the advice of counsel may be considered in determining whether he had probable cause, and not whether he acted with malice, as charged by the court. But still, according to our view of the facts, we cannot see that the defendant or appellant has any cause to complain of the charge; because it seems to be obvious, from his own testimony, that he did not act upon the advice of his counsel. Appellant testifies that "the following morning, [the morning after he went to Mrs. Jones' house] as I went down town, I met an attorney in whom I had confidence, at Mason's corner on Market street, and stated the case to him, as I have stated it here, and asked him what I ought to do, and he told me that I ought to send an officer out, and [have?] him get the turkeys, or to have Mrs. Jones arrested if he did not get them." There is no evidence whatever that Shannon acted on this advice. No officer was sent out to get the property, or to make any effort in that direction. But the next step appears to have been the affidavit, followed by the arrest by the officer. There was nothing in this testimony calling for an instruction upon the defense claimed,—the existence of probable cause growing out of appellant's alleged action upon the advice of counsel. Under this evidence, it cannot be contended that a jury would have been authorized to find that appellant did act upon the advice of counsel.

We have endeavored to carefully examine the record, and we think the judgment should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment affirmed.

SOUTHERN PAC. CO. v. STALEY.

(*Supreme Court of Texas*. March 4, 1890.)

APPEAL-BOND.

1. Rev. St. Tex. 1879, § 1639, provides that a party appealing from a judgment in a justice's court to the district court shall, within 10 days from the date of the judgment, file with the justice a bond payable to the appellee, "conditioned that the appellant shall prosecute his appeal to effect, and shall pay off and satisfy the judgment which may be rendered against him on such appeal." *Held*, that an appeal-bond conditioned that appellant should "prosecute its appeal to effect, or pay," etc., is a sufficient compliance with the statute.

2. A misrecital of the date of a judgment in an appeal-bond is not fatal to the appeal when the court, names of the parties, amount and effect of the judgment, and number of the case are all correctly stated, as the other recitals sufficiently show that the bond is given in the identical case in which the judgment appealed from is rendered, which is all that is necessary.

Appeal from district court, Wharton county.

Rev. St. Tex. 1879, art. 1639, provides that the party appealing from a judgment in a justice's court to the district court shall, within 10 days from the date of the judgment, file with the justice a bond payable to the appellee, "conditioned that the appellant shall prosecute his appeal to effect, and shall pay off and satisfy the judgment which may be rendered against him on such appeal."

Stockdale & Proctor, for appellant.

GAINES, J. Appellee on the 27th day of November, 1888, in cause No. 550 in the justice's court of precinct No. 1 of Wharton county, recovered a judgment against appellant for the sum of \$58.50, and for costs of suit. On the 24th of December, 1888, appellant filed a bond, which was approved by the justice, for an appeal to the district court. In describing the judgment in the bond, the number of the case, the style of the court, the names of the parties, and the amount and effect of the judgment are accurately stated, but the date is given as the 1st of December, instead of the 27th of November; also the condition of the bond reads, "shall prosecute its appeal to effect, or pay," etc. On motion in the district court, the appeal was dismissed. The grounds of the motion were: (1) That the judgment was misdescribed; (2) that the condition was not such as the law requires; and (3) that the bond recites a judgment rendered on Sunday.

The second ground of objection was not well taken. The condition provided by our statute for an appeal-bond from the district to the supreme court is very similar to that for appeal-bonds from the justices' courts; and it has long since been settled that the use of the word "or" instead of "and," in the condition of the former bond, does not change its legal effect, and therefore does not render it void. *Robinson v. Brinson*, 20 Tex. 438.

Neither does such a departure from the language of the statute change the effect of a bond for an appeal from a judgment in a justice's court, and the same rule should be applied. That the rule does apply is expressly held by our court of appeals. *Worley v. Hudson*, 2 Willson, Civil Cas. § 26.

The question of the effect of the misrecital of the date is one of more difficulty. The date of a judgment is one of the most important features by which it can be identified. The same judgment cannot have two dates. It is probably for this reason that we have not been able to find any decision in our Reporters in which it has been held that the misrecital of the date of the judgment in the appeal-bond is not fatal to the appeal. But it has been held that it is not necessary that the date should be stated, and the sole purpose it can serve is to aid in identifying the judgment appealed from. Such is the sole purpose of any part of the description. In *Cochrane v. Day*, 27 Tex. 385, in speaking of the description required in a petition in error, Judge MOORE uses this language: "But it has also been held that the petition or citation must describe the judgment with sufficient accuracy to notify the defendant with reasonable certainty what judgment it is proposed to revise." We think this indicates the correct and reasonable rule, as applied to appeal-bonds. The object of the description in the bond is not only accurately to define the obligation of the sureties, but it is to show the court to which the appeal is taken that the required bond has been given in the identical case in which the judgment appealed from is rendered. There should be such definiteness and accuracy in the description that the identity can be made certain without resort to evidence *dehors* the record. It seems to us, therefore, that, although a discrepancy or misdescription may exist, this should not be held fatal to the bond, provided the judgment is so fully described in other respects as to identify it beyond any reasonable doubt. In this case we have the court, the names of the parties, the amount and effect of the judgment, all correctly stated, and in addition thereto the correct number of the case. It is possible that in the same court two judgments may have been rendered between the same parties, to the same effect, and for the same amount, even on the same day; but, if the officer has done his duty in numbering his cases upon the docket, it is impossible that there could be two with the same number. The date is not so determinate an element of description as the number of the case. It is a false idea that there is any peculiar sanctity about the date of a judgment. Being relieved of this idea, we think there should be no difficulty in concluding that the misrecital of its date in an appeal-bond should not necessarily be held fatal to it. Like any other misrecital, it should be disregarded, provided the other elements of the description show with reasonable certainty that it can be no other than the judgment appealed from. The rule,

v.13s.w.no.10—31

falsa demonstratio non nocet, applies in this as in other cases. Whether the date of the judgment recited in the bond was Sunday or not, we deem unimportant. The other recitals in the bond show that the judgment intended was the judgment of the 27th of November, from which the appeal was taken. We think the appeal-bond was sufficient, and for the error of the court in dismissing the appeal, on account of the objections thereto, the judgment is reversed, and the cause remanded.

CHILDERS v. HENDERSON *et al.*

(Supreme Court of Texas. March 28, 1890.)

HOMESTEAD—RIGHTS OF CHILDREN.

1. Const. Tex. art. 16, § 50, exempts from forced sale "the homestead of a family;" and section 53 provides that the homestead shall not be partitioned among the owner's heirs so long as it is used as such by the surviving husband or wife, or so long as the guardian of minor children may use and occupy the same. *Held*, that a further provision in section 52, that on the owner's death his homestead "shall descend and vest in like manner as other real property," does not subject the homestead to administration in favor of creditors, so long as it is used as such by the constituents of the owner's family.

2. A widowed daughter who returns to her father's home, and is domiciled there, as a member of his family, when he dies, is entitled to hold her father's homestead exempt from the claims of his creditors, under Rev. St. Tex. art. 1993, which provides that there shall be set apart for the use of the widow and minor children, and "unmarried daughters remaining with the family of deceased," all property exempt from execution or forced sale.

STATTON, C. J., dissenting.

Appeal from district court, Jasper county.

W. W. Blake, for appellant. *T. W. Ford*, for appellees.

HENRY, J. Appellees, as creditors of John Bevil, deceased, applied for letters of administration upon his estate. Appellant resisted the grant of letters on the ground that there was no necessity for an administration, because there was no property subject to one. The only property owned by the deceased at the time of his death, was a tract of land containing 100 acres, upon which he resided, and a small quantity of personal property exempt from forced sale. Bevil had resided on the land for many years. Besides appellant, he had three adult children, and some grandchildren by a deceased son, none of whom lived with him. Appellant was his daughter. She married, and left her father's family. About 30 years before her father's death, she became a widow, and returned with two children to her father's house. Subsequent to her return, her mother died, and her father remained a widower until his death. Appellant and her children remained with her father until his death. She kept house for him, ate at the same table with him; and she and her daughters were partially, though not entirely, provided for by him. One of appellant's daughters married before her father died. The other remained with her, unmarried.

ried. Appellees were creditors of the deceased. The court granted letters of administration.

Article 1874 of the Revised Statutes, in effect, directs that administration upon an estate may be prevented by showing there is no necessity for one. As, in the case before us, there were debts, the only way by which an administration could be shown to be unnecessary was by establishing that there was no property belonging to the estate that was subject to the payment of the debts. It was admitted that there was no property so subject during the life-time of Bevil. The constitution¹ exempts from forced sale "the homestead of a family." It also directs that "on the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution; but it shall not be partitioned among the heirs of the deceased during the life-time of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same."² Under our statutes, all real estate except the homestead, on the death of the owner intestate, vests in his heirs subject to the payment of the ancestor's debts. It must be admitted that the language of the constitution, that the homestead "shall descend and vest like other real property," does not indicate that it was the purpose to make the homestead subject to administration in favor of creditors, and to make void all legislation exempting and setting it aside to the survivor, and other members of the family. It is obvious that no such result was in fact intended. Before the adoption of the constitution of 1876, the statutes and the decisions of the courts had uniformly secured the homestead to the widow and children who were surviving constituents of the family, against the claims of creditors, after the death of the head of the family, as fully as it had been done during his life-time. When it ceased to be used by the constituents of the family, after the death of the owner and head of the family, while it then had never gone to the creditors, it, to say the least, had not been clear, when the estate was insolvent, either under the statutes or the construction given to them by the courts, that, in the ultimate partition of the land, it would be distributed to all of the heirs of the owner according to the rules of descent governing his other real estate, but, rather, the contrary. Article 1305, Pasch. Dig.; *Green v. Crow*, 17 Tex. 180. It seems to us that in this respect the purpose of the constitution is to provide for the equal distribution of the homestead among the heirs of the owner, when it shall become subject to distribution, after the uses to which

it is devoted have ceased, and not to suggest or provide a contingency upon which it will become subject to the claims of creditors. *Brau v. Von Rosenberg*, post, 485, (decided at the present term of this court.) Like the constitution, the statute exempts from forced sale "the homestead of the family." Rev. St. art. 2335. The legislature has directed that out of every estate there shall be set apart, "for the use and benefit of the widow and minor children and unmarried daughters remaining with the family of the deceased, all such property of the estate as may be exempt from execution or forced sale by the constitution and laws of the state." Id. art. 1993. The legislature has provided that, in ascertaining the solvency of an estate, property classed as exempt shall not be estimated or considered as assets of the estate. Id. art. 2003. And also that "the executor or administrator shall have the right to the possession of the estate as it existed at the death of the testator or intestate," except such as may be exempted from the payment of debts. Id. art. 1817. And also (article 2007, Rev. St.) that "the homestead shall not be liable for the payment of any of the debts of the estate," except for purchase money, taxes, and improvements. The foregoing provisions show, we think, that the intention of the legislature was that the homestead should not be disposed of in an administration, where a constituent of the family entitled to participate in its occupancy survived, otherwise than by partition among the heirs of the owner, if it should become subject to partition before the close of the administration. While, by one section of the constitution, it is the homestead of "a family" that is protected from forced sale, another section (52, art. 16) shows that the same exemption was intended to be continued in favor of the husband, wife, or minor child, even if they should become the sole owner, and the family should become otherwise extinct. Independently of the constitution, the exemption of the homestead, and the right to occupy it, under such circumstances, has been recognized by the decisions of this court. *Schneider v. Bray*, 59 Tex. 670; *Blum v. Gaines*, 57 Tex. 119; *Kessler v. Draub*, 52 Tex. 575. The constitution takes it for granted that the protection from forced sale of the homestead "of a family" will inure to the benefit of every surviving constituent of the family, without express mention, as is shown by its providing against its being partitioned contrary to the right of occupancy of the surviving husband, wife, and minor children, without mention of creditors. Subject to the manner of its final partition, and its use until then, its *status* with regard to creditors was left, as it always had been, to the legislature.

When, upon the death of the owner of the homestead, no constituent of the family survives, and, as a consequence, there remains no family, the exemption ceases, and the homestead becomes subject, like other real estate, to be sold for the payment of debts.

¹Article 16, § 50.

²Article 16, § 52.

Givens v. Hudson, 64 Tex. 471. But if, upon the death of the owner, any constituent of the family survives, so that the family continues to be represented, then the homestead, subject to the prior right of occupancy of such as are protected in remaining, descends and vests in the heirs of the owner. See *Brau v. Von Rosenberg*, post, 485. A daughter who, having been once married, becomes unmarried, and returns to her father's home, and is permanently domiciled and remaining there, as a member of his family, at the date of her father's death, comes within the literal terms of the statute, as one of the members of the family to whom, and for whose benefit, the exemption is preserved. Whether or not she is within the spirit of the law, and whether the purpose may not have been to limit the exemption to such daughters as have never dissolved their family relations, and acquired others by marriage, is a question about which we have had much difficulty. While there will arise cases to the contrary, it will, no doubt, very often occur that a daughter so circumstanced comes within every purpose for which such protection was provided. In fact, few reasons can exist for making the exemption in favor of a daughter who was never married, without regard to her age, condition, or finances, that may not apply with equal if not greater force to one who, as a widow, seeks again the protection of her father's house, and, as such, is remaining there when he dies. We do not feel ourselves at liberty to hold that appellant should not be included in the description of an "unmarried daughter remaining with the family of the deceased," or "living with the family," as it is expressed in subdivision 4 of article 1996, Rev. St. This leads us to the conclusion that, as there exists no property subject to administration, none should have been granted. The judgment of the district court will be reversed, and a judgment rendered in this court dismissing the application for the grant of an administration, and for costs in favor of appellant.

STAYTON, C. J., (*dissenting*.) In my opinion, the only interest in the homestead formerly occupied by the deceased father which can be withdrawn from administration is that inherited by the daughter who resided with him. She remained or lived with her father; and under the terms of the statute, but not otherwise, may be regarded as the remaining constituent of the family. The statute seems to make such an unmarried daughter a constituent entitled to the benefit of some of the provisions made for the family of a deceased person. Whether, if this be true, the property would be subject to partition, it is not now necessary to determine. That the interests of the other adult heirs, in no sense constituents of the family, can be exempted from the payment of the ancestor's debts because her interest may be, seems to me to be contrary to the spirit as well as let-

ter of the law. Views upon this question have been presented in another case, and will not be repeated.

CLAFLIN *et al.* v. PFEIFER *et al.*

(*Supreme Court of Texas*. March 11, 1890.)

HUSBAND AND WIFE—COMMUNITY—SEPARATE ESTATE.

1. Profits on investments of a wife's separate estate are community property and liable for the husband's debts; and if the profits be mixed with the wife's separate estate, in a contest between the wife and the husband's creditor, the burden is on the wife to show how much of it retained the character of separate estate, or, if any part of it has undergone mutations, to trace and identify it.

2. Where an insolvent member of a firm engaged in the manufacture of show-cases conveys his interest in the partnership to his wife, which includes the cases on hand and material used for their manufacture, her interest will be presumed to be community property, although the conveyance is in good faith and for consideration, and in a contest with her husband's creditor the burden is on her to show that it is her separate estate, and to trace and identify that portion of it which has undergone mutations.

Commissioners' decision. Appeal from district court, Galveston county.

Scott & Levi, for appellants.

ACKER, P. J. Gustave Pfeifer and Carl Emme were partners in the business of manufacturing show-cases, under the firm name and style of Gust. Pfeifer & Co., or the Galveston Show-Case Manufactory, each owning a half interest. Gustave Pfeifer was also a member of a mercantile firm which was insolvent. On the 19th day of September, 1887, Pfeifer conveyed his half interest in the business of Gust. Pfeifer & Co. to his wife, Anna, for the recited consideration "of \$1,500, money belonging to my wife, being part of her inheritance derived from her father, and loaned by her to me." It was understood and agreed between Emme and the Pfeifers that the business would be continued with Mrs. Pfeifer a member of the firm instead of her husband. On the 27th of September, Emme published a notice of dissolution of the partnership of Gust. Pfeifer & Co., and that he would thereafter "carry on the business under the name and style of the Galveston Show-Case Factory. Carl Emme, proprietor." The mercantile firm of which Pfeifer was a member was indebted to H. B. Claffin & Co. in the sum of about \$6,000, upon which an attachment suit was instituted, and on the 6th day of October, 1887, the writ of attachment sued out by Claffin & Co. was levied on the Pfeifer half interest in the show-case factory business. The attachment lien was foreclosed, and the half interest in the business purchased by Claffin & Co. On December 21, 1888, this suit was instituted by Anna Pfeifer, joined by her husband, against Carl Emme, to recover \$2,500, the alleged value of an undivided half interest in certain personal property, consisting of show-cases, tools, and material for manufacturing them, office furniture, etc., described in an exhibit

attached to the petition. It was alleged that the property was left in the hands of Emme subject to the order of Anna Pfeifer, and that Emme converted it to his own use and benefit on the 27th day of September, 1887. Carl Emme answered that H. B. Clafin & Co. claimed the identical interest or estate sued for by plaintiffs, and prayed that Clafin & Co. be impleaded. Clafin & Co. filed a plea in intervention, claiming the half interest by virtue of the attachment proceedings, and sale and purchase thereunder. The intervenors alleged that the conveyance from Pfeifer to his wife on September 19, 1887, was colorable only, and made with intent to hinder, delay, and defraud the creditors of Pfeifer; that if said conveyance was *bona fide* it substituted Anna for Gustave Pfeifer as a partner in the business by consent and agreement of both Pfeifer and Emme, and that the business was continued under said agreement from the 19th of September, 1887, up to time of trial; that the interest sought to be conveyed by the bill of sale from Pfeifer to his wife, Anna, if not the separate property of Gustave Pfeifer, was the community property of himself and his wife, Anna, and liable for his debts. Plaintiffs replied to the petition in intervention, alleging that the transfer from Gustave to Anna Pfeifer was *bona fide* and for a good consideration, and vested the property in Anna as her separate estate; and that the firm of Gustave Pfeifer & Co. was dissolved on September 27, 1887, and thereupon the said interest of Anna was converted by the defendant Emme. The trial without a jury resulted in a judgment in favor of plaintiffs against defendant Emme for \$749.33, and that intervenors take nothing by their petition. The court filed separate findings of fact and conclusions of law, to which the intervenors excepted, and perfected this appeal.

The first assignment of error is: "The court erred in its finding that the sum of \$99.20, received by Gustave Pfeifer from the business of Gust. Pfeifer & Co., was received within a few days of the transfer by Gust. Pfeifer to his wife, for that the undisputed evidence shows that all but \$16.50 of said sum was received by him on and after October 12th, 1887." The statement of facts sustains the assignment, but it is not perceived how this erroneous finding could have operated to the prejudice of appellants. Plaintiffs claimed that the partnership between Mrs. Pfeifer and Emme was dissolved on the 27th of September, and that Emme on that day converted her interest in the partnership assets to his own use. The fact that Pfeifer was receiving money from the firm business after that date tended to disprove plaintiffs' case against the defendant Emme, and he would probably have cause for complaint in this finding of the court against the evidence, but he has not appealed. Appellants acquired no interest in the assets of Pfeifer & Co., not included in the levy of the writ of attachment under which they purchased. We

understand appellants to have contended in the court below: (1) That the conveyance by Pfeifer to his wife of the half interest in the partnership assets and business was colorable only, and void as to them; (2) if the conveyance was not colorable only, but made in good faith and upon good consideration, the interest conveyed was community property and liable for the husband's debt; and, (3) if by the conveyance the half interest became the separate estate of the wife, it devolved on her to clearly show by the evidence that the property levied by the attachment was the identical property conveyed to her. We understand appellants to here insist upon only the last two of these contentions, and we do not think the fact that Gust. Pfeifer received most of the \$99.20 after the date when plaintiffs alleged that the partnership was dissolved, tended, in any degree, to prove either of them. Whether the property after the conveyance from Pfeifer to his wife was community or separate estate of the wife, he was authorized to look after it and receive money due to the business; and it seems to us immaterial, so far as appellants are concerned, when the partnership between Mrs. Pfeifer and Emme was dissolved, or whether it has been dissolved at all.

The second assignment of error is to the effect that the court erred in its findings of fact, in that it assumes that on September 27, 1887, the defendant Emme converted to his own use Anna Pfeifer's interest in the assets and business of the firm. If the court erred in the particular indicated by this assignment, it was not prejudicial to appellants, and Emme does not complain.

The fourth and fifth assignments relate to alleged errors in the findings and conclusions of the court with respect to the formation and dissolution of the partnership between Emme and Mrs. Pfeifer. We think these matters could not have affected the rights of appellants, and therefore cannot afford them any ground for complaint. It appears from the evidence that Gustave Pfeifer was insolvent at the time he conveyed to his wife his half interest in the business of Gust. Pfeifer & Co.; that that business was in debt, but solvent; that it was a manufacturing business, in which materials, such as pine woods, glass, and metals, were converted into show-cases and sold for profit; that part of the value of the manufactured articles was the labor that was put into them; that Carl Emme, the defendant, was the other partner in said business; that the transfer to Mrs. Pfeifer was made with the full knowledge and consent of Emme, and that it was understood between the parties that the business should be carried on as theretofore, Mrs. Pfeifer being substituted for her husband as a partner in the business, and that her husband should be employed at \$60 per month to work in the business and watch her interest; that the business was so conducted and carried on until September 27, 1887, or a few days later, when differences arose between Pfeifer and

Emme, the Pfeifers claiming that Emme had dissolved the partnership and converted Mrs. Pfeifer's interest to his use, Emme denying that he had either dissolved the partnership or converted her interest; that intervenors, on October 6, 1887, levied their attachment on the Pfeifer interest in the business, foreclosed their attachment lien, and, under judgment of foreclosure, had it sold, and purchased it; that the business was conducted in due course and regularly carried on from the time of the transfer to Mrs. Pfeifer until after the levy of the attachment, the assets changing form by converting material into show-cases and selling them, just as before the transfer to Mrs. Pfeifer. There was no evidence offered to show that the estate or assets on which the attachment was levied on the 6th day of October, 1887, was or were the same estate or assets conveyed to Mrs. Pfeifer on the 19th day of September, preceding. Indeed, the evidence showed the property levied was not identical with that conveyed, at least to the extent that material had been converted into show-cases, but the extent of the mutations does not appear. Under this state of facts it is urged that, if the conveyance from Pfeifer to his wife was made in good faith, and upon a good consideration, the interest conveyed was community property when levied on, and passed to appellants by their purchase; and, (2) if by the conveyance the half interest became the separate estate of the wife, and was not community property at the time of the levy, it devolved on her to clearly show by the evidence that the identical property conveyed to her was levied and sold under the attachment.

All property acquired by onerous title by either the husband or wife during the coverture is presumed to be community estate, and the burden of proving that it is not rests upon the party asserting that fact. It seems to be settled by the previous decisions of this court that profits on investments of the wife's separate estate are community property, and liable for the husband's debts. *Cleveland v. Cole*, 65 Tex. 404; *Epperson v. Jones*, Id. 425; *Smith v. Bailey*, 66 Tex. 553, 1 S. W. Rep. 627; *Middlebrook v. Zapp*, 73 Tex. 29, 10 S. W. Rep. 732. If such profits be mixed with the wife's separate estate, in a contest between the wife and a creditor of the husband who seeks to hold the property liable for the husband's debt, the burden is on the wife to show by the evidence how much of the property retained its character of separate estate. Authorities supra. If any part of the estate has undergone mutations, to protect it against liability for the husband's debts it devolves upon the wife to trace and identify it by satisfactory evidence. We think so much of the estate levied on as represented the profits of the business since the conveyance to Mrs. Pfeifer was community property, and subject to the levy, and that, such profits having been mixed with her separate estate, her failure to show how much of the

estate levied remained separate estate, and to trace and identify by the evidence that part of the estate that had undergone mutations, made the entire estate subject to the writ of attachment. We are of opinion that the judgment of the court below should be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment reversed and the case remanded.

ZWERNEMANN v. VON ROSENBERG.

BRAU et al. v. SAME.

(Supreme Court of Texas. March 14, 1890.)

HOMESTEAD—RIGHTS OF CHILDREN.

Rev. St. Tex. art. 1993, provides that the court shall set apart for the use of the widow and minor children and unmarried daughters remaining with the family of the deceased all such property of the estate as may be exempt from forced sale by the constitution and laws of the state. Article 2002 provides, if the estate is insolvent, the title of the widow and children to all the property and allowances set apart or paid to them under the provisions of this and the preceding chapter shall be absolute, and the property shall not be taken for any debts of the estate except for certain liens and preferred claims. Article 2007 provides that the homestead shall not be liable for any debts of the estate, except for the purchase money thereof, taxes, etc. *Held*, that the homestead of a decedent is wholly exempt from the claims of the general creditors of the estate, if a constituent of the family survives the decedent, but that so much of article 2002 as attempts to pass the homestead of an insolvent absolutely to the widow and minor children, to the exclusion of the adult, was in violation of Const. Tex. art. 16, § 52, providing that the homestead shall descend and vest as other real property of the deceased. STAYTON, C. J., dissenting.

On rehearing. For former report, see 11 S. W. Rep. 150.

Brown & Dunn, for appellant and plaintiffs in error. *Moore, Duncan & Meerscheidt*, for appellee and defendant in error.

GAINES, J. At the last term of the court, at this place, an opinion was delivered in these cases, (11 S. W. Rep. 150,) and a judgment entered reversing the decree of the lower court, and remanding the cause. The appeal and the writ of error were by different parties, from the same judgment. Within the 15 days the appellant and the plaintiffs in error practically joined the appellee, who was also the defendant in error, in a motion to set aside the judgment of reversal, and to grant a rehearing, waiving the error for which the judgment had been reversed. That error was in proceeding to judgment in behalf of appellee, who was plaintiff below, without proof that no other debts except his own existed against the estate of the defendants' ancestor. The object of the waiver was to obtain a decision of the courts upon the merits of the case.

The plaintiff below, as a creditor of one J. C. Brau, deceased, sought to recover of plain-

tiffs in error and the wards of appellant on the ground that, as children and heirs of the decedent, they had received property belonging to his estate subject to the payment of his debts. The trial judge filed his conclusions of fact and law, the substance of which is correctly stated in appellant's brief as follows: "*First.* That J. C. Brau did make the said notes as alleged by plaintiff; that plaintiff is the owner of them; and that there is due him on said notes \$730.78,—a community debt. *Second.* That J. C. Brau died at his home in Fayette county, Tex., September, 1883, and Caroline Brau died at said home March 7, 1885. *Third.* That said J. C. Brau and Caroline Brau were husband and wife, heads of a family consisting of themselves and their children, the defendants Henry, Amelia, Conrad, Dorothea, John, Albert, Augusta, and Robert, and lived together as a family on said land, it being their homestead of 151 acres, and that they had no other land or homestead. *Fourth.* That, after J. C. Brau died, his widow, Caroline Brau, continued until her death to occupy said land as a homestead with her children, whose names, ages, and sexes are as follows, viz.: Henry, a male, 26 years old; Amelia, a female, 24 years old; Conrad, a male, 23 years old; Dorothea, a female, 20 years old; John, a male, 16 years old; Albert, a male, 14 years old; Augusta, a female, 12 years old; and Robert, a male, 8 years old. *Fifth.* That all said children lived with their father and mother, as a family, on said homestead until the father died, and afterwards with their mother till she died, except Amelia, who married and moved off between the dates of her father's and mother's deaths. *Sixth.* That, after the mother died, said children, except Amelia, continued to live on said homestead as a family, and they have no other homestead, nor did their mother before her death acquire any other homestead. *Seventh.* That both J. C. and Caroline Brau died intestate and insolvent. *Eighth.* That Caroline qualified as community survivor in the county court of Fayette county; that all the estate was community, and, except \$720 in money and cotton, was exempt property; that said \$720 in money and cotton was paid by Caroline before her death as follows, viz.: \$595 to the extinguishing in part of vendor's liens—valid debts—on said homestead, and the balance to the extinguishment of valid debts against the community estate, such as medicines and medical bill incurred in last sickness, and funeral expenses, of the husband. *Ninth.* That, of said community property, only the following came into the hands of said children, viz.: (1) The homestead, worth \$1,820.67; (2) two horses, worth \$100; (3) ten head of cattle, worth \$80; (4) twenty hogs, worth \$60; (5) farming tools, worth \$65; (6) wagon and harness, worth \$40; (7) buggy and harness, worth \$30; (8) household and kitchen furniture, worth \$130,—and that all of it would have been exempt by law from sale for the payment

of any debt of the estate of either J. C. Brau or Caroline Brau, whose estates were insolvent. *Tenth.* That there are other valid and subsisting community debts unsatisfied against the estates of J. C. and Caroline Brau besides that of plaintiff, but the amount is not shown by the evidence. *Eleventh.* That there is a duly-opened guardianship on the estates of John, Albert, Augusta, and Robert Brau in the county court of Fayette county, and M. Zwernemann, defendant, is guardian, who qualified May 15, 1885; but no order has been made in the county court concerning the occupancy of the homestead, nor has any been applied for." Upon these facts the court concluded, as a matter of law, that the minor defendants were entitled to the use of the homestead during their minority, but that, subject to this use, the inheritance of each of the defendants in the property was liable to sale for the payment of the ancestor's debt. Judgment was rendered accordingly. For the purposes of this opinion, the details of the judgment need not be stated.

We are of opinion that the court erred in holding that the defendants inherited the homestead charged with the payment of their father's debts. The constitutional provision which regulates the descent of the homestead reads as follows: "On the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution; but it shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same." Const. art. 16, § 52. It having been decided, under the probate act of 1848, that in insolvent estates the widow and minor children took an absolute title to the homestead to the exclusion of the adult heirs, (Horn v. Arnold, 52 Tex. 161,) it was probably the purpose of this provision to prevent a repetition of that legislation. It is clear that it was not intended to determine the disposition of the homestead after the death of the owner, as between his heirs and his creditors, further than to designate it as a home for the surviving husband or wife and for the minor children, under the prescribed limitations. In the previous constitutions of the state the disposition of the homestead after the death of the owner was left wholly to the wisdom of the legislature. It is so, also, in the present constitution, except as to the manner of its descent, and the use reserved to the surviving spouse and the minor children. The language, "shall descend and vest as other property of the deceased," was employed, we think, to determine the persons who should take, and their respective interests, but not the conditions

which were to be imposed upon the inheritance. It was not, in our opinion, intended that the homestead should descend charged with the payment of debts, as other property. When the present constitution was adopted, the policy of exempting from administration for the payment of debts such property of the decedent as had been exempt from forced sale during his life-time had been steadily pursued by our legislatures. In this we have found "no variableness, nor shadow of a turning." First, by the act of the 9th of January, 1843, it was provided that "the same amount of property and the same kind, if so much belong to the estate in kind, that is exempt from sale under *fieri facias* or execution * * * be, and the same is hereby, declared to be exempt from sale by order of any probate court." By the law of 1846 the exemption was enlarged by providing that, in the event there should not be among the effects of the deceased all of the specific articles exempt from forced sale by the constitution and laws of the state, a sale of sufficient property should be ordered, in order to purchase such articles for the use of the widow and children. Pasch. Dig. art. 1305, note 481. The rights of the widow and children were still further enlarged by the act of March 20, 1848; and in *Green v. Crow*, 17 Tex. 180, it was held that under that act, in case of an insolvent estate, the widow and children took an absolute title to the exempt property set apart to them. The probate law of 1870 seems to give emphasis to the provision that, as a rule, creditors have no claim upon the property of a decedent previously exempt from forced sale, by prescribing that, in case a constituent of the family survive, such property "does not form any part of the estate of a deceased person." In *Scott v. Cunningham*, 60 Tex. 566, this provision was given a construction in harmony with the former laws upon the same subject. This was the law in force when the existing constitution took effect. In our opinion, it was not repugnant to any provision of that instrument, and therefore continued in force until repealed by subsequent legislation. Under none of the laws cited was the exempt property subject to be sold by the order of the court of probate in case a constituent of the decedent's family survived.

When we turn to our existing statutes, the intention of the legislature is clear. Article 1993 of the Revised Statutes reads as follows: "At the first term of the court after an inventory, appraisalment, and list of claims have been returned, it shall be the duty of the court, by an order entered upon the minutes, to set apart, for the use and benefit of the widow and minor children and unmarried daughters remaining with the family of the deceased, all such property of the estate as may be exempt from execution or forced sale by the constitution and laws of the state, with the exception of any exemption of one year's supply of provisions." Article 2002 also provides that, "should the

estate, upon final settlement, prove to be insolvent, the title of the widow and children to all the property and allowances set apart or paid to them under the provisions of this and of the preceding chapter shall be absolute, and shall not be taken for any of the debts of the estate, except as hereinafter provided." The debts thereafter provided for are certain liens and preferred claims. Articles 2007, 2008. This language is explicit, and of itself is not difficult of construction. With regard to the homestead, there is a difficulty growing out of what we conceive to be a conflict between that article and the section of the constitution previously quoted. Since the exempt property is to be set apart and delivered to the widow, minor children, and unmarried daughters, to the exclusion of adult children not females and unmarried, we think, by the literal interpretation of article 2002, it was meant that the property should, in case of insolvency, descend absolutely to the widow, minor children, and unmarried daughters, and that the other children were to be excluded. But we are of opinion that section 52 of article 16 of the constitution prohibits this disposition of the homestead, and, as before intimated, that it was, in part at least, its immediate purpose to prohibit just such a law. So much of article 2002 as attempts to provide that the homestead of a decedent whose estate is insolvent shall descend to the widow, minor children, and unmarried daughters, to the exclusion of other persons entitled to the real estate of the ancestor under our general laws of descent and distribution, cannot take effect. But we do not think that it follows that, because the legislature has attempted to exceed its authority in this particular, all the article should be held wholly inoperative and void. The leading object of the provisions of the Revised Statutes upon this subject was to prescribe that the exempt property should not be subject to sale by the order of the probate court, for the payment of debts generally, in the event either a husband or wife, or a minor or an unmarried daughter, survived the owner. This object is clearly manifested by other articles of the Revised Statutes relating to the administration of the estate of deceased persons. Article 1817 provides that when a person dies his property shall descend to his heirs, but also provides that "all of such estate, * * * except such as may be exempted by law from the payment of debts, shall still be liable and subject, in their hands, to the payment of the debts of such * * * intestate." Article 2007 prescribes that "the homestead shall not be liable for the payment of any of the debts of the estate, except for the purchase money thereof, the taxes due thereon, or for work and material used in constructing improvements thereon," etc. This is to be construed in connection with, and to be limited by, article 2002, which applies only to homesteads of decedents who leave a constituent of the family surviving. *Givens v. Hudson*, 64 Tex. 471. But, so

limited, language could not make the intention more clear to continue after death the exemption which before existed. The rule for the construction of statutes in partial conflict with the constitution is that if the portion repugnant to the fundamental law can be stricken out, and that which remains is complete in itself, and "capable of being executed in accordance with the apparent legislative intent, * * * it must be sustained." *Ex parte Towles*, 48 Tex. 421, quoting *Cooley*, Const. Lim. 178. If the unconstitutional provision be but incidental to the main purpose, and be not essential to give effect to the statute, such part may be rejected, leaving the remainder to stand. The provisions we have quoted clearly show, we think, that it was the legislative intent to utterly exempt the homestead from the claims of the general creditors of the estate, provided a constituent of the family survived the decedent, and, in case the estate was insolvent, to remove it beyond the pale of administration. This is in accordance with all previous legislation, and is not repugnant to the constitution. So much of the statute as attempts to make the homestead of an insolvent to descend in a manner different from other real property is prohibited by the constitution, and is void. But the other provisions of the statute are not dependent upon this. They can have effect without it, and should therefore stand. The homestead should be held exempt from the payment of debts, and to descend, not as prescribed in article 2002, but as provided in the constitution. It is clear that if property is not subject to sale, by order of the probate court, for the payment of debts, the heirs who have received the property, there being no administration, cannot be charged with its value at the suit of the creditor.

It follows from what we have said that the homestead, in this case, could not be subjected to the payment of plaintiff's debt. The judgment must therefore be reversed, and will be here rendered in favor of the defendants in the court below.

STAYTON, C. J., (*dissenting*.) While concurring in the reversal of the judgment, I am of opinion that the interest inherited by those who were adults fixes upon them liability for debts of their ancestors to extent of value inherited. Under the terms of the constitution, declaring that "the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution," there can be no doubt that each child of J. C. and Caroline Brau inherited an equal share of the tract of land on which they lived. The main purpose of so much of the constitution was to deny, as had been before allowed, to the widow and minor children, in case of an insolvent estate, the right to take absolutely against adult brothers or sisters, as well as against creditors. The statute provides that, "when a person dies,

* * * all of his estate, * * * whether devised or bequeathed or not, except such as may be exempted by law from the payment of debts, shall still be liable and subject, in their hands, to the payment of the debts of such testator or intestate; and, whenever a person dies intestate, all of his estate shall vest immediately in his heirs at law, but, with the exception aforesaid, shall still be liable and subject, in their hands, to the payment of the debts of the intestate." Rev. St. art. 1817. This statute was construed in *Givens v. Hudson*, 64 Tex. 471, in which it was correctly held that, upon the death of the surviving parent and owner of the homestead, his adult heirs, not constituents of his family, could not hold the land freed from the claims of their father's creditors. It was then said that whether, within the meaning of the article above referred to, property was "exempted by law from the payment of debts," depended on the status or condition of the person claiming the exemption, and not upon that of a former owner, from whom the inheritance might come. "The thing is not exempted to the child or widow because it was exempted to the father or husband who was the head of the family, but because the child or widow was and remains a constituent of the family; and, when this relation ceases before the death of the intestate, there is nothing in reason, nor in the letter or spirit of the law, which can give the exemption to one not sustaining such a family relation." Any other holding is based on the theory that homestead character, once attaching to property, inheres, and, as an estate, descends to whomsoever may inherit the property. This has been steadily denied. *Tadlock v. Eccles*, 20 Tex. 782; *Brewer v. Wall*, 23 Tex. 590; *Johnson v. Taylor*, 43 Tex. 122; *Grothaus v. DeLopez*, 57 Tex. 672; *Shannon v. Gray*, 59 Tex. 251; *Ashe v. Yungst*, 65 Tex. 686.

When we look to laws exempting land from sale for payment of debts, as we must, to understand what exemption is meant in the statute before quoted, we find that by this is meant the homestead of a family. Rev. St. art. 2335. In case of the death of the husband and father, the statute declares that, "at the first term of the court after an inventory, appraisement, and list of claims have been returned, it shall be the duty of the court, by an order entered upon the minutes, to set apart for the use and benefit of the widow and minor children, and unmarried daughters remaining with the family of the deceased, all such property of the estate as may be exempt from execution or forced sale by the constitution and laws of the state, with the exception of any exemption of one year's supply of provisions." *Sayles' Civil St. art. 1993*. Other articles direct to whom the exempt property other than homestead shall be delivered, and declare that "in all cases the homestead shall be delivered to the widow, if there be one, and, if there be no widow, to the guardian of the

minor children and unmarried daughters, if any, living with the family." These laws practically declare that the unit of the family entitled to exemption in case of the death of its natural head shall be composed of the surviving widow, minor children, and unmarried daughters remaining with the family; if both parents be dead, that the family may then consist of the minor child or children, and unmarried daughters, if any, residing with the family of the deceased. If there be neither minor child, children, nor unmarried daughter, the husband or wife surviving, the family still has a constituent, and all the interest in the property constituting the homestead owned by those who make up the family is absolutely exempted from sale for payment of debts of the ancestor. Under the terms of the constitution, there is a further right in such surviving parent or minor child or children, as against adult heirs, who inherit an equal interest in the fee with minors, which is that the surviving parent has the right to use the adult's share inherited "so long as the survivor may elect to occupy the same as a homestead," and the minors have the right to use the adult's share "so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same." Const. art. 16, § 52. This burden the constitution places on the inheritance of the adult, and no person claiming through him can acquire a right he had not. The statute further provides that, "should the estate, upon final settlement, prove to be insolvent, the title of the widow and children to all the property and allowances set apart or paid to them under the provisions of this and the preceding chapter shall be absolute, and shall not be taken for any of the debts of the estate, except as hereinafter provided." Sayles' Civil St. art. 2002. It could not have been intended by this statute to declare that the title of minor heirs, there being adults, should be absolute to the entire homestead property, if the estate was insolvent, nor that the widow's title to such property, if there were no minor children, should be absolute as against adults in such a case; for the effect of such legislation would be to divest the estates of adults, which the constitution declares shall vest in homestead property as in other property owned by a deceased parent, subject, however, to the burden before referred to. An estate which the constitution declares shall vest in all the children of a deceased person equally cannot be divested, nor the rule of descent so changed, by statute, as to take from the adult, and give to the widow or minors, their shares, on the ground that the estate is insolvent, nor upon any other ground. The reasonable construction of that statute is that the legislature intended, in case an estate was insolvent, to vest the interests owned by a widow, minor children, or unmarried daughters remaining with the family, in them absolutely, freed from all claims of creditors of

the estate of the deceased person, and, as does the constitution, to secure them in the right to use the shares of adults, as provided by the constitution, in like manner freed from claims of creditors of the estate. They are to hold absolutely "all the property and allowances set apart or paid to them." Does the word "property," as here used, mean the land which constituted the homestead, or does it mean the interests therein inherited or owned by those to whom it is set apart, together with the right to use the shares of adults as the law provides? If it means the first, it is in violation of the provision of the constitution before referred to; but we ought not so to construe it, unless its language will not admit of any other reasonable interpretation. If it means the latter, then it is not in conflict with the constitution, and is in harmony, as far as it operates, with the policy evidenced by the decisions made under laws existing before the present constitution was adopted, which, to the prejudice of adult heirs, gave to the widow and minor children, or such of them as there were, the exempted property belonging to insolvent estates of deceased persons. The power to make such laws exists under the present constitution, as it did under former constitutions, except that the right of an adult heir in homestead property passing to him by inheritance cannot thus be divested. The word "children," used in article 2002, evidently refers to the children mentioned in article 1998, and referred to in succeeding articles, and means some other than minor children and unmarried daughters remaining with the family of the deceased; and the property so set apart to them can be none other than their own shares of that property taken by inheritance, and the use of the shares inherited by adults for the term prescribed. So interpreting the statute, the implication is that the shares of adults not recognized as constituents of the family are subject to sale for payment of debts of the estate of the deceased person.

The statutes referred to recognize adults other than unmarried daughters remaining with the family as of its constituents, in whose favor the homestead right and consequent exemption exist; and nothing short of a clear statutory declaration that the property rights of such persons shall be protected from sale to pay the debts of the creditor will justify a holding that the interests of such persons are exempt. An exemption cannot be broader, or of longer duration, than the estate on which it is based; and, when given for the protection of a collection of persons, or a single person, recognized as a family, it cannot extend to those whom the law excludes from that protected unit or association. The proposition is that the property of the adults is to be protected from sale, not because they are entitled to the exemption, but because other persons, having a like property right in the same tract of land, are so situated as to be entitled to have their own interests exempted. As well might one of

two tenants in common—a single man—claim that his interest was exempted from sale for paying of his debts because his co-tenant, having a family, and occupying the land as his home, was entitled to exemption to the extent of his interest; that not exceeding the homestead limit. Laws of this state granting homestead exemption are most liberal, and the interests intended to be protected through them should be most strictly guarded; but such laws ought not to be given a construction not imperatively demanded by their letter or spirit, which will lead to their prostitution to uses foreign to those contemplated by their makers.

The case before us does not involve interests of any great pecuniary magnitude, but there is a principle involved in it, far-reaching in its application, involving, as it largely does, the proposition, once a homestead, always a homestead; home for one or a few, and exemption for many ownerships not occupant. There may be a hundred who will take by inheritance, but the property will be exempt in their hands if one minor child or widow exists for whom a probate court may set it apart for a time to be used as a home, if the rule contended for be established. If the exemption does once thus attach, the property passes forever beyond the reach of creditors of a deceased person's estate. Cases suggest themselves illustrative of the pervasions of exemption, if the rule announced be established. Those who take by inheritance are liable for debts of the ancestor only because they receive debt-paying assets of the estate, and the extent of this measures the liability. Those who receive property freed from that liability assume no obligation to creditors. The estate in question may be assumed to be insolvent; and I see no reason why children such as articles 1993 and 2002 embrace may not hold their interests in the homestead, as well as the right to use the shares of the adults for a time, freed from the claims of creditors to interfere with the possession, or to subject their interests to sale. This seems to be the spirit of article 2002. I have, however, a deep conviction that adult heirs are liable to creditors of the estate for a sum equal to the value of their interests in the homestead, which may be sold under execution in satisfaction of that liability. A purchaser at such a sale, however, would take the interests subject to the right of the minors to use under the terms of the law. That the interests of the adults may be, in a sense, remainders, interposes no obstacle to a sale under execution. If the legislature had declared that property used as homestead by an ancestor should remain homestead after his or her death, notwithstanding most or all of the children were adults, and in no manner constituents of the family, then it would be the duty of the courts to give effect to such declarations, unless the constitution places a limitation on the power of the legislature to create homestead exemptions. I find no law making

such a declaration, and am unwilling to assume its existence, in the absence of clear and explicit language fairly requiring it.

STATE v. HOPE.

(Supreme Court of Missouri. March 22, 1890.)

CRIMINAL LAW—WITNESS—DELIVERY OF VERDICT.

1. Under Rev. St. Mo. 1879, § 1907, which declares that "the provisions of law in civil cases, relative to compelling the attendance and testimony of witnesses," and their examination, "shall extend to criminal cases so far as they are in their nature applicable thereto," exceptions to the admission of testimony in a criminal case cannot be considered when the reasons for excluding it were not stated to the court with the objection.

2. Where a witness in a murder case has been questioned as to the general reputation of accused, without any objection that the question did not fix the time as that of the murder, his answer will not be excluded from the jury on that ground.

3. When defendant has cross-examined a witness, he cannot object, on motion for new trial, that the witness was not sworn, where there is nothing in the record to show when the fact was discovered by defendant.

4. Rev. St. Mo. 1879, § 1891, which provides that the verdict of the jury may be received by the court, and be entered upon the records in the absence of the defendant, when such absence is willful or voluntary, and shall have the same force and effect as if received and entered in the presence of such defendant, is not in conflict with Const. Mo. 1875, art. 2, § 23, which provides that "in criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him, face to face."¹

Appeal from circuit court, Scotland county; BEN. E. TURNER, Judge.

This cause is here upon an indictment, in the usual form, charging defendant with an assault upon Walker Hale with intent to kill. He was convicted of unlawfully assaulting, stabbing, and wounding Hale, and was sentenced in accordance with that verdict. He then appealed to this court, after the customary motions. The evidence on the part of the state tended to prove that defendant and Hale had an altercation on the public road, during the course of which defendant inflicted certain wounds on Hale with a knife. That there was abundant testimony to support the verdict is not denied. The defendant relied upon self-defense, and, furthermore, offered evidence of good general reputation as a peaceable and quiet boy, as well as for veracity. In this branch of the case, during the examination of a witness for defendant, the following questions on his behalf were asked, and answers given: "B. Riley, sworn on the part of the defendant. Direct examination. (1) Do you live in the neighborhood of Mr. Hope? Answer. Yes, sir. (2) Are you a relation of his? A. No, sir. (3) How long have you lived there? A. I have lived there, within a half of a mile, for ten or twelve years. (4) Have you been acquainted with the family? A. Yes, sir. (5) Are you acquainted with his reputation for truth and veracity in the

¹ See note at end of case. by Google

neighborhood? A. Yes, sir. (6) Is it good or bad? A. I think it is good. (7) Are you acquainted with his reputation as being a quiet and peaceable boy? A. It is considered good." In rebuttal, the state offered some evidence regarding defendant's reputation, in the course of which the question (referred to in the opinion) arose on a motion to exclude a part of the testimony of witness Zugg. The passage from the record presenting this point is as follows: "Ernest Zugg, recalled on the part of the plaintiff. (1) Are you acquainted in the neighborhood in which the defendant, Gustus P. Hope, resides? Answer. Yes, sir. (2) Are you acquainted, in the neighborhood in which he resides, with his general reputation as to being a quiet, law-abiding boy? A. Yes; I guess I am. By the Court. Is his general reputation good or bad? A. I don't know what general reputation is. I don't know what you mean. By the Court. It is the estimation in which he is held by the people generally. Is that general reputation good or bad? A. I don't know what you call good or bad. (3) What is the estimation of him? A. It is quarrelsome. (Objected to.) By the Court. That will not do. By the Court. General reputation consists in the estimation in which a man is held by the people generally. (4) They were relatives of Mr. Hale's? A. Not all of them wasn't. (5) Wasn't it a fact that this talk was from the relatives of Mr. Hale? A. I don't know that it was; it wasn't all from them. (6) Wasn't the principal talk that you heard from them? A. I don't know but one family that were relatives. Here Mr. Smoot (counsel for defendant) asks that the court exclude all this testimony from the jury, as not being founded on any time with reference to this difficulty. By the Court. Objection overruled. To the said action of the court, in not excluding the said testimony from the jury, the defendant, by his counsel, did then and at the time except." Another witness (Mr. Goslin) for the state was examined on the same subject, and the following questions asked, and answers made, without any objection or exception: "(5) Are you acquainted with his general reputation for peace and quiet in the neighborhood in which he lives? Answer. Yes, sir; I am. (6) Is it good or bad? A. It is bad." The opinion states the other facts bearing upon the questions discussed in it.

Smoot & Pettingill and R. F. Walker, for appellant. *Attorney General*, for the State.

BARCLAY, J., (*after stating the facts as above.*) The points made by defendant upon the rulings of the trial court on the evidence are not well taken.

1. Most of these rulings were made over objections to testimony which assigned no ground or reason for excluding it. Section 1907 of our statutes concerning criminal procedure (Rev. St. 1879) declares that "the provisions of law in civil cases, relative to

compelling the attendance and testimony of witnesses, their examination, the administration of oaths and affirmations, and proceedings as for contempt, to enforce the remedies and protect the rights of parties, shall extend to criminal cases, so far as they are in their nature applicable thereto, subject to the provisions contained in any statute." This has been a part of the law of Missouri from a date as early, at least, as 1835. It has been re-enacted repeatedly in the various revisions of the statutes that have taken place since then. Its language to-day is substantially, if not identically, the same that it has been for some 50 years. Rev. St. 1835, (3d Ed.) p. 490, § 15; Rev. St. 1845, p. 880, c. 138, § 16; Rev. St. 1855, p. 1191, c. 127, § 18; Gen. St. 1865, p. 850, c. 213, § 17; Rev. St. 1879, § 1907; Rev. St. 1889, § 4207. In civil cases it has been uniformly ruled by this court, from a very early period of its history, that it is not sufficient, for the purposes of review, to object generally to improper testimony when offered, but that the grounds must be stated to the court with the objection. *Fields v. Hunter*, (1843,) 8 Mo. 128; *Roussin v. Insurance Co.*, (1851,) 15 Mo. 244; *Clark v. Conway*, (1856,) 23 Mo. 438; *Railroad Co. v. Cox*, (1862,) 32 Mo. 456; *Lohart v. Buchanan*, (1872,) 50 Mo. 201. That rule has thus become a fixed part of our jurisprudence governing the trial of civil causes, and must be regarded as having been in contemplation of the law-makers when the revision of the statutes alluded to occurred. Section 1907, Rev. St. 1879, should therefore be considered as having been re-enacted from time to time with the then prevailing rule relative to the examination of witnesses in civil cases as part of it, in accordance with an established principle of interpretation of laws. *Sanders v. Anchor Line*, 97 Mo. 27, 10 S. W. Rep. 595. We hence consider it necessary in criminal, as well as in civil, causes for a party, objecting to the admission of testimony, to state opportunely the reasons for the objection in order to preserve the ruling for review, should it be adverse to the objector. If the ruling be favorable to the latter, however, and thus the evidence be excluded, generality in the objection would furnish no cause for reversing the ruling of the trial court. It would be sustained, if defensible on any grounds. In *State v. O'Connor*, 65 Mo. 374, views are expressed somewhat at variance with those above indicated. In so far as they conflict, that decision should no longer be regarded as authoritative.

2. Referring to the other rulings of the trial court on the evidence, as to some no exceptions were saved, which precludes reviewing them, as this court has often held; and as to others the objections were interposed too late,—that is to say, after the testimony had been admitted, unchallenged, in response to pertinent questions. A party cannot, in general, demand the exclusion of evidence called out in fair response to questions asked without objection. Nothing exceptional is shown

here affecting the application of that rule. When the legal objection to testimony is not apparent from the question that educes it, but is developed later in any way, (for instance on cross-examination,) the omission to object, at the time it came in, is no waiver of the right to have it excluded. It is only when the exceptionable nature of the testimony has become apparent that the failure to object may constitute a waiver of objection. The reason of this rule is thus stated in a recent case: "To allow a party to permit, without objection, the admission of evidence, and for the first time make his objection in instructions, would be intolerable practice. If he had an opportunity to interpose an objection, he cannot take the chances that the testimony will be favorable to him, and when it turns out otherwise raise his objection, but must be held to have waived it." *Maxwell v. Railway Co.*, (1884,) 85 Mo. 95. The rule itself merely involves an application of the principle frequently declared of late, that, on appeal, parties are bound by the theories of law they asserted or acquiesced in at the trial. Whether such theories take the form of instructions asked, (*Manufacturing Co. v. Guggemos*, 98 Mo. 391, 11 S. W. Rep. 966,) or of instructions unexcepted to, (*State v. Griffin*, 98 Mo. 672, 12 S. W. Rep. 358,) or of rulings on evidence, the nature of which is clear at the time, we think the principle equally applies. In the case before us it appears that defendant's objection to the testimony of witness Zugg in rebuttal (to the effect that defendant was generally reputed to be quarrelsome) was that the question eliciting it did not fix any time with reference to the difficulty. The objection itself was not valid. The question, by the use of the present tense, did fix the time as that of the trial; but construing it broadly as an objection to receiving the testimony because it did not fix the time at that of the difficulty, then it was too tardy for recognition, under the rule we have discussed. Moreover, defendant made the same inquiry, as that against which his objection under discussion was directed, during the examination of his witness Mr. Riley, and interposed no objection to the same question when asked Mr. Goslin, a prior witness for the state. (The statement preceding this opinion presents the exact language used in each of these instances.) There is respectable authority for holding that either of these acts on defendant's part was a waiver of the objection in question. *Hinde's Lessee v. Longworth*, 11 Wheat. 206; *Hayden v. Palmer*, 2 Hill, 205; *Gale v. Shillock*, 29 N. W. Rep. 661; *McCormick v. Laughran*, 16 Neb. 87, 20 N. W. Rep. 107. But, without expressly deciding that point, we think the trial court committed no reversible error in the ruling, considered in all its bearings.

8. The next assigned error rests on the claim that a witness testified on behalf of the state at the trial without having first been sworn. No objection on this ground was made at the hearing. It appears for the first

time in the motion for a new trial, and nothing in the record shows when the fact was discovered by defendant or his counsel. Had the point been suggested when the witness began his statement or during his examination, the irregularity or oversight of permitting him to testify, unsworn, (if it existed,) could have been easily and promptly rectified. But it was not suggested. After the witness had been examined in chief, he was fully cross-examined on the part of defendant. Thus was he treated by both parties as in all respects fully qualified to testify. It has been held by other courts, as well as our own, that where an oath is requisite to qualify a person as a trier of the facts or of law, it may be waived by the competent parties in interest, either expressly, (*Howard v. Sexton*, 1850, 4 N. Y. 157; *Tucker v. Allen*, 1871, 47 Mo. 488; *Grant v. Holmes*, 1881, 75 Mo. 109,) or by going forward in the matter without inquiry or objection, (*Arnold v. Arnold*, 1866, 20 Iowa, 275; *Merrill v. St. Louis*, 1884, 83 Mo. 244; *Cochran v. Bartle*, 1887, 91 Mo. 636, 3 S. W. Rep. 854.) We think the principle on which these rulings are based is applicable also to the case of a witness in the circumstances here shown. *Lawrence v. Houghton*, (1809,) 5 Johns. 129. This assignment of error has been considered on the assumption that the facts alleged were as claimed by defendant, but it is not thereby conceded that an affidavit accompanying a motion for new trial, though uncontradicted, is necessarily to be accepted as establishing the facts it recites, where they are such as have occurred in the immediate presence of the court.

4. The record shows that defendant was "wilfully and voluntarily absent" when the verdict of the jury was returned in open court, though his counsel was present at the time, and defendant had been personally in attendance, until then, during the entire trial. He was afterwards brought in, and the sentence of the court was pronounced in his presence, after his motions for new trial and in arrest had been overruled. By section 1891, Rev. St. 1879, in force when the alleged offense was committed, and when the trial of defendant occurred. It is provided as follows: "No person indicted for a felony can be tried unless he be personally present during the trial; nor can any person be tried or be allowed to enter a plea of guilty in any other case unless he be personally present, or the court and prosecuting attorney shall consent to such trial or plea in the absence of the defendant; and every person shall be admitted to make any lawful proof by competent witnesses or other testimony in his defense: provided, that in all cases the verdict of the jury may be received by the court, and entered upon the records thereof in the absence of the defendant, when such absence on his part is wilful or voluntary, and, when so received and entered, shall have the same force and effect as if received and entered in the presence of such defendant: and

provided, further, that, when the record in the appellate court shows that the defendant was present at the commencement or any other stage of the trial, it shall be presumed, in the absence of all evidence in the record to the contrary, that he was present during the whole trial." The provisos in this section first became a part of our law at the revision of 1879. Prior to that time, and ever since 1835, the statute declared that "no person indicted for a felony can be tried unless he be personally present during the trial," etc., omitting any such qualifications of that rule as are contained in the provisos of the present law. Rev. St. 1835; Gen. St. 1865, p. 850, § 15. While the statute was in that form, prior to the revision of 1879, this court had held it error to receive a verdict in the absence of defendant, even though he had escaped from custody after the cause had been submitted to the jury. *State v. Buckner*, (1857,) 25 Mo. 167; *State v. Braunschweig*, (1865,) 36 Mo. 397. It had further been held that the record must affirmatively show the presence of defendant at the rendition of the verdict, (*State v. Cross*, 1858, 27 Mo. 332; *State v. Dooly*, 1876, 64 Mo. 146,) though in some instances that fact had been taken as established by inferences from other entries in the record, (*State v. Schoenwald*, (1860,) 31 Mo. 147; *State v. Lewis*, (1878,) 69 Mo. 92.) The important change made in the statute by the revision of 1879 (section 1891) was probably induced by a consideration of the decisions mentioned. In view of the history of the law on the subject, there can be no doubt of the legislative purpose in the amendment. It was, among other things, to prevent a defendant from securing a mistrial and continuance by escaping if in custody, or absconding if on bail, after the cause had been submitted to the jury, and before verdict rendered. Whether that purpose was accomplished will appear presently.

The language of the law so plainly sanctions the reception of a verdict by the court in defendant's absence, when wilful or voluntary, that no difference of opinion is likely to arise as to its meaning. The difficulty, if any there be, appears upon the suggestion that the enactment in question may be in conflict with the organic law, particularly with that section of the bill of rights which declares that, "in criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face," etc. Const. 1875, art. 2, § 22. The statute, in permitting a verdict when defendant is voluntarily or wilfully absent, evidently proceeds on the assumption that by such wilful or voluntary absence the defendant waives the right to be present, which otherwise he might constitutionally insist on. Is such waiver valid? In considering this question, we start from the postulate that the courts will not declare a statute unconstitutional unless it is manifestly so, and that all fair and reasonable

doubts on that point will be resolved in favor of its constitutionality. The presumption is that the legislature acted within the proper sphere of its powers, and, until the contrary is clearly and satisfactorily made to appear to the court, the law will be upheld. That the accused may waive some rights secured by the constitution is a proposition supported by the authority of so many adjudicated cases that a citation of them now seems unnecessary. But there is great diversity of opinion respecting the particular constitutional rights that may be waived. Numbers of cases hold that certain rights cannot be waived by the accused for reasons of public policy. It would probably tend to confuse, rather than to elucidate, the present case to attempt any summary of the principles applicable to the waiver of constitutional rights generally. The issue actually before us requires only a decision upon the validity of a waiver, by defendant's own act, of his right to be personally present at the rendition of verdict. Defendant undoubtedly has a right to be heard, and for that purpose to be present when the verdict against him on a charge of felony is given; but if, being on bail, he sees fit to run away at that stage of the trial, on whom shall the consequences of such misconduct fall? It is a "fundamental legal principle," of far-reaching scope in its practical application, (*Insurance Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. Rep. 877; *Reynolds v. U. S.*, 98 U. S. 161; *Riggs v. Palmer*, 115 N. Y. 506, 22 N. E. Rep. 188,) that "no one should have an advantage from his own wrong." 1 Co. Litt. 148b; *Broom, Leg. Max.* (8th Ed.) Yet to hold that, in such a state of facts as we have supposed, defendant, during his wilful absence, retains the right, while he endeavors to increase the impossibility of his being heard in the cause, would seem to us a clear instance of giving him a great advantage from his own wrong. The maxim is founded on principles of common fairness and good faith, as is also the idea expressed in section 1891 of the Revised Statutes, that defendant, by voluntarily withdrawing from the court when the verdict is rendered, should be held to relinquish the right to be present and heard, which, but for his own wrongful act, he might freely enjoy. In such case he is deprived of no right. He merely refuses to avail himself of one, just as he may in various ways waive his constitutional right to confront the witnesses against him under repeated rulings of the court. *State v. Wagner*, (1883,) 78 Mo. 644; *Merrill v. St. Louis*, (1884,) 83 Mo. 252; *State v. Houser* (1858,) 26 Mo. 431. In *State v. Smith*, (1886,) 90 Mo. 37, 1 S. W. Rep. 753, the present statute was considered, and no intimation of its unconstitutionality was made. In other cases it has been further held, even under the old statute, (Gen. St. 1865, p. 850, § 15,) that defendant's absence at the trial during part of the argument of counsel to the jury was not a prejudicial error requiring a reversal. *State v. Bell*, 70 Mo. 683; *State v. Grata*, 68 Mo.

22. In other states, without such a statute as our present one, and under constitutional provisions in most instances substantially like those in force here, it has been repeatedly held that where defendant was absent by his own voluntary act, (*e. g.*, by escape or by absconding while on bail,) at the rendition of verdict in cases other than capital, the court might properly receive it, notwithstanding his absence. *Sahlinger v. People*, (1882) 102 Ill. 241; *State v. Kelly*, (1887,) 97 N. C. 404, 2 S. E. Rep. 185; *Price v. State*, (1858,) 86 Miss. 531; *Gales v. State*, (1886,) 64 Miss. 101; *Barton v. State*, (1881,) 67 Ga. 658; *Hill v. State*, (1864,) 17 Wis. 675; *Flight v. State*, (1835,) 7 Ohio, pt. 1, 180; *Jackson v. State*, (1887,) 49 N. J. Law, 252, 9 Atl. Rep. 741; *State v. Peacock*, (1887,) 50 N. J. Law, 34, 11 Atl. Rep. 270; *Lynch v. Com.*, (1878,) 88 Pa. St. 189. The principle on which those decisions rest has been declared in others in its application to different phases of court proceedings in criminal cases. *People v. Bragle*, (1882,) 88 N. Y. 585, as explained in *People v. Lyon*, (1885,) 99 N. Y. 224, 1 N. E. Rep. 678; *U. S. v. Davis*, (1869,) 6 Batchf. 464; *State v. Paylor*, (1883,) 89 N. C. 539. We do not think the court loses jurisdiction of the cause by reason of defendant's getting beyond the confines of the court-room when the verdict comes in. *State v. Kelly*, (1887,) 97 N. C. 404, 2 S. E. Rep. 185. If that were the effect of such action on his part, the court would not have power to enter an order for his arrest thereafter, so long as he remained away. That result certainly could not have been intended by the constitutional provision in question as now worded. In interpreting the fundamental law of the state it is proper to consider the effect and consequences of any proposed construction of it in ascertaining what was probably the intention designed to be expressed by the instrument. Constitutions, like other laws, are governed by established rules of interpretations, and among others by that just mentioned. To hold that the flight of defendant while on bail, just before verdict, must necessarily produce a continuance of the cause, would make it possible for any one able to give bond, by repeating that performance at each successive trial, to finally defeat the ends of justice. Such conduct would not deprive defendant of his constitutional right to bail or of his freedom of action during every recess of the court while the trial lasted; but (if now sanctioned here) it would introduce a new and novel mode for securing continuances, having some advantage over the ordinary methods heretofore in use. It would have, at least, the merit of simplicity. But we do not think those who framed or the people who adopted the constitution contemplated such a construction of it in this regard as would make it ever possible for any defendant in a criminal case to avoid and escape altogether a verdict, otherwise just and correct, by any such acts of his own. We believe that no language used in that instru-

ment will bear a construction which would make such results possible. We are of opinion that section 4191, Rev. St. 1889, (section 1891, Rev. St. 1879,) in so far as it relates to the subject under discussion, is entirely constitutional, and that the trial court committed no error in proceeding in accordance with its terms.

We find no error in any of the rulings of the court, to which exceptions were saved, in the giving or refusal of instructions, and, after a careful examination of the record, observe nothing calling for further remark. The judgment is affirmed, for the reasons stated, with the concurrence of all the members of the court except SHERWOOD, J., who dissents.

NOTE.

CRIMINAL LAW—TRIAL—PRESENCE OF DEFENDANT. At common law, in all criminal cases involving life or member, the defendant must be present when the verdict is returned. But in *New Jersey* this is limited to capital cases, *Jackson v. State*, 9 Atl. Rep. 740; and, if defendant is present at the commencement of the case, the fact that he subsequently voluntarily absents himself is no ground for discontinuing the trial, *State v. Peacock*, (N. J.) 11 Atl. Rep. 270; and in *North Carolina* where a defendant, on trial for an offense less than capital, purposely absents himself before the verdict is rendered, he is deemed to waive his right to be present, and the court is not bound to discharge the jury, and thus grant defendant a new trial, *State v. Kelly*, 2 S. E. Rep. 185. See, also, note *Id.* In *State v. Perkins*, 8 South. Rep. 647, the *Louisiana* court held that a verdict might be legally rendered, received, and recorded in the absence of the defendant, where he voluntarily absents himself, and said: "The accused cannot be permitted to take advantage of his own wrongs to defeat the course of criminal justice." Where a defendant is out on bail when the verdict is returned, it will be presumed that he was voluntarily absent, and thus waived his right to be present. *State v. Guinness*, (R. L.) 16 Atl. Rep. 910. In *Kentucky* it is error to submit a felony case to the jury in the absence of defendant, *Allen v. Com.*, 6 S. W. Rep. 645; *Brewer v. Com.*, 8 S. W. Rep. 389; and it is error to recall the jury, and give further instructions, in the absence of defendant, in *Kansas*, *State v. Myrick*, 16 Pac. Rep. 530; and in *Indiana*, *Roberts v. State*, 12 N. E. Rep. 500. In *State v. Jones*, (S. C.) 7 S. E. Rep. 296, which was a trial for murder, after the jury had been out some time, they were recalled, and asked if they desired further instructions, to which they replied in the negative, and were told to retire, and that, when they had agreed, they could send for the judge and counsel, and have their verdict received. The supreme court held that this was no part of the trial, and that, therefore, defendant's absence when it occurred was immaterial. It is not error to re-read a portion of the charge to the jury on their return into court, in the absence of defendant. *People v. La Munion*, (Mich.) 81 N. W. Rep. 598.

A joint defendant, who is himself a witness, cannot be compelled to leave the court-room with other witnesses during the trial. *Garmon v. State*, (Miss.) 5 South. Rep. 335. Absence of defendant's counsel, when a demurrer to the information is overruled, is not ground for reversal, *People v. Rice*, (Cal.) 14 Pac. Rep. 851; neither is their absence when the verdict is returned, *People v. Wilson*, (N. Y.) 16 N. E. Rep. 540; and the absence of defendant at the hearing of a motion to amend the information so as to alter a name therein is immaterial, *State v. Dominique*, (La.) 1 South. Rep. 665. The constitutional right of a defendant in a criminal case to appear and be heard in his own behalf applies to trials in *metropolitan* courts only, and he cannot demand to be allowed to appear on appeal. *Tooke v. State*, (Tex.) 8 S. W. Rep. 782. In *Colo-*

rado, one cannot be tried for a misdemeanor in his absence, and in the absence of his attorney. *Lawn v. People*, 18 Pac. Rep. 231. Adjournment of the jury from their consultation room, and return to the consultation room, is not a resubmission of the case, in the absence of defendant. *Richie v. Com.*, (Ky.) 8 S. W. Rep. 918. Where a motion for new trial is made and overruled in the absence of defendant, the error is cured by subsequently giving him the opportunity to renew the motion. *Bond v. Com.*, (Va.) 3 S. E. Rep. 149.

**WHITMORE et al. v. SUPREME LODGE
KNIGHTS & LADIES OF HONOR.**

(Supreme Court of Missouri. Feb. 24, 1890.)

**MUTUAL BENEFIT INSURANCE—EVIDENCE—ERRORS
CURED.**

1. Where neither the beneficiary of mutual benefit insurance certificates nor the trustee for the beneficiary and her husband (the beneficiary's parents) could insure the life of the assured for the beneficiary's benefit, under defendant's charter, if the trustee's husband induced the assured to insure her life for the benefit of the beneficiary, and paid therefor, the certificates were void; but if they were issued to the assured on her own application, and paid for with her money, and if she died a natural death, the beneficiary can recover, unless the insurance was fraudulently procured.

2. The court instructed that the certificates were fraudulently procured, and plaintiffs could not recover, if the assured, when she became a member of defendant, misrepresented her age, physical condition, or family history, and the facts misrepresented actually contributed to her death; and that "misrepresentation" meant any statement of fact not then known by the assured to be true. *Held* not objectionable, especially as substantially the same instructions were requested by plaintiffs, and as the benefits of Rev. St. Mo. 1879, §§ 5976, 5977, which declare that in certain instances misrepresentations shall not be a defense, do not apply to this class of insurance.

3. Evidence that insurance in other companies was effected on the life of the assured by or on behalf of the beneficiary is admissible to show that the object was to defraud defendant.

4. An error in the admission of evidence is cured where appellants fail to object thereto, and its consideration is afterwards excluded from the jury by the instructions.

Appeal from St. Louis circuit court.

The pleadings in this cause are in substance as follows: Plaintiffs, Benjamin T. and Marie E. Whitmore, are husband and wife, and defendant is a corporation. On the 22d of November, 1883, Mary A. Mudd was a member of Nonpareil Lodge, No. 592, of defendant, in St. Louis, and entitled to participate in the relief fund of said order to the amount of \$1,000; said sum to be paid to plaintiff Marie E. Whitmore, as trustee of Marie L. Whitmore. Defendant issued its benefit certificate, under seal, to said Mary A. Mudd for \$1,000, payable on death of said Mudd to said Marie E. Whitmore, as trustee as aforesaid. Mary A. Mudd complied with all the conditions of said certificate, paid all assessments, etc., and died on the 21st of July, 1884, a member of said order in good standing. The certificate is filed as "Exhibit A." Plaintiff asks judgment for \$1,000. The petition has a second count, upon another certificate for \$2,000, filed as "Exhibit B." The answer, after a general denial, alleges that the deceased, Mary A. Mudd, procured the insurance in question by false and fraudulent representations as to her health,

and by false answers to the questions put to her by defendant as to the relationship of the beneficiary to her, as to the cause of death and age of her relatives. These answers are set forth in full, and alleged to have been as to material matters. The answer further sets up that Mary A. Mudd was of weak mind, and was induced by fraudulent representations and influence of plaintiffs, Benjamin L. and Marie E. Whitmore, to become a member of defendant; that Benjamin L. Whitmore, being a physician, caused himself to be made a medical examiner of defendant, and, as such, witnessed and subscribed the application of said Mary A. Mudd, and fraudulently recommended her to defendant as a good subject for insurance, and made false statements to defendant as to her health; and that he and his wife, by fraudulent acts and representations, induced the lodge of defendants to receive said Mary A. Mudd to membership, and procured further insurance on her life to the amount of \$9,000 within eight months from the date of the certificate in suit. That Marie L. Whitmore, the *cestui que trust*, is the infant daughter of plaintiffs, and that the insurance in question and the other insurance was obtained by a fraudulent conspiracy of plaintiffs. That Mary A. Mudd lived with plaintiffs, and that her death was caused by their ill treatment and neglect of her, and that her initiation fee and assessments were advanced for her by plaintiffs. The answer also denies that Mary A. Mudd was of kin to either of plaintiffs or to their daughter, the beneficiary in question under the certificates in suit. The replication specifically denies the new matter set forth in the answer. It is admitted by the pleadings that the defendant was an incorporated co-operative benevolent insurance society.

The evidence is not preserved at length in the bill of exceptions, but only in short form, and, omitting the cross-examination of Williamson, (afterwards ruled out and instructed against by the court,) is the following: Plaintiffs introduced evidence tending to prove all the material allegations of the amended petition, and also introduced the constitution and by-laws of defendant. Defendant introduced testimony tending to show that the statements made by Mary A. Mudd, in her written application to defendant for insurance, as to her health, the relationship of the *cestui que trust* of plaintiffs to her, and the age and cause of death of her relatives, were, in some respects, untrue; also that said Mary A. Mudd was of weak mind, and under the influence of plaintiff Benjamin T. Whitmore; that said Whitmore was a member of the lodge of defendant to which said Mary A. Mudd belonged, and was a medical examiner of the same, and, as such, at the time of such insurance, and in order to effect the same, signed a physician's certificate as to the health of said Mary A. Mudd, which was, in some material respects, false. Defendant introduced evidence tending to show that the life of Mary A. Mudd was al-

so insured in four other benefit societies for the benefit of the children of said plaintiffs, Benjamin J. and Mary E. Whitmore, to the amount of \$19,000; all of which testimony as to other and further insurance was then and there objected to by plaintiffs as incompetent and irrelevant, and the objection overruled; to which rulings the plaintiffs then and there excepted. Defendants introduced evidence tending to show that the health of said Mary A. Mudd was weak; that she was no relation to plaintiffs or to either of them, or to their children; that plaintiffs allowed said Mary A. Mudd to sleep and live in a cellar-room in their house after she was insured, and that she lived with them in a menial capacity, and that she had no money except what plaintiffs gave her; and that plaintiff Benjamin furnished her with the money with which the insurance in question was effected, and the monthly assessments with which it was kept up. And defendant also offered evidence tending to prove the several facts stated in the instructions afterwards given by the court in this cause. Plaintiffs introduced evidence tending to show that Mary A. Mudd, deceased, was of good health and fair intellectual abilities, and of good education; that she was not under any undue influence of plaintiffs, or either of them; that she was a first cousin of plaintiff Benjamin T. Whitmore; that the children of plaintiff, who are beneficiaries of the policy, were two girls of tender age; that deceased was devotedly attached to them; that she was treated always by plaintiffs as an honored member of their family, and not as a menial; that she loved them, and they her; that the most friendly relations existed between deceased and plaintiffs; that her room in their house was cheerful, wholesome, and comfortable, and not a cellar-room; that the deceased had money of her own, and that the money with which she kept up and paid the insurance in question was her own; and that no statements were made at any time to the defendant by the deceased, or by plaintiff Benjamin T. Whitmore, which they, or either of them, believed to be false, or that were false, in regard to said application for insurance; that the said Mary A. Mudd, at or about the time of the insurance in question, was examined for other insurance by two other physicians, and was passed by them, and recommended by them for membership into two of the other orders to which she belonged.

The court refused all instructions asked by either party, but gave of its own motion the following: "(1) The court instructs the jury that the relationship existing in this case between the beneficiary, Marie L. Whitmore, and the insured, Mary A. Mudd, was such that while Mary A. Mudd, under the charter of defendant, might lawfully effect such insurance on her own life for the benefit of said beneficiary, as the certificates read in evidence express, it would not have been lawful for the beneficiary, Marie L. Whitmore, or

for either of plaintiffs for their said child, to effect such an insurance on the life of Mary A. Mudd. Hence, if you find, from the evidence, that Benjamin T. Whitmore procured or caused Mary A. Mudd to insure her life as expressed in the certificates read in evidence, (as Exhibits A and B,) and that he paid for said insurance out of his own funds, then said certificates are void, and your verdict should then be for defendant; but if, on the other hand, you believe, from the evidence, that said certificates were issued to said Mary A. Mudd upon her application, and the payments made to obtain the same, and keep the same in force, were made by her, (Mary A. Mudd,) or by any person on her behalf, with her money, and that during July, 1884, said Mary A. Mudd died a natural death, you should then return a verdict for plaintiffs, unless you should believe, from the evidence, that said insurance was fraudulently procured. (2) The insurance recited in the certificates read in evidence would be 'fraudulently procured,' as mentioned in instruction No. 1, if obtained by any such misrepresentation as is defined in the next instruction, No. 3. (3) The court instructs the jury that if they believe, from the evidence, that Mary A. Mudd, at the time of becoming a member of defendant, made to it any misrepresentation (in the papers read in evidence as Exhibit C or D) with regard to her age, physical condition, or family history, and that the fact so misrepresented actually contributed to her death, then plaintiffs cannot recover in this case, and the jury should find for defendant. By 'misrepresentation,' in this connection, is meant any statement of fact not then known by her to be true. (4) The court instructs the jury that, for the purposes of this case, the word 'cousin,' as used in the benefit certificates in evidence, may be interpreted to mean a degree of relationship more distant than that of first cousin. (5) The jury are instructed to disregard any statement made by any witness concerning the alleged death of James Milburn, or concerning any alleged insurance upon his life, and to give no effect to any such statement in their consideration of this case. (6) The petition of plaintiffs in this case presents two counts or demands for decision. Your verdict should contain a separate and distinct finding as to each of said counts. If you find for plaintiffs, you should assess their damages at the sum of \$1,021.66 on the first cause of action, and at the sum of \$2,043.32 on the second cause of action, stated in the petition. If you find for defendant as to either or both of said counts, your verdict then should simply recite that you find in favor of defendant as to such count or counts as to which you so find." The jury found the issues in favor of the defendant, and the plaintiffs appealed.

R. A. Bakewell, for appellants. *D. Hermann and Valle Reyburn*, for respondent.

SHERWOOD, J., (after stating the facts as above.) It is the settled law of this court

that, in order to the validity of a life insurance policy, the person who secures such policy must have a pecuniary interest in the life of the person assured, or else the policy will be a gambling or wager policy, which the law will not enforce. Thus, in *Singleton v. Insurance Co.*, 66 Mo. 63, it was ruled that an uncle had no insurable interest in the life of his nephew; and therefore such a policy, based merely upon such relationship, was void. In that case the authorities both in this state and elsewhere are well reviewed, and the principle already announced declared. This, it seems, was the rule at common law; and the statute of 14 Geo. III., avoiding wagering policies, was but declaratory of the common law. *Ruse v. Insurance Co.*, 23 N. Y. 516. In addition to the authorities cited in *Singleton's Case*, supra, will be found *Warnock v. Davis*, 104 U. S. 775; *Insurance Co. v. Hazzard*, 41 Ind. 116; *Association v. Hoyt*, 9 N. W. Rep. 497; *Brockway v. Insurance Co.*, 9 Fed. Rep. 249; *Association v. Houghton*, 13 Ins. Law J. 895; 17 West. Jur. 297. The principle announced in these authorities is expressed in the instruction given by the court of its own motion; and the declaration in that instruction contained, that what Benjamin T. Whitmore could not do directly, in the way of effecting an assurance on a life in which he had no insurable interest, he could not do indirectly, is obviously correct. A party will not be permitted to obtain an advantage by indirect methods which would be denied him if done openly. *Brockway v. Insurance Co.*, 9 Fed. Rep. 249; *Swick v. Insurance Co.*, 2 Dill. 160; *Nino & N. Dig.* 75.

Nor is anything objectionable seen in instructions 2 and 3, which the court gave. Indeed, those instructions were in substance asked by plaintiffs in instructions 21 and 22, which were refused. Where a party has asked similar instructions to those given, he is in no position to complain. *Harris v. Hays*, 53 Mo. 90; *McGonigle v. Daugherty*, 71 Mo. 259; *Bank v. Hammerslough*, 72 Mo. 274; *Smith v. Culligan*, 74 Mo. 387; *Fairbanks v. Long*, 91 Mo. 628, 4 S. W. Rep. 499; *Bettes v. Magoon*, 85 Mo. 580; *Noble v. Blount*, 77 Mo. 235; *Holmes v. Braidwood*, 82 Mo. 610; *Reilly v. Railway Co.*, 94 Mo. 600, 7 S. W. Rep. 407. And it may be said that the third instruction given by the court was even more favorable for plaintiffs than the law warranted; because sections 5976, 5977, 2 Rev. St. 1879, do not apply to benevolent or charitable incorporations.¹ See *Laws 1881*, p. 87. In the absence of such statutory regulations, then, as prevail in cases of ordinary insurances, declarations in any re-

spects, if false, if made contrary to the agreement of the parties, will vitiate and avoid the policy, though such declarations be not material to the risk. *Insurance Co. v. France*, 91 U. S. 510; *Jeffries v. Insurance Co.*, 22 Wall. 47; *Brockway v. Insurance Co.*, 9 Fed. Rep. 249. And courts will enforce all reasonable laws and rules established by these benevolent organizations for their guidance and the regulation of their relief funds, if in conformity with the laws of the state. *Holland v. Taylor*, 12 N. E. Rep. 116; *Osceola Tribe v. Schmidt*, 57 Md. 98; *Society v. Baldwin*, 86 Ill. 479; *Borgraefe v. Lodge*, 22 Mo. App. 127. The constitution and by-laws of the defendant were not preserved in the record, and therefore it is impossible to pass properly upon any matters connected with such constitution and by-laws.

There was no error in admitting evidence tending to show that the beneficiary effected other insurances upon the life of the party in question, when the issue was, as here, that the object was to defraud the insurance company. The supreme court of the United States, in passing upon this point, say: "The theory of the defense is that the purpose of Hunter in obtaining the insurance was to cheat and defraud the company. In support of that position, evidence that he effected insurance upon the life of Armstrong in other companies, at or about the same time, for a like fraudulent purpose, was admissible. A repetition of acts of the same character naturally indicate the same purpose in all of them; and, if, when considered together, they cannot be reasonably explained without ascribing a particular motive to the perpetrator, such motive will be considered as prompting each act." *Insurance Co. v. Armstrong*, 117 U. S. 598, 6 Sup. Ct. Rep. 877.

In regard to the evidence elicited on the cross-examination of Williamson, it was admitted without objection by plaintiffs' counsel; and afterwards the court gave an instruction, as already seen, which excluded such evidence from the consideration of the jury. This cured the error, if any could be said to have been committed, in the circumstances mentioned. Moreover, there was no objection taken in the motion for a new trial to the instructions given by the court of its own motion. Considering all of these things, and looking at the record as a whole, we are not prepared to say that any reversible error was committed at the trial, and so we affirm the judgment. All concur but BARCLAY, not sitting.

SUTTON v. DAMERON *et al.*

(Supreme Court of Missouri. March 10, 1890.)

ESTOPPEL—EJECTMENT—RES JUDICATA—LIMITATION OF ACTIONS.

¹ Rev. St. Mo. §§ 5976, 5977, provide that no misrepresentation in obtaining an insurance policy shall avoid the same, unless it shall have contributed to the contingency on which the policy is to become payable; and that no defense based on misrepresentation shall be valid, unless the defendant shall deposit in court, for the benefit of plaintiffs, the premiums received.

1. A recital in an agreed statement of facts, in ejectment, that plaintiff's grantor "died in 1871 intestate, and her husband in 1864 intestate," is not such a precise affirmation that plaintiff's grantor was a *feme covert* at the time of her husband's

death as to estop defendants, in a subsequent partition proceeding of the same land, from showing that she had been divorced in 1860, before she executed a deed of trust of the land to defendants.

2. A judgment in ejectment is not a bar to another action of the same sort between the same parties litigant, for the same land, where no equitable defense was interposed in the former action, and defendants may attack an agreed statement in the former action as being equally inconclusive as the judgment based thereon.

3. In partition proceedings, it appeared that defendant's grantor went into the exclusive and adverse possession of the land in 1863, claiming under a foreclosure of a trust-deed; that this possession continued until 1873, when ejectment was brought by three of the four devisees of a one-sixth interest in the land, who had not united in the trust-deed; and that the right of action in all the devisees accrued in 1865. *Held*, that the ejectment proceedings did not operate to prevent the running of the statute as against the fourth devisee, who had not joined therein.

Appeal from St. Louis circuit court; AMOS M. THAYER, Judge.

This is an equitable proceeding for the partition of a lot of ground in the city of St. Louis. The agreed statement of facts, which formed part of the evidence in the action of ejectment in the cause of Sutton v. Casseleggi, 77 Mo. 397, and which, it is insisted by appellants Sutton and Hill, forms a complete bar to any further recovery by Abbie Dodd than that accorded to her predecessor in title, Pauline Dalton, in that cause, is as follows: "It is admitted in the trial of the cause that Joseph Montaigne is the common source of title to the lot sued for, and owned the said lot in fee on the 8th day of June, 1818; that J. Baptiste Robidoux had disappeared for several years from his family and his home, and Rosalie Robidoux came from Canada to St. Louis with her daughter Archange in the year 1817; that soon after Rosalie came to St. Louis, she being regarded as a widow, and her husband, Robidoux, as dead, one Lange Allard took her as his wife, and lived with her as such during the year 1818, and until J. Baptiste Robidoux appeared in St. Louis and claimed his rights as a husband, in the year 1819. Lange Allard left and went up to the mountains, and died there within a few years. J. B. Robidoux lived with his wife, Rosalie, in the city of St. Louis, from 1819 up to the time of his death, in 1826. His widow, Rosalie, thereupon married Paul Morris, who died in 1832; and after the death of Morris the widow married Victor Chataign, in 1836; and they lived together as husband and wife until 1833, when he died, leaving said Rosalie, his widow, surviving him. Said Rosalie died the 18th day of October, 1858, leaving her last will, that was probated on the 21st day of October, 1858. Archange, her daughter, had married one McDowell in 1836, and had issue of said marriage, five children: Robert A., John B., Emily, Rosalie, and Mary. Mary died in 1863, intestate and without issue. All of the surviving children of McDowell were of the age of twenty-one years in 1861, December 5th. Emily married Joseph W. Renfrow in 1863, and Rosalie married James A. Maclay in

1864. Archange McDowell died in 1871, intestate, and her husband died in 1864, intestate. Laurent Robidoux is still alive, and has eight children, who are all alive. The net rents, over and above taxes, were \$1,137 a year prior to 1873, and \$937 a year since January 1, 1873. The said Mary McDowell was eighteen years and eight months old on the 6th day of December, 1861. The said Pauline Dalton has all the right, title, and interest in and to said premises sued for which was vested in her husband, John Dalton."

A portion of a succinct statement of the deductions made from that agreed statement, as well as from other facts, in evidence in that cause, by Commissioner Martin, can be properly inserted here: Joseph Montaigne was the original owner of the premises. On the 8th day of June, 1818, he conveyed the lot to Lange Allard and Rosalie Allard, his wife. Rosalie Allard was not his wife, but was, in truth, Rosalie Robidoux, who had left her husband in Canada, and was cohabiting with Allard as his wife. This deed gave the land to Lange Allard and Rosalie as tenants in common; Rosalie thereby becoming vested with one undivided half in fee, while the other half vested in Allard. In 1819, J. Baptiste Robidoux, her lawful husband, hunted up his wife in St. Louis, claimed his marital rights, and lived with her till his death, in 1826. Before the death of Robidoux, Lange Allard, who had given Rosalie back to him, conveyed, on the 8th day of June, 1818, the undivided one-half of the land to Horatio Cozzens, as trustee for Rosalie, for life, with remainders as to said half, in fee, to Laurent and Archange, son and daughter of Rosalie by Robidoux, her husband. At this date the title stood one-half in Rosalie in fee, the other half in her for life, with remainder in fee as to that half in Laurent and Archange, one-fourth in each undivided. Thus stood the title at the death of Robidoux, in 1826. It remained unchanged in November, 1828, at which date Rosalie married Paul Morris, which fact is evidenced by a marriage contract of that date. He died in 1832. In 1836, Rosalie married Victor Chataignem, her third and last husband, with whom she lived till his death, in 1853. The title remained unchanged at the death of Rosalie, which took place in 1858. It appears in evidence that, by herself or tenants, she had occupied the lot up to the time of her death. She left a last will, by which, after certain other devises, she willed all the rest and residue of her estate, one-third to Laurent, one-third to the children of Laurent, and one-third to the children of Archange. Those two persons were her son and daughter. This will carried to the devisees all that she died seized of, viz., one-half undivided. As to the other half undivided, she had possessed only a life-estate, which terminated at her death. Thus her decease left the title, one-fourth in Laurent and one-fourth in Archange, which came to them from the deed of Lange Allard made in June, 1821. The other half of which Rosa-

lie had died seised in fee by virtue of her will vested, as to one-third of one-half or one-sixth, in Laurent, one-sixth in the children of Laurent, and one-sixth in the children of Archange. The devolution of the record title is very clear. No one could claim any part of this title except by deed, devise, or descent from Laurent or Archange, or the children of Laurent or Archange. According to the statement of facts, Archange married one McDowell in 1836, and had issue, five children: Robert A., John B., Emily, Rosalie, and Mary. Mary died intestate in 1863, without issue, leaving her brothers and sisters to inherit her share. Emily married Renfrow in 1863. Rosalie married Maclay in 1864. Archange, the mother, died intestate in 1871. Laurent is living, with eight children, all alive. The plaintiff submitted three deeds from three of the four heirs of Archange,—Robert, Emily, and Rosalie, Jr.,—all made on the 18th day of April, 1873. These four heirs, as we have seen, acquired one-fourth from the Allard deed as heirs of Archange, and one-sixth from their grandmother's will. These three deeds from three of the four heirs gave to plaintiff three-fourths of the one-fourth coming from Allard, and three-fourths of the one-sixth coming by the grandmother's will, amounting to one-eighth, making in all fifteen forty-eighths. There was no valid deed, given in evidence, taking any part of this title from the plaintiff or his grantors. The court of appeals held that, as to the portion coming through the conveyance from Allard, the title was lost by the statute of limitations, and allowed recovery only for the one-eighth coming by the will of Rosalie, their grandmother; and the plaintiff comes here by appeal, insisting that, under the law and evidence, he is entitled to have judgment for the three-fourths of the one-fourth denied to him by the circuit court and court of appeals, being nine forty-eighths of the whole.

It is necessary for us to consider the facts relied upon by the defendant for defeating this portion of the plaintiff's title. But, before doing this, I may as well call attention to the record title submitted in evidence by Pauline Dalton, the defendant. It consisted of a deed of trust by Laurent and wife to secure a debt of \$4,000, dated March 2, 1861, and the deed of the trustee to John Dalton, dated January 29, 1862. This placed in Dalton the one-fourth acquired by Laurent from the Allard deed, also the one-sixth acquired by the will of his mother, which would be five-twelfths or twenty forty-eighths of the whole. By the agreement in the case, Pauline Dalton is possessed of all the title acquired by John Dalton, which, as we have seen, amounted to twenty forty-eighths. There remained five forty-eighths outstanding in John B., the son of Archange, and eight forty-eighths in the children of Laurent, none of whom are parties to this suit.

G. M. Stewart, for plaintiff. *Thos. Thorougman* and *J. K. Hansbrough*, for defendants.

SHERWOOD, J., (after stating the facts as above.) Under the judgment in the cause aforesaid, as already seen, to Pauline Dalton, the successor in title to John Dalton, who was the successor in title of Laurent Robidoux under the deed of trust sale, there were adjudged 20-48 of the entire title. The deed of trust was executed by Laurent Robidoux March 2, 1861, and foreclosed January 29, 1862. But, as will be seen from the case cited, at the same time that Laurent Robidoux executed the deed of trust on his portion of the title, Archange McDowell also executed one upon her portion, to-wit, 12-48, derived from the Allard deed, which deed of trust was foreclosed, and a sale thereunder occurred on the same day on which the deed of trust given by Laurent Robidoux was foreclosed. So that, if these two sales under these deeds were valid, they passed to John Dalton, and subsequently to his successor in title, Pauline Dalton, the entire Allard title, 24-48, as well as the portion derived by Laurent Robidoux from the will of Rosalie, his mother, to-wit, 8-48, making in all 32-48 of the entire title, and leaving to be accounted for 16-48 of the title, being all that portion of same held by the children of Laurent Robidoux, to-wit, 8-48, and a like portion by the children of Archange McDowell, derived in each instance from the will of their common grandmother, Rosalie.

But, before investigating further as to the 16-48, it is opportune to determine whether Pauline Dalton did obtain so much as 32-48 of the title. It is a conceded fact that Pauline Dalton acquired all the interest Laurent Robidoux had in the premises, to-wit, 20-48, by reason of the foreclosure of the deed of trust he gave; and this was the amount adjudged to her in the ejectment cause aforesaid. But it is disputed that Pauline Dalton is to be considered as having acquired any interest whatever in the 12-48 which represent the amount derived by Archange McDowell through the Allard deed; and this dispute is based upon Archange's being a married woman in 1861, when she gave the deed of trust. This contention is made, not upon the fact of coverture of Archange in 1861, but upon the ground that the agreed statement of facts made in the Sutton-Casseleggi Case, aforesaid, as well as the judgment thereon, do each constitute a complete bar,—an estoppel by record,—forbidding the introduction of evidence to establish the truth as to the coverture of Archange at the time mentioned. It may be conceded that, if Pauline Dalton was concluded by the matter aforesaid, then Abbie Dodd, who purchased her interest from her, is likewise concluded. But do any of the things which occurred in the Sutton-Casseleggi Case conclude Pauline Dalton? The well-settled rule of law in this state, notwithstanding an improvident *dictum* in *Foster v. Evans*, 51 Mo. 39, to the contrary, is: Actions of ejectment, though between the same parties, having the same defenses, concerning the same title and possession, and in all re-

spects similar in their facts, may be maintained *ad infinitum*, so long as equitable defenses are not interposed and ruled upon, thereby converting the whole proceeding into an equitable one, and thus making the adjudication binding. *Kimmel v. Benna*, 70 Mo. 52; *Ekey v. Inge*, 87 Mo. 493; *Avery v. Fitzgerald*, 94 Mo. 207, 7 S. W. Rep. 6; *City of St. Louis v. Lumber Co.*, 98 Mo. 613, 12 S. W. Rep. 248. For this cause it is that when two or more ejectments are brought, and decided in favor of the defendant, he, in order to prevent being further harassed by a litigious adversary, may maintain his bill of peace, and thus put a stop to oppressive litigation. *Primm v. Raboteau*, 56 Mo. 407. But, if a judgment in ejectment is not a bar to another suit of the same sort between the same parties litigant, then it must stand for true that an agreement of facts made for the mere purpose of convenience in having the particular cause tried, which results in such a judgment,—a mere incident thereof,—cannot be a bar. In other words, if the judgment itself does not bind, certainly the admitted facts upon which that conclusion of law is based should be equally inconclusive.

But there is another reason which will be presently given,—a reason of such cogency that it would allow a judgment in an ejectment cause to be regarded as *res judicata*, and a stipulation of parties filed in such a cause deemed equally binding, and yet would deny to the stipulation under discussion any such force or effect. It will have been observed that near the conclusion of that stipulation these words occur: "Archange McDowell died in 1871, intestate, and her husband died in 1864, intestate." From these words the inference was drawn in the *Sutton-Casseleggi* cause that Archange McDowell was a *feme covert* in 1861, and this inference was quite natural. But it must not be forgotten that it is of the very essence of all estoppels, especially where the matters relied on to estop are committed to writing in the form of a court paper, that, as they are intended to preclude a man from alleging the truth, they must be certain to every intent, and are not to be sustained by argument or inference. There must be a precise affirmation, to have this effect. *Co. Litt.* 352b; *Vin. Abr. tit. "Estoppel," A 2*; 4 *Kent's Comm.* 261, note; *Bigelow, Estop.* (3d Ed.) 302, 311, 312; *Best, Ev. (Chamberlayne.)* 527; *Pelletreau v. Jackson*, 11 *Wend.* 110; *Jackson v. Allen*, 120 *Mass.* 64; *Carver v. Jackson*, 4 *Pet.* 83. And the reason given for the necessity of an estoppel being certain to every intent is: "For no one shall be denied setting up the truth unless it is in plain and clear contradiction to his former allegations and acts." 1 *Greenl. Ev.* § 22. In the stipulation aforesaid, it will be noticed that there is no "precise affirmation" that Archange McDowell was a *feme covert* at the time of her husband's death, in 1864. It is a mere matter of inference or argument that such must have been the case. This being so, there

was no estoppel in the present instance, so that the court below very properly admitted evidence to show that Archange had been divorced from her husband in 1860, and consequently was a *feme sole* when she executed the deed of trust which, being foreclosed in 1862, swept away all of her interest, to-wit, 12-48, being $\frac{1}{2}$ of that derived from Allard. This conclusion gives the successor in title of Pauline Dalton, Abbie Dodd, an indisputable right to 32-48 of the entire title, which was the quantity awarded to her by the decree of the circuit court. And this conclusion also deprives Sutton, the plaintiff in the ejectment suit, and trustee for William P. Hill and plaintiff in this proceeding, of 9-48 of the title he was supposed to have acquired by deed in 1873 from three of the four children, heirs of Archange, who by reason of their mother being a *feme sole* in 1861, got nothing from or of the Allard title except what they obtained from their grandmother's will, to-wit, 6-48 of the title devised by her, and leaving 2-48 thereof outstanding in John B. A. McDowell, also the child and heir of Archange, who did not join in the ejectment suit instituted in 1873 by Sutton, to whom the trial court awarded the said 6-48 in his capacity as trustee, and awarded to William P. Hill 2-48 of the title in his individual capacity; he having purchased and acquired by deed the interest of John B. A. McDowell in the premises on the 15th day of August, 1883, which, as already stated, was only 2-48 of the title.

The rights of all the parties to this proceeding were adjusted and finally settled in the lower court, save those of Sutton, the plaintiff and trustee in this proceeding of William P. Hill, and William P. Hill in his own behalf; and they have appealed to this court, and so has Abbie Dodd. Hill appeals from the allotment to Abbie Dodd. Sutton does the like; and Abbie Dodd appeals from the allotment to Hill, claiming that to her belong the 2-48 which Hill obtained by the decree below. There is no question made by any of these appellants, whether plaintiff or defendants, as to the other shares distributed by the said decree, which, in addition to those already mentioned, awarded to E. C. Dameron the 4-48 formerly held by W. C. Jamison, to Paul, Charles, Mark, and Joseph Robidoux, children of Laurent Robidoux, each 1-48, thus filling out the requisite number of shares, and completing the integer of title. So that the point to be considered is whether the claim of John B. A. McDowell was barred by limitation before the institution of this equitable partition, which occurred the 30th day of January, 1884. From the conclusion already announced, John B. A. McDowell took nothing from his mother, Archange, and only his proportionate part of the $\frac{1}{2}$ of $\frac{1}{2}$ which his grandmother devised by her will to Archange's children, being 1-6 or 3-48 of the whole title; but, as there were four children among whom these shares were to be divided, he, of course, was only entitled to $\frac{1}{4}$ of that

1-6, equal to 2-48. But not only did he take no part in the Sutton-Casseleggi litigation begun on the 2d of November, 1878, but, as already stated, he did not make conveyance of his interests to William P. Hill until August 15, 1883. The record in the Sutton-Casseleggi Case was read in evidence by both parties in the case at bar, from which it appears that John Dalton took the exclusive and adverse possession of the premises, as the owner thereof, on May 1, 1862, receiving all the rents therefrom, and dying in 1864. His wife, Pauline, as his successor in title, continued such adverse possession in the same manner certainly until the cause was tried, in 1876; and no writ of restitution was awarded therein until after the return of that cause, when such a writ issued, and Sutton was put in possession on January 30, 1884, of the 15-48 title adjudged to him by the second judgment of the circuit court under the mandate of this court. How much longer she actually remained in possession after the first judgment in the circuit court, in 1876, in favor of Sutton, for 6-48 of the title, does not appear, nor is it material to know; for a possession of such a duration as has been mentioned was sufficient to confer a title on Pauline Dalton as against any one not a party to the ejectment suit. But there were some other considerations to be adverted to presently on this point. The agreed statement shows that all of the children of Archange were of age in 1861; but, taking, as they did, solely under the will of their grandmother, Rosalie, and she having leased the premises on the 1st of May, 1850, for the term of 15 years, to Little, of course his lease would not expire until May 1, 1865, and the rights of Archange's children would be subordinate to the lease. Therefore the statute would not run against them, though of age in 1861, until the expiration of the lease, May 1, 1865. This was so ruled in the Sutton-Casseleggi Case. So that from that period on to some time in 1876 the statute would run as to any one not asserting his rights to the premises during that period; and this was the attitude of John B. A. McDowell, under whom, as before stated, William P. Hill claims. This claim must, therefore, be ruled as barred.

The position is, indeed, taken by counsel, that, though McDowell was not a participant in the ejectment litigation, yet that the decision therein in favor of Sutton as the grantee of the other heirs of Archange McDowell operated as much in favor of the heir not conveying as in favor of those who did; that, unless all were barred, none were. This position, however, is untenable. In *Keeton's Heirs v. Keeton's Adm'r*, 20 Mo. 530, it was recognized that one or more parties having interests in common may be barred while the others are not, though it was also ruled that those not barred could not unite in actions with those who were. Owing to a change in the statute, however, so far as concerns real estate, no matter how many parties join

in an action of ejectment, some may recover and others not, according to the evidence adduced. Some may be barred and others not. *Rev. St. 1879, § 2249; Miller v. Bledsoe*, 61 Mo. 96. We therefore hold that J. B. A. McDowell being barred by the statute, Hill, as to the 2-48, was barred also, and that in consequence thereof those shares accrued to the benefit of John Dalton and those claiming under him, in whose favor the statute had run. For this reason, to Abbie Dodd should also have been awarded the shares aforesaid, thus giving to her 34-48 of the shares in controversy.

A single point remains for discussion. It is this: The lower court, in its decree, charged E. C. Dameron's 4-48 of the title derived from William C. Jamison with the amount of the rents collected by Jamison on the entire property between 1878 and 1884, and appropriated to his own use, on the ground that, having purchased said shares with knowledge of such conversion, he bought subject to such charge, which the court by its decree would enforce. This portion of the decree it is unnecessary to discuss, because Dameron does not appeal; but it was insisted that not only should the charge already mentioned be enforced against Dameron's interests, but that, in addition thereto, such shares should be charged with taxes which Jamison, having the rents in his hands, should have paid, but failed to pay. The trial court refused to sanction this claim, and we have been presented with no reasons, and cited to no authorities, showing why we should sanction it; and we refuse to do so. For the error aforesaid we reverse the decree and remand the cause, with directions to proceed in conformity to this opinion. All concur but BARCLAY, J., not sitting.

GAVEN v. ALLEN.

(*Supreme Court of Missouri. March 22, 1890.*)

WILL—CONSTRUCTION—FOREIGN WILL.

1. A testator devised his property to his wife, providing, however, that in case of her remarrying, it should be divided among his children. She was empowered to act, as to the sale of his property, "as she may think best for the benefit of herself and my children." *Held*, that the will gave her power to convey a perfect title in fee.

2. *Rev. St. Mo. 1879, §§ 5992, 5993*, providing for the filing of a copy of a will under which one claims property in the state, apply to a will probated in a foreign country as well as to one probated in another state.

Appeal from St. Louis circuit court.

Gist Blair, for appellant. *Leonard Wilcox*, for respondent.

BLACK, J. Anthony Gaven, a citizen of Great Britain, residing in Ireland, died testate in September, 1880, being then the owner in fee of the parcel of real estate now in question, which is situate in the city of St. Louis, in this state. The will was probated in Ireland, and a copy thereof, and of the probate, recorded in the city of St. Louis. The plaintiff is the widow of the testator

and claims the property by the will of her husband. She sold it to the defendant; and this is a suit brought by her, as vendor, for the specific performance of that contract. The case is here by appeal from the judgment of the circuit court sustaining a demurrer to the petition; and the questions are whether by the will the plaintiff has a fee-simple, absolute title; and, if not, then whether the will gives her power to convey a perfect title in fee.

The will, omitting formal parts, is as follows: "I devise unto my dear wife, Ellen Gaven, all my estate, right, title, and interest in my two houses and farm of land at present occupied by me under lease from the Marquis of Sligo. I also devise unto my said wife, Ellen Gaven, all my estate, right, title, and interest in Calf island and Derinish island, * * * county of Mayo. I also bequeath unto my said wife, Ellen Gaven, all my cattle, horses, sheep, and farming implements which may be on my said lands at the time of my death. And my will is, and I desire, that if my said wife, Ellen Gaven, should happen to get married at any time after my death, the above-mentioned property, or any money or property hereafter mentioned, shall be divided, share and share alike, between all or any of my children then living; and, as to the rest, residue, or remainder of my property, whatsoever or whosoever the same may be, and not hereinbefore given and disposed of, after payment of my just debts, funeral expenses, and the expense of providing this, my will, I give and bequeath unto my said wife, Ellen Gaven. And I do hereby constitute and appoint my said wife, Ellen Gaven, and my dear brother, Thomas Gaven, (at present in the United States of America,) executrix and executor to this, my will. And I also constitute and appoint my said wife and brother guardians of my dear children. My will is, and I do desire and hereby direct, that my said wife, Ellen Gaven, shall or will not dispose of any of my aforementioned fee-simple and leasehold property without the written consent to same of my brother, Thomas Gaven, so long as he survives; but in case of his death, then I desire that my said wife shall act, as to the sale of my said property, as she thinks best for the benefit of herself and my children."

1. The clause in this will which declares that, if the wife of the testator should happen to get married, then the above-mentioned property, or any money or property hereafter mentioned, shall be divided among his children, applies alike to the property previously mentioned and of that covered by the residuary clause. Unless this is so, the words "or any money or property hereafter mentioned" must be disregarded. The intention of the testator is too plain to admit of any question. The plaintiff acquired the property now in question under and by virtue of the residuary clause, and she holds it subject to the qualification that she remains unmarried.

She has a fee which may continue for ever. Still, it will cease, and the property pass to the children, upon her marriage. In short, she has a base or qualified fee, and no more. 2 Bl. Comm. 110; 4 Kent. Comm. 9.

2. With this result, the question arises whether the plaintiff has the power, under the will, to convey a title freed from the qualification attached to it in her hands. The testator says: "My will is, and I do desire and hereby direct, that my said wife, Ellen Gaven, shall or will not sell or dispose of any of my aforementioned fee-simple and leasehold property without the written consent to same of my brother, Thomas Gaven, so long as he survives; but, in case of his death, then I desire that, my said wife shall act, as to the sale of my said property, as she thinks best for the benefit of herself and my children." This sentence follows the residuary clause, and applies to the devise made by that clause as well as to the property previously mentioned. That the testator intended to confer upon his wife a power of sale is clear, and it is equally clear that this power extends to all of his leasehold and fee-simple property. There is room for saying that it extends to all of the property devised, and that the consent of Thomas was only required in case of a sale of the fee-simple or leasehold property; but we have no occasion to discuss that question. Thomas is dead, so that full force and effect must be given to the words: "Then I desire that my said wife shall act, as to the sale of my said property, as she thinks best for the benefit of herself and my children." The claim of the defendant is that these words only give her a right to sell such an estate as she possessed, but it is our opinion the claim is not well founded. In *Brant v. Iron Co.*, 93 U. S. 327, the testator gave to his wife all of his property, real and personal, "to have and to hold during her life, and do with as she sees proper before her death." It was ruled that a conveyance made by the wife could pass no more than her life-estate. The rule as there and in other cases stated is that where a power of disposal accompanies a bequest or devise of a life-estate the power is limited to such a disposition as a tenant for life can make, unless there are words clearly indicating that a larger power was intended. This statement of the rule shows that all depends upon the intention of the donor. Kent says: "No formal set of words is requisite to create or reserve a power. It may be created by deed or will, and it is sufficient that the intention is clearly declared. The creation, execution, and destruction of powers all depends on the substantial intention of the parties; and they are construed equitably and liberally in furtherance of that intention." 4 Kent. Comm. 319. See, also, 1 Sugd. Powers, 118; *Owen v. Switzer*, 51 Mo. 328. Now, it is to be observed that the devisee in this case has more than a life-estate. She has a qualified fee. The testator, in giving to the wife a power of sale, had in mind the

welfare of both wife and children; for he says she shall act, as to the sale of his property, as she thinks best for the benefit of herself and the children. He evidently designed that, if she found it best to sell, then she should make to the purchaser a perfect and complete title. To say that she can only convey to the purchaser a qualified fee is, in our judgment, to thwart and defeat the intention of the testator. The common-sense reading of the will is that he intended to give her the power to make as perfect and complete a title as he had. The defendant has no grounds for saying the plaintiff cannot make him a perfect title.

3. It is suggested that sections 3992 and 3993 apply only to wills proved up in one of the states of this Union, and not to a will probated in a foreign country; but we are of a different opinion. On this petition, we must assume that there has been a compliance with these sections. Until there has been a compliance with these sections, and the will proved anew in this state, it is worthless as a muniment of title to real estate located in this state. *Keith v. Keith*, 97 Mo. 224, 10 S. W. Rep. 597. The judgment is reversed, and the cause remanded. All concur.

CRESCENT MANUF'G CO. v. N. O. NELSON MANUF'G CO.

(*Supreme Court of Missouri. March 22, 1890.*)

CONTRACT—CANCELLATION—DAMAGES.

1. A contract for the manufacture of barbed wire by plaintiff for defendant which provides that "any judicial or legal interference shall act as a cancellation of this contract, if either party so desire," is not canceled by the mere fact that an action was brought to enjoin defendant from selling the wire, but that it was necessary for defendant to give notice of his intention to cancel it on account of such suit.

2. A refusal on the part of defendant to go on with the contract because of alleged excessive and deceptive weights would not be an exercise of the right of cancellation reserved in the contract.

3. Where defendant refused to go on with the contract, and to furnish wire to be manufactured as provided by the contract, plaintiff's measure of damages is the difference between the contract price, and the cost of manufacture on the minimum amount of wire defendant agreed to furnish during the unexpired term of the contract.

4. It is no defense to plaintiff's action for breach of the contract that he might have made a contract with another party on equally as good terms.

5. Where a suit is based on two causes of action, one a contract to manufacture certain articles, the other a running account, the insertion in the count on the latter of certain items which might have been included in the count on the contract is not ground for reversal, even if properly objected to, as it cannot prejudice defendant.

Appeal from St. Louis circuit court; W. H. HORNER, Judge.

Taylor & Pollard, for appellant. *Draffen & Williams, Fisher & Rowell*, and *W. B. Horner*, for respondent.

BLACK, J. Plaintiff and defendant are corporations organized under the laws of this state. The suit is in two causes of action.

The first seeks to recover damages for a breach of the following contract: "December 27, 1883. We propose to manufacture for Nelson Manufacturing Company 5,000 pounds of barbed wire per day, commencing January 1st, 1884, and to continue to March 1st, 1884; and from March 1, 1884, to January 1, 1885, 10,000 to 15,000 pounds per day,—all at fifty cents per one hundred pounds,—we to furnish all material, except wire and reels, which they are to furnish, delivered at our factory. We agree to sell to no other St. Louis dealers or manufacturers. Any judicial or legal interference shall act as a cancellation of this contract, if either party so desire. We agree to return in barbed fence wire an amount equal to the number of pounds plain or galvanized wire supplied us. Tare each reel to be five pounds. CRESCENT MANUFACTURING COMPANY. HORACE STONE, Manager. Accepted. N. O. NELSON MANUFACTURING CO. By J. B. CASE, Secretary."

The breach alleged is that defendant refused to furnish the plaintiff with wire from and after the 11th July, 1884, and thereafter refused to comply with the terms of the contract. The second cause of action is for a balance due on a running account. The answer, besides a general denial, sets up three separate defenses and a counter-claim; but, as the case is presented here, it will only be necessary to notice the third defense. In that the defendant sets out that part of the contract which provides that any judicial or legal interference shall act as a cancellation, if either party so desires, and states that in the latter part of May, 1884, suit was instituted in the circuit court of the United States for the eastern district of Missouri by the Washburn & Moen Manufacturing Company and others against the defendant, to restrain it from selling barbed wire; the bill alleging an infringement of certain letters patent, and that the suit was such a legal interference as justified the cancellation of said contract; and defendant determined to cancel the same as soon as the wire it then had on hand was disposed of, and so notified the plaintiff. These matters were put in issue by the reply. The case was tried before a referee, who found for the plaintiff on both causes of action, and assessed the damages on the first at \$4,056.30, which amount was reduced by a *remittitur* to \$3,739.36, and on the second in the sum of \$352.75, adding interest to the last-named amount. The other facts in the case will be stated in connection with the questions to which they relate.

1. The second cause of action is, as we have said, based upon a running account, with items on both sides. From the exhibit filed therewith, many of the items appear to be for spools of wire at 50 cents per 100 pounds, and other items are for cartage, and for money laid out in the purchase of reels and plain wire. On the hearing before the referee, it was admitted that the items for spools of wire were for barbing wire under

the terms of the contract, and thereupon the defendant asked the referee to exclude all the evidence relating to these items, because the petition did not state a cause of action for work and labor done. The point is now made that the plaintiff had no right to split up its cause of action into two counts, and that the referee erred in not requiring defendant to elect upon which cause of action it would proceed to trial. We are unable to see how any such a question is before us on this record. The objection made before the referee does not even suggest the proposition that plaintiff had improperly split up its cause of action, and the referee does not appear to have ever passed upon, and to have been asked to pass upon, any such a question. Besides this, the objection actually made before the referee was obviated by an amendment of the petition by interlineation. There were items in the second cause of action which could not have been recovered by declaring on the contract, because they do not come within its provisions, but are for money laid out and expended by plaintiff at the request of defendant. The plaintiff could not, therefore, have been required to elect as to which cause of action it would proceed to trial. These items for barbing wire, and possibly some of the other items of the account, might have been included in the count based upon the written contract; but we are unable to see that defendant was in the least prejudiced by including them in the cause of action based on the running account, and, if a timely and proper objection had been made and overruled, it would be no ground for reversal.

2. The suit of the Washburn & Moen Manufacturing Company, to restrain defendant from selling barbed wire because of certain letters patent, was commenced on the 19th May, 1884. Though the bill prayed for injunctive relief, no temporary injunction was issued, and what the final decree was, if any was ever entered, does not appear from the record before us. The referee's conclusions are that the institution of that suit justified the defendant in canceling the contract, but that it was necessary for defendant to give plaintiff notice of such intention and determination; and he finds the fact to be that defendant gave no such notice, and he finds that defendant waived this provision of the contract by failing to give prompt notice, and by continuing to furnish plain wire, and receiving and selling barbed wire after the suit had been commenced. The defendant insists that these conclusions of law are erroneous, and that the findings of the facts are not supported by the evidence.

The evidence shows that defendant did not furnish plaintiff any plain wire after the 18th June, 1884, and the last item for barbed wire turned over by the plaintiff to the defendant is 42 spools on the 28th June of that year. The proof, however, shows that, after the commencement of the patent injunction suit in May, the defendant turned over to plaintiff 115,000 pounds of clear wire, and plain-

tiff barbed and turned over to defendant about 800,000 pounds. The evidence for the plaintiff shows that in June, 1884, Mr. Chase, the defendant's secretary, told an officer of the plaintiff that the patent suit was taking up his time, but that it amounted to nothing. It appears that as early as May of that year Mr. Chase, for defendant, demanded of plaintiff large deductions from accounts rendered, because of alleged excesses in weight of the reels over the tare agreed upon, and for excessive weight of barbed wire. The plaintiff refused to make the demanded allowances, and the officers of the plaintiff say that it was because they refused to make these allowances that the defendant refused to furnish any more wire. This alleged deception in the weight of the reels is set up in defendant's answer as a justification for refusing to go on with the contract, and the alleged excessive charges, amounting to about \$2,000, are set up in the counter-claim, which issues were found against the defendant by the referee. In May, 1884, a corporation known as the "American Barbed-Wire Company" was organized, for the purpose of barbing wire. The incorporators were the employees of the defendant corporation, and another person who had no means. The cash capital of \$5,000 was furnished by Mr. Nelson, the president of defendant, and he leased in his own name the building in which the work of the new corporation was carried on, though the new corporation paid the rent. The president of the new company continued in the services of the defendant, and transacted much of the business of the new corporation at the defendant's office. This new company commenced and continued to barb wire for defendant. In short, the business which the plaintiff had been doing for the defendant was turned over to the new company.

We shall, with the referee, assume that the patent suits (for there was one against the plaintiff) furnished a sufficient ground for canceling the contract on that clause, which says: "Any judicial or legal interference shall act as cancellation of this contract, if either party so desires." The plaintiff and the defendant knew that their right to manufacture and sell this barbed wire was questioned, and hence the above stipulation. It gives either party an option to terminate the contract, but to say that either party could exercise that right by some uncommunicated determination is manifestly unjust, and is not the true meaning of the contract. To terminate the contract on that ground it was necessary for the party intending so to do to give the other party clear and unequivocal notice. If there is any evidence in the record tending to show such notice, it is not pointed out in the abstracts. We agree with the referee that no such notice was ever given.

But it is argued that plaintiff had notice of defendant's refusal to go on with the contract. The evidence shows clearly and beyond all doubt that the refusal to go on with

the contract was by defendant placed on the ground of alleged deceptive and excessive weights, and on no other ground. But we cannot refrain from coming to the conclusion from the evidence, the substance of which has been given, that the real reason was that defendant concluded to barb its own wire, and that the new corporation was created for that purpose. The facts stand out too boldly to admit of fair contradiction. But a refusal to go on with the contract, for either or both of these reasons, was not an exercise of any right of cancellation reserved in the contract. The defendant never availed itself of that right by giving notice. There was no cancellation of the contract. The result reached by the referee on this branch of the case is right, without regard to any question of waiver.

3. The evidence shows and the referee found that plaintiff was at all times ready, able, and willing to execute the contract. The defendant having refused to furnish any more wire, the plaintiff's mill closed in July, but resumed work in September. The defendant offered evidence, in mitigation of damages, tending to show that plaintiff could have made other engagements for barbing wire for at least part of the unexpired time of the contract at the same prices which the defendant agreed to pay; but the referee, in the end, excluded the evidence. The referee took the lowest amount of wire specified in the contract to be furnished daily, and deducted the cost of barbing the same from the contract price, and allowed the difference for the unexpired time as damages on the first count, and in this it is insisted he erred. In the recent case of *Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. Rep. 210, we had occasion to consider a like question. In that case the plaintiff agreed to furnish the timber, and saw and deliver to defendant at a specified place a quantity of lumber of a particular character, for named prices. The defendant refused to complete the contract, after it had been partly executed; and, as to lumber not yet sawed, we held the measure of damages was the difference between the contract price and the cost of furnishing the logs, manufacturing the lumber, and delivering it at the designated place,—thus allowing the plaintiff to recover for any profits it might have made had the contract been fully performed on both sides. The only substantial difference between this case and that one is that here the plaintiff was to manufacture furnished plain wire into barbed wire, and there plaintiff furnished all of the material. This difference does not affect the measure of damages. The present case is like that of *U. S. v. Speed*, 8 Wall. 78, where the United States agreed to furnish the hogs, and Speed agreed to slaughter them, and the same rule was applied. The difference between the contract price and the cost to plaintiff of doing the work is the true measure of damages in this and like cases. *Devlin v. Mayor*, 63 N. Y. 25; *Hinckley v. Steel Co.*, 121 U. S. 272, 7

Sup. Ct. Rep. 875; *Nilson v. Morse*, 52 Wis. 254, 9 N. W. Rep. 1. Where a servant is wrongfully discharged during his term, and lays his damages at the contract wages for the balance of the term, it is generally held that evidence may be introduced in mitigation of damages of what he might have earned in the interim by using reasonable efforts to procure other employment. So, in general, where a party has been injured or damaged by a breach of a contract, he should do whatever he can to lessen the injury. Many cases asserting these principles of law are cited by the defendant, but they have no application to the case in hand. The plaintiff owned its factory, and the machinery and the contract constituted no such relation as that of master and servant. It had the right to make as few or as many other contracts as it saw fit while executing the contract with defendant, and it is entitled to the profits which it might have made on this particular contract. The evidence offered in mitigation of damages was properly excluded. We see no reason for disturbing the judgment in this case, and it is therefore affirmed.

BABOLAY, J., not sitting. The other judges concur.

STATE *ex rel.* TRAMMEL, Collector, etc., v. HANNIBAL & ST. J. R. Co.

(Supreme Court of Missouri. June 10, 1889.)

TAXATION—EXEMPTION—RAILROAD COMPANIES.

1. Acts Mo. 1847, p. 157, gives to defendant company all the privileges and immunities which were granted to the Louisiana & Columbia Railroad Company by Acts 1836-37, p. 252, which provide, *inter alia*, that "the stock of said company shall be exempt from all state and county taxes." Act Sept. 20, 1852, granting lands to defendant, and accepted by it, provides that it shall "pay into the treasury of the state a sum of money equal to the amount of state tax on other real and personal property of like value for that year, upon the actual value of the road-bed * * * and other property of said company," etc. Held, that this act in no way affects defendant's charter exemption from taxation for county purposes.

2. A tax levied to pay the bonds of the county, given by it for stock in a railroad company, is a county tax; and this, though the bonds can only be paid out of the tax levied for that special purpose.

3. Though Act Mo. March 23, 1868, known as the "Township Aid Act," has by this court been held to be unconstitutional, yet, as the federal courts uphold the act, bonds issued under it are proper subjects of compromise, and a tax levied to pay such compromise bonds issued under 2 Rev. St. Mo. 1879, p. 848, is valid.

4. A local tax levied only on property within the limits of a particular township to pay township funding bonds is not a "county tax," within the meaning of defendant's charter, (Acts Mo. 1847, p. 157,) which exempts it "from state and county taxes."

5. Under Rev. St. Mo. 1879, §§ 6371, 6373, which make it the duty of the state board of equalization, after assessing a railroad in its entire length, to apportion the aggregate value to each county according to the ratio which the number of miles in each county bears to the whole number of miles in the state, an assessment of a railroad by a county court for state, county, township, and school taxes need not describe the property other than as so many miles of road of a given value; and a peti-

tion, in a suit to recover these delinquent taxes, which sets forth the number of miles of road owned by defendant in a designated county, is sufficient, as it need not be more specific than the assessment, though the form for a petition prescribed by section 6889 contemplates a description of the road.

6. Neither need the petition state the number of miles of road owned by defendant in a designated township, where it states the amount of the railroad tax levied against defendant in that township; nor, so far as the validity of the township tax is concerned, is it a matter of any importance whether or not the county had adopted township organization.

7. An order of the county court levying township taxes for prior years, which recites that special taxes to pay the bonds of a designated township had been omitted for those years, and which then orders the clerk of the county court to extend the taxes on defendant's property in said township at a certain rate, "said rate being the same as extended upon other property in said township for said years," is a sufficient levy of the tax, as well as *prima facie* evidence both that the taxes for the designated years had been omitted, and that the rate for those years was the same as that levied on defendant's property.

8. Where the county court opens a regular term, and adjourns from day to day, or for a number of days, the adjournments are a part of the regular term, within the meaning of Rev. St. Mo. 1879, § 6879, which provides that taxes against railroad property are to be levied "at a regular term of said court, if in session at the time."

9. A levy of a tax by the county court to pay township funding bonds gives rise to a presumption that a preliminary order had been previously obtained from the circuit court directing the county court to levy the tax, as provided by Rev. St. 1879, § 6799.

On motion for rehearing. Former opinion, 11 S. W. Rep. 746.

Strong & Mossman, for appellant. *B. R. Dysart, John F. Mitchell, and Sears & Guthrie*, for respondent.

BLACK, J. This is a suit by the collector of Macon county, in the name of the state, to recover state, county, school, municipal, and township taxes for various years. The defendant made a tender of the amount it believed to be due for state, school, and city and town taxes, which was accepted as to the school taxes; and the court found the amount tendered for state, city, and town taxes to be the amount due. The tender was deposited with the clerk of the circuit court. The plaintiff impliedly conceded that the judgment is erroneous in so far as he recovered what are called "Missouri & Mississippi Railroad Taxes" for the years 1868, '69, and '70; so that the taxes still in dispute are taxes of the last-named description for the years 1871, '72, '77, '78, '79, '80, '82, '83, '84, and '85, amounting to about \$3,000; and what are called "Omaha Railroad Taxes," levied in Hudson township, for the years 1882 to 1885, both inclusive, amounting to \$680. These taxes were all levied on the assessed value of the defendant's property, as made out and certified to the county court by the state board of assessment and equalization of railroad property. The following admissions were made on the trial of this case: That the Missouri & Mississippi Railroad tax, mentioned in the petition, was a tax levied for

the purpose of paying the interest and principal of certain bonds issued by the county court of Macon county. That said county, in the year 1867, subscribed for 175 shares of the capital stock of the Missouri & Mississippi Railroad Company, and in 1870 said court again subscribed for 175 shares of the capital stock of said company; and that said bonds were issued by said county in order to pay for the stock of said company issued by said county; and that said county became a stockholder in said company, and took part in the meetings and deliberations of the shareholders as such. That the tax described in the petition as the "Omaha Railroad Tax," assessed and levied in Hudson township, was a tax for the purpose of paying the principal and interest on bonds of said county issued by the county court, in pursuance of an act approved March 23, 1868. That under said act the county court had been petitioned by the tax-payers to order an election in relation to subscribing for the stock of the St. Louis & Omaha Air Line Railroad, a corporation organized under the general laws of this state. That an election had been held, and the county court had subscribed \$40,000 of bonds in the name of Hudson township. That the bonds which the tax is levied to pay are funding bonds to take up the above-named bonds; said funding bonds being issued under the general statutes of this state.

1. It is deemed best to notice here some preliminary questions. The defendant insists that the circuit court should have sustained its objection to the introduction of any evidence, because the petition is defective, in this: that it gives no sufficient description of the defendant's property; and in this: that it is not stated that Macon county had adopted township organization, or that there was such a township as Hudson township. There are four counts in the petition, but it will be sufficient to notice the first. It is alleged that defendant was the owner of "thirty-one and 15-100 miles of railroad bed, including side tracks, buildings, and other property in said Macon county of the total value," etc.; "that there were legally assessed and levied against said property for 1884, for state, school, municipal, and other purposes, the aggregate sum of \$3,485.97; that the taxes so assessed and levied thereon are now due and unpaid, * * * for Omaha Railroad taxes, levied and assessed in Hudson township, in said Macon county, the sum of \$161.32," etc. Section 6889, Rev. St. 1879, gives a form of petitions in these tax-suits, and the form contemplates a description of the taxed property. But, in determining what will be a sufficient description, we must look to other sections of the same law. It is made the duty of the state board of equalization to assess the railroad in its entire length, including branches, double and side tracks, depots, water-tanks, turn-tables, engines, and cars, and to apportion the aggregate value to each county, township, city, or incorporated town according to the ratio which the num-

ber of miles in such county, township, city, or incorporated town bears to the whole length of the road in this state.¹ It is apparent that the assessment in each county must be according to the apportioned mileage; and the law contemplates that the property which comes within the jurisdiction of the state board of equalization will be assessed by designating the number of miles of road in each county, township, and municipal corporation. The assessment need not, therefore, describe the property otherwise than as so many miles, of a given value, with the proper proportion of the value of the rolling stock added. The petition need be no more specific than the assessment; and it follows that the description of the property given in the petition in this case is sufficient, for it sets out the number of miles of road in Macon county, with the assessed value of road and rolling stock. It is true that the number of miles in Hudson township is not stated in the petition, though it is in the assessment; nor does the statutory form of the petition require such a statement. The petition does state the amount of the railroad tax levied in Hudson township on defendant's property; and that is sufficient. So far as the validity of this township bond tax is concerned, it is a matter of no importance whether Macon county had or had not adopted township organization.

2. On behalf of the defendant, it is next insisted that the judgment of the circuit court is erroneous in so far as defendant is charged with Missouri & Mississippi Railroad taxes, because they are county taxes; and that the defendant is, by its charter, exempt from the payment of all county taxes. The plaintiff insists that these are not county taxes, within the meaning of the exemption clause of the defendant's charter; and, if it may be called a "county tax," still the legislature had the power to levy such a tax on the defendant's property, and that it exercised that power in passing article 8, c. 145, Rev. St. 1879. The act incorporating the Hannibal & St. Joseph Railroad Company gave to it all the privileges, rights, and immunities which were granted to the Louisiana & Columbia Railroad Company. Acts 1846-47, p. 157, § 4. The twenty-fourth section of the act incorporating the last-named company provides: "And the stock of said company shall be exempt from state and county taxes." Acts 1836-37, p. 252. The act of September 20, 1852, granting lands to the defendant, which were received by the state under an act of congress to aid in the construction of certain railroads, provides that the defendant shall each year "pay into the treasury of the state a sum of money equal to the amount of the state tax on other real and personal property of like value, for that year, upon the actual value of the road-bed * * * and other property of said company, which shall be as a consideration to the state for the execution of the

trust reposed in the state by an act of congress," etc. This act of 1852, which was accepted by the defendant, modified the charter exemption so that the defendant thereafter became liable for taxes for state purposes, the same as like corporations organized under the general law. State v. Railroad Co., 60 Mo. 143. But it has been constantly ruled by this court that the property of the company could not be taxed for county purposes, because the act of 1852 in no way affected the charter exemption as to such taxes. Railroad Co. v. Shacklett, 30 Mo. 550; State v. Railroad Co., 37 Mo. 266; Livingston Co. v. Railroad Co., 60 Mo. 516. Some language used in the earlier of these cases has led to the argument in this case that the former statutes were not broad and comprehensive enough to include the property of defendant in the subject of county taxation, and that the judgments in those former cases should be regarded as standing on that ground. The case last cited was a suit to recover a county tax and a school tax levied and assessed under the act of March 10, 1871, (Acts 1871, p. 56.) The first section of that act is as broad and comprehensive as language could make it. It is as broad and comprehensive as article 8, c. 145, Rev. St. 1879, upon which the plaintiff relies. This court then, speaking of the county tax there in suit, said the exemption of the road from county taxes had never been rescinded by the act of the parties, and that the demurrer to so much of the petition as claimed a recovery for county taxes was properly sustained. It cannot be, and we believe is not, claimed that the legislature or any constitutional convention could repeal the exemption without the defendant's consent. If there has been any act on the part of the defendant, such as a sale or consolidation, that can have the effect of depriving the defendant of its charter exemption from the payment of county taxes, that act is not made to appear by this record. There is nothing left for the court to do but to say the defendant is not liable for county taxes.

But the plaintiff says these Missouri & Mississippi Railroad taxes are not county taxes, within the meaning of the defendant's charter exemption. The county became a stockholder in that railroad company, and the bonds of the county were issued to pay for the stock. No other subdivision of the state is under any obligation to pay the debt thus incurred; and, if the tax levied to pay them is not a county tax, then it is difficult to say what kind of a tax it is, when we are speaking of state, county, and other taxes. County taxes are mentioned in the defendant's charter as a class; and the defendant is exempt from the payment of taxes which come within that class. It is true, the thirteenth section of the charter of the Missouri & Mississippi Railroad Company, and under which the bonds were issued, provides for a tax of one-twentieth of 1 per cent. to pay them; but the tax is one levied on all the property in the county not exempt from taxation, and is

¹ Rev. St. Mo. 1879, §§ 6871, 6873.

still a county tax, and cannot be otherwise designated, when speaking of county taxes as a class. The plaintiff places much stress upon a remark made in *Livingston Co. v. Railroad Co.*, 60 Mo. 519, where it is said: "In regard to school taxes, they may be considered as originating since the charter; and therefore nothing was said in it concerning them. Like the municipal taxes of St. Joseph, in *St. Joseph v. Railroad Co.*, 39 Mo. 476, they may be regarded as not within the exemption." We fail to discover anything in these observations which says that the defendant was exempt only from such county taxes as were levied and collected at the date of the defendant's charter. It is a matter of no consequence when the particular tax was first levied. If it is a county tax, the defendant is exempt from the payment of it.

3. The defendant objects to the Omaha Railroad tax on the ground that the act of March 23, 1868, known as the "Township Aid Act," and under which the original bonds were issued, is a void law. This court has held that the act was unconstitutional, in a number of cases. *Webb v. Lafayette Co.*, 67 Mo. 367; *State v. Walker*, 85 Mo. 44, and cases cited. On the other hand, the United States courts, following *Cass Co. v. Johnston*, 95 U. S. 365, uphold the act; and bonds issued pursuant to it are, by those courts, held to be valid obligations. Because of this state of affairs, it was held in *State v. Holladay*, 72 Mo. 499, that such bonds were proper subjects of compromise, under the act of 12th April, 1877. The township bonds now in question are conceded to be funding bonds issued under the general statutes of this state, and, by this, reference must be had to the act of 1879.¹ That act authorizes the various counties themselves, and for any township therein, to make contracts for the compromise, purchase, or redemption of bonds; and the county courts, under the restriction therein stated, may issue new bonds for such purposes. Following the logical result of that case, and of the case of *Dallas Co. v. Merrill*, 77 Mo. 573, it must follow that these new compromise or funding bonds are valid, and the taxes levied to pay them are valid taxes, if not invalid for some other reason.

4. With the result just reached, the defendant still insists that these township taxes levied to pay township funding bonds are county taxes within the meaning of its charter exemption. It does not appear from this record that Macon county has ever adopted township organization; so we have no occasion to speak of township organization laws. Hudson township, so far as this record shows, is simply a geographical subdivision of the county, without any corporate existence. As the defendant's charter only speaks of state and county taxes, it has been held the exemption never did extend to municipal corporation taxes, such as cities and towns, (*City of St. Joseph v. Railroad Co.*, 39 Mo.

477;) nor to school taxes, (*Livingston Co. v. Railroad Co.*, 60 Mo. 518.) School-districts, like municipal corporations, do have a corporate existence; and in this respect they differ from townships. But the tax here in question is local, and levied only on the property in the particular township, and in our judgment was not within the contemplation of the legislature when it exempted defendant from the payment of county taxes. It does not fall within that class of taxes.

5. The order of the county court levying the township taxes for 1882 and 1883 was made on the 2d September, 1884. It recites that the special taxes to pay Hudson township bonds were omitted for the designated years; and it is then ordered that the clerk of the county court extend such taxes on the tax-books of the county on property of defendant in said township at the rate of 20 cents on each \$100 valuation; said rate being the same as extended upon other property in said township for said years. These taxes for the omitted years were levied by authority of section 6879, 2 Rev. St. 1879. The plaintiff did not offer any evidence other than the order itself to show that those years had been omitted. The county court, in making the order, must have found, and in point of fact did find, that they had been omitted; and the recital is at least *prima facie* evidence that they had been omitted. For a like reason it was not necessary for the plaintiff, to make out a *prima facie* case, to introduce the levy for those years made upon property other than railroad property. Until some evidence to the contrary is offered, it must be taken as proved that the rate levied on other property for the same years was 20 cents on the \$100 valuation. The point made that the court did not, by the order, levy any tax, is extremely technical. The order does direct the clerk to extend the specified tax at a specified rate upon the tax-books for the omitted years; and this, we held, was a good and sufficient levy. We find nothing to the contrary in the case of *City of Kansas v. Railway Co.*, 81 Mo. 294.

6. These taxes against railroad property are to be levied after the assessments are returned "at a regular term of said court, if in session at the time; if not, at a special term of said court called for that purpose." Section 6879. When the county court opens a stated term, and adjourns from day to day, or for a number of days, such adjournments are but a part of the regular term, and the tax may be levied at any of these adjourned sessions. The special term mentioned in the clause of the statute just quoted, evidently means a term called pursuant to sections 1207, 1208, Rev. St. 1879; but, when the court adjourns from time to time, the adjourned terms, as they are called, are but parts of the regular term.

It has been suggested in this court that the taxes levied to pay these township funding bonds are void, because it does not appear that the Macon county circuit court ever

¹Laws 1879, p. 47; 2 Rev. St. Mo. 1879, p. 849.

made an order directing the county court to levy a tax to pay them, as provided by the act of March 8, 1879, (Acts 1879, p. 185; 2 Rev. St. 1879, § 6799.) Taxes have been held to be invalid because of a non-compliance with that act in a number of cases. *State v. Hannibal & St. J. R. Co.*, 87 Mo. 236; *State v. Missouri Pac. Ry. Co.*, 92 Mo. 153, 6 S. W. Rep. 862; *State v. Wabash, St. L. & P. Ry. Co.*, 97 Mo. 298, 10 S. W. Rep. 494. But the act has been recently held to be unconstitutional by the supreme court of the United States, so far as concerns bonds issued prior to its passage. *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. Rep. 1190. It is probable that the ruling in that case would not apply to the bonds in question, because they were issued subsequent to date of the act. But, be that as it may, it does not appear whether the circuit court did or did not make the order. The county court is the only court which has the power to levy these taxes; and, when a levy is shown, we are of the opinion it should be presumed that the preliminary order had been procured until the contrary is made to appear.

Other objections are made to these taxes levied to pay township bonds, but we cannot pursue them in detail. We are of the opinion they are not well taken. It follows that the judgment is erroneous as to all the Missouri & Mississippi Railroad taxes, and, as they are separately stated in the judgment, it is not necessary to remand the cause. As to all Missouri & Mississippi Railroad taxes, the judgment is reversed, but in all other respects the judgment is affirmed, and a judgment will be entered here in conformity with what has been said. The costs of this appeal will be taxed against the plaintiff below, respondent here. All concur.

ADAMS v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri. March 23, 1890.)

CARRIERS OF PASSENGERS—NEGLIGENCE.

A passenger aged 67, and in good health, was directed to get off defendant's train, a freight carrying passengers, before reaching his station. His duties requiring haste, he started on beside the train, the roadbed being closely fenced with barbed wire, but soon came to a bridge, to cross which he had to mount a flat-car, as did also another passenger. Reaching the front of the car, and being anxious lest the train might start, he, having first examined the ground, jumped from the coupling outward, with one hand on the car in front, and on landing broke his leg. *Held*, that it was for the jury to determine whether defendant's wrongful act was the proximate cause of the injury. RAY, C. J., and SHERWOOD, J., dissenting.

On rehearing. For former report, see 12 S. W. Rep. 637.

Action by Adams against the Missouri Pacific Railway Company for personal injuries, in which plaintiff recovered judgment for \$10,000, and, on its reversal on appeal, now moves for a rehearing.

T. J. Portis and Adams & Bowles, for appellant. Rayley & Burney, for respondent.

BARCLAY, J. Upon further consideration

of this case on the motion for rehearing, it seems to me that the question whether or not the injury which plaintiff sustained was referable to the wrongful act of defendant complained of as a proximate cause was a proper one to submit to the jury. The facts do not appear to me sufficiently free of doubt on that point to justify the decision of it as a question of law. That is the feature of the case that has given me great difficulty in reaching a conclusion. As to the question of plaintiff's alleged contributory negligence, it seems to me that it was fairly a question of fact in the circumstances here shown. The opinion of Brother BRACE fully states the essential facts, and they need not be repeated now. This brief statement of my conclusions will probably suffice in the premises, since the cause must be retried; all my brethren agreeing that the judgment should be reversed, though not entirely united on the reasons therefor. A majority of the court is now of opinion that upon such reversal the cause should be remanded for further proceedings, and that the motion for rehearing be overruled.

RAY, C. J., and SHERWOOD, J., dissenting. The other judges concur.

WINTER et al. v. ARNOLD et al.

(Supreme Court of Arkansas. April 12, 1890.)

NON-PAYMENT OF TAXES—DONATION BY STATE.

Act Ark. March 14, 1879, which revises the whole subject of donation of farm lands forfeited to the state for non-payment of taxes, and which permits the state to donate such lands to any adult citizen of the United States, "subject to the conditions hereinafter mentioned," but which mentions no condition obliging the donee to pay for improvements on the land, repeals act Ark. Dec. 23, 1840, § 3, (Manuf. Dig. § 4250,) which provides that the donee of improved land forfeited to the state shall pay the person owning the improvement double its value; and one whose land has been forfeited and donated to another by the state, subsequent to the repeal of such act, cannot recover for his improvements. Following *Thomas v. Joyner*, ante, 390.

Appeal from circuit court, Hempstead county; C. E. MITCHELL, Judge.

Action by Sarah Winter and another against Moses Arnold and others to enforce a vendor's lien and foreclose certain mortgages, and to recover double the value of certain improvements on donated land. At the final hearing the court found, as a matter of fact, that said lands were forfeited to the state in 1884 for taxes of 1883, and not redeemed; that the state donated them to the defendant George Arnold on the 30th of June, 1887; and that the lands were not subject to the vendor's lien; and that the act of 1840, for action for value of improvements, had been repealed, and that the plaintiffs cannot recover under the same; and decreed accordingly, dismissing the complaint. Plaintiffs excepted and appealed. Act of December 23, 1840, § 3, (Manuf. Dig. § 4250,) on the subject of the donation of lands forfeited to the state for non-payment of taxes, pro-

vides: "If any one shall obtain such donation to a tract of improved land, he shall pay to the person owning such improvement double the value thereof," etc. Act of March 14, 1879, revises the whole subject of donation of farm lands forfeited to the state, and provides (section 1,) that "the right of the state to all lands, other than town and city lots, which have been forfeited to the state for non-payment of tax, penalty, and costs due thereon, may be donated to any adult citizen of the United States, in tracts not to exceed 160 acres to each applicant therefor: provided, * * * that such donation shall be granted subject to the conditions hereinafter mentioned." The act makes no provision obliging the donee to pay anything for the improvements on the land donated to him.

Smoots, McKee & Arnold, for appellants.

PER CURIAM. Section 4250, Mansf. Dig., was repealed before the appellant's rights attached under his donation deed. *Thomas v. Joyner*, ante, 390. As she relies upon that section for a recovery, her action must fail.

Affirm.

SHUMARD *et al.* v. PHILIPS *et al.*

(Supreme Court of Arkansas. March 8, 1890.)

COURTS—GUARDIAN AND WARD—SALE OF INFANTS' LAND.

1. The fact that a court convened before the time fixed by statute does not invalidate an order made by it on the subsequent rightful convening of the court.

2. Mansf. Dig. Ark. § 3463, authorizes the clerk of the probate court to appoint guardians in vacation, subject to the approval of the court. *Held* that, though no subsequent confirmation of the appointment was shown, the guardian's authority could not be attacked collaterally, where it appeared that she had rendered her accounts to, and had been recognized by, the probate court, as guardian.

3. Gould, Dig. Ark. 184, granting jurisdiction to the probate courts in the matter of the estates of wards, gave no express authority to sell the ward's lands for his maintenance. *Held*, that the general chancery jurisdiction of the circuit court to order the sale of an infant's lands for his maintenance, on the petition of the statutory guardian, was not thereby taken away.

Appeal from circuit court, Sebastian county; JOHN S. LITTLE, Judge.

J. T. Hurley, P. J. M. MacGregory, and Duval & Cravens, for appellants. *B. B. Bryant and Clayton, Brizzolare & Forrister*, for appellees.

COCKRILL, C. J. This is an action of ejectment brought by the appellants. They demand their title to the land in controversy from the government. The appellees assert that the appellants' title was divested by sale under a decree of the Sebastian circuit court, and has come to them through conveyances from the purchasers at the judicial sale. The validity of the decree under which the sale was had is the sole question for our determination. The decree purports to have been entered by the Sebastian circuit court

on the 5th day of November, 1870, upon the petition of the plaintiffs' mother, who claimed to be acting in the capacity of their statutory guardian; they being infants at the time. The object of the petition, which was attained by the decree entered in pursuance of its prayer, was to sell the land in dispute for the support of the infants. The sale took place in January, 1871, and was soon after regularly confirmed. The decree is assailed upon the ground (1) that the court rendering it was not held at the time or place prescribed by law; (2) that the petitioner for the sale was not the statutory guardian of the minors, and had no authority to appear for them, because appointed by a probate court held at a time and place not prescribed by law; and (3) that, in any event, the probate court had exclusive jurisdiction of the estates of the minors, and that the circuit court was without power to order the sale. The argument is that for each of these reasons the decree of the circuit court is *coram non jure* and void, and that the title of the appellants is therefore unimpeached.

The confusion about the time and place fixed by law for the courts to convene comes from that prolific source of evil, the division of a single county into two judicial districts, which was begun in the session of the legislature of 1860-61, when the division of Sebastian county was made. The statute provided for holding probate and circuit courts at Ft. Smith, as well as at Greenwood, the county-seat, and fixed the times for them to convene at each place. For a time the local authorities acted under the belief that the county-seat had been removed by an order of the county court, in pursuance of a vote of the people, from Greenwood to Ft. Smith, and that Ft. Smith was the only legal place for holding courts in the county. During that time the holding of courts at Greenwood was abandoned. See *Patterson v. Temple*, 27 Ark. 202, and *Ex parte Jones*, Id. 349. It was during this time that the orders now questioned were made. The probate judge undertook to hold probate court at Ft. Smith on the day the law prescribed for the meeting of that court at Greenwood, and on that day caused an order to be entered on the records appointing Mrs. Shumard guardian of the plaintiffs; and the circuit court which rendered the decree, upon her petition, for the sale of her children's lands, convened at Ft. Smith, as at the opening of a regular term, at a time not authorized by law. The latter court continued in session, however, adjourning from day to day, until the fifth Monday after the fourth Monday in September, which was the time prescribed by law for the opening of the fall term of the circuit court at Ft. Smith. Acts Feb. 4, 1869; *Ex parte Jones*, supra. When the court convened on that day at the place prescribed by the statute, it was invested with all the judicial power conferred upon it by law. The previous illegal meeting of the officers had no blighting effect upon the subsequent

rightful convening of the court, and its judgments thereafter were as binding as those of the same court at any other regular term. The decree in controversy was rendered after the court had rightfully convened, and while it was legally in session. The question therefore is, had the court jurisdiction to order the sale of the infant's lands upon the petition of Mrs. Shumard?

In answering this question, we are not embarrassed by the appearance of a stranger, as next friend for a minor, invoking the power of the court for the sale of the infant's estate; for, regarding the action of the probate court in ordering the appointment of Mrs. Shumard as a nullity, upon the ground that the order was made when the court was not legally in session, subsequent action had in reference thereto shows that she was clothed with the authority and responsibility of a statutory guardian. The clerk of the probate court at the time indicated, as now, was authorized to appoint guardians in vacation, subject to the approval of the court. Mansf. Dig. § 3462. When letters of guardianship are issued by the clerk, and a bond is filed with him, the person to whom the letters issue is authorized to enter upon the discharge of the duties of guardian; and as was said by Judge WALKER in delivering the opinion of this court in *Knott v. Clements*, 13 Ark. 335, the letters so issued must be regarded as legally granted until it is shown that they have been rejected by the court; the silent acquiescence of the court in the action of the clerk in vacation being taken as confirmation of the letters issued by him, as against collateral attack upon the guardian's authority. In this case the probate court for the Ft. Smith district of Sebastian county was the court having jurisdiction to issue or confirm letters for the guardianship of the plaintiffs; for they were domiciled in that district, and all the property of which they were seised appears to have been situated therein. The letters were issued by the clerk, in the vacation of that court, to Mrs. Shumard, after she had entered into the statutory bond, with sureties. The previous unauthorized action of the judge in ordering her appointment neither added to nor detracted from the rightful action of the clerk in granting the letter. No subsequent confirmation of this grant of letters is shown or disproved; but, conceding that none was had, it appears that Mrs. Shumard rendered her accounts to, and was recognized by, the probate court as guardian. She comes, then, within the rule then laid down in *Knott v. Clements*, and the validity of her appointment cannot be questioned in this collateral attack. *Dodge v. Cole*, 97 Ill. 351.

The question, therefore, is reduced to this: Had the circuit court in 1870 jurisdiction to order the sale of an infant's lands for the maintenance of the infant, upon the petition of the statutory guardian? It does not appear expressly whether the guardian invoked the aid of the common-law or equity powers

of the court in presenting her petition for the sale. But that is immaterial if the circuit court had jurisdiction to grant the relief sought; for, the court being clothed with general jurisdiction at law and in equity, the question is not one of proper procedure, but of power. *Harris v. Townsend*, ante, 283. Jurisdiction over the estates of minors was exercised by courts of equity from the time of their establishment. Their power to control the realty and sell the personality of the minor for his benefit was never doubted; but the power to divest the infant of the title to his realty was at least not generally exercised by the English courts, and its existence has been denied by some American tribunals. See *Faulkner v. Davis*, 18 Grat. 663. The supreme court of Illinois find the reason of the English rule in the aversion of the English law to the free disposition of real estate; and, as the policy of this country was the reverse of that, the English rule, they conclude, found no place in our jurisprudence. *Dodge v. Cole*, supra. Another and more obvious reason is that assigned by Chancellor COOPER, to-wit, that the rule is based not upon a question of policy, nor upon the lack of the court's jurisdiction to act upon the realty, but rather in the minor's want of power to convey; the court being unable to supply him with the power, or to authorize another to do for him what he could not do himself. *Gray v. Barnard*, 1 Tenn. Ch. 298; *Williams v. Williams*, Id. 306; *Kearney v. Vaughan*, 50 Mo. 284. This reason is substantiated by the practice of the courts of chancery when the title to lands was in a trustee for the minor's benefit. The court then found no difficulty in divesting the title by acting upon the trustee, who was *sui juris*, and could be compelled to convey. *Gray v. Barnard*, supra; *Anderson v. Mather*, 44 N. Y. 260. In this state the difficulty of divesting the title has been removed by statute; a vestige of the ancient practice still remaining, in allowing the infant one year after he has obtained his majority to show cause against a judgment in certain cases. Mansf. Dig. § 5184. Whatever the effect of this section may be, it can have no influence in this case, if for no other reason than that no attempt to show cause against the decree was made within the year of grace allowed. See *Schouler*, Dom. Rel. § 357. Courts of probate had jurisdiction of the management of the estates of minors from the outset in this state; but not until the passage of the act of December 23, 1846, (*Gould*, Dig. 134,) did they have power, under any circumstances, to order the sale of the ward's lands. But, says Judge EAKIN in the case of *Reid v. Hart*, 45 Ark. 46, chancery has such jurisdiction all the while. And this may be said to be in accordance with the weight of American authority. *Dodge v. Cole*, supra; *Gray v. Barnard*, supra; *Kearney v. Vaughan*, supra; *Goodman v. Winter*, 64 Ala. 410; *Dorsey v. Gilbert*, 11 Gill & J. 89; *Huger v. Huger*, 3 Desaus. Eq. 18; *In re Sallis*

bury, 3 Johns. Ch. 347; 2 Kent, Comm. 230; Story, Eq. Jur. § 1857.

Did the grant of jurisdiction to the probate court oust the jurisdiction of equity? The power of the chancery court in such cases was recognized by the judges who delivered the opinions of this court in the cases of Myrick v. Jacks, 33 Ark. 425, and State v. Grisby, 38 Ark. 406. The general rule is that the inherent jurisdiction of equity is not destroyed by the grant of jurisdiction in similar cases to another tribunal, unless the intention of the law-makers appears to be otherwise. Hill v. Mitchell, 5 Ark. 608; King v. Payan, 18 Ark. 583; Myrick v. Jacks, supra; State v. Grisby, supra. The rule is illustrated in the grant of a limited jurisdiction in the assignment of dower to the probate courts, which the court in Hill v. Mitchell declined to consider as exclusive, to any extent, of the jurisdiction of equity. Hilliard v. Hilliard, 50 Ark. 84, 6 S. W. Rep. 326. But, as the statute stood at the time of the decree in this cause, no authority to sell the ward's lands for his maintenance was expressly granted to the probate court. Gould, Dig. 134. As that court had power to sell, its judgments ordering a sale for the maintenance of a minor would doubtless be regarded as valid on collateral attack; but, as there was no express grant to the probate court of an adequate remedy in such cases, it cannot be said that the chancellor was shorn of the power which he had always exercised. How far we had abandoned the ancient jurisdiction of equity over the persons and estates of minors prior to the adoption of the constitution of 1874, or what the effect of the grant of jurisdiction to the probate courts by that instrument is, it is not material now to consider. It is sufficient to ascertain that the chancery court had jurisdiction over the estate in the case presented. As the decree, which is the basis of the appellees' title, is not void, the judgment must be affirmed.

WOLF et al. v. GRAY et al.

(Supreme Court of Arkansas. March 23, 1890.)
ASSIGNMENT FOR BENEFIT OF CREDITORS—CONDITIONS—PREFERENCES.

1. A stipulation for a release in a general assignment for the benefit of creditors, which is made only as a condition of preference, does not invalidate the instrument.

2. An omission in the assignment of directions to the assignee to notify the creditors of the condition on which they may be preferred does not avoid the deed.

3. An agreement by the debtors to appropriate certain property in the hands of some of their creditors to the payment of their indebtedness to the latter, said creditors having a lien on the property to secure the debt, and the debt being greater than the value of the property, is not a fraudulent withholding of assets by the debtors.

Appeal from circuit court, Little River county; R. D. HEARN, Judge.

Action by Wolf & Bro., against Gray & Clem to recover \$1,591.62. An attachment was issued therein against defendants' property,

setting out as grounds of attachment that defendants had sold, conveyed, and otherwise disposed of their property with the fraudulent intent to cheat, hinder, and delay their creditors, and that they were about to do so, or suffer the same to be done, with a like intent. The defendants filed a traverse of the grounds of attachment. These grounds of attachment were tried by the court, and decided in favor of defendants. To this ruling of the court exception was taken, and a motion for a new trial was filed, which was overruled; to which ruling an exception was taken and appeal prayed by plaintiffs.

Cohn & Cohn, for appellants. *U. M. & G. B. Ross* and *Scott & Jones*, for appellees.

COCKRILL, C. J. In Clayton v. Johnson, 36 Ark. 406, an assignment for the benefit of creditors was upheld which stipulated for a release of indebtedness from assenting creditors as a condition to their participation in the assets. There was no express reservation to the debtor, in that case, of the assets remaining after the assenting creditors were paid. In the subsequent case of McReynolds v. Dedman, 47 Ark. 347, 1 S. W. Rep. 552, an assignment similar to that in Clayton v. Johnson, except that it contained an express reservation of the residue of the estate to the assignor, was adjudged fraudulent upon the ground that it was, in effect, an attempt on the part of the insolvent debtor to prefer himself to non-assenting creditors; that is, to those who refused to execute releases. Quickly following this decision came the case of Collier v. Davis, 47 Ark. 367, 1 S. W. Rep. 684, in which it was ruled that, in every assignment such as that passed upon in Clayton v. Johnson, there is an implied reservation of the surplus to the use of the assignor; that, as the effect of an implied reservation is like that of an express reservation of the same benefit, there could be no distinction in principle between them; and that one could not be sustained while the other was condemned. The case of Clayton v. Johnson was, therefore, overruled upon that point. It was not the stipulation for a release—the validity of which, upon the principles of justice and humanity, Chief Justice ENGLISH so earnestly and ably maintained in the latter case—that was condemned in Collier v. Davis, but only the reservation of the surplus by the debtor to himself before satisfying his creditors. An insolvent debtor who executes an assignment for the benefit of his creditors, Judge SMITH, who pronounced the judgments in both the latter cases, maintained, “may stipulate for a release; but he must dedicate all of his property not exempt by law to the payment of all his creditors,—not necessarily to the payment of all in equal proportions, for he may prefer such as will execute releases. But the deed must provide for the distribution of any surplus that may remain in the hands of the trustees after the payment of the preferred creditors among the other creditors, whether they assent or not.”

McReynolds v. Dedman, supra. The stipulation for a release received the unqualified approval of the court in *Clayton v. Johnson*, and its authority upon that point is not impaired except as modified by the cases before cited. It follows that the law is established here, in accord with much authority elsewhere, that a stipulation for a release, in a general assignment, which is made only as a condition of preference, does not invalidate the instrument.

We fail to appreciate the contention that an omission in the assignment of directions to the assignee to notify the creditors of the condition upon which they may be preferred avoids the deed. A reasonable time is fixed by the deed within which the assent shall be given. Those who do not execute the release within the time fixed can share only as non-preferred creditors. There is, therefore, no embarrassment to the assignee in making the distribution, or in otherwise executing the trust. It is his duty to notify the creditors of the assignment in any event, whether the debtor directs it or not; but a failure of the one to direct or the other to perform has never been held, so far as we are informed, to avoid the deed.

No other objection is made to the terms of the instrument; but it is insisted that it should be annulled because, it is said, the assignors fraudulently withheld a part of the assets at the time of its execution. The undisputed facts in relation to this feature of the case are as follows: When the assignment was executed the assignors were indebted to Hill, Fontaine & Co., who were cotton factors in the city of St. Louis in a large amount. Against this account the factors held cotton which had been shipped to them by the debtors who made the assignment, and which they afterwards sold and applied in part payment to the debt, leaving a balance due of about \$3,700. An estimate of the value of the cotton in the hands of the factors appears to have been deducted from the amount of the debt due them at the time of making the assignment, which left an estimated balance of "about \$3,300" due the factors, and a preference in their favor was declared in the deed for that amount. The fair inference to be drawn from this proof is that before the assignment was made the cotton had been specifically appropriated by the debtors to the part payment of the general balance due the factors. The factors had a lien on the cotton to secure the balance due them. The debtors could not withdraw it from their control. The debt was greater than the value of the cotton, and the agreement to appropriate it to the payment of their debt was not a fraudulent withholding of assets by the debtors. If it can be said that there was sufficient testimony to sustain a finding upon each of the other propositions argued by the appellants, it is enough to say that testimony upon the other side contradicts it. The questions arise, then, upon a conflict of evidence; no declarations of law

being made or refused. The presumption is that the court would have declared the law correctly, if required to declare it at all; for error is never presumed. The appellant stands, then, as though the court had declared the law in his favor, and a jury had found against him on conflicting testimony. We do not mean to intimate that the conclusion of the trial court would be incorrect if the testimony for the appellant stood uncontradicted in every particular. It is probable the result would not be changed, but the question is not presented. Affirmed.

GILKERSON-SLOSS COMMISSION CO. v. LONDON *et al.*

(Supreme Court of Arkansas. March 23, 1890.)
ASSIGNMENT FOR BENEFIT OF CREDITORS—DELIVERY TO ASSIGNEE.

Under *Manuf. Dig. Ark. § 305*, which provides that, before an assignee for the benefit of creditors shall be entitled to take possession of the property assigned, he shall file in court a complete inventory and description of such property and give a bond, the surrender of possession to an assignee under an agreement made at the time of the assignment, by delivering to him the key of the premises in which the assigned goods are stored for the purpose of making an inventory, and before the assignee has qualified by filing an inventory and giving bond, avoids the assignment.

Appeal from circuit court, Crawford county; JOHN S. LITTLE, Judge.

O. P. Brown, S. P. Sandels, and U. M. & G. B. Ross, for appellant. *B. H. Tabor*, for appellees.

BATTLE, J. London Bros., a firm composed of Jesse and John London, were engaged in the mercantile business at Alma and Rudy, in Crawford county, in this state. On the 24th of November, 1887, they assigned to S. W. Frye all their notes, accounts, and other evidences of indebtedness, and all their goods, wares, merchandise, and fixtures of every kind, at Alma and Rudy, for the benefit of their creditors. Thereupon, Gilker-son-Sloss Commission Company commenced an action against the assignors, and sued out an order of attachment, and caused the sheriff to execute the same by levying on the property assigned. The ground of the attachment was, the defendants had fraudulently disposed of their property; the fraud relied on being the making of the assignment. They made no defense to the action, but controverted the ground of the attachment. Frye filed a complaint, and claimed the property attached under the assignment. The attachment was discharged, and the claim of Frye was sustained; and plaintiff appealed.

The deed of assignment was valid on its face. It did not authorize the assignee to take possession before the filing of an inventory and the execution and approval of his bond as required by law. But evidence was adduced on the trial tending to prove that the assignors, contemporaneously with the execution of the deed, agreed to deliver

to the assignee the keys to the store-houses containing the property assigned, for the purpose of enabling him to make his inventory; that pursuant to this agreement the deed of assignment and one of the keys to the Alma store was delivered to the assignee at the same time, and, within a very short time thereafter, the only key to the Rudy store; that Jesse London retained the only other key to the Alma store; and that he admitted that he did not go near the store or exercise any control over the property after the delivery of the deed. Upon this evidence the appellant asked an instruction in the following words: "The court instructs the jury that, under the law, the assignee is entitled to access to the property assigned for the purpose of making an inventory and bond, but he is not entitled to possession until he has filed his inventory and bond in the clerk's office. If, upon the face of a deed of assignment, the assignor directs or authorizes the assignee to take possession of the property assigned before he has filed his inventory and bond, this renders the deed fraudulent and void as to creditors; and if the assignee or his agent, before the filing of the bond and inventory, by direction or with the consent of the assignor, in consummation of an agreement, oral or written, extraneous to the deed, takes the keys of the store-house, and thus has possession of the property assigned, it renders the deed fraudulent and void as to creditors, just as though such agreement was set forth in the face of the deed." And the court refused to give it, but gave the following: "The court instructs you that, under the law, the assignee is entitled to access to the property assigned for the purpose of making an inventory and bond, but he is not entitled to possession until he has filed his inventory and bond in the clerk's office. If, upon the face of the deed of assignment, the assignor directs or authorizes the assignee to take possession of the property assigned before he has filed his inventory and bond, this would render the deed fraudulent and void as to creditors; and if the assignors or their agents, by their direction or with their consent, in consummation of an agreement, oral or written, extraneous to the deed, and made at or before the execution of the deed, agree to put the assignee in possession of the property assigned before the making and filing of the inventory and bond as provided by law, and such assignee was put in possession of the property before the filing of the bond, this would render the deed fraudulent and void as to creditors. And if you find from the evidence that a key or keys to the store-house or houses were delivered to the assignee at the time of the delivery of the deed, or afterwards, in consummation of a contemporaneous agreement, together with the possession of the property, this would render the deed fraudulent and void. But, if the key or keys were delivered to the assignee for the purpose only of giving access

to the goods, to enable him to make an inventory, the assignors retaining to themselves the possession and control of the assigned property, this would not render the deed void. By 'access,' as used in the instruction, is meant 'liberty to approach and inspect the property.' By 'possession' is meant 'that condition under which one can exercise his power over property, at his pleasure, to the exclusion of all others.' "

Under this state of facts arises the question, did the agreement and the delivery of the keys avoid the deed? Section 305, Mansf. Dig., provides: "In all cases in which any person shall make an assignment of any property, whether real, personal, mixed, or choses in action, for the payment of debts, before the assignee thereof shall be entitled to take possession, sell, or in any way manage or control any property so assigned, he shall be required to file in the office of the clerk of the court exercising equity jurisdiction a full and complete inventory and description of such property, and also make and execute a bond to the state of Arkansas in double the estimated value of the property in said assignment, with good and sufficient security, to be approved by the clerk of said court, conditioned that such assignee shall execute the trust confided to him, sell the property to the best advantage, and pay the proceeds thereof to the creditors mentioned in said assignment according to the terms thereof, and faithfully perform the duties according to law."

The intention of this statute is manifest. Before the assignee can lawfully take possession of the property assigned, he must file an inventory of the property conveyed to him, and execute a bond, with good and sufficient sureties, to faithfully perform his duties. The object of this provision is the protection of creditors and the prevention of fraud. The inventory is to show the property assigned, and the bond to secure all parties concerned against loss on account of the failure of the assignee to perform his duties; and both are required to be filed before the assignee can lawfully have an opportunity to make a fraudulent disposition of the property. Until they are filed, it is the duty of the assignor to retain possession and control, and take care of and protect the property. The delivery of possession to the assignee, for any purpose, prior to the time fixed by law, which would enable him to do what the statute intended to prevent, would be clearly unlawful. The purpose can avail nothing if the possession given afforded the assignee the opportunity to commit the frauds that the statute intended to prevent by requiring the bond and inventory to be first filed. If the evidence adduced, as stated, be true, possession was delivered to the assignee in this case in violation of the statute. *Bartlett v. Teah*, 1 McCrary, 176, 179, 1 Fed. Rep. 768.

But the question recurs did the agreement, and the delivery of the keys in pursuance thereof, avoid the assignment? This court

has repeatedly held that provisions in a deed which were in contravention of the statute rendered the deed void. In *Teah v. Roth*, 39 Ark. 66, an attachment was sued out on the ground that the defendant had fraudulently disposed of her property; the fraud relied on being the making of an assignment for the benefit of creditors. In speaking of the deed of assignment in that case, the court said: "The deed empowered the assignees to retail the goods privately for twelve months, and then to sell the remainder by public auction. This is in contravention of our statute of assignments, which directs a public sale within 120 days after the assignee takes upon himself the execution of the trusts of the assignment, and the legal effect is to avoid the deed as against non-assenting creditors;" and the court held the assignment fraudulent. See *Raleigh v. Griffith*, 37 Ark. 150; *Rice v. Frayser*, 24 Fed. Rep. 460.

In *Aaronson v. Deutsch*, 24 Fed. Rep. 465, the question under consideration was presented and decided. The court said: "It was the understanding of the parties to the deed that possession of the assigned property should be delivered to the assignee upon the execution and delivery of the deed, and before the assignee had qualified by giving bond and filing an inventory. Accordingly, immediately after the execution of the deed the assignor put the assignee in possession of the property. The key to the store-house containing the property, and the property itself, was delivered to the assignee. The assignor withdrew from the place, and abandoned all watch or care over the property, leaving the assignee to exercise absolute and unrestricted dominion over it. The assignee had not given bond and filed the inventory up to the time the goods were attached. The contention of the learned counsel for the defendant is that, because this illegal understanding and action of the parties was not, in terms, provided for in the deed, the validity of the assignment is not affected thereby, and that the wrongful possession of the assignee was a matter occurring subsequent to the execution of the deed, and cannot affect its validity. The mere act of taking possession was subsequent to the execution of the deed, but it was done in pursuance of an understanding had at the time of the execution of the deed; and, when that fact is shown, its legal effect is the same as if the deed had provided for it. When the parties to the deed enter into an agreement to do an act in violation of the requirements of the statute of assignments, and that agreement finds expression in the deed, the instrument is fraudulent and void in law upon its face. Where such an agreement is made, but is not disclosed on the face of the deed, it must be proved; and when it is proved, and it is also shown that the parties are carrying out their illegal purpose, the effect upon the validity of the assignment is precisely the same as if the illegal purpose had been declared on the face of the deed. And a deliberate agreement, in or

out of the deed, made at the time, and carried into effect, to violate the statute, is a fraud upon the statute, and a fraud upon the legal rights of creditors, which the law will redress by removing the fraudulent barrier to the assertion of their legal rights against their debtor." *Whedbee v. Stewart*, 40 Md. 414, 424.

Upon the evidence adduced the instructions asked for by appellant should have been given. For reasons indicated the instruction given was erroneous and misleading.

Other questions are presented for our consideration, but we do not deem it necessary to decide them.

Reversed.

GOODBAR *et al.* v. MEARS *et al.*

(*Supreme Court of Arkansas*. April 12, 1890.)

Appeal from circuit court, Greene county; J. E. RIMMICK, Judge.

Action by Goodbar, Love & Co., attaching creditors of defendants J. W. Mears & Co., in which plaintiffs seek to set aside an assignment of a stock of merchandise, books, notes, accounts, etc., made by J. W. Mears & Co. to defendant J. D. Spencer, as assignee, on the 12th day of December, 1887, on allegations of fraud. Appellants' attachment was issued on the same day, but several hours after the assignment had been executed, acknowledged, and recorded. The attachment came to the hands of the officer the same day issued, but was not levied until December 17, 1887. Assignee's bond was given on the next day, about noon, after the assignment was made. Upon the testimony, the court found, as matter of fact, "that upon execution of the deed of assignment the assignors delivered possession of property assigned to assignee, and that assignee took possession thereof before giving bond; but that this was not done with any fraudulent intent either on part of assignors or assignee." The deed of assignment did not provide for the surrender of the property to the assignee before he had qualified by filing an inventory and giving bond. Judgment for interpleader for goods, and for defendants on the attachment. Plaintiffs appeal.

John B. Boykin, for appellants. *L. L. Mack & Son*, for appellees.

PER CURIAM. This case is controlled by the decision in *Commission Co. v. London*, ante, 518. Reversed and remanded.

WILSON *et al.* v. SLAUGHTER *et al.*

(*Supreme Court of Arkansas*. April 12, 1890.)

DESCENT AND DISTRIBUTION—INDEBTED HEIR.

Intestate's entire estate was a tract of land already mortgaged for over a third of its value to secure a debt of one of his three heirs, who was insolvent. Defendant, with knowledge of these facts, bought at execution sale the interest of the insolvent heir in the fund which was left after foreclosure and payment of the mortgage debt. Held that, as the debtor had no interest in the fund, the purchaser acquired none.

Appeal from circuit court, St. Francis county; M. T. SANDERS, Judge.

Action by Sallie C. Slaughter and others, heirs of Edwin Jones, against D. M. Wilson and others, for certain funds held by Wilson and claimed by defendant Philander Littell. Judgment for plaintiffs, and defendants appeal.

J. J. & E. C. Hornor, for appellants. *Jas. P. Brown*, for appellees.

PER CURIAM. Edwin Jones was the owner of the land the proceeds of the sale of which are now in dispute. He mortgaged it to secure the payment of the debt of his brother, John I. Jones. Edwin died intestate, and John I., being one of the heirs, inherited a third interest in the land. It does not appear that Edwin has any other estate, and, as John I. has been wholly insolvent all the while, we take it there is none. The land was sold under the power in the mortgage, after Edwin's death, and the fund in dispute remained after paying the mortgage debt.

Under these circumstances if John I. were seeking a distribution of the fund he would take nothing, because the full share to which he was entitled had been appropriated to the payment of his debt. It would stand as though he himself had previously drawn out his share of the fund.

If a part only of the land had been taken under the mortgage to satisfy John I.'s debt, and the residue had stood for partition among the heirs of Edwin, a court of equity would not have awarded John I. any part of it; but, as between him and his co-heirs, it would have treated him as having mortgaged his interest in the land, and the purchaser at the mortgage sale as having succeeded to his right. The appellants substantially concede that John I. Jones could not have enforced any claim to the fund. But Littell, for whose benefit a share of the fund is claimed, purchased the interest of John I. Jones in the land at execution sale, with actual knowledge of all the facts, and of the equities of the appellees. Under such circumstances the purchaser takes no greater right than the debtor himself had. *Pindall v. Trevor*, 30 Ark. 249; *Allen v. McGaughey*, 31 Ark. 252; *Newman v. Davis*, 24 Fed. Rep. 609.

Let the judgment be affirmed.

SHATTUCK v. WATSON.

(Supreme Court of Arkansas. April 12, 1890.)

CANCELLATION OF CONTRACT—EQUITY.

In an action to cancel two mortgages it appeared that the first was a forgery by plaintiff's son; that plaintiff gave the second to secure the forged notes, in consideration of defendant's agreement not to prosecute. *Held*, that the first would be canceled, but that as to the second plaintiff having entered into the illegal contract, and not having withdrawn from it until his son was prosecuted by other persons, equity would not interfere.

Appeal from circuit court, Johnson county; B. J. BROWN, Special Judge.

McKennon & Reding, for appellant. *A. S. McKennon* and *J. N. Sarber*, for appellee.

HEMINGWAY, J. The appellant had advertised for sale, and was about to sell, lands of the appellee, under the power contained in two mortgages, purporting to have been executed by him and his wife to secure the payment of certain notes therein described. One mortgage bears date March 15, 1886, and recites that it was given to secure one note

given for borrowed money and six notes for the interest thereon. The other is dated December 8, 1886, and was given to secure the same notes, except one interest note, which had been previously satisfied. The appellee's son paid it. The appellee brought this suit to cancel both mortgages, and to restrain a sale under them. The complaint alleges that the prior deed, and the notes therein described, are forgeries, and that the plaintiff was entirely ignorant of their existence until the day that he executed the latter deed; that appellant's agent (Mangum) visited his residence on the 8th day of December, 1886, for the purpose of obtaining the deed and notes of that date; that Mangum showed him the forged instruments, and told him they had been forged by his son J. E. Watson, and that he had thereby obtained the amount of money therein indicated; that he (Mangum) only wanted the money secured, and if that was done the liberty and good name of the son would be saved, but that if it was not done he would be vigorously prosecuted and sent to the penitentiary, and lose his standing at the bar and in society; that, in order to prevent the prosecution and ruin of the son, the deed of trust and notes, all of which Mangum brought ready for signature, were executed, and the deed acknowledged before a justice of the peace, who had accompanied Mangum for that purpose. The appellee testified that the only consideration for the deed and notes was Mangum's promise not to prosecute his son. The court found that the material averments of the complaint were true, and that the deeds and notes executed by appellee on the 8th of December were void because they were made upon an illegal and invalid consideration; and it decreed that the appellant should surrender for cancellation said deed and notes, and be forever enjoined from selling the land or collecting the notes. From this judgment the appellant has appealed. He insists that the first mortgage and notes were executed by the appellee, and are valid, and that the second mortgage and notes were given as a further security for the first to remove all doubts as to their validity. He asked no affirmative relief in his answer, and we have not considered what his rights would be if he had done so. The evidence shows that the appellee did not execute the mortgage of March 15th, and fails to satisfy us that he was a party to a conspiracy to obtain money by means of it. As the deed was forged, the appellee is not estopped to set it up, although the son obtained money upon the faith of it, and loaned a portion of it to him, unless he participated in the illegal acts. A sale under the power in that deed would cast a cloud on the appellee's title, and was properly restrained.

The question whether the appellee, on the case made by him, is entitled to any relief as against the latter mortgage and notes, is not free from difficulty. His case, in effect, is that his son had forged a mortgage, on the faith of which he had obtained money from

the appellant; that appellant desired to obtain security for that money, and appellee desired to suppress the criminal prosecution of the son; that appellant proposed to appellee that if he would execute the mortgage and notes tendered, appellant would not prosecute his son; that the proposition was accepted, and the papers executed and received accordingly; that the son was prosecuted through other agencies, and the appellee at no time sought to withdraw from the compact, or to recover the securities given in pursuance of it, until the sale was advertised, an interval of over two years, and never released the appellant from his promise except as it may be implied by bringing this suit. Upon this state of case, can the appellant invoke equitable relief? The allegation of duress is not sustained. It seems to be conceded that the son was guilty of a felony, and the appellant threatened only to prosecute him for his crime unless the amount obtained was secured. It was not a threat to prosecute on a simulated charge in order to extort money. *Marvin v. Marvin*, 12 S. W. Rep. 875. It is a practical principle that guides equity courts, in their administration of justice, that he who invokes their aid must come with clean hands; that he who hath committed iniquity shall not have equity. It is the policy of the law that crime shall be prosecuted, and it prohibits, under severe penalties, the suppression of prosecution. An injured party who agrees with the felon who robs him that he will not prosecute him on condition that he return the stolen goods, or who takes a reward on such condition, violates the spirit as well as the letter of the law. The party who gives a reward, and the party who receives it, on such condition, stand in *pari delicto*. Mr. Story, treating the subject as to the rights of parties to such an agreement, states the law as it is generally approved: "The general rule is that, where an illegal contract has been made, neither courts of law nor of equity will interpose to grant any relief to the parties, but will leave them where it finds them, if they have been equally cognizant of the illegality." 2 Story, Cont. § 486, (5th Ed. vol. 1, § 611); 2 Pars. Cont. 746; 2 Add. Cont. 715-724; 1 Pom. Eq. Jur. § 402. There are some exceptions to the rule where the contract is *malum prohibitum*, as also where public policy is considered as advanced by allowing the parties, or the less culpable one, to sue for relief; but it is not material to consider the exceptions now, for cases like this have been considered to fall within the general rule. In the case of *Atwood v. Fisk*, 101 Mass. 363. *Atwood* sued to compel the surrender and cancellation of two notes, and a mortgage given to secure them, on the ground that they were given upon the consideration that the defendant would not prosecute him for a felony. The bill was dismissed, because the plaintiff was not in a position to claim the equitable relief prayed for. *Compton v. Bank*, 96 Ill. 301, is a case in which a wife sought to cancel a conveyance executed by her to the defendant in consideration of its promise not

to prosecute her husband for embezzlement. The court reviewed the authorities, and concluded that the bill should be dismissed, saying: "But though the deed may be void for such reason, equity does not relieve the party who executed it upon or for such immoral and illegal consideration and purpose." We might add many citations to the same effect: *Allison v. Hess*, 28 Iowa, 388; *Inhabitants v. Eaton*, 11 Mass. 377; *Smith v. Rowley*, 66 Barb. 503; *Swartz v. Gillett*, 1 Chand. 207. Nor can he derive benefit from the rule that a party to an executory, illegal contract may rescind it while it is executory and unperformed, and recover back money paid under it. The contract was to give the notes and mortgage in consideration of a promise not to prosecute for a felony. When the papers were delivered and the promise given, there was nothing more to be done by either party, and the contract was fully executed. It was held in *Atwood v. Fisk*, *supra*, that the delivery of securities was the same in effect as the payment of money. But, conceding that there was a time when the appellee might have withdrawn from his illegal compact, removed the obstacle he had placed in the way of justice, and recovered the securities, he never sought to do it until the illegal purpose failed from other causes, and his agreement no longer thwarted justice. Both parties, following impulses of their own, willfully contracted to violate the law. The law will lend no aid to either of them, but leave them where they have placed themselves. The judgment will be reversed, and a judgment rendered here canceling the mortgage of March 15, 1886, and enjoining any sale under it, but no relief will be given as against the second mortgage.

CARUTH-BYRNES HARDWARE Co. et al. v.
DEERE et al.

(Supreme Court of Arkansas. April 12, 1890.)

UNAUTHORIZED ATTACHMENT—PRIORITY.

Suit by attachment was brought on notes in the name of the payees, without their knowledge, by attorneys acting for their surety. The payees subsequently ratified it, but meanwhile other creditors had levied a second attachment. Held, that the first attachment was not the suit of the payees until their assent to it, and the lien of the second attachment was entitled to priority.

Appeal from circuit court, Crawford county; J. S. LITTLE, Judge.

Reynolds Bros. were indebted to Deere, Mansur & Co. on certain notes. William Reynolds, who was surety on these notes, instructed certain attorneys to sue on the notes. They did so in the name of Deere, Mansur & Co., and made attachments on the property of Reynolds Bros. Their actions were afterwards ratified by Deere, Mansur & Co. In the mean time, however, the Caruth-Byrnes Hardware Company and other creditors of Reynolds Bros. made attachments, and intervened by petition in the suit of Deere, Mansur & Co., asking that Deere, Mansur & Co.'s claim be declared subsequent to theirs. From

a judgment denying their prayer they appeal.

O. P. Brown and Sandels & Warner, for appellants. *J. E. Joyner and Cohn & Cohn*, for appellees.

HEMINGWAY, J. Assuming that the attachment sued out in the name of the appellees was not vitiated by fraud or collusion, we must decide—*First*, if it was their attachment; and, if so, *second*, when was the lien fixed in their favor. The right of attachment is incident to a civil action, and dependent upon it. Mansf. Dig. § 309. An action is a formal demand of one's rights from another person in a court of justice. The plaintiff may bring an action either directly in person, or indirectly through an agent; but his assent in one way or the other is essential, and, unless his mind does thus enter into it, it is not his action. Section 6396, Mansf. Dig., authorizes a surety to bring an action against his principal to obtain indemnity against the debt or liability for which he is bound, but it does not authorize him to sue in the creditor's name. The surety failed to do what he might have done, and did what he had no authority to do.

In *Jones v. Moody*, 59 Miss. 327, a junior attaching creditor sought by bill in chancery to vacate a senior attachment on the grounds that it was founded on no debt, and was a fraud. The attachment assailed was in favor of a party who had owned the note sued on, but assigned it as collateral. The court held that, although not the proper party to sue, he had an interest in the note, and that the attachment in his favor was not a fraud. It did not hold that he could sue for his assignee without authority.

The attorneys who filed the complaint were not authorized to collect the debt for Deere, Mansur & Co., or in any way to act for them. In fact, it is not contended that there was any authority of any kind to institute the action in their favor, and it follows that it was not in fact their action. But they were notified of its institution by the attorneys who had assumed to act for them, and expressly ratified the unauthorized act. That a party may adopt a suit brought in his name without his consent was ruled in the case of *Craig v. Twomey*, 14 Gray, 486, and seems to follow from the general rules applicable to the relation of principal and agent. Of this we entertain no doubt; but the difficulty arises in considering the effect of the ratification in this case. The appellees contend that "every ratification of an act already done has a retrospective effect, and is equal to a previous request to do it." This is a rule applicable to the subject; and, if given in this case the broad meaning it conveys, the effect is to give to every act done in this action, including the attachment proceeding, the same effect as if they had been originally authorized. But the rule has its exceptions, as well recognized and as generally approved as the rule itself. Without attempting to indicate to what extent the rule applies, or to specify the exceptions that

are recognized, we hold that where, prior to the ratification, third persons have in good faith acquired substantial rights, or have been placed in such position in reference to the transaction that they will be prejudiced by such retroactive effect, the ratification will not be allowed to cut out or prejudice those rights. The benefit of this exception has been extended to protect the rights of intervening purchasers and lienors, by attachment and otherwise. *Mechem*, Ag. § 168; *Whart. Ag.* § 78; *Wood v. McCain*, 7 Ala. 800; *Taylor v. Robinson*, 14 Cal. 396; *Johnson v. Johnson*, 31 Fed. Rep. 700. Mr. Wharton, by way of illustrating the rule and its exceptions, puts a state of case as an exception which is a counterpart of the case at bar. The supreme court of Massachusetts, in the case of *Baird v. Williams*, 19 Pick. 381, which involved the same questions upon the same facts, said: "If it be urged that the subsequent assent of the creditors relates back to the making of the note, and makes the transaction valid *ab initio*, the plaintiffs are met by the well-known rule that this principle of relation, equitable in itself as between the parties, is not to be so construed as overreaching mesne liens and rights accrued to others before the consent and ratification." It may be that there are certain kinds of acts done for another, without authority, so manifestly for his benefit that all parties dealing in relation to the matter would be held to know, and the law would presume, their ratification. Be that as it may, no such presumption exists as to attachments and their incident liabilities. As the intervenors had acquired their liens before the appellees had adopted this action, it follows that the lien of the latter became fixed, as against the former, at the time of the ratification, and is subsequent to theirs.

The appellees contend that appellants cannot question the validity of their lien; and cite, to sustain them, the case of *Sannoner v. Jacobson*, 47 Ark. 31. The objection urged by appellants in this case did not go to the grounds of the attachment or the irregularities of the proceeding, but deny the validity of the attachment, and attack the groundwork of the lien. A prior lien would be of little value if the lienor could not assert it; but the law affords him the opportunity. Mansf. Dig. § 356. Without considering the question of fraudulent and collusive attachments pressed by counsel for the appellants, we conclude that the record shows that their liens are prior to the lien of appellees. The judgment will be reversed, and the cause remanded, with directions to the circuit court to render judgment in accordance with the law as herein announced.

LUCY v. HOPKINS.

(Court of Appeals of Kentucky. April 24, 1890.)
VENDOR'S LIEN—ENFORCEMENT—VARIANCE—SALE OF LAND.

1. A deed from J. to D. recited that \$100 of the purchase price was due December 15, 1873.

D. conveyed the land to B. by a deed which referred to a \$100 note of B. to J., and recited that it was given in lieu of the payment still owing by D. to J., and that it was payable on or before March 1, 1876. The note recited that it was given for the land described in the deed, and was of the same date, but was payable December 15, 1875. Held, that the variance between the deed and note as to the date of maturity was not fatal to a petition to enforce the note as a lien on the land, as the deeds, which were both filed with the petition, sufficiently identified the note.

2. As an action to enforce as a lien on land in the hands of a third person a note given for its purchase price is not barred until after the lapse of 15 years, plaintiff is not precluded from recovering by his failure to sue until after 18 years from the maturity of the note and the time when it was assigned to him, during which the vendee was solvent and remained in the county, where it appears that plaintiff has not estopped himself by contract from asserting his lien, and that his declaration that he could have collected the note, but delayed too long, was not made to defendant.

3. Gen. St. Ky. c. 63, art. 1, § 24, which provides that, "when any real estate shall be conveyed," the vendor shall have no lien on the land, unless it is stated in the deed what part of the consideration remains unpaid, does not deprive a vendor of his lien on the land, as against a remote *bona fide* purchaser, where neither the deed of the vendor nor that of his grantee was recorded, or lodged for record.

4. Under Civil Code Ky. § 694, which provides that, before ordering a sale of land for the payment of debts, the court shall be satisfied from the pleadings, or agreement of the parties, or affidavits, or commissioner's report, that it can be divided without materially impairing its value, the court is warranted in ordering a sale of land where it appears from the description in the petition that it is divisible, though there is no special allegation to that effect.

Appeal from circuit court, Clinton county.
"Not to be officially reported."

J. A. Brents, for appellant. Sam C. Hardin, for appellee.

HOLT, J. December 15, 1874, Nathan Jarvis executed a deed to L. J. Downs to two town lots for \$135, of which \$100 was payable on December 15, 1875. It was acknowledged, and left in the county clerk's office, but never recorded, or even properly lodged for record by the payment of the tax. September 30, 1875, Downs executed a deed to J. M. Bristow for the lots at the same price; and the latter, by way of paying Jarvis what Downs still owed him upon the land, executed to him a note for \$100, which Jarvis, on January 8, 1876, assigned to the appellee, P. H. Hopkins. The last-named deed was also acknowledged, and left in the clerk's office, but never recorded, or even properly lodged for record. It recites as a part of the consideration: "One hundred dollars to be paid to Nathan Jarvis on or before the 1st day of March, 1876." The note was, however, given payable on December 15, 1875. January 1, 1876, Bristow conveyed the lots to J. F. McWhorter, and the deed was recorded. The last-named grantee died intestate; and two of his heirs, W. O. and T. F. McWhorter, purchased the interest of the others, and received conveyances from them; and then the two McWhorters sold and conveyed the lots to the appellant, John A. Lucy. January 31, 1889, the appellee, Hopkins, brought this ac-

tion upon the note assigned to him by Jarvis, seeking to enforce it as a lien against the lots. The lower court having so decreed, Lucy has appealed; and the main ground for a reversal urged by him is that he is an innocent purchaser without notice, either actual or constructive, of the alleged lien, and that, if it ever existed, the right to enforce it has been lost by laches upon the part of the appellee. The deed from Bristow to McWhorter, and which is of record, does not speak of the one from Downs to Bristow. If it had done so, then the subsequent purchaser would have been required at his peril to know its contents, and that a lien had been therein retained in favor of Jarvis for the payment of the note subsequently assigned to Hopkins. *Johnston v. Gwathmey*, 4 Litt. (Ky.) 320. Upon the contrary, it recites that the land had been conveyed by Jarvis directly to Bristow. The appellant, therefore, contends that the "Downs deed," as it is termed, is not a part of his chain of title; that, not being of record, he had not only no actual, but no constructive, notice of its existence; and that for these reasons, as well as on account of the variance between the maturity of the note as shown upon its face and as named in the so-called "Downs deed," his demurrer to the petition as amended should have been sustained. The deeds from Jarvis to Downs, and from the latter to Bristow, were filed with the petition. When they are considered with the note sued upon, it appears to a reasonable certainty that it is the same note that is named in the Downs deed. It is of the same date as the deed, and for the same amount as the note spoken of in it. It recites that it is for the same lots as are described in the deed; and by being made payable on December 15, 1875, it is evident that it was given in lieu of the payment owing to Jarvis by Downs, as set forth in the deed to the latter.

It is true that more than 13 years elapsed from the maturity of the note, and from the time it was assigned to the appellee, before this suit was brought; and that until 1879 Bristow remained in the county, and was solvent. The time necessary to bar an action upon it is 15 years, however; and the vendor or his assignee is not bound to sue at law upon the note. He may assert his lien in equity, in the first instance, and he has the full period before limitation runs within which to do so. There is some showing of a disposition upon the part of the appellee to favor Bristow, owing to a kind feeling for him; but it does not appear that the appellee has by word or conduct waived the lien, if one existed, or estopped himself from asserting it. The demurrer to the third paragraph of the answer was properly sustained. It sets up the solvency of Bristow, the failure of the appellee to sue him, and avers that the appellee indulged him from time to time upon promises to pay, looked to and accepted him for the debt, and waived the lien. It does not aver any contract, however, upon the

part of the appellee to this effect with the appellant, or, indeed, with any one. The statement of the appellee that he "held an old note against the house and lots that he could have collected, but he had let it lay too long," was not made to the appellant, but to T. F. McWhorter, after the latter had become an owner of the property, and cannot operate as an estoppel.

Did a lien exist? is the only question. If the appellee's assignor had a lien for the payment of the note, then it passed to the appellee by the assignment of the note. Our statute does not create the lien. It merely provides that in a certain event a vendor shall not have one as against *bona fide* creditors and purchasers. It says: "When any real estate shall be conveyed, and the consideration, or any part thereof, remains unpaid, the grantor shall not have a lien for the same against *bona fide* creditors and purchasers, unless it is stated in the deed what part of the consideration remains unpaid." Gen. St. c. 63, art. 1, § 24. A waiver of the lien arises by virtue of this provision as to certain parties, in case the grantor conveys, without stating what part of the consideration remains unpaid. If a vendor has not conveyed, the lien exists, and he may assert it as against a remote vendee, unless his doing so is barred by time, or he has in some way estopped himself from doing so, or unless he has waived the lien. Here the legal title has not been conveyed by either Jarvis or Downs. The so-called deeds from them are nothing more than bonds for a title. They have never, in fact, conveyed the land. Neither of the instruments were ever recorded, or even lodged for record. Whatever title the appellant has, comes through them. He is claiming under them; and he therefore holds subject to any burden existing by virtue of the sales by them. The fact that he had neither actual nor constructive notice of the existence of the lien for unpaid purchase money is not, therefore, material. He cannot, in such a case, hold the land, and be free of the burden. The case involves some hardship. Private mischief must sometimes result, however, for the public convenience. A well-established rule cannot be varied to suit individual privation. Moreover, the appellant is not without fault, nor is his immediate vendor. The latter knew of the existence of the note before the sale to the appellant; and the latter did not, before his purchase, investigate the title, or have it done.

Error does not appear from the direction in the judgment as to the mode of sale. Section 694 of the Civil Code provides: "Before ordering a sale of real property for the payment of debt, the court must be satisfied by the pleadings, by an agreement of the parties, by affidavits filed, or by a report of a commissioner or commissioners, whether or not the property can be divided without materially impairing its value." The petition need not, however, expressly aver whether the property is or is not divisible. This may appear by

the description of it in the pleading. The court is then "satisfied from the pleadings" of the fact. *Sears v. Henry*, 13 Bush, 413. Judgment affirmed.

JOHNSON v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 22, 1890.)

CRIMINAL LAW—APPEAL—BRIEBRY AT ELECTIONS.

1. Where a denial of the right of suffrage and to hold public office is annexed to the punishment imposed on conviction of a misdemeanor, an appeal will lie to the court of appeals, though the fine imposed is insufficient to give the court jurisdiction.

2. At a trial for receiving a bribe to vote for a certain candidate for congress, the testimony for the commonwealth was that of a single witness, who testified that he loaned defendant five dollars, but not to influence his vote, though he did not know that he would have loaned it but for the election; and that the accused entertained the same political views as witness. *Held*, that a motion to dismiss should have been granted.

3. Defendant requested an instruction that the jury must believe that the money was given accused to influence his vote, and that for such money the accused did vote as requested, and that if the money was in good faith loaned the accused was not guilty. *Held*, that it was improperly refused.

Appeal from criminal court, Carter county.
"To be officially reported."

J. D. Jones, for appellant. P. W. Hardin, Atty. Gen., for the Commonwealth.

PRIOR, J. The appellant, James Johnson, was indicted by a grand jury of the Carter criminal court for the offense of unlawfully receiving a bribe in money paid to him by one Strother; that for a consideration in money paid to him by Strother he voted for T. H. Paynter, who was at the time a candidate for a seat in the house of representatives of the United States. There was a demurrer to the indictment for a failure to allege where the vote was cast, or that an election was held in the county of Carter for representative. While the indictment should have been more specific, and the demurrer sustained, it is proper to notice other questions raised, and upon which this case will be finally determined in the court below. It is first insisted by the attorney for the state that the appeal should be dismissed, as it is an indictment for a misdemeanor, and the fine imposed is only \$10. The Code gives this court jurisdiction (now belonging to the superior court) where the fine exceeds \$50. Section 347, Carroll's Code. This being a misdemeanor by statute, it is urged that the extent of the punishment cannot give the jurisdiction unless the fine exceeds \$50. There is no imprisonment imposed in this case, and the fine made at \$10 only, which is much less than the sum fixed by the statute. It provides that "any person guilty of receiving a bribe for his vote at an election, or for his services or influence in procuring a vote or votes at an election, shall be fined from fifty to five hundred dollars, and be excluded from office and suffrage." How the jury arrived at the amount of a fine not authorized by the

statute is not explained; but, if the party is guilty, the fact that he was made to pay a less fine than that authorized by the statute to be imposed affords no ground for a reversal, and if this was the only punishment inflicted the appeal would be dismissed. It is plain that if the fine had been \$500, the limit prescribed by the statute, the superior court would have had jurisdiction, and a denial of the right of suffrage being annexed to the penalty and imposed by the court below, the jurisdiction of this court would attach, as a franchise involving the inestimable right of suffrage is directly involved in the issue. The court below, after the verdict of guilty, pronounced this judgment: "And it is further adjudged by the court that the defendant shall hereafter be disqualified from holding or discharging the duties of any office of honor, trust, or profit under the laws of this state, or any town, or city, or municipality thereof, and prohibited from exercising the right of suffrage within the state of Kentucky during his natural life." That dollars and cents are to be more highly valued in determining the jurisdiction of this court by reason of the statute than the right of suffrage, or the infliction of a punishment that degrades the offender for all time, cannot be conceded, and, while the offense is termed a misdemeanor, the deprivation of such a right will be treated in this court as a direct proceeding to deprive the offender of the rights of a citizen, and the judgment entered by the court below, depriving the appellant of the right to vote and of the right to hold office, being the result of the verdict imposing the fine, this court will necessarily assume jurisdiction of the entire judgment. It was never contemplated by the law-making power that an appeal could be prosecuted from the judgment imposing a fine of \$500, and not from a judgment entered by the court based on a verdict for that amount, or a less sum, by which, during the natural life of the offender, he is prohibited from holding any office of trust or profit within this commonwealth. The offense is a high misdemeanor, and, depriving the citizen of a most sacred right, he can be heard in this court. *Cheek v. Com.*, 7 S. W. Rep. 408.

Strother, the witness for the state, says that he loaned the appellant five dollars, but not to influence his vote in any manner, but did not know that he would have loaned it but for the election; that the accused entertained the same political views that the witness did. On this testimony, it being all introduced by the state, the defense moved to dismiss the indictment because no offense had been proven. The court refused the motion. This was error. The distinct charge was that the accused had voted for Paynter for congress, and received a bribe to do so. The voting was by ballot, and there was no evidence by the state that any such vote was cast. The system of voting by ballot is based upon the idea that it makes the action of the voter independent, and to en-

able him to vote for whom he pleases. No one has the right to examine the ballot of the voter, or to testify as to its contents with a knowledge acquired in any other mode than the information given him by the voter himself. His ballot, says Mr. Justice Cooley, is absolutely privileged, and the veil of secrecy should be impenetrable unless the voter voluntarily lifts it. Cooley, Const. Lim. 762. It places the voter beyond the influence of wealth and power, and if the manner of his voting is open to investigation, as any other issue, the virtue of the system is destroyed. The jury, therefore, had no right to speculate as to the person for whom the vote was cast, or to reach such a conclusion from the former political convictions of the accused. The motion to dismiss should have been sustained.

The court below having refused to dismiss the case, the accused then testified substantially as the witness for the state, but admitted that he voted for Paynter. At the conclusion of the testimony the court instructed the jury that if the accused, in consideration of a bribe in money paid him by Strother, voted for Paynter, they must find the defendant guilty. The defendant then asked the court to say to the jury, in effect, that they must believe the money was given him by Strother for the purpose of influencing his vote, and that for said money the accused did vote for Paynter; that if the money was in good faith loaned the accused is not guilty. This is, in substance, the instruction asked by defendant and refused. What conclusion the jury reached as to the facts necessary to constitute bribery does not appear; but we see no reason for refusing an instruction based on testimony conducing to show, at least, that it was a loan of the money in good faith, and not for the purpose of influencing the vote for Paynter. The defense, in so far as it was sustained by the testimony, should have been presented to the jury, and the failure to do so may have led their minds to the conclusion that a case of bribery had been made out. The judgment below is reversed, and remanded for proceedings consistent with this opinion. A new trial will be granted.

LOUISVILLE BANKING CO. v. LEONARD *et al.*
(Court of Appeals of Kentucky. April 5, 1890.)

MORTGAGES—FUTURE ADVANCEMENTS—HOMESTEAD.

1. A mortgage for a specific sum given in good faith as security for future advances is a valid security, as against the general creditors of the mortgagor, for advances not exceeding the sum specified in the mortgage.
2. Though a mortgage purports to be given for a fixed sum, parol evidence is admissible to show that it was given to secure future advances, and their amount.
3. An agreement that a mortgage shall be a continuing security for any future advances, whether made before or after its maturity, will extend the lien of the mortgage in favor of advances made after its maturity.
4. A mortgagor's wife, who joined in the execution of the mortgage, which covered the homestead, cannot complain that it was given for future

advancements, where these are less than the sum to secure which the mortgage purports to be given.

Appeal from Louisville chancery court.

"To be officially reported."

Barnett, Miller & Barnett, for appellants.
A. Duval, Geo. L. Everback, and I. T. Woodson, for appellees.

HOLT, J. Prior to April 22, 1886, F. J. Duile, who was then a furniture manufacturer, had been in the habit of discounting the notes which he took from his customers with the appellant, the Louisville Banking Company. About the time named he wished to discount to the bank more paper upon one of his patrons than it was willing to accept upon one person. To induce it to do so he executed to it his note for \$5,000, dated April 22, 1886, and due one year thereafter; and to secure its payment a mortgage, absolute in its terms, and in which his wife, Catharine Duile, united, upon three adjoining lots in the city of Louisville, upon one of which they lived, and upon which property the furniture manufactory was located. There was already a purchase-money lien upon one of the lots and a mortgage lien upon another. The note and mortgage were delivered to the bank as additional security to that afforded by the names of the makers and indorsers upon the paper which Duile might *in futuro* discount to it. They were to be a continuing security for this purpose, just as if he had deposited with the bank a stock certificate to secure it. The defeasance clause in the mortgage provides: "Whereas, said first-named party of the first part has executed to the party of the second part his promissory note for five thousand dollars, payable in one year, now, if this note should be paid, and if the parties of the first part will also, until it is paid, keep the buildings, machinery, and stock on the lot insured to two-thirds of its value, or reimburse to the party of the second part the premium for so keeping it insured, then this deed to be void; otherwise to be and remain in full force." It is not stated in either the note or the mortgage that they were given to secure future advances to or indebtedness by Duile to the bank. After their execution he continued to discount the notes of his customers to the bank, and among other paper he discounted to it and received the money upon 10 accommodation notes, drawn in his favor by one Deutsch, for different sums, and bearing different dates. Their accommodation character was not known to the bank when Duile indorsed them to it. They are all dated after maturity of the 5,000-dollar note, but it is proven that, save one for \$350, they are renewals of notes given prior to its maturity. October 10, 1887, Duile made an assignment for the benefit of his creditors. All of the notes upon his customers, which he had discounted to the bank, had then be paid; but it still held the 10 Deutsch notes, the earliest being dated August 8, 1887, and the last one October 8, 1887, and amounting in all, as

shown by the commissioner's report filed in this case, to \$1,769.90. In this suit brought by Duile's assignee to settle the estate, the bank asserted these notes as a preferred claim by virtue of the 5,000-dollar mortgage. It was rejected as such, but allowed as a general debt against the trust-estate. The lower court also allowed a homestead of a thousand dollars in the property embraced by the bank's mortgage, and it has appealed.

It is claimed by the appellees that the mortgage was given to secure the bank as to the notes of one particular customer of Duile, and that in any event it was only to secure it as to paper discounted to it upon his customers that had been given for value, or as to what is sometimes known as "business paper." The evidence, however, shows it was the agreement that it was to be a continuing collateral security for any indebtedness of Duile to the bank in the future, whether arising before or after the maturity of the mortgage note. This is substantially proven by the president of the bank by Deutsch, and another party, and Duile has not testified. There is evidence tending to show that this was known to his wife, and there is an entire absence of fraud or unfair dealing upon the part of the bank in the transaction. It may now be regarded as settled law in this country by virtue of a long line of decisions, beginning with the leading case of *Shirras v. Caig*, 7 Cranch, 34, that a mortgage to secure future advances is a valid contract. The only proper question in such a case is the *bona fides* of the transaction. It was said by Judge STORY in the case of *Leeds v. Cameron*, 3 Sum. 492: "Nothing can be more clear, both upon principle and authority, than that, at the common law, a mortgage, *bona fide* made, may be for future advances, and liabilities for the mortgagor by the mortgagee, as well as for present debts and liabilities." And in *Conard v. Insurance Co.*, 1 Pet. 448, the supreme court of the United States, speaking through the same distinguished judge, said: "Mortgages may as well be given to secure future advances and contingent [debts] as those which already exist, and are certain and due. The only question that properly arises in such cases is the *bona fides* of the transaction." In *Lyle v. Ducomb*, 5 Bin. 585, the court, speaking through TILGHMAN, C. J., said: "There cannot be a more fair, *bona fide*, and valuable consideration than the drawing or indorsing of notes at a future period for the benefit and at the request of the mortgagor; and nothing is more reasonable than the providing a sufficient indemnity beforehand." There has been some diversity of views between courts and text-writers as to the rights of mortgagees under mortgages for future advances as to third parties. Some have thought that if the mortgage did not give notice of what it was in fact intended to secure, or that it was for future advances, and a necessity, therefore, arose for proof *aliunde*, that it was invalid as to third persons. It was said,

however, by MARSHALL, C. J., in the case of *Shirras v. Caig*, supra: "It is true that the real transaction does not appear on the face of the mortgage. The deed purports to secure a debt of £30,000 sterling due to all the mortgagees. It was really intended to secure different sums, due at the time to particular mortgagees, advances afterwards to be made, and liabilities to be incurred to an uncertain amount. * * * If, upon investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed of his real equitable rights, unless it be in favor of a person who has been in fact injured and deceived by the misrepresentation."

In the case now before us it is said, that the mortgage does not truly recite the transaction. It may more properly be said that it only recites a part of it. It is a general rule that a written instrument cannot be varied or contradicted by parol evidence of what occurred anterior to or when it was executed; but Greenleaf, in speaking of it, says: "Nor does the rule apply in cases where the original contract was verbal and entire, and a part only of it was reduced to writing." 1 Greenl. Ev. (14th Ed.) § 284z. Here it was the verbal agreement to mortgage the property to the extent of \$5,000. This was reduced to writing; but the further part of the agreement, that it was to secure future indebtedness to that amount was not embraced in the writing. No one could be imposed upon to his injury, because this was not done, inasmuch as the mortgage gave notice that the property was in lien to the extent of \$5,000. The liability could not, of course, be enlarged, beyond the amount named in the mortgage to the injury of subsequent creditors; but here no one is prejudiced, as the existing indebtedness is less than the amount of it. It is said in 1 Jones on Mortgages, §§ 374-376, 384: "It is not necessary that the mortgage should express on its face that it is given to secure future advances. It may be given for a specific sum, and it will then be security for a debt to that amount. This definite sum will then limit the extent of the lien. * * * The omission to state on the face of the mortgage the time when the first advances are to be made is not material. It is sufficient that they are to be made from time to time, as the mortgagor may desire, during a specified period. The amounts of the several advances, and the times when they were actually made, and the object of the mortgage, may be shown by extrinsic proof, for in such case the proof does not contradict the mortgage, or alter its legal operation and effect in any way. Although the deed purports to be in consideration of a definite sum in hand paid at the time, it may be shown by parol evidence that the deed was made to secure advances made and to be made to that extent. * * * Parol evidence is admissible to show the true character of a mortgage, and for what purpose,

and what consideration it was given. Although it is for a definite sum, and secures the payment of notes for definite amounts, it may be shown that it is simply one of indemnity. When the object is simply to indemnify the mortgagee for a liability he has incurred or may incur, the amount of the mortgage or of the mortgage note serves merely to limit the extent of the security." This appears now to be the accepted rule, and it was therefore admissible to show by parol evidence that the mortgage to the appellant, though absolute upon its face, was in fact given for future advancements. No other lien was created upon the mortgaged property between the giving of the mortgage to the appellant and the time when the last note was discounted, and hence no question arises between lienholders.

The fact that the notes held by the appellant are dated after the maturity of the mortgage note does not, in our opinion, affect the question of lien. With one exception, they were renewals of indebtedness existing before its maturity, and the renewal of the evidences of the indebtedness would not affect the continuance of the security. *Burdett v. Clay*, 8 B. Mon. 287. It is immaterial, however, in our opinion, whether they were executed before or after its maturity. It was given to secure future indebtedness to the amount of it. It was executed simply as a collateral, and it should in reason make no difference whether it was due one day or ten years after its execution. It was so held by the supreme court of the United States in the case of *Lawrence v. Tucker*, 23 How. 14, where the note given to secure the future advances was payable one day after its date.

As to the homestead right, it is urged for Mrs. Duile that she can be affected by the mortgage according to its terms only, and that its effect upon her rights is bounded by the extent of her acknowledgment, or the tenor of the paper she acknowledged. The bank, however, holds the note and mortgage for \$5,000. She consented by the mortgage to putting the property and her rights in it in lien to this extent. The liability asserted is less than that sum. It was intended to secure it by the mortgage. The advances were undoubtedly made upon the faith of it, and in all fairness, by the bank. Under these circumstances she is not prejudiced by the allowance of a less sum as a lien against the property than that for which she stipulated. Instead of being prejudiced, she is benefited, and cannot be heard to complain. Judgment reversed, with directions to allow the appellant's claim as a preferred one with precedence over the claim to a homestead.

WICKLIFFE v. MAGRUDER.

(Court of Appeals of Kentucky. April 17, 1900.)

DEDICATION OF RIGHT OF WAY.

1. A will authorized the executor to sell certain lands, "with the understanding, in the sale of all the tracts, there is to be a passway, at least 11-

teen feet wide, near or where the present lane is, to the public road." Plaintiff and defendant each purchased part of said lands, the lane passing over defendant's tract. Held that, where the existing lane had been used as a matter of right, there was a sufficient dedication of the passway, and defendant could make no change in its location.¹

2. The fact that such passway is reserved in the will is sufficient to bind the purchaser of the fee, even though no such reservation is made in the deed from the executor to him.¹

3. The use of a strip of ground as a passway for more than 15 years constitutes a dedication, and its location cannot be changed by the owner of the fee.¹

Appeal from circuit court, Nelson county.
"Not to be officially reported."

N. W. Halstead, J. C. Beckham, and C. T. Atkinson, for appellant. *John D. Wickliffe*, for appellee.

BENNETT, J. This action was instituted by the appellant, R. C. Wickliffe, against the appellee, Magruder, to prevent him from obstructing or changing a certain passway, and to compel him to remove certain obstructions which he had placed therein. The appellant, Wickliffe, claimed the right to said passway as it had existed before the said appellee obstructed or changed it. Said appellee denied the appellant's right to said passway as it existed before he changed or obstructed it, and asserted his right to make the change and obstruction, which change, he alleges, simply puts the center of the passway upon the line that divides the appellee's land from others; whereas, before the change, the passway was on his land exclusively nearly all the way, and the change was only made to the extent of so arranging the passway, and resetting the fence accordingly, as to have the passway seven and a half feet on the appellee's land and an equidistance on his neighbor's land. The parties own their respective lands by virtue of purchases from the executor of Wilson Bowman. Wilson Bowman died in 1858. In his will he authorized his executor to sell all his lands in Nelson county. In the fourth clause of said will is this language: "The Caney Fork tract, upon the same terms and conditions as the above tracts, with the understanding in the sale of all the tracts, there is to be a passway, at least fifteen feet wide, near or where the present lane is, to the public road." There is no doubt that the foregoing language, though uncertain as to the precise location, is sufficient to dedicate a passway, if the same is accepted by the parties concerned. If not accepted, it would be regarded as a mere proposition to remain open only for a reasonable time, which would be considered impliedly withdrawn after the lapse of a reasonable time, without the acceptance having been made, which acceptance need not be evidenced by any formal act, but a use of it as a matter

of right would be sufficient evidence of such acceptance. It is true that the language, abstractly considered, refers to a passway near or at any lane that might have been on said land leading to the public road, but the concurrent facts show what lane was referred to by the deviser, which facts are that the lane and passway were then in existence, and were then used as a passway to the public road. If there had been other lanes in that locality, leading to the public road, and only one of them had been used as a passway, that fact would be sufficient to prevent the dedication from failing for uncertainty, and to establish the same as the one that the deviser meant to dedicate. The evidence is clear and overwhelming that said passway had been used and enjoyed as a passway ever since it was dedicated until it was changed by the appellee; that this use was not merely permissive but as a right; that its location as a passway had not fluctuated, sometimes changed to one place and sometimes to another place, to suit the convenience of the neighbors, but it remained at the same place that it was at the time of the dedication until it was changed by the appellee, and had been used as a passway (as thus located) as a matter of right all of that time. Even if there had been no dedication by the will of Wilson Bowman, the proof clearly establishes the fact that this particular strip of ground had been used as a passway as a matter of right, not permissive, for more than 15 years before the time that the appellee obstructed its use, which fact, according to the case of *O'Daniel v. O'Daniel*, 10 S. W. Rep. 638, constitutes a dedication of the said strip as a passway. Said strip having been dedicated as a passway, it follows that the appellee had no right to change it, even for the apparently equitable purpose of having one-half of it to rest on the appellee's land and the other half to rest on his neighbor's land. The strip of land having been dedicated so as to give the right to its use where it then was, the appellee had no right to change it, and persons having a right to travel on said passway had no right to change it, or encroach upon the appellee's adjoining land. To allow such right would subject dedicated passways to changes *ad infinitum*, and greatly inconvenience the parties concerned. The change that might be considered by some beneficial and convenient would in fact inconvenience and discommode others, and place the passway upon ground not desirable. For these reasons it is best that the passway, when once established at a particular place, should remain at that place until changed by proper proceedings. The fact that said passway was not reserved in the deed from Bowman's executor does not entitle the appellee to deny that it was dedicated by the will, and that that dedication is binding upon him. The dedication was made in the will, which was notice to the appellee, when he purchased the land, that the dedication was made, and he was as much bound by it as if it had been

¹ In general, as to what constitutes a dedication of land to public use, see *City of Eureka v. Armstrong*, (Cal.) 32 Pac. Rep. 925, and note; *Same v. Croghan*, Id. 693, and note, 19 Pac. Rep. 485, and note; *Baker v. Vanderburg*, (Mo.) 12 S. W. Rep. 493, and note; *Hicklin v. McClellan*, (Or.) 23 Pac. Rep. 1057.

expressed in the deed to him. The judgment on the original is reversed, with directions for further proceedings consistent with this opinion, and on cross-appeal it is affirmed.

COLEMAN'S ADM'R v. PARROTT.

(Court of Appeals of Kentucky. April 19, 1890.)

ADMINISTRATORS—TRUST COMPANY—CONSTITUTIONAL LAW.

The provision in the charter of a corporation, which is authorized to act as an administrator, that its capital stock shall be taken and considered as the security required by law for the faithful performance of its duties, and that other security shall not be required on its appointment as administrator except when required by the court or parties in interest, is constitutional.

Appeal from circuit court, Washington county.

"Not to be officially reported."

John T. Milburn, for appellant. John W. Lewis, for appellee.

LEWIS, C. J. The Louisville Safety Vault & Trust Company, a corporation, authorized by its charter to act as executor, administrator, or other trustee when appointed by deed, will, or order of court, instituted this action as administrator of the estate of Mary E. Coleman, deceased, to recover on promissory notes executed by appellee; but, special demurrer to the petition, upon the ground that the corporation has not legal capacity to sue, having been sustained and the action dismissed, it prosecutes this appeal. Power to sue and defend actions, as well in capacity of fiduciary as individually, is expressly given by the charter. It was regularly appointed by the proper county court administrator; its president, for it, executed bond, and took the oath required by law for faithful discharge of its duties; and therefore the only reason we perceive, or that has been suggested, for the alleged incapacity to sue is its failure to give personal security on the bond. It is provided in the charter that the capital stock of the company shall be taken and considered as the security required by law for faithful performance of its duties, and other security shall not be required upon its appointment as administrator or other fiduciary, except when required by the court or parties in interest; but power is given the court to make investigation of the affairs and management of the corporation, with view to determine the sufficiency of its capital stock as security before as well as after such appointment. We are not able to perceive wherein that provision conflicts with the constitution, for it does not confer upon the corporation an exclusive privilege, nor discriminate in its favor any more than would be the case if the legislature should, as it would have the unquestionable power, instead of requiring the owner of real estate to give personal security as a fiduciary, create by a law a lien thereon to secure faithful performance of his duties. The policy of the law is to secure at all events the *cestui que trust* against damage

or loss by maladministration by the fiduciary, and it is satisfied when and only until that is done, the mode by which it may be accomplished being of secondary consideration. The charter does not require a county court to dispense with personal security, unless satisfied the rights and interests of the *cestui que trust* will be fully protected and secured by lien on the capital stock of the company, and when so satisfied there is no reason for exacting other and additional security. But the question of the validity of that provision of the charter has been directly considered and passed on by this court in *Bank v. Payne*, 8 S. W. Rep. 856, and *Johnson v. Johnson*, 11 S. W. Rep. 5. Judgment reversed, and cause remanded with directions to overrule the demurrer, and for further proceedings consistent with this opinion.

PITTMAN et al. v. WAKEFIELD.

(Court of Appeals of Kentucky. April 19, 1890.)

JUDGMENT—LACHES—JURISDICTION.

1. A judgment entry foreclosing a lien on land provided that it should not be enforced unless so directed by plaintiff, and the case should remain on the docket for further orders. No sale having been directed, an order was made four years later that the case be filed away, "subject to being redocketed." After four years more the land was sold by plaintiff's direction. Held no such laches as would destroy his lien as against the debtor.

2. The fact that plaintiff caused the land to be sold without first having the case redocketed gives the debtor no ground of objection thereto, when he was notified that the sale would be ordered, and suffered no injury from the omission.

3. The purchaser under the sale, and the mortgagees of a mortgage given after the filing away of the case, must be held to have had notice of all the proceedings, and are bound thereby.

4. Gen. St. Ky. p. 849, provides that the superior courts shall not have appellate jurisdiction "where there is involved . . . the title to a freehold," etc. Held, a superior court has jurisdiction as to the loss by laches of a judgment lien, and as to the priority between a judgment and a mortgage lien upon a freehold, even though another feature of the case involve a question of title thereto.

5. Where the court of appeals has acquired jurisdiction because a question of title to a freehold is involved in one feature of a case, it will determine all questions arising therein.

Appeal from circuit court, Franklin county.

"To be officially reported."

Geo. C. Drane, for appellants. John L. Scott, for appellee.

BENNETT, J. In 1881 the appellee obtained a judgment in the Franklin circuit court for a sale of so much of the lot of ground described in the petition as was sufficient to pay a material-man's lien for the sum of \$40; said material or lumber having been furnished the appellant Pittman by the appellee for the purpose of repairing the house on said lot, and a lien having been retained on said lot for the payment of said sum. In the judgment it was provided that the sale was not to be enforced unless it was so directed by the appellee, and the case was to remain on the docket for all further orders. The case did remain on the docket without sale

until 1885, in which year it was ordered that it be filed away, "subject to being redocketed." In 1889, upon notice to the appellant Pittman, but without the case having been redocketed, the lot was sold under the said judgment of 1881, and the appellant Herndon became the purchaser. Between the time of filing said case away and the sale of the land under said judgment, the People's Homestead & Saving Association received a mortgage on said lot from the appellant Pittman to secure a loan of \$200. The appellant Pittman filed exceptions to the report of sale upon the ground that the appellee had lost his lien by delay, etc.; and the appellant Herndon, having refused to execute a bond in response to a rule, contended that the appellee had lost his lien by delay, etc., and that the People's Homestead & Saving Association, by reason of the appellee's delay, etc., and its taking said mortgage for value and without notice of appellee's lien, acquired a lien on said lot superior to that of the appellee. The People's Homestead & Saving Association also, by petition, set up substantially the same grounds of defense, and asked that its lien be declared superior to that of the appellee's.

The title of the appellant Pittman to said lot is nowhere put in issue. His title is conceded. The validity of the appellee's lien is admitted, as is the judgment foreclosing the lien. The validity of the People's Homestead & Saving Association's lien is also admitted. The only question to be decided is, has the appellee's lien been dissolved or been postponed to that of the association's by reason of the laches or conduct of the appellee occurring after he had obtained his judgment of foreclosure? This inquiry does not involve the title to the real estate, so far as the appellants Pittman and the association are concerned, in the sense of depriving the superior court of jurisdiction to try the issue. The question may be illustrated by the case of the levy of two executions, each in favor of different persons, and against the same person, upon the latter's tract of land, and the question arises as to the priority or waiver of lien resulting from the laches of the one or the other. Would it be contended that the superior court had not jurisdiction to try this issue as to the priority of the lien, or the issue as to the waiver of lien resulting from the laches of either party? We think not. The reason is, the title is not involved, but merely the question of priority of liens upon that title, resulting from the fact of levy or laches on the part of the party having the older levy in proceeding to execute the same.

But the question involved as to the appellant Herndon is one of title. The property at the decretal sale was struck off to him as the best bidder, and the appellee seeks to hold him to his purchase. He contends that no title was sold, or, if it was sold, it was subject, by reason of the laches of the appellee, to the mortgage lien of the People's Homestead & Saving Association; and he, by reason there-

of, could not get a clear title under his purchase. By reason of this issue of title, this court has jurisdiction of the case.

As said, the appellee's lien, and judgment foreclosing the same, were proper. That judgment remained on the docket until some time in the year 1885, unexecuted. The judgment was notice to all parties that might be concerned of its contents, which were that the appellee had acquired a material-man's lien on said property, and that the land was adjudged to be sold to satisfy the same; but it was not to be sold unless ordered by the appellee, and the case was to remain on the docket subject to all future orders. So the case remaining on the docket was perfectly consistent with the idea that the judgment remained unsatisfied, and appellee looked to his right to have the land sold under it to satisfy his judgment debt. This was certainly sufficient notice to the appellant the People's Homestead & Saving Association to put it on its guard, and make it a mortgagee, as far as the appellee was concerned, subject to appellee's judgment. So, also, the filing of the case away with the privilege of redocketing the same indicated to said appellant that the judgment was yet unsatisfied, and the appellee reserved the right to resort to the sale of the land for the purpose of satisfying it. There was nothing in this proceeding calculated to deceive and mislead the appellant; and, unless the conduct of the appellee had that effect upon the appellant, the latter cannot complain. The appellee's statutory lien had ripened into a judgment lien, and all the proceedings thereafter had on said judgment showed with reasonable certainty that the same was not satisfied; and the appellee looked to its execution, in the way of a sale of the land, to satisfy it. It seems that the appellant had as much reason to believe that the appellee had not abandoned this judgment lien as if the appellee had held a lien by a recorded mortgage, and the same had remained without any proceedings thereon for a number of years after its maturity. In the latter case the prior recorded mortgage would be good, as against the junior mortgage, for 15 years after the maturity of the former. The mere supineness or non-action of the holder of the senior mortgage would not be such laches as to give the junior mortgagee priority of right over him; but any action of his that would induce the holder of the junior mortgage, as a person of ordinary prudence, to believe that his mortgage had been satisfied or abandoned, and cause him to take the junior mortgage, which he otherwise would not have done, would be a fraud upon the junior mortgagee, and the lien of the senior mortgage would be postponed to the lien of the junior mortgage.

But the conduct of the appellee in this case should not be construed as calculated to create the belief that the judgment debt had been satisfied, or that the judgment lien had been abandoned. On the contrary, his conduct not only indicated that the judgment lien was

still looked to, but it certainly was sufficient to put a person of ordinary prudence upon further inquiry in regard to that matter, and the appellant should have made inquiry.

The appellant Pittman was duly notified that the land would be sold by the commissioner, and it does not appear that his interests suffered by reason of the failure to place the case on the docket. For these reasons, he should not be heard to complain. The other appellants, certainly, have no ground of complaint. The judgment is affirmed.

WAPLES et al. v. OVERAKER et al.

(Supreme Court of Texas. April 15, 1890.)

SALE—RIGHTS OF SELLER—NEW TRIAL.

1. Where the seller elects to resell the goods which the buyer has refused to accept, the buyer's knowledge of the legal right to resell, resulting from his refusal to comply with the contract, is a sufficient notice to him of the intention to resell to entitle the seller to recover the damages sustained by a resale.

2. The seller's right to resell goods which the buyer refuses to accept is not restricted to the place where the buyer ought to receive the goods, but he may sell in a distant market, provided he exercises good faith, and tries to realize the best price he can on a resale.

3. A motion for a new trial, on the ground of newly-discovered testimony, will not be granted, where the petition and answer show that such evidence was necessary on the trial, and the motion fails to show that any effort was made to obtain it.

Appeal from circuit court, Grayson county.

Hare, Edmundson & Hare, for appellants.
R. De Armond and *C. N. Buckler*, for appellees.

STAYTON, C. J. Appellants, who were millers and doing business in the city of Sherman, made a contract with appellees, under which the latter were to buy wheat at the market price in Collin county, where they lived. This wheat they were to ship to appellants, who therefor were to pay the market price paid by appellees, freight from place of shipment to Sherman, and, in addition to this, two and one-half cents per bushel for such wheat as might be thus bought and shipped to appellants during the season of 1884. Seven car-loads of wheat were thus bought by appellees early in July, and shipped to appellants, who on the arrival of the wheat at Sherman refused to receive it, wherefore it was shipped by appellees to New Orleans, and there sold, but at a loss, and this action was brought to secure damages for breach of the contract. There is some conflict in the evidence, but the case made by appellees was, in substance, this: The contract was formed as stated. On July 9th, appellees had bought under the contract and had loaded in seven cars 3,850 bushels of wheat, when they received a telegram from appellants directing them not to ship any more wheat at that time. On receipt of that telegram, one of appellees, with samples of the wheat in the cars, went to Sherman, and exhibited the samples to appellants, who then agreed to take the wheat at 70 cents per

bushel, with freight and $2\frac{1}{2}$ cents per bushel added; whereupon, on July 11th, the wheat was sent to Sherman, consigned to appellants, who refused to receive it, of which appellees were not informed until the 14th or 15th of that month, when they were notified by the railroad agent at Sherman that they had refused to receive the wheat, and that the railway company desired to use its cars which were still standing on a side track with the wheat still in them. On receipt of this information one of appellees went to Sherman to induce appellants to receive the wheat, but they refused to do this, and gave their written rejection of the wheat, basing that on claim that the wheat was inferior to samples furnished, which, in view of the evidence, the charge of the court, and the verdict of the jury, must be considered to have been untrue. Appellants were then informed that the railway company were pressing for the cars; that they would be held responsible for the breach of contract; and that appellees would be compelled to sell the wheat then, or reship it, if they did not receive it. Appellees then tried to sell the wheat to other millers in Sherman, but were unable then to find a market for it; whereupon they sought a market for the wheat, through telegrams, in Dallas, Houston, and Galveston, but were unable to find a market for the wheat in Texas, whereupon they were compelled to sack the wheat, and ship it to New Orleans, where it was subsequently sold. It is further shown that New Orleans was considered the best market for Texas wheat, and that, when appellants refused to receive the wheat at Sherman, wheat had fallen in price, and was selling at 65 cents per bushel. One of appellees stated that he told one of appellants "that he could not sell the wheat in Sherman, and that the road had notified us that they wanted the cars, and that I would have to reship the wheat to some other point, where I could find sale for it. He just remarked, 'That is your business, not mine,' and kept on walking away from me, and did not seem disposed to talk about the matter." After this J. H. Hays was sent by appellees to Sherman to sell or reship the wheat still in the cars, and to sack it for shipment, if this became necessary. This witness made another effort to sell the wheat in Sherman, but failed, when he sacked it and shipped it to New Orleans. While in Sherman he also had a conversation with one of appellants, which, so far as pertinent, he states as follows: "I went to the Eagle Mills, the one owned by defendants, and there found defendant Paul Waples, and one or two others. I stated that I had been sent by plaintiffs to see about that rejected wheat, and inquired what they proposed to do about it. I told Paul Waples that my instructions from Overaker were either to sell the wheat or to reship it. I told him that the railroad would not let us have the cars much longer, and that something had to be done. To this Waples made no satisfactory reply. Simply said that he could do

nothing. * * * I simply told him that I had been sent by plaintiff to sell or reship the wheat." Witness then stated the efforts he made to sell at Sherman, and that, failing in that, the wheat was sacked and shipped to New Orleans. After the conversation between Overaker and Paul Waples, before referred to, the former wrote on July 16th to appellants the following letter: "Montcastle [his partner] refuses to do anything about the 7 cars wheat, so leaves it all to me. Mr. Paul treat me like a white man over this thing. The wheat is there, and God knows I am willing to do the clean thing. You recollect all the time what you told me about buying wheat for you. Now, let me know what you will do for me about this. If the wheat was of my own to say about, I then could decide at once. Let me know. Yours, etc., H. C. OVERAKER." The letter was not replied to, and was received by appellants before the conversation between them and Hays occurred. It is not shown that there was any agreement to sell the wheat on credit, and, in the absence of this, it must be presumed that it was to be paid for on delivery.

There may have been such constructive delivery, and existence of such other facts as would have vested title to the wheat in appellants, but they cannot claim, under the facts shown, that such an absolute delivery had been made as would defeat the lien of appellees for the purchase money. The conduct of appellants forbids their claim that such a state of affairs existed. They denied having any interest in the wheat, or liability for the price, and refused to make their possession absolute. Had they done the latter, appellees would have been driven to an action to recover the agreed price. As the wheat stood in the cars, appellants refusing to receive and pay for it, it was the right of appellees to hold it until its price was paid, as they might have done had the wheat not been shipped to Sherman. Appellants having refused to receive and pay for the wheat, appellees might have retained it, and have recovered the difference between the contract price and the market price at time and place of delivery, or they might have held the property for appellants, and at their risk, and have received the purchase money, which under the agreement would be the aggregate of freight paid and 72½ cents per bushel. Appellees, however, were not bound to pursue either of these courses on the refusal of appellants to receive and pay for the wheat; for they had the right to resell and appropriate proceeds on the debt due them, and were not bound to run the risk of the insolvency of appellants, which they would do if they pursued either of the other courses suggested, nor were they bound to assume the risks resulting from fluctuation of markets or the perishable nature of the article. The right of the seller to resell in satisfaction of unpaid purchase money, if title, but not possession, has passed, seems to be well settled; and if there is a contract to sell, and per-

formance be tendered by the seller, the same rule applies. *Whitney v. Boardman*, 118 Mass. 242; *McLean v. Richardson*, 127 Mass. 345; *Lewis v. Greider*, 51 N. Y. 231; *Jackson v. Covert*, 5 Wend. 141; *Smith v. Pettee*, 70 N. Y. 13; *Ullmann v. Keut*, 60 Ill. 271; *Bagley v. Findlay*, 82 Ill. 524; *Pollen v. Le Roy*, 30 N. Y. 549; *Young v. Mertens*, 27 Md. 115; *Gordon v. Norris*, 49 N. H. 382; 2 *Schouler, Pers. Prop.* §§ 546, 549; *Benj. Sales*, 746, 747.

It is not contended that the measure of damages fixed by the charge of the court was erroneous, but it is urged that the court erred in permitting the application of that measure to this case, because there was no evidence of a direct notice of an intention to ship to New Orleans having been given; and further erred in charging "that a simple note of intention to sell was all that was required of plaintiffs before shipping to a distant market;" and further erred in instructing the jury "that, after simply giving notice to defendant of an intention to sell the wheat, plaintiffs had the right to sell in a distant market, if plaintiffs found themselves either unable to sell in Sherman, or that they could get a better price by shipping to a distant market." In reference to these matters, the court instructed the jury as follows: "If, however, you find that the wheat was as good as the samples, and defendants refused to accept the same, then plaintiffs had the right, after giving notice to defendants, to sell the same for the best attainable market price; and if they were unable to sell in the market at the place of delivery, or could get a better price by shipping, they had a right to ship and sell at the best and most convenient market. Hence if you find that plaintiffs complied with their part of the contract, and defendants did not comply with their part, and if plaintiffs gave defendants notice of their intention to sell the wheat, and plaintiffs afterwards did sell or cause the same to be sold within a reasonable time, and if it was necessary for them to transport the wheat to get a market for it, then, and in that case, you will find damages for plaintiffs," etc. Another part of the charge made the right of plaintiffs to recover under the rules applicable to cases of resale to depend on notice to defendants of intent to resell. The evidence bearing on the question of actual notice of intent to resell was somewhat conflicting, but ample to sustain the finding of the jury on that issue.

We are of opinion that there was no error in the charge of the court as to notice of intent to resell of which appellants can properly complain, and that the charge was more favorable to them, in this respect, than it ought to have been under the uncontroverted facts of the case. That the wheat was tendered to appellants at the proper place of delivery is not controverted, nor is it denied that they absolutely refused to receive it. It was known that appellees were purchasers of wheat, and of the particular wheat for sale, at once, and

not to hold. The wheat was known to be in cars the railway company was demanding, and we are of opinion that knowledge of these and other like facts conveyed to appellants notice of the vital fact necessary for them to know to authorize appellees to sell some other person, and to subject them to the liabilities resting on the buyer, who refuses to comply with his contract, in cases in which the seller resells. They had notice and knowledge of appellees' legal right to sell to some other person, resulting from their unqualified refusal to comply with the contract to receive and pay for the wheat when tendered at the proper place of delivery. It is enough that the defaulting buyer has notice of the facts which give to the wronged seller the right to resell, when these consist of the absolute refusal of the buyer to comply with the contract of sale. *Ullmann v. Kent*, 60 Ill. 273; 2 Schouler, Pers. Prop., § 550; *Saladin v. Mitchell*, 45 Ill. 80. After notice of the right thus arising, notice of an actual intent to sell could only operate in the way of a threat to induce compliance. If, having once refused to comply with the contract, there be *locus penitentiae* for the buyer, he must avail himself of it without further notice or request from the seller. There was nothing in the evidence from which it could have been understood that appellees intended to waive their right.

It is urged that appellees had no right to ship the wheat to New Orleans for sale, and make the price at which it then sold the basis of the recovery; that it should have been sold in Sherman, or in the nearest market. It is the duty of the seller in such a case to exercise good faith, and to realize the best price he can on resale; but if in the light of the facts before him, obtained in the exercise of due diligence, he pursues the course which prudence would dictate to a man of ordinary prudence, then the defaulting buyer ought not to be heard to say that the market in which the thing was sold was not in fact the most advantageous one. If appellants desired to select the market, they ought to have received the wheat, and sent it to that market. There are cases which seem to hold that the seller has not the right to ship to a distant market for sale, when the buyer refuses to receive the thing bought. *Chapman v. Ingram*, 80 Wis. 290; *Rickey v. Tenbroeck*, 63 Mo. 568. If such a rule was recognized, in case property could not be sold at the place where the buyer ought to receive it the right of the seller to resell would be practically taken away. The true rule we believe to be that asserted in *Lewis v. Greider*, supra: "The place of sale is not necessarily restricted to the place where, by the contract, the vendee was bound to receive the property. The vendors having, as they should, the intent of both parties in view, had the undoubted right, as a means of guarding against loss, to procure an insurance upon it, and within the rule that would justify such reasonable outlay to save it from loss they should be per-

mitted to exercise a reasonable discretion as to the place of sale, and to exercise it within a reasonable time." Whether the market selected and manner of sale were fair were questions open to inquiry, but from the evidence introduced there is no reason to question either.

A motion for new trial was asked on the ground of newly-discovered testimony, by which appellants proposed to show that a market might have been found for the wheat at Sherman, and at other places in Texas at which it had been shown that appellees had tried without success to find a market; and, as an excuse for not having the evidence on the trial, it was plain that the original petition did not negative these facts, and that the contents of an amended petition filed the day before the trial, which did, were unknown to them. No sufficient reason is shown why appellants did not ascertain what the amended petition alleged. They had opportunity to read it, and must have heard it read at the opening of the trial, and did not then claim surprise. If, however, they were shown to have been excusably ignorant of the averments of the amended petition, this would not benefit them; for the motion for new trial shows that the original petition contained such averments as would make such evidence as that claimed to be newly discovered not only proper, but necessary, on the trial. Moreover, the answer alleged "that such wheat was worth on the Sherman market, at time defendants refused it, 80 cents per bushel; and plaintiffs, by the use of reasonable diligence, could have obtained that price for it, instead of sending it, at such great expense, to a distant market, where the price was less." This answer shows that appellants were fully aware that they needed just such evidence as they claimed to have discovered after trial to meet the case made by appellees' pleadings, and the motion for new trial fails to show that any effort was made to obtain it. The court did not err in overruling the motion for new trial, and its judgment will be affirmed.

MILLER et al. v. FOSTER et al.

(Supreme Court of Texas. June 28, 1889.)

WILL—CONTINGENT REMAINDER—PROBATE.

1. A testator devised land to his wife for 21 years, then to any children he might have, or, in case of the death of his children, to his wife for life, and in case no child of his survived her, then on her death to the children of M. After the probating of will, testator's widow brought suit to have it set aside. The executor and a guardian *ad litem* for testator's child filed answers. Held, that the children of M., who had under the will a contingent remainder, were represented in the suit by the parties thereto, and, as a proceeding to vacate a will is a proceeding *in rem*, they were bound by the decree annulling the probate of the will.

2. Where a widow renounces a life-estate granted under a will, and takes possession in her own right, the remainder vests at once, and a suit by the remainder-men, brought 16 years thereafter, is barred.

Commissioners' decision. Appeal from district court, Gonzales county.

F. G. Morris, for appellants. *Harwood & Harwood*, for appellees.

HOBBS, J. This is an action of trespass to try title, brought by the appellants on the 13th day of January, 1886, against the appellees, to recover an undivided one-half interest in 1,107 acres of land, granted to Darwin M. Stapp. The appellants deraign title to the land from and under the will of Thomas P. Rutledge, executed on January 7, 1848, and probated on April 29, 1850. It was provided by the clause of the will under which appellants claim title that all property, real or personal, owned by the testator, should vest first in Eliza Rutledge, his wife, for the period of 21 years from his death, at the expiration of which time it should go to any child or children of the testator he might have by his said wife. In the event of the death of his offspring by his said wife, the property was to vest in her for life. In the event of the death of his wife, Eliza, without offspring by him surviving her, his property should be owned equally by the children of Alsey S. Miller, who survived the testator, and which he might have by his present wife. Such are the appellees in this case. It was admitted that the land involved was the community property of Thomas P. and his wife, Eliza Rutledge, on the 7th day of June, 1848, and continued so to be until the death of said Thomas P.; that they were married on June 25, 1846, and resided in Gonzales county; that one child, W. M. Rutledge, was born July 23, 1848, the issue of that marriage; that Thomas P. Rutledge died in January, 1850, leaving as his only surviving heirs at law said wife and child; that his will was executed June 7, 1848, appointing Alsey S. Miller, father of plaintiffs, executor; that the mother of plaintiffs, and wife of said Miller, was the sister of said Eliza; that in July, 1850, Eliza Rutledge married W. L. Foster, one of the defendants, and the other defendants are the children of this union; that said Eliza died on 25th February, 1881; that W. M. Rutledge died July 14, 1854; that the plaintiff F. H. Miller was born March 18, 1848, W. A. H. Miller, January 1, 1846, and Mrs. M. F. Nicholls, March 1, 1848. She married W. V. Ramsey July 21, 1861, who died November 1, 1869, and she married A. J. Nicholls, plaintiff, October 26, 1871. None of the plaintiffs were under disability in March, 1870. Foster testified that the defendants had been in possession of the land since 1850 as a homestead, when he married Eliza Rutledge, the widow of Thomas P. Rutledge, and had paid the taxes on the same, except, perhaps, the first year, when they were paid by Miller, the executor; that A. S. Miller lived about five miles from the land, and raised his family there. The plaintiffs were born there, and lived there until they attained their majority. Plaintiff Mrs. Nicholls, up to the time of her marriage to

Ramsey, lived at defendant's place about as much as at her father's. Defendant Foster lived at Miller's place when he married said Eliza. The family were intimate; Alsey S. Miller's wife and Eliza Rutledge being sisters. "The matter of the judgment vacating the will was often discussed between us," and plaintiffs knew all about it, he supposed.

On the 19th of April, 1852, Eliza Foster, formerly the wife of Thomas P. Rutledge, joined by her husband, W. L. Foster, filed a petition in the district court of Gonzales county, where the parties resided, against the executor under the will, to set aside and declare the same null and void. The petition alleged that she was the relict of said Thomas P. Rutledge. The execution of the will on June 7, 1848, at which time he had a small amount of property, and no children. That afterwards he had a child born to him, who is now living, named William M. Rutledge. That said deceased, late in 1849, and long after the birth of his child, left on a visit to Tennessee, and died on his return passage January 10, 1850; and Alsey Miller, with whom his business was left, and the will found among his papers, felt it his duty to have the probate thereof made, and the same was done in Gonzales county, on the 29th of April, 1850, and he was appointed executor thereon. Your petitioners allege that all the property of the deceased was community property. That said will was made without reference to the contingency which took place, or at least before the birth of the child, which was born some months afterwards. That the disposition made by the will of all the property is contrary to law, and is trammelled with conditions illegal and embarrassing to said Eliza Ann and the child, and should be set aside as void, and contrary to law, and your petitioner, Eliza Ann, and the child have distribution under the statute. Petitioners set forth that the executor, Alsey S. Miller, has faithfully performed his trust, and has paid all debts, and has closed, or is ready to close, said estate, and it now becomes the duty of your petitioners to pray your honor to hear such proof as may be necessary, that the will be examined by your honor, and that the same be declared null and void, and that an order of distribution be made by your honor regardless thereof, and that the property in the hands of the executor now of right belonging to the estate be divided between the said Eliza Ann and W. M. Rutledge, as heirs at law, and that the said heirs take according to law. Said Eliza Ann also prays for an order of your honor's court, that she may have the benefits of the allowance made to widows, having received none heretofore. Your petitioner prays that Alsey S. Miller be made defendant hereto. That he be required to appear and answer this petition, and show cause, if any he have, why the prayer hereof shall not be granted; and that he be ordered to obey the decree of the court hereon. Your petitioners make proof of the will, and order of the court hereon, and

the letters of executorship to said Miller, closing with a prayer for general relief. An answer was filed by the executor, and by S. B. Conley, guardian *ad litem*, for the minor, W. M. Rutledge. The answer of the executor, Alsey S. Miller, admitted the truth of the material facts set forth in the petition. The minor and heir, W. M. Rutledge, through his guardian *ad litem*, answered, in effect, neither admitting nor denying the allegations; and submitted the matters to the court. The following judgment was rendered by the court: "Foster and Wife, (253) vs. Miller, Executor. Saturday, October 23, 1852. Came all the parties, by their attorneys, and S. B. Conley, Esq., guardian *ad litem* for the minor, Wm. M. Rutledge, and the matters and things being all before the court, by the pleadings and record evidence therein, the same was submitted to the court, and, being heard, it is ordered, adjudged, and decreed by the court that the will of the deceased, Thomas P. Rutledge, made on June 7, 1848, and admitted to probate on April 29, 1850, be, and the same is hereby, declared to be null, void, and of no effect, and that the same be in all things set aside and held for naught. It is further ordered, adjudged, and decreed that the said Eliza Ann Foster, as relict of said Rutledge, deceased, and the said Wm. M. Rutledge, minor, be entitled to take, receive, and hold all the property of said deceased jointly between them as heirs at law, be the same real, personal, or mixed, and subject to the action of the county court of Gonzales county, as to distribution after the debts are paid and estate closed by the report of the executor, whose acts under the will are not impaired by the decree; and that said court is required to make the yearly allowance to the said Eliza Ann Foster, in accordance with law and the order of said county court. It is further ordered and adjudged that the executor, out of the funds of the estate, pay the costs herein expended, and that this decree be duly certified to the county court for observance."

We do not deem it necessary to consider each of the assignments presented, or to comment upon the many authorities cited, in the elaborate briefs in support of the propositions respectively contended for by appellants and appellees; but shall confine our examination of the questions raised to those we believe to be decisive. There are three controlling propositions involved in this case, and the law of each, we believe, upon principle and authority, to be settled adversely to appellants. If the law is so settled in either one of them, it precludes a recovery by appellants. It is earnestly contended that the appellants were not parties to the suit in which the judgment vacating the will was rendered; that it is not therefore binding on them, and is subject to be impeached in this action; that they were necessary parties to the suit; and that it was not such a proceeding *in rem* as would be for that reason conclusive as to them. Before determining whether this judgment is conclusive as to appellants upon

the principle that a proceeding to probate or vacate a will is one *in rem*, and binding upon the world, it may be well to ascertain whether the objection to the judgment upon the ground that plaintiffs were not parties to it has any foundation in fact; and whether they were parties to it depends upon the character of, and legal consequences attached to, the estate created by the will in favor of plaintiffs, and the relation established by law between such estate and other estates created by the same instrument in favor of other devisees, who were parties to the judgment sought to be impeached. The will of Thomas P. Rutledge bequeathed to his wife, Eliza Rutledge, all of his estate, real and personal, for and during the period of 21 years from and after his death. After the expiration of said 21 years, it was provided that his estate should be "owned and enjoyed by my offspring or child or children by my said wife. In the event of the death of my said wife without offspring by me at her death which may survive her, I direct that all of my estate, real and personal, shall be owned equally by children of Alsey S. Miller, which may survive me, which he may have by his present wife. In event of the death of the offspring which I may have by my said wife, I direct that my said wife shall have all of my estate, real and personal, for and during her life," etc. Such are the estates created by the will; and applying to the estate created in favor of plaintiffs, upon the contingencies stated, the description given by the learned writers on this intricate branch of the law of a contingent remainder, it would seem to belong to that class of estates. It was contingent upon an interest, first, of 21 years in favor of Eliza Rutledge, and, again, dependent on a life-estate granted to her in the event of the death of the testator's offspring by her. It was contingent, further, upon the death of W. M. Rutledge, to whom an inheritable estate was devised, before it became vested in the appellants. Tested, then, by the definition of a remainder, that is, an estate limited to an uncertain person, or to a certain person and a certain event, but not vesting in possession until the determination of the preceding estates, (Wig. Wills, 139,) the remainder in fee to plaintiffs was contingent upon W. M. Rutledge's death, but did not take effect in possession, because of the estate for years and the estate for life in Eliza Rutledge, unless, after it vested in plaintiffs, her estate failed, or was renounced, in which event it would vest in possession as fully as if her estate had terminated under the will.

Such being the estate of appellants, the next inquiry is, how far and to what extent they would be represented by those to whom other estates were devised in a suit to which such other devisees were parties. After discussing the rule "that all persons having an interest in the subject-matter should, under all circumstances, be before the court as parties," Judge Story says: "On the contrary, there are cases in which certain parties before

the court are entitled to be deemed the full representatives of all other persons, or, at least, so far as to bind their interests under the decree, although they are not, or cannot be made, parties." Story, Eq. Pl. § 142. Citing examples in support of the rule, he says: "Upon similar grounds of a virtual representation of all the proper interests where there is real estate in controversy which is subject to an entail, it is generally sufficient (all the parties having antecedent estates being before the court) to make the first tenant in tail *in esse*, in whom an estate of inheritance is vested, a party with those claiming the prior interests, without making any persons parties who may claim in remainder or reversion after such vested estate of inheritance." The tenant in tail, in such case, is equally the representative of all subsequent estates and interests, (Id. § 144;) "and a decree for or against such first tenant in tail will generally bind those in remainder or reversion, although, by the failure of all the previous estates, the estates in remainder or reversion may afterwards vest in possession." "If there be no such tenant in tail in being, the first person in being entitled to the inheritance should be made a party; and if there be no such person in being, then the tenant for life; and in such a case the decree made will bind the other persons not in being." Id. § 145. So "where a bill is brought by a tenant in tail, or by any other person having the first estate of inheritance, other persons having a subsequent vested or contingent interest will generally be bound by the decree, and will be entitled to the benefits as well as the disadvantages thereof." Id. § 146. An exception to this rule of virtual representation is said to exist "where a person is in being, claiming under a limitation by way of executory devise, not subject to any preceding vested estate of inheritance." The rule on this subject is also stated by Mr. Freeman as follows: "If several remainders are limited by the same deed, this creates a privity between the person in remainder and all those who may come after him; and a verdict and judgment for or against the former may be given in evidence for or against any of the latter." So where lands were conveyed to be held, *first*, for S. P. C. for life; *second*, remainder to the heirs of his body; *third*, remainder to R. C. for life; *fourth*, remainder to the heirs of R. C.'s body; *fifth*, remainder in fee to the children of S. C.,—in an action against the trustees this deed was set aside. S. P. C. and R. C. afterwards dying, the children of S. C. commenced suit to obtain their remainder in fee. But it was held that the decree setting aside the deed was binding on them; that the contingent remainders depended on the legal fee and the equitable estate in S. P. C. intermediate, and was liable to be destroyed by anything which defeated those estates. * * * "It is sufficient to bring before the court the first tenant in tail in being; and, if there be no tenant in tail in being, the first person entitled

to the inheritance, and, if no such person, then the tenant for life." Freem. Judgm. § 172, and cases cited.

Applying these principles to this case, we do not find appellants claiming "under a limitation by way of executory devise, not subject to any preceding vested estate of inheritance;" and therefore an exception to the rule of virtual representation, because it was subject to the preceding estate of inheritance of W. M. Rutledge. But we do find several remainders, limited by the same instrument, and that of appellants, depended on the estate W. M. Rutledge, the vested estate of 21 years in Eliza Rutledge, and the contingency of a life-estate in her. We find, also, that when the judgment vacating the will was rendered in 1852, the person entitled to the first estate of inheritance, as also the tenant for life and for years, were parties to the suit. These estates were destroyed by this judgment, and, if the principle be correct that the estate in remainder is subject to destruction by anything which defeats the preceding inheritable estate, it necessarily follows that such was the effect upon the estate of appellants. If the doctrine of virtual representation, as announced in the authorities cited, applies where the tenant for life is made a party, where there is no person in existence having an estate of inheritance, by stronger reason would it apply, and include as a party the appellants, when the person having the inheritable estate was in existence, and a party as well also as the tenant for life. It is to be observed in this connection that the executor, the trustee for the devisees under the will, was also a party to the judgment. *Anderson v. Stewart*, 15 Tex. 289; *Hollis v. Dashiell*, 52 Tex. 187. Upon the doctrine of virtual representation, it would seem that, in the absence of fraud, at least, a decree rendered, to which persons possessing the interests in the subject-matter of the decree, as above explained, would be binding upon the contingent estates dependent on these interests, a judgment affecting the invalidity of a testament is an exception to the rule that only parties to the same or their successors are bound. *Bigelow, Estop.* 12. The statute (*Pasch. Dig. art. 1262*) under which the will was vacated did not declare who should be parties to the suit; and it has been repeatedly held in this state that in suits involving the title to land (and the suit to vacate the will involved the title to land) it is not necessary to make the heirs parties with the executor. *Gunter v. Fox*, 51 Tex. 383; *Zacharie v. Waldrom*, 56 Tex. 117; *Guilford v. Love*, 49 Tex. 715. If, however, the appellants were necessary parties, we think, under the authorities cited, they were represented by the persons made parties, owning the estate of inheritance and the life-estate, together with the executor under the will, who was also a party. The suit to set aside the will was instituted under article 1262, *Pasch. Dig.*, the law then in force. This article, after providing the manner in which a will

shall be probated, provides that "any person interested in any such will may, within four years after it is admitted to probate, institute suit in the district court to contest its validity." Infants, *femes covert*, and persons *non compos mentis* are allowed the same period after the removal of their respective disabilities within which to institute such suit, etc. There can be no doubt that in October, 1852, the district court was clothed with the jurisdiction to determine any contest with respect to the validity of a will. This question was settled in the early case of *Parker v. Parker*, 10 Tex. 86, which has been repeatedly since cited with approval, in which case it was held that, independently of its general and enlarged powers to entertain such a suit, it was expressly conferred by the statute. *Vickery v. Hobbs*, 21 Tex. 576. The transfer of this jurisdiction, under the provisions of the present constitution, was explained in *Franks v. Chapman*, 60 Tex. 46.

If the appellants' position be correct, that they were necessary parties to the suit in which the will was vacated, and that the doctrine of virtual representation has no application, the question then presented is, whether the proceeding to vacate Rutledge's will was one *in rem* or not, and, if so, what was its effect upon the appellants? The authorities are uniform to the effect that a proceeding to probate a will is a proceeding *in rem*. Upon this point there appears to be no diversity of opinion. Such proceeding is said to be an adjudication upon the *status* of some subject-matter, which, wherever binding upon any person, is upon all persons. A careful consideration of the question in the case of *Steele v. Renn*, 50 Tex. 481, resulted in the conclusion that an application for the probate of a will is a proceeding *in rem*, and that a judgment of the court thereupon is binding upon all the world until revoked. See, also, *Freem. Judgm.* § 607; *Zacharie v. Waldrom*, supra; *Wells, Res Adj.* § 426; *Scott v. Calvit*, 8 How. (Miss.) 159. If any distinction exists in this respect between a proceeding to probate a will and one to vacate or set aside a will so probated, it will be found fully explained in the case of *Franks v. Chapman*, 61 Tex. 579. In that case, discussing the features characterizing these proceedings, it is said: "A proceeding to contest the validity as a will of a paper which has been admitted to probate as such is no less a probate proceeding than is one instituted to have a paper probated as a will. The inquiry in each case is the same, the subject-matter is the same, and the jurisdictional power exercised in declaring a paper already probated to be invalid as a will is co-extensive with that exercised in refusing to declare, by the act of probate, that the paper offered is the valid will of the deceased. The actors in the one case assume the burden of establishing a proposition negative in its character, while in the other they assume the burden of an affirmative. This is practically all

the difference in the two procedures." If, then, the only practical difference between the proceeding to probate and that to annul the will relates to the burden of proof, it follows, necessarily, that in all other respects they are similar. If so, a suit under our statute to set aside and declare invalid a will admitted to probate, being a proceeding *in rem*, the judgment therein is as conclusive as would be the judgment admitting it to probate; about which there seems to be no diversity of opinion whatever. From the views expressed, it follows that we are of opinion that appellants were not necessary parties to the suit; that the estate in remainder, created by the will in favor of plaintiffs, was represented in the suit to set aside the will in the estate of inheritance, and that for 21 years and for life, respectively, vested in W. M. Rutledge and Eliza Rutledge, who, with the executor, Aisey S. Miller, as trustee for the legatees under the will, were made parties; that if the plaintiffs were not so virtually represented by those holding these estates, still, upon principle and authority, the proceeding to vacate the will was *in rem*, affecting the *status* of the property, and binding upon all parties, as before explained.

In addition to the reasons already stated, which would preclude a recovery by appellants, there is another made manifest by the record which in our opinion is fatal to the action. The estate in fee granted to W. M. Rutledge by the will vested in the appellants upon his death, and awaited only the termination of the life-estate of Eliza Rutledge to take effect in possession under the will. W. M. Rutledge died in 1854. The estate in fee vested in appellants immediately; not the right of possession, however, against Eliza Rutledge, if she held under the will. But the will and the life-estate conveyed to her were renounced by her in October, 1852. She severed the connection between these estates, destroyed the trust relation existing by reason thereof between herself and appellants, entered into possession adversely to the will, in her own right, and so openly held until her death, in 1881, which possession was continued by defendants until the institution of this suit in January, 1886. That her claim and possession was in her own right, and adverse to appellants, was a notorious act, repudiating the trust relations, and renouncing title under the will, is unmistakably evidenced by the decree of 1852 vacating it. In *Anderson v. Stewart*, 15 Tex. 290, the possession by an administrator for nine years was held to be sufficient to bar the suit of a former wife of the testator, who claimed one-half of the property, which the testator had disposed of by will. In the case cited the plaintiff resided in another state. It was held that limitation would begin to run when the trust relation was repudiated by some notorious act, and reference was made to an example of such notorious act in the case of *Winburn's Ex'rs v. Cochran*, 9 Tex. 123, where it was said that the inventory of a slave

was such an act. The judgment of the district court setting aside the will would certainly be an act more notorious and public in its assertion of an adverse claim than the inventory of the property in the one case, and equally as notorious an act of adverse claim as the possession and administration of the estate by the executor in the other. In addition to this the proof was that defendants had been in possession from 1852 to 1886, paying taxes, and occupying it as a homestead; that plaintiffs resided within a few miles of the land, the families were related and intimate, and the judgment vacating the will a frequent topic of conversation between them. Including the time from the death of W. M. Rutledge, in 1854, to March 30, 1870, appellants, though having the estate in fee vested in them, were under disabilities; but on March 30, 1870, their right of action accrued, and they were then, by such legal proceedings as would accomplish that end, entitled to protection, and could assert their rights against any act to injure or destroy their estate in fee, or place them in possession under the remainder. Mrs. Rutledge's renunciation under the will, and repudiation of any possession for or inuring to appellants, her open adverse assertion of title, and possession in her own right, put the statute of limitation in motion against appellants, as would the repudiation by a trustee of his relations to, and an adverse assertion of claim against, his *cestui que trust*.

It is contended that, though the estate in fee vested in appellants upon the death of W. M. Rutledge in 1854, no right of action accrued until the death of the life-tenant, Mrs. Rutledge, in 1881, and therefore no limitation ran against them until that time, because the remainder did not take effect in possession until then. This would be true, and appellants would not, by virtue of the estate in remainder vested in them upon W. M. Rutledge's death, be entitled to the possession as long as the life-tenant held as such; but upon the renunciation of the will and the estate thereunder, and the assertion of claim, coupled with adverse possession in her own right, the right of action accrued; because, by virtue of this renunciation, they were entitled to possession. The authorities are to the effect that, where the estate in remainder is dependent upon the life-estate of the widow of the testator, and she waives the provisions of the will, and takes under the statute, the estate in remainder vests immediately upon the determination of the widow's estate or interest. 2 Redf. Wills, p. 257, par. 66. In Wood's Adm'r v. Wood's Devisees, 1 Metc. (Ky.) 512, it was said that, "as a general rule, where real or personal estate is devised to one for life, with an ulterior devise to another, the ulterior devise vests absolutely upon the death of the testator, and takes effect in possession whenever the prior devise from any cause ceases or fails." In that case there was a devise of all of his estate to the wife

during her life, and devises over to others. The widow renounced the provisions of the will, and it was held that the ulterior devise took effect upon the widow's renunciation of the will, as they would have done upon her death. So in the case of Fox v. Rumery, 68 Me. 121, where the wife waived the provisions of the will, and accepted dower instead, it was held that the effect was to accelerate the devise over. See, also, 2 Jarm. Wills, 574. In the case under discussion, there was a devise for life to Mrs. R., remainder over to appellants. She waived the devise,—declined to accept it; therefore, the devise or remainder over took effect at once, as if no first life-estate had been created. The remainder to appellants vested upon W. M. Rutledge's death in 1854. The right to possession took effect upon the renunciation by the life-tenant, Mrs. R., of the estate granted her under the will, which, although in 1852, could not affect appellants, until the right of action accrued in 1854, when W. M. R. died, and in this case did not put the statute in motion until March, 1870, because they were under disability. But from March, 1870, to January 13, 1886, nearly 16 years after the right to possession of the land, and the right of action against the life-tenant, or whoever might be in possession, the appellants have instituted no proceedings, and, as before stated, if no other cause existed which precludes a recovery, this would be fatal to the action. If there had been a conveyance by Eliza Rutledge of the land, and possession thereunder for 16 years adversely, and in the right of the purchaser, the statute of limitations would have been available against appellants. Such conveyance and possession could not have been more adverse to them than her renunciation of title under the will, and her possession in her own right during that time. We are of opinion that there is no error in the judgment, and that it should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, and, without passing on other questions discussed in the report, we approve so much of the opinion as holds that the necessary parties were before the court when the decree annulling the probate of the will of Thomas P. Rutledge was entered, to give validity to that decree, and the judgment will be affirmed.

ON REHEARING.

(March 11, 1890.)

STAYTON, C. J. A rehearing was granted in this cause, and, after reconsidering the case, we are of opinion that the judgment was properly affirmed on the former hearing, on the one ground then made the basis of the judgment; and now, as then, it becomes unnecessary to pass on other questions discussed in the opinion of the commission of appeals. The judgment of the court below will be affirmed.

SAM v. HOCHSTADTER et al.

(Supreme Court of Texas. March 18, 1890.)

JURISDICTION—NON-RESIDENT DEFENDANT—SPECIAL APPEARANCE.

Under Rev. St. Tex. art. 1243, providing that, when citation or service thereof is quashed on motion of defendant, he shall be deemed to have entered his appearance to the succeeding term, a non-resident defendant, served with notice without the state, who appears specially, and files a motion to quash the service on a plea in abatement, thereby enters his appearance to the next term of the court. Following *York v. State*, 11 S. W. Rep. 869.

Commissioners' decision. Appeal from district court, Harris county.

Action by J. M. Sam against Alfred F. Hochstadter and others, for breach of contract. The residence of defendants was alleged to be in New York, and notices were served on them in that state, under article 1230 of the Revised Statutes. Afterwards defendants filed a motion to quash the service on a plea in abatement, setting forth that they did not appear for the purpose of submitting themselves to the jurisdiction of the court, but only for the purposes of the plea, and that they, nor either of them, had ever been properly served with citation. The plea was sustained, the court holding there was no valid citation, and the cause was adjudged to stand as if no citation had been issued and served, and the cause was continued until service of citation within the state of Texas, or until property of defendants should be seized and brought within the jurisdiction of the court. On March 5, 1888, the defendants answered, filing, first, general and special demurrers, and general denial and pleas in bar. On October 15, 1888, the defendants filed their first amended original answer with leave, and on the 19th of November, 1888, there was a judgment for plaintiff for \$600. There was motion for a new trial overruled, and an appeal by defendants, which appeal was heard by the supreme court at its last Galveston term, and the cause reversed and remanded. 11 S. W. Rep. 408. At the October term, 1889, (October 7th,) the cause again coming on for trial without any further service on defendants, the court, upon plaintiff's declining to continue for further process, dismissed the cause, and rendered judgment against the plaintiff for costs, from which judgment plaintiff appeals. Rev. St. Tex. art. 1243, provides that, "where the citation or service thereof is quashed on motion of the defendant, the case may be continued for the term; but the defendant shall be deemed to have entered his appearance to the succeeding term."

W. P. Hamblen, for appellant. *Jones & Garnett*, for appellees.

COLLARD, J. When this case was before the court on former appeal, the only question then presented and discussed was the one of attachment, and jurisdiction obtained by the levy and seizure thereunder. The attachment falling, it was held that the jurisdic-

tion depending thereon failed, and the cause was reversed and remanded. 11 S. W. Rep. 408. It now appears that defendants below appeared by motion to quash the service on them in New York at the October term of the court, 1887; that the motion was heard and sustained by the court, and the cause continued, and defendants allowed until the next term to answer; that at the March term, 1888, the defendants answered by demurrers, general denial, when they continued the cause. At the October term, 1888, there was judgment for plaintiff for \$600, when it was appealed and reversed, because, as before stated, the attachment failed. New questions are presented by the record, and it is claimed that defendants, having appeared to quash the service, were in court for all purposes, at least at the next succeeding term of the court thereafter. The court below took the opposite view of the case, and dismissed the case upon refusal of plaintiff to continue for service. The point raised has recently been decided by the supreme court, holding that, under such circumstances, the defendants, under article 1243 of the Revised Statutes, are deemed to have appeared at the next term of the court after the motion to quash service was sustained. *York v. State*, 73 Tex. 652, 11 S. W. Rep. 869.

This question was not involved in the former appeal, and was not decided. The law is settled against appellee, and the judgment of the court below should be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, judgment reversed, and cause remanded.

HARNESSE et al. v. STATE.

(Supreme Court of Texas. March 18, 1890.)

MUNICIPAL CORPORATIONS—CHARTER.

1. Rev. St. Tex. tit. 17, c. 1, art. 340, provides that "any city * * * containing one thousand inhabitants or over may accept the provisions of this title in lieu of any existing charter," etc. *Held*, that a town incorporated under title 17, c. 11, Id., which provides for the organization of a "town or village" containing 200, and less than 1,000, inhabitants, cannot reorganize under said provisions, even though it has increased to more than 1,000 inhabitants.

2. An attempt by a town of over 1,000 inhabitants, incorporated under Rev. St. Tex. tit. 17, c. 11, to reorganize under the provisions of title 17, c. 1, Id., does not result in the surrender of its existing charter, even though all steps were taken as prescribed.

3. A town, acting under a supposed incorporation, which is void because of a valid and existing charter previously obtained, cannot procure a new charter by proceeding as for an original incorporation.

4. Persons who are acting as town officers under an incorporation which is void because of a pre-existing valid charter will be ousted on proceedings in *quo warranto*, when the boundaries of the districts from which they were elected are not coterminous with those prescribed in the original charter.

Appeal from district court, Mitchell county. *Martin & Jones*, for appellants. *Xavier*

Ryan, Dist. Atty., and Charles A. Jennings, for the State.

STAYTON, C. J. This is a proceeding in the nature of *quo warranto*, instituted by the state to test the right of the mayor, marshal, clerk, tax assessor, and aldermen of the municipal corporation known as the "City of Colorado," to exercise the powers pertaining to such officers of cities and towns incorporated under title 17, c. 1, Rev. St. It appears that on the 11th day of February, 1882, a petition signed by 20 resident voters was presented to the county judge of Mitchell county, praying for an election under chapter 11, tit. 17, Rev. St., to determine whether Colorado should be incorporated as a town. On the 25th day of February, 1882, the election was held in accordance with the prayer of the petition, and resulted in favor of incorporation. On the 17th day of March, 1882, the county judge made the order required by article 513, Rev. St., whereupon the town proceeded regularly with the election of the officers prescribed by law, to-wit, a mayor, a marshal, and five aldermen. The territory incorporated, as shown by the order of the county judge, included all of section 41, the N. $\frac{1}{2}$ of section 44, and the N. W. $\frac{1}{4}$ of section 45. After the incorporation in the manner above named, it continued to act as an incorporated town until the 21st day of November, 1882, at which time, at a regular meeting of the town council, a resolution was duly offered, and by a two-thirds majority vote of the council duly passed, whereby they surrendered their town charter under the town incorporation, and accepted in lieu thereof all the franchises and powers conferred in title 17, Rev. St. This resolution was passed under the power conferred, or supposed to be conferred, by article 340, Rev. St. This resolution was duly attested and recorded. At the time of the passage of this resolution, Colorado had a population of over 1,000, and less than 10,000, inhabitants. It is admitted that after this action by the council, on November 21, 1882, the council assumed to act as the city council of Colorado, under article 340, Rev. St., and that it became an incorporated city, if, under the law and under article 340, a town, incorporated as Colorado was, could avail itself of article 340. During the time that Colorado acted as an incorporated city under this transformation by the council, the boundaries were the same as under the town incorporation. In May, 1883, the council began to entertain doubts as to the validity of the incorporation as a city, and employed counsel to investigate the matter. The result of the investigation was that the people were induced to incorporate themselves as a city under an act of the legislature approved July 1, 1881. Thereupon 50 qualified voters living within the designated territory petitioned for an election as an original act of incorporation. The territory then sought to be incorporated included four sections, to-wit, sections 40, 41, 44, and 45. The

petition was presented to the county judge of Mitchell county, who thereupon ordered the election in accordance with the petition. The election was held on the 13th day of June, 1883, resulting in a majority of the votes for incorporation as a city. The result was duly declared, and on the 3d day of July, 1883, the county judge caused an entry as required by law to be made upon the minutes of the commissioners' court. The town or city at that time contained over 1,000, and less than 2,000, inhabitants. In February, 1884, the council divided the new city into four wards, and in April following two aldermen were elected from each ward, together with all the other officers authorized to be elected under title 17, Rev. St. The respondents in this suit are the successors of the city officers who were elected in April, 1884.

The court in his conclusion of fact says: "There is no question made but that the incorporation proceedings of 1883 were regular, unless rendered void by reason of the existence of a former corporate existence within the same limits; and also that all of the officers now defendants were elected by the votes of the legal voters residing both within and without the limits of the original town incorporation, except the aldermen in the 1st and 2d wards, these two being within the original town limits, the voters in each ward voting for the two aldermen elected from such ward, but for no other aldermen." The court, however, held that there was no law in force prior to the act of March 27, 1885, (Sayles' Civil St. art. 340b,) under which towns and villages incorporated under chapter 11, tit. 17, Rev. St., on acquiring the requisite population, could accept the provisions of that title in lieu of an existing charter, in the manner provided by article 340, Id., and thus become an incorporated city, with all the powers, privileges, and duties given or imposed on such towns and cities as might incorporate under the first chapter of that title. That the town of Colorado became an incorporated town, under the law providing for incorporation of towns and villages having more than 200, and less than 1,000, inhabitants is not questioned, and such corporation it remains, unless by steps subsequently taken it has become an incorporated town or city under the law providing for the incorporation of towns and cities having more than 1,000, and less than 2,000, inhabitants. Prior to the amendment of March 27, 1885, (Sayles' Civil St. art. 340b,) there was no law which expressly empowered municipal corporations, created under chapter 11, tit. 17, Rev. St., to accept, in lieu of an existing charter, through its board of aldermen, the provisions of that title applicable to cities and towns having a population of more than 1,000. It is not believed that article 340, Id., conferred such a power on the board of aldermen of such a corporation. That article applies to cities "containing one thousand inhabitants or over." The power is given to be exercised "by a two-thirds vote of the city council of

such city," and it declares that, when the requirements of that article are complied with, "all acts theretofore passed, incorporating such city, which may be in force by virtue of any existing charter, shall be repealed from and after the filing of the said copy of the proceedings aforesaid." Why the same power was not given to the board of aldermen of a corporation created under chapter 11, of same title, as was done by the amendment of March 27, 1885, is not readily seen, but that it was not is clear. The amendment last referred to evidences that the legislature did not understand that such a power was possessed by such "boards of aldermen," for the sole purpose of that amendment was to confer the power. From this it follows that the action of the board of aldermen of November 21, 1882, was without effect, and the original corporate existence, given through the proceedings begun on February 11, 1882, continued.

Prior to the amendments of March 26 and April 6, 1881, (Sayles' Civil St. arts. 340, 340a,) a city or town having over 1,000 inhabitants could not incorporate under an election held upon the petition of not less than 50 residents, in accordance with the provisions of chapter 11. The purpose of these amendments was to enable unincorporated cities or towns having a population of more than 1,000 to incorporate; but there is nothing in the entire law which countenances the holding that an existing corporation could be destroyed by such a procedure. Article 540, Id., provides a method by which the inhabitants of towns and villages incorporated under chapter 11, tit. 17, might abolish such corporations, but that was not pursued. Had it been, there would have been no objection to the creation of a new corporation, as this was attempted by the proceedings had in June and July, 1883.

The boundaries of the corporation created in March, 1882, embraced 1,120 acres of land, while the corporation attempted to be created by the proceedings had in 1883 embraced within the boundaries prescribed 2,560 acres; and the persons claiming to be mayor, marshal, clerk, and tax assessor were elected by persons living within that territory. The only officers authorized to be elected by the charter acquired under chapter 11, tit. 17, were a mayor, marshal, and five aldermen, each of whom should have been elected by the voters living within the corporation created by the proceedings had in March, 1882. A mayor, marshal, clerk, and assessor and collector were elected by the voters living within the boundaries of the corporation attempted to be created in June and July, 1883; and at the same time eight aldermen were elected in the several wards into which the territory was divided. These persons cannot be recognized as officers of the corporation created in March, 1882, for they were not elected by the persons entitled to vote in that corporation for its officers. It is true that two of the wards created under the attempted or-

ganization in 1883 embraced the territory within the corporation created in March, 1882, but under that charter aldermen were required to be elected by the voters of the entire corporation, while those now claiming to have been elected aldermen within that territory were elected by voters living within the wards which had been established, and not by the voters at large.

There is much confusion in the statutes providing for the incorporation of cities, towns, and villages, and their revision is required for the public welfare; but the courts have simply to enforce them as they are found. Municipal corporations can be created only in the manner provided by law, and when created must continue until abolished in some legal method. We see no reason why it should not be provided that a village corporation might give up its corporate existence in the very act of incorporating as a city under the provisions of articles 340 and 340a, Sayles' Civil St., as well as by pursuing the course pointed out in the succeeding article; but the legislature has not seen proper to permit this to be done. The corporation created in March, 1882, still exists, and if those who live within that desire to incorporate, and to have the enlarged powers conferred on cities incorporating under chapter 1, tit. 17, they may do so by compliance with amendment of March 27, 1885. The corporation in that case, however, would be limited to its original territory, (article 348, Sayles' Civil St.,) unless extended in the manner therein provided.

The questions involved in this case are practically settled by the following cases: *State v. Dunson*, 71 Tex. 65, 9 S. W. Rep. 103; *Buford v. State*, 72 Tex. 182, 10 S. W. Rep. 401; *Largen v. State*, ante, 161, (decided at present term.)

There is no error in the judgment, and it will be affirmed.

BIERING *et al.* v. WEGNER *et al.*

(*Supreme Court of Texas. March 18, 1890.*)

PROMISSORY NOTE—CONSIDERATION—EVIDENCE.

1. The defense to a suit on a note was that it was in lieu of others given in consideration of a promise to refrain from prosecuting the maker for theft. Plaintiffs replied that the original notes had been surrendered to defendants, who were indorsers, at their request, and that they had attached the maker's property, and realized a large sum therefrom. *Held*, evidence of the attachment was properly admitted, and that as to the amount realized, properly excluded.

2. Evidence of one of the indorsers that plaintiff understood that it was given under an agreement not to prosecute the maker for theft is incompetent as a mere opinion.

Commissioners' decision. Appeal from district court, Galveston county.

S. S. Hanscom and *J. R. Burnett*, for appellants. *McLemore & Campbell*, for appellees.

HOBBS, J. The appellants brought this suit in the district court of Galveston county,

August 21, 1883, on a promissory note executed by appellees on April 13, 1883, for \$1,300, payable to the order of appellants four months after date, with interest at the rate of 10 per cent. per annum. The defense was that the note was given in lieu of two notes,—one for \$350, and the other for \$1,000,—previously executed to appellants by William Pohl as principal, and appellees as indorsees; and that the only consideration for these two notes was a promise and agreement by appellant Biering that Pohl should not be prosecuted for the theft of the goods for the value of which it was claimed the notes were given. Appellants replied that the note for \$350 was given for the balance of an account due them by Pohl, and that the \$1,000 note was executed for the value of the goods stolen from them by Pohl. They denied that there was any agreement or promise on their part not to prosecute Pohl for the theft of said goods, etc. They also alleged that the note sued on was given by defendants in lieu of said two notes at the request, and for the accommodation and benefit, of defendants, who, after the surrender of the first notes, attached the property of Pohl, and recovered judgment against him upon Pohl's liability to them by such surrender, and had realized the full, or a large, amount of the note sued on by the said attachment, etc. Upon exception to this allegation by the defendants, it was stricken out.

Two appeals in this cause have been heretofore prosecuted by the appellees, reported, respectively, in 65 Tex. 507, and 73 Tex. 89, 11 S. W. Rep. 155. The last trial resulted in a verdict and judgment for the appellees. It was decided, in effect, upon the first appeal in this case, that the defense that "the note was given partly in consideration of an agreement by Biering & Co. not to prosecute one Pohl for theft of goods" was good, if proved. 73 Tex. 90, 11 S. W. Rep. 155. Upon the last appeal it was held that certain instructions set forth in the opinion of the court were "irrelevant, and calculated to lead the jury away from, instead of towards, the true issue in the case," and should not have been given. 73 Tex. 91, 11 S. W. Rep. 155. It is now claimed that the court erred in refusing to allow appellants to prove that appellee realized from Pohl's estate, by attachment and execution, the amount of the debt sued for by appellants, or a large portion thereof, as shown by appellants' bill of exceptions. An inspection of the bill of exceptions shows that the evidence referred to was excluded by the court, except as to the fact that defendants sued out the attachment, which fact plaintiffs were permitted to prove. To the ruling of the court so restricting the proposed evidence plaintiffs excepted.

We think the ruling of the court was correct. Proof of the fact that the attachment was sued out was admissible, but evidence of the amount realized by the appellees was calculated to mislead the jury, and divert them from the true issue in the cause.

There is but one other assignment we believe it is necessary to consider. The bill of exceptions recites that, "whilst the defendant John Wegner was on the stand testifying as to the circumstances, etc., occurring between witnesses and E. J. Biering and Wm. Pohl, etc., the court asked the following question of said witness: 'Did Biering understand the note [\$1,000 note] was given under an agreement he should not prosecute Pohl?' To which the witness answered: 'Yes, sir,'—to which question plaintiffs objected, because the same was leading, and calculated to draw out from the witness his conclusion of what Biering understood, without stating facts warranting such conclusions," etc. This action of the court is made the basis of the eighth assignment of error. We think the assignment is well taken, and that the court erred in propounding the question to the witness, and that the answer should have been excluded. It was not competent, we think, for the witness to testify that Biering understood that the note was given under an agreement that he would not prosecute Pohl. It was but the opinion of the witness Wegner. This was a question for the jury to determine, from all the facts in the case.

The other assignments we think are not tenable.

For the error above mentioned, we think the judgment should be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, judgment reversed, and cause remanded.

OSBORN *et al.* v. OSBORN.

(Supreme Court of Texas. March 13, 1890.)

HOMESTEAD—MINOR CHILDREN—GUARDIAN.

1. Const. Tex. art. 16, § 52, provides that on the death of the husband or wife, or both, the homestead shall descend as other real property of the deceased, but it shall not be partitioned among the heirs of the deceased so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same. Rev. St. art. 1996, provides that when there is no widow the possession of the homestead shall be delivered to the guardian of the minor children. *Held*, that the possession of the homestead by the minor children after the death of both parents can be protected from partition only through the agency of a regular guardian under the authority and permission of the probate court.

2. Where, in partition of a homestead among the heirs after the death of both parents, it appears that one of the heirs is a minor without any guardian, and the probate court has never determined his right to occupy the homestead, it is the duty of the court to arrest the proceedings until a guardian can be appointed, and the court can determine whether he shall be permitted to occupy it for his ward.

Commissioners' decision. Appeal from district court, Red River county.

Sims & Wright, for appellants. *S. W. Harman*, for appellee.

AKER, J. Appellants brought this suit against appellee for partition of a tract of

land. The defendant being a minor, S. W. Harman, Esq., was appointed guardian *ad litem* for him, and answered that defendant and plaintiffs were joint owners of the land by inheritance from their mother, who died in July, 1888, occupying and using the land as her homestead, and owning no other land at the time of her death; that defendant was living with her as one of her family, and occupied the land with her as his homestead, and has continued to so occupy and use the land ever since her death, having no other property or means of support; that he was only 18 years old. Prayer, that partition be refused, and that the use of the land be decreed to him during his minority. The trial, without a jury, resulted in judgment for defendant in accordance with his prayer, and that plaintiffs pay all costs. Plaintiffs appealed, and the cause is here on the following agreed case: "(1) That the following named persons are tenants in common of the tract of land described in the petition; the same being situated in Red River county, Tex.: W. T. Osborn, S. W. Osborn, H. M. Osborn, John Osborn, Nancy Hight, Sarah Hopkins, Martha Carroll, J. T. Davidson, and Robert Osborn. (2) That the tract of land sought to be partitioned was purchased by the mother of said tenants in common after her husband's death, and paid for by her. (3) That all of said tenants in common were of age at the time of her mother's death, which occurred about one year ago, except the defendant, Robert Osborn, who was then about 18 years of age, and is now 19; that all the plaintiffs had moved away, and entirely lost their standing as members of the family. (4) That the defendant had been at work for himself, and on his 'own hook,' for three years prior to his mother's death, and received the fruits of his labor; sometimes he lived out from home, but most of the time remained there, and worked for his mother, who paid him for his work; that he was married prior to his mother's death, and then was, and now is, the head of a family; that he has not now, and never has had, a guardian, nor has any order ever been made by any court, authorizing either him, or any guardian of his, to use or occupy the property sought to be partitioned as a homestead. (5) That said property was their mother's homestead at the time of her death, and that the defendant lived on the place with her, and that the defendant, Robert Osborn, has no property except his interest in the land in this suit, and had none at the death of his mother, and is living on the property now." The only assignment of error presented is: "The court below erred in not decreeing that the premises described in the petition were subject to partition under the facts as set forth in the case agreed."

The constitution of this state (article 16, § 52) provides that "on the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distri-

bution; but it shall not be partitioned among the heirs of the deceased during the life-time of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same." In our opinion, this provision admits of but one construction, in so far as it applies to this case. After the death of both parents, the use and occupation of the homestead by the minor children, to protect it from partition at the suit of other tenants in common, must be through the agency of a guardian under authority and by permission of an order of the probate court having jurisdiction. This constitutional provision has received no direct legislative construction that we are aware of, but the provisions of the statutes relating to setting apart the homestead, and the possession of it, seem to accord with the construction given it. Article 1996, subd. 4, of the Revised Statutes, provides that when there is no widow the possession of the homestead shall be delivered to the guardian of the minor children, etc. The reasoning employed by Chief Justice STAXTON in discussing this provision in the case of *Hudgins v. Sansom*, 72 Tex. 229, 10 S. W. Rep. 104, has relieved us of much difficulty we might otherwise have encountered in sustaining our conclusion. The chief justice says: "The purpose of the constitutional provision quoted, evidently, was to secure the surviving husband or wife the right to use the homestead so long as he or she might elect to do so, and to protect minor children in a home so long as, in the opinion of the court having jurisdiction over the property and minors, it was necessary that they should use a homestead. It was the right of such persons to occupy the homestead which it was the purpose of the constitution to protect, and it therefore forbids the partition of the homestead so long as the given conditions continue. * * * A proceeding which would result in this is forbidden by the constitution so long as the surviving husband or wife elects to occupy the homestead, or so long as the proper court shall permit a guardian, with minor children of the deceased, to occupy." We can add nothing to this language.

We think the court erred in holding that the land was not subject to partition, and in decreeing the use of it to defendant during his minority. But, while we decide that the facts presented in this case did not entitle appellee to judgment in his favor, we are not to be understood as holding that in such a case the minor is without remedy. Being under disability, and not able to protect his rights, the court should protect him. We are, therefore, of opinion that when, in a case like this, a partition of the homestead is sought among the children of the deceased, and it appears that the minor has never had a guardian, and the probate court has never

determined his right to occupy it, it is the duty of the court to arrest the proceedings, and suspend further action in the case until the county court shall appoint a guardian, and determine whether or not he shall be permitted to occupy and use it for his ward. Appellee relies upon the case of *Adair v. Hare*, 73 Tex. 273, 11 S. W. Rep. 320, in support of the view entertained by the trial court; but we do not think it in point. There the homestead sought to be partitioned was used and occupied by the surviving husband and minor children.

We are asked to reverse the judgment and render judgment here for appellants; but this we cannot do, as it appears that appellee is still a minor, for whom a guardian may be appointed, who may obtain an order of the probate court permitting him, with his ward, to occupy the land. We are of opinion that the judgment of the court below should be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, judgment reversed, and cause remanded.

SMITH v. WESTALL *et al.*

(*Supreme Court of Texas. March 18, 1890.*)

DEED—DESCRIPTION—CONSIDERATION.

1. A deed described the property conveyed as "all that certain tract or tracts, parcel or parcels, of land by me inherited by, through, or from my deceased parents, * * * situated in the county of Brazoria or state of Texas, and all right that I now have, have had, or may have to any estate or property that is or might be due me, whether real, personal, or mixed, in this county or state. This conveyance is meant to convey and carry with it every possible interest that I now have or may have to any property in this county, or any other county in the state of Texas." *Held*, that the description was sufficient to convey all lands in the state vested at that time in the grantor by inheritance.

2. Where a grantee, in consideration of the conveyance to him, extinguishes a debt due to him by a third person, to whom his grantor is indebted in an equal amount, and the claim against the grantor is also canceled by the third person, the deed is supported by a valuable consideration.

Commissioners' decision. Appeal from district court, Brazoria county.

Action by T. L. Smith, executor of Thomas G. Masterson, against A. E. Westall and another, to recover a tract of land. Plaintiff appeals.

A. R. Masterson, for appellant. W. S. Brooks, for appellees.

COLLARD, J. No specific property is described in the deed to Rowe. The property conveyed is "all that certain tract or tracts, parcel or parcels, of land by me inherited, by, through, or from my deceased parents, Henson G. Westall, my father, and Harriet Westall, my mother, situated in the county of Brazoria or state of Texas, and all right that I now have, have had, or may have to any estate or property that is or might be due me, whether real, personal, or mixed, in

this county or state." An explanatory clause follows in these words: "This conveyance is meant to convey and carry with it every possible interest that I now have or may have to any property in this county, or any other county in the state of Texas." The deed contained a general warranty.

It is a general rule that a deed must be construed so as to give effect to all its parts, if it can be done. *Hancock v. Butler*, 21 Tex. 804; *Pugh v. Mays*, 60 Tex. 192; 3 Washb. Real Prop. 398. The deed before us makes at least two grants: First, all lands inherited by the grantor from his deceased father and mother, without qualification or restriction; then, of all other property, real and personal, he owned, had owned, or might own, derived from every source. The next part of the grant was intended to declare that every possible interest in any property owned or held by the grantor in the state was to pass. It was intended to enlarge, rather than to limit, the grant. It was not intended as a more particular designation of the property, and to limit the conveyance to such estate only as the grantor then owned, or to have the effect of quitclaiming the property.

It is insisted by appellant that Rowe was not an innocent purchaser, because the consideration paid by him was an antecedent debt. The fact stated is true, that the consideration was a debt due to Rowe; but it was not a debt due by Westall, but a debt due by one Bates to Rowe,—Bates at the same time surrendering to Westall a claim against him for the same amount, \$500. We think that this was a valuable consideration, and one that will support the plea of innocent purchaser. Bates gave Rowe no guaranty; was in no way responsible to him if the title failed, or the interests in the estates purchased proved to be of no value. Rowe surrendered a valuable right, was in a worse position than before, and therefore entitled to protection as an innocent purchaser having no notice of the former conveyance to Masterson. *Paddon v. Taylor*, 44 N. Y. 371; *Ayres v. Duprey*, 27 Tex. 593, 607. The description in the deed was sufficient, and it passed all lands in the state vested by inheritance in Westall at its date. *Baxter v. Yarborough*, 46 Tex. 231; *Harvey v. Edens*, 69 Tex. 420, 6 S. W. Rep. 306; *Bitner v. Land Co.*, 67 Tex. 341, 3 S. W. Rep. 301. We conclude the judgment of the court below should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, judgment affirmed.

ROGERS v. GALVESTON CITY R. Co.

(*Supreme Court of Texas. March 18, 1890.*)

MASTER AND SERVANT—DEFECTIVE APPLIANCES.

A street-car driver who continues in the service after becoming aware of a defect in the platform on which he stands cannot recover for an injury sustained by a fall caused by the defect, but will be held to have assumed the increased risk.

Commissioners' decision. Appeal from district court, Galveston county.

S. S. Hansom and F. M. Spencer, for appellant. *James B. & Charles J. Stubbs*, for appellee.

COLLARD, J. The platform of the street-car on which appellant, the plaintiff below, was a driver at the time of the injury becoming worn by the feet of the drivers continually standing thereon, it was repaired by two planks, which were nailed down on the floor. The platform at the front part is five feet across. Its general width is five feet and five inches. One of the planks nailed down in front, near the dash-board, is eleven inches wide and two feet long, and the other plank is nine inches wide and two feet five inches long. They touch each other, and are beveled down at the edges. One of them is not more than a half inch thick, and the other said to be five-eighths of an inch. The thinner one is in the rear. They do not extend all the way across the platform. Plaintiff testified that there was a small space between the boards, but the photograph sent up with the record does not show it. This patch is the defect complained of, which it is alleged caused the injury. The position of the driver was on the front board. Plaintiff said in his testimony: "If I stepped to the front or back of it, either my heel or toe would be the higher, and on account of the long hours it was very tiresome." Plaintiff's testimony gives an account of the occurrence as follows: "As I crossed 27th street I looked right and left, as orders were, and as I always did. I saw no one in sight. I had got about two car-lengths west of the west side of 27th street, when I heard some one call out, 'Hey!' I could hear the call very plainly. When I heard that hail, I was standing upon the platform, with my lines in my left hand, and my right hand on the brake, and I immediately reached out my right hand, and grabbed hold of my lines, and stepped over to the left side of the car, and reached out to look back. As I did, the mule gave a jump. Whether he thought I was going to strike him on the fore-feet, as drivers do, I don't know, but he gave a very great jump, just as if he had been struck, and that threw me around. I had a tight line, and before I knew it I was over the car. When he gave that jump my foot slipped on a board that was on the floor of the platform, [the front board.] I could see after I got on the car where my foot slipped. I was standing on that board, and I stepped a little over to the left, to see where the sound came from. I was not positive the hail was for me, and I did not put the brake on. I did not know whether the hail was for me or the car I had just passed. If there had been no other car around there, I would have stopped my car without looking back. I was just balancing on my right toe and left foot on that board, and I was jerked around, and turned a full summersault and went over. The board was

where the driver stood. * * * If I stepped far over to the left, I would step off the board. When I heard this call I stepped over to the left so quick I did not see where I put my feet. I don't think my whole foot was on the board, and my foot slipped off the board. The board did not quite cover the hole even then. If that board had not been there, I would not have fallen. If the floor had been smooth from one side to the other, I would not have slipped and fallen. I never drove a car fixed like that before this car. * * * The board had been worn some by the drivers' feet, and it was between three-quarters of an inch and one inch thick above the floor of the platform. * * * I notified the car-repairer of the defect, and he said he had no time to fix it. * * * I had no idea of any danger from driving with that board there. If I drove for a year, I might not have occasion to look for passengers that way again. * * * I wasn't thinking about any danger from the plank; I was looking for the passenger. Of course I knew the plank was there, but I didn't apprehend any danger from it. * * * When I was doing my duty, and wanted to do it properly, I wouldn't always look just where I would put my feet. I wouldn't have a chance to always look to see where to step. I didn't regard the plank as dangerous in any way. I wanted it repaired though, as it was very tiresome to stand on. * * * That plank had been there all the time I had been driving that car,—four days. I was told it was there before that." The plaintiff had been in the service of defendant as driver about nine months before the accident.

From the foregoing statement of plaintiff's case, as made by his own testimony, we are unable to see any grounds for a recovery. The employer is bound to use ordinary care in furnishing his employe with safe appliances suitable to his employment; but, to authorize a recovery by the employe for injuries occasioned by a dangerous defect in the same, it must be shown that he did not know of the defect, and could not have known it by the use of ordinary care. The servant assumes the risks ordinarily incident to his employment, and such as arise from open and visible imperfections of things about which he is employed, and of defects which he might have known by the use of ordinary care. These are elementary principles. Chief Justice STAYTON announced the law applicable to this case as follows: "The liability of the master to the servant for injuries resulting from the use of defective implements arises from the fact that it is the duty of the master to furnish implements not defective; and a servant, unless the defect be patent, may assume that the master in this respect has performed his duty; but when he has knowledge that the master has not done so, if he continues in the employment in which such defective implements are used, he must ordinarily be held to assume the risks incident to the same as it is attempted to be carried on,

and not to assume only the risks incident to such service when carried on with implements not defective of their kind, and suitable to the work undertaken." *Railway Co. v. Bradford*, 66 Tex. 734, 2 S. W. Rep. 595. Testing the case before us by these established principles, we cannot see how the plaintiff can recover. The patch on the floor of the car platform, and its condition, was open to common observation, visible to every one, and was in fact known to plaintiff. There was no concealed danger about it; nothing that a man of ordinary intelligence could not understand. No expert was required to note the physical facts, and determine the consequences possible upon its use. Plaintiff was a man of mature years, and nine months' experience in defendant's service. The floor was obviously uneven, and the probabilities of stumbling over it or slipping upon it were as open to plaintiff as to defendant. The simplest natural laws were involved in any conjecture that might be made as to risk of its use, and plaintiff would be presumed to understand these as well as the company, and he must be held to have assumed the risk incident thereto. The following authorities cited by appellee are in point, and abundantly sustain the view we have taken of the facts of the case: *Electric Co. v. Murphy*, (Ind.) 18 N. E. Rep. 30; *O'Keefe v. Thorn*, (Pa.) 16 Atl. Rep. 737; *Moulton v. Gage*, 138 Mass. 390; *Marsh v. Chickering*, 101 N. Y. 398, 5 N. E. Rep. 56; *Walsh v. Railroad Co.*, (Minn.) 8 N. W. Rep. 145; *Railroad Co. v. Lempe*, 59 Tex. 19. Where a servant is employed about machinery or anything, and special knowledge is required to know or apprehend what constitutes a defect, though open to observation, and whether its use would be dangerous, other principles apply; but here we have nothing more complicated than a horse wagon, or a plow used in the ordinary way, having repairs upon it, the danger of which can be appreciated by the driver of ordinary intelligence and prudence as readily as any other person. Authorities supra. Our conclusion is the judgment of the court below should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, judgment affirmed.

HUNTINGTON v. CRAFTON.

(Supreme Court of Texas. March 18, 1890.)

MORTGAGE—RELEASE—INNOCENT PURCHASER.

Where a note secured by deed of trust has been partially paid, and a part of the land has been released from the lien of the deed, one claiming under the *cestui que trust*, who purchased the land at a foreclosure sale, takes no title to the land so released, though without notice of the payment and release.

Commissioners' decision. Appeal from district court, Brazoria county.

A. R. Masterson, for appellant. W. S. Brooks, for appellee.

HOBBY, J. The facts in this case, about which there seems to be no controversy, show that on the 28th of October, 1881, Sterling McNeel, who was the owner of the tract of land involved in this suit, executed a deed of trust conveying it, together with other lands, to secure a note due by him to Charles McNeel for \$250, with interest, etc. The deed of trust was properly recorded on the same day. Before the maturity of the note, H. Masterson became the owner thereof. On the 18th of January, 1883, Sterling McNeel conveyed the land to appellant, Huntington. On the 22d May, 1883, Huntington paid to Masterson \$60, and the latter indorsed on the deed from McNeel to appellant a release of the lien on the 40 acres of land; but the other property was not to be affected by this release. The deed from McNeel to appellant was acknowledged and recorded February 25, 1886. The release was not duly authenticated, nor recorded with any certificate of authentication; and appellee had no actual notice of the payment by appellant to Masterson of said sum, and the execution of the release. The note for \$250 was never paid by McNeel. On March 3, 1886, the original trustee named in the trust-deed having declined to act, W. S. Brooks was appointed substitute trustee by Masterson, the holder of the note. The land in suit, together with other tracts conveyed in the deed of trust, was sold on the 24th March, 1886; Masterson becoming the purchaser. The trustee executed a deed to him, which was also properly recorded March 26, 1886. On the same day, March 26, 1886, Masterson sold the land in suit, and the other tracts to appellee Crafton, taking his note for the purchase money, \$375, except the cash payment of \$15 made by appellee. A subsequent payment of \$75 was made by appellee. The deed from Masterson to appellee warrants the title to appellee against the claim of all persons claiming said land by, through, or under said grantor, Masterson. There was testimony to the effect that appellant was in possession of the land at the time of the purchase by appellee from Masterson. The court, under the foregoing proof, rendered judgment in favor of the appellee, who was plaintiff below, from which the defendant appeals; and the assignments of error are that the court erred in holding that said appellee was an innocent purchaser for value, without notice, and in awarding him judgment for the land, because the conveyance of said land by Sterling McNeel to appellant was on record at the time of appellee's purchase thereof from said H. Masterson, and properly authenticated for record. Said conveyance to appellant, dated 18th January, 1883, was recorded 15th February, 1886, and deed to appellee is dated 26th March, 1886, whereby appellee had constructive, legal notice of appellant's title. And, further, because the inclosure of said land by appellant, and his possession thereof, was constructive notice to appellee of said title of appellant. The court erred in hold-

ing said plaintiff, Crafton, to be an innocent purchaser for value, because, as shown by all the proof in the case, he parted with nothing in making said purchase at the time thereof, nor has he yet paid anything, unless his cash payment of \$75 be especially applied to this tract of land in suit, rather than to the other two tracts included in same purchase and deed, and to which he acquired a good title. The court erred in adjudging said land to appellee, Crafton, because, as shown by all the proof, the lien on the land in controversy had been discharged before the sale of same under said trust-deed, and said H. Masterson, who caused said trustee's sale, was the purchaser, with full notice of the discharge of said lien, (having received the money and executed the release himself,) and took no title by said purchase of said tract; and his conveyance to said Crafton conferred only such title as he had, because he only released or quitclaimed all interest of himself, and warranted only against himself, or those claiming under him. The court erred in adjudging said land to appellee because, as shown and admitted, appellant's title was over three years older than appellee's title, and was duly recorded before appellee acquired any claim, and because the legal title to said land did not pass from said Sterling McNeel to said J. V. Hinkle as original trustee, or said W. S. Brooks as substitute trustee, by the execution of said trust-deed, but remained in said Sterling McNeel until his conveyance of same to appellant, Huntington.

We think the judgment is erroneous. It is evident from the proof that the payment by appellant of the \$60 to Masterson, who held the note, extinguished the lien held by him. This is clearly shown by the indorsement made by Masterson on the deed executed by McNeel to appellant. The lien having been so discharged, there could be no foreclosure by Masterson of a lien already satisfied, nor a sale of the land under the deed of trust. But it is claimed that appellee, Crafton, had no knowledge of this release, or the payment of \$60 on the note to Masterson. It is only necessary, in reply to this, to say that, the debt which was a lien upon the land having been paid, the lien no longer existed. We are of opinion that the judgment should be reversed, and here rendered for appellant.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment reversed, and rendered for appellant.

PRATHER *et al.* v. McCLELLAND.

(Supreme Court of Texas. March 21, 1890.)

WILLS—PROBATE AND CONTEST—TESTAMENTARY CAPACITY.

1. Under Rev. St. Tex. art. 1933, which provides that, when a will has been probated, its provisions shall be executed, unless annulled or suspended by order of the court probating the same,

a proceeding to annul some of the provisions of a will must be commenced and conducted as a distinct proceeding after the will has been probated.

2. An independent provision in a will that the executors probate the will, and return an inventory of the property, and that "no further action be had in the county court," does not deprive the county court of jurisdiction of a proceeding to annul some of the provisions of the will.

3. Under Rev. St. Tex. art. 1855, which provides that a certified copy of the record of testimony taken in the county court in probate proceedings may be read in evidence in the same matter in any other court, the presence of witnesses in the court-room on an appeal of a probate proceeding to the district court does not render incompetent the introduction of the record of their testimony in the county court; nor can they be introduced as witnesses in the appellate proceeding for the purposes of cross-examination.

4. In a will contest, the circumstances and characters of the executors is a proper subject of consideration and proof on the issue of testator's sanity.

5. Evidence as to the willingness with which a witness would have trusted testator to make an important bargain for him is irrelevant, even on a cross-examination for the purpose of testing the ground and extent of a favorable opinion as to testator's sanity expressed by the witness on his direct examination.

6. A declaration by testator's wife, just before the execution of a codicil, that testator was in no condition for that kind of business, is inadmissible on the question of testator's capacity.

7. Where there is nothing in the evidence to show that testator had willed away all his wife's property, it is error to allow an hypothetical question containing an assumption to that effect.

8. An instruction that, to have been capable of making a will, testator must have known the nature of the business he was engaged in, the extent of his property, the persons he wished to make objects of his bounty, and must have been free from any insane delusion, is proper.

Appeal from district court, McLennan county.

Seth Shepard, E. H. Graham, and Prather & Lindsey, for appellants. *Clark, Dyer & Bolinger*, for appellee.

HENRY, J. Appellants commenced this suit in the county court by an application to probate the will, and a codicil thereto, of Peter McClelland, Sr., and for issuance of letters to themselves as executors. Appellee, who is the only child of said Peter McClelland, Sr., opposed the probate of the will and codicil on the ground of the want of testamentary capacity in his father when they were executed, and prayed the court to annul and vacate all provisions of the will and codicil which, if probate should be granted, would interfere in any manner with the full and absolute enjoyment of the estate given to him. Appellants demurred on the ground that the court had no authority to declare any of the provisions of the will invalid until after it was admitted to probate. The court overruled the demurrer. The county court admitted to probate both the will and the codicil, but ordered "that each and every provision of the will and codicil which provides that the residue of said estate shall be received and enjoyed by the devisee, Peter McClelland, Jr., only *in futuro*, and that said executors shall hold, control, and manage said estate in trust for twenty-five years from and after the death of said testator before

the same shall be turned over to said devisee, or which provides, or attempts to provide, that said executors shall hold and manage said estate in trust for said devisee during his natural life, or which directs that the executors shall take the rents, income, and profits of the estate for the period of twenty-five years, or during the natural life of Peter McClelland, Jr., and invest the same from time to time in other property, and all other restraints and limitations upon the use and enjoyment of said estate by the residuary devisee and legatee, Peter McClelland, Jr., be null, void, and inoperative, and shall not hereafter constitute any part of said will or codicil." Appellants took to the district court by *certiorari*, for revision, so much of the judgment as annulled provisions of the will. Afterwards the contestant removed by appeal the whole case to the district court, and the appeal was there docketed as a separate suit. In the district court, on the motion of appellee, and over the opposition of appellants, the two proceedings were consolidated, and the contest was subsequently conducted as one suit. The effect of the charge of the court was to withdraw from the jury the issue as to the construction and effect of the will, and to submit to them only the issues as to the execution of the will and codicil, and mental capacity of the testator. The jury found that the testator was of sound mind on the 22d day of October, 1881, when the will was executed, and of unsound mind on the 17th day of August, 1886, when he signed the codicil, and that the codicil should be set aside. The court entered judgment in pursuance of the verdict, establishing the will, and refusing to establish the codicil. The contestant, upon the return of the verdict, filed a motion to have entered in his favor a decree upon the verdict setting aside each and every provision of the will depriving him of the immediate use and enjoyment of the estate devised to him, and directing it to be turned over to him upon his paying, or giving bond for the payment of, the debts of the estate. This motion was overruled by the court.

On the trial in the district court the evidence of two witnesses in the trial in the county court, and there reduced to writing, was read by the contestant. The proponents of the will objected to the evidence on the ground that the witnesses were present in the court-house, and should be examined orally. After the written evidence had been read the proponents requested the court to allow them to cross-examine the witnesses, treating them as contestant's witnesses. The court refused the request. The introduction of the written evidence was authorized by article 1855¹ of the Revised Statutes. The request to be allowed to introduce the wit-

nesses for cross-examination was properly refused.

The will was executed on the 22d day of October, 1881. It gave to the wife of the testator the homestead for the period of her life, and all the household and kitchen furniture, plate, table-ware, pictures, ornaments, and other personal property used in and about said homestead, and the carriage horses, milch cows, and also the sum of \$150 per month, or so much thereof as she might see fit to use, during her life, to be paid to her in monthly installments by the testator's executors. The provisions with regard to his son, Peter, and the executors of the will, are as follows: "*Item 4th.* I give and bequeath to my beloved son, Peter McClelland, Junior, should he survive me, all the residue of my estate, real, personal, and mixed, to be received, however, and enjoyed by him, only *in futuro*, upon the terms, conditions, incumbrances, trusts, and stipulations herein provided for, which said estate shall be held by my executors, controlled and managed as herein provided, in trust for my said son, Peter, for twenty-five years from and after my death, before the same shall be turned over to my said son, except such provisions and legacies as are herein made for the support and maintenance of my said son during the said period of twenty-five years, should he live so long. *Item 5th.* I also give and bequeath to my said son, Peter, one hundred dollars per month, to be paid to him from and after the date of my death, in cash, for his maintenance and support, in monthly installments, so long as he shall remain single, or until he shall come into possession of my estate as herein provided; but, should my said son marry before or after my death, this special legacy shall be increased to one hundred and fifty dollars per month from and after the date of such marriage, to be paid to him in cash, in monthly installments, for his maintenance and support after my death, by my executors, as herein provided, which shall be a charge upon my estate until he comes into the possession of the same as herein provided, or dies; and, in case of such marriage, my executors shall provide, by purchase or otherwise, for my said son, Peter, out of my estate, a suitable house for him to live in, including lots, grounds, and outbuildings, without charge to him, not to exceed in value the sum of five thousand dollars, if purchased by my said executors for his use and enjoyment. But upon the death of my said wife, Joanna, my said son, Peter, first having so married, may, at his option, move into, live at, and enjoy the homestead bequeathed to her during her life, free of charge, in lieu of any other provision for a home, until he shall come into the possession of my estate according to the provisions of this will. *Item 6th.* I hereby appoint John E. Gilbert, Charles F. Gilbert, and Amos W. Gilbert, citizens of the county of McLennan and state of Texas, my executors, to carry out the terms and execute the

¹ Rev. St. Tex. art. 1855, provides that a certified copy of the record of testimony taken in the county court on an application to probate a will may be read in evidence in the same matter in any other court.

trusts provided for in this will; and, as I repose full confidence in their honesty, fidelity, and ability, I desire that no bond shall be required of them. Should any one of my said executors leave the state of Texas, and remain away for more than two years at one time, he shall thereupon be disqualified from further acting as such executor. *Item 7th.* Upon my death, it is my desire that my said executors, or either of them, have this will probated in due form of law, and that they, or either of them, have a full and complete inventory and appraisement of my estate returned into court according to law, and that the same be recorded, and that no further action be had in the county court in reference to my estate except as herein provided. *Item 8th.* Upon my death, and after the probate of this will as aforesaid, my said executors, accepting and qualified to act as aforesaid, are hereby authorized and empowered to take possession of my entire estate, whether in money, real estate, personal, or mixed, and the same to keep and hold in their possession and care, upon the trusts, terms, and conditions herein provided for, for the full period of twenty-five years after my death, should my son, Peter, live so long; and at the expiration of said twenty-five years my said executors shall turn over to my said son, Peter, if living, the entire residue of my estate, whether money, real, personal, or mixed, with the increase and accretions to the same as provided for herein, after paying the charges of every kind and legacies herein provided for out of the same. But should my son, Peter, die before the expiration of said period of twenty-five years after my death, or before I do, then it is my desire that said trusts shall end, and that my heirs at law shall take my estate clear of the trusts, charges, and incumbrances herein created, according to the laws of the state of Texas, and that my executors turn the same over to them, charged, however, with the bequests to my wife, if living." The codicil was executed on the 17th day of August, 1886, and contained the following provisions: "2nd. And I now here revoke item seventh of my said will, and in lieu thereof I desire, upon my death, that my said executors, or either of them, have my said will probated in due form of law, and that they, or either of them, have a full and complete inventory and appraisement of my said estate returned into court according to law, and that the same be recorded, and that no further action be had in the county court in reference to my estate except as provided in said will or herein; and this codicil now here is made a part of said will as fully as if it had been originally incorporated therein. Upon a further consideration, I desire, after my death and the death of my wife, that my son, Peter McClelland, may occupy and enjoy my homestead, if he chooses so to do, but upon the condition that he first convey back to my estate the homestead I have given him on Hogan Hill. In case he does not do so, then my home-

stead, upon the death of my wife, shall pass to the possession of my executors, to be administered as provided for the balance of my estate. I further desire to continue the trust created herein in my executors for and during the natural life of my said son, Peter; but if, in their judgment, he is provident and careful, they may make such advances out of the estate as they may think right and proper, over and above the provisions made herein for him and in said will." It also revoked the clause of the will appointing executors, and reappointed John E. Gilbert, and substituted W. L. Prather for the other two.

It is contended that the district court committed error in consolidating the proceeding by *certiorari* with the appeal, and also "in overruling plaintiff's demurrers to that part of the contestant's opposition to the probate of the will and codicil which seeks to have said will and codicil construed, and to have certain provisions of the will and codicil set aside as contrary to public policy and void, on the ground that such action could not be taken or relief had in any case in a proceeding to probate a will; and in this case neither the county court, nor the district court on appeal, had any jurisdiction to take such action, because the will and codicil is an independent one, and provides that no other action shall be had in the county court relative to the settlement of the testator's estate than the probating and recording of his will, and return of inventory, appraisement, and list of claims." This question is, we think, controlled by the following provisions of the Revised Statutes: "Art. 1938. When a will has been probated, its provisions and directions shall be executed, unless the same are annulled or suspended by order of the court probating the same, in a proceeding instituted for that purpose by some person interested in the estate. Art. 1939. Such proceedings shall be by application in writing, filed with the clerk of the court, setting forth the provisions and directions in the will that are objected to, and the grounds of the objection. Art. 1940. Upon the filing of such application the clerk shall issue a citation for the executor or administrator with the will annexed to appear at a regular term of such court and answer such application, the substance of which application shall be set forth in the citation; and such citation shall further direct such executor or administrator to refrain from executing the provisions and directions in the will that are objected to until such application has been heard and decided by the court." The proceedings relating to the probate of a will, and what shall be proved to entitle it to probate, are plainly prescribed by other provisions of the statutes. Articles 1830, 1833, 1836, 1840, 1851, 1854. That the proceeding to annul some of the provisions of the will attempted, in this case, to be injected into the proceeding to probate it, is required to be commenced and conducted as a separate and distinct proceeding after the will has been probated, is, we think, too

clear to require argument or illustration in its support. If we doubted the wisdom or the policy of the law in requiring the probate proceeding to be tried as a separate and distinct issue from the other,—which, however, we do not doubt,—we would still be constrained, by the unmistakable phraseology of the statutes, to give them that effect. Because the two matters should not have been joined in one proceeding, we think the court erred in overruling plaintiff's exceptions. Independently of that question, there was no error in consolidating in the district court, the *certiorari* with the appeal proceedings. We do not think that the independent provision in the will has the effect to deprive the county court of jurisdiction to entertain a proceeding to annul provisions of the will.

The court charged the jury that: "(2) To find this will or codicil valid, the testator must have been of sound mind at its execution; and by this is meant that he must have been capable of understanding the nature of the business he was engaged in, the nature and extent of his property, the persons to whom he meant to devise and bequeath it, the persons dependent upon his bounty, and the mode of distribution among them; that he must have had memory sufficient to collect in his mind the elements of the business to be transacted, and to hold them long enough to perceive, at least, their obvious relations to each other, and be able to form a reasonable judgment as to them; and that he was not under the influence of an insane delusion, either in regard to his property or the natural and proper objects of his bounty, which affected the disposition he was about to make. (3) If, however, he had not the qualities and capabilities above enumerated, or if, at the date of the will or at the date of the codicil, he was laboring under an insane delusion, either in regard to his property or the natural and proper objects of his bounty, which affected the disposition he was then attempting to make, or of which delusion the papers were the offspring or fruit, then he was not at such time in a condition to make such will or codicil; and, if you find this will or codicil propounded under such circumstances, the instrument, if either, so propounded, ought to be set aside, and, as to it, you will find against the proponents and in favor of the contestant, stating in your verdict, plainly, which, if either or both, you so find should be set aside. (4) By 'insane delusion' is meant the belief of a state of supposed facts which no rational person would believe. (6) Ordinarily, less capacity is required to enable a testator to make a will than for the same person to make a contract or to engage in a struggle with another person, in which each is bargaining to secure the best terms, or to engage in intricate and complex business matters; and, generally, less capacity is required to enable a testator to make a codicil than to make a will. But in every case it is a question of fact for the jury."

The court refused the request of appellants to charge that there was no evidence of insane delusion in the case, and that they were not to consider that subject. In addition to the foregoing charges, the court gave to the jury a charge, requested by appellants, explaining the law, and definition of an "insane delusion," in its application to the facts of this case, and refused all other charges asked by either party. The court refused to give the following charges at the request of appellants: "(1) You are instructed that all the testamentary capacity required of a testator in making a valid will or codicil is that he have sufficient mind to understand what he is doing in making the particular will or codicil he makes, and that there be a will of his own accompanying the act. Though the mental frame may be reduced below the ordinary standard, yet, if he have sufficient intelligence to understand the particular will or codicil he makes in its different bearings, the power to make the will or codicil remains. The strength of mind must be simply equal to the purpose to which it is applied, and that is all that is required. So that if you believe, from the evidence before you, that Peter McClelland, deceased, had, at the time the codicil was executed, sufficient mental capacity to comprehend the changes made in his will by the codicil before you, then he had sufficient mental capacity to make the codicil. (2) It takes less mental capacity to make a codicil than to make a will; and, if the codicil only changes the will in a few plain particulars, then it requires still less mental capacity to execute such codicil than if the same contained many such changes. (3) All parents have a right to judge and determine as to who are the proper objects of their bounty, and, if free from undue influence and insane delusion, and of sufficient mental capacity, may give their property to any person they may choose. A child has no natural right to the estate of its father which courts of justice can recognize against the will of the father." Upon the foregoing charges given and refused, appellants assign the following errors: "(4) The court erred in giving to the jury part of clause two (2) of its general charge, relating to the mental capacity in a testator necessary to make a will or codicil, in that this part of the charge is too general, not sufficiently full to cover the case before the jury, not applicable to the whole case, and required more mental capacity in the testator than was necessary, under the law, to make the codicil before the jury, and misled the jury. (5) The court erred in refusing to give to the jury charge number five (5) asked by plaintiffs or proponents, on the same subject as that complained of in the last assignment, because it presented correct propositions of law applicable to the case before the jury, sought to correct, and, if given, would have corrected, the errors in the court's charge on this subject. (6) The court erred in giving to the jury so much of part of clause six (6) of its general charge as relates

to the relative mental capacity necessary to make a will and codicil, and in refusing to give charge two, (2,) on the same subject, asked by plaintiffs or proponents, because said charge No. two (2) sought to apply the general proposition contained in the court's charge to the case before the jury, and was in every way proper in itself, and the court's charge was too abstract, not full enough, and too general and misleading. (7) The court erred in giving to the jury part of clause No. three (3) of its general charge, on the subject of insane delusion, and in refusing to give to the jury charge No. one, (1.) on the same subject, asked by plaintiffs or proponents, and in charging the jury on that subject at all, because there was not sufficient evidence of insane delusion before the jury to authorize the court to charge the jury on the question, and the jury was misled by submitting the question to them. (8) The court erred in refusing to give to the jury charge number three (3) asked by plaintiffs or proponents, to the effect that Peter McClelland, Sr., deceased, had the right to give his estate to whom he pleased, etc., because it presented a correct proposition of law, and was necessary to counteract what was so fully and so bitterly said by contestant's counsel before the jury about the unjustness of the testator's will and codicil. (9) The court erred in giving to the jury clause number one (1) of its general charge, and in refusing to give charge number six (6) asked by plaintiff or proponent, to the effect that the testator had the right to create the trust that he did by the will, and provide for the accumulation of his estate, because contestant sought, by parading before the jury this feature of the will as a great outrage, to prejudice their minds against the will and codicil; and this charge was necessary, in a measure, to correct this or counteract it, and the court's charge was not full enough on this point."

In view of another trial of the cause, when the evidence on the issue may be different from what it appears in the record now before us, we think it inappropriate to comment on the refusal of the court to charge, as requested by plaintiffs, "that there was no evidence of insane delusion, and that the jury should not consider that issue." What constitutes insane delusion, and its effect upon the testamentary capacity, are questions of law. Whether or not the testator came within the definition is a question of fact to be found by the jury from the evidence. If, in the view of the court, there shall be no facts in evidence bringing the testator within the embrace of the court's definition or explanation of such a state, the issue should be taken from the jury. With regard to all other assignments upon charges given and refused, we deem it sufficient to say that we think the charges given were substantially correct, and, in so far as the charges refused embraced correct propositions proper to be given, that they were sufficiently embraced in the charges given.

The court, over the objections of appellants, permitted contestant to prove that John E. Gilbert, one of the executors named in the will and codicil, did not then live in Texas; that he had been absent about one year; that he was not a married man; that he came from Ohio to Denison, and from there to Waco, and had no property, so far as the knowledge of the witness went; that Charles S. and Amos W. Gilbert, two executors named in the will, left Waco about three years before the trial, and then lived on the Pacific slope. We are not prepared to say that, upon the issue of the sanity of the testator, the disposition made of his property, as well as the character and circumstances of the persons appointed to execute the will, may not be proper subjects of consideration and proof. The inquiry is not cut off because the facts, when all are developed, tend to vindicate the fitness and wisdom of the appointment.

The contestant, upon cross-examination of a witness introduced by plaintiffs, and who had testified to the sanity of the testator when he executed the codicil, was permitted to ask the witness "whether McClelland was in a condition at that time to make a \$50,000 trade;" and the witness was permitted to answer "that he would not be willing to trust him to make such a trade for him." Plaintiffs objected to the question and answer. It was the right of contestant, in cross-examining the witness, who had expressed a favorable opinion of the sanity of the testator, to fully test the grounds and extent of the opinion; and the same restrictions upon the introduction of such evidence cannot be applied as would be proper upon the direct examination. Under the most liberal application of the rule, however, it is difficult to see that evidence of a witness that he would not willingly trust another to make an important trade for him is calculated to cast light upon the question of such other person having sufficient mental capacity to make a codicil to his own will.

At the instance of contestant a witness was permitted to testify that, just before the codicil was executed, and when they were preparing for it,—one of the witnesses being then inside the room where the testator lay,—the other witness was in the act of entering the room, when he met the testator's wife coming out of the room; "that she stopped him, and remarked to him that she did not think that her husband was in any condition to attend to that kind of business; that this took place a few feet outside of the door; and that he understood the remark to apply to his mental condition." The evidence was improper, and should not have been admitted.

Dr. Halbert, a witness for contestant, being under cross-examination, plaintiffs' counsel "stated such part of the main facts and circumstances attending the execution of the codicil as are shown by the statement of facts, and asked the witness whether or not

he would, from these facts, think the testator sane or insane, capable or incapable, of making a will, and received an answer." The contestant's counsel was then permitted to ask the witness the question: "Doctor, in reference to the hypothetical question put to you, suppose that, in addition to what he asked you, by way of hypothesis, that this man take charge of all of his wife's estate,—will it away in this condition,—and then, several days after, the testator forgets what provision he had made for his wife, he having limited her to one hundred and fifty dollars per month the balance of her life-time. Do you think he was in a condition to make a will?" The answer of the witness was: "I should not think that this would indicate it." Among other objections made by plaintiffs to the question, one was that the facts assumed in the question put were not shown by the evidence. In fact, there is nothing in the evidence tending to show that the testator had "willed away all of his wife's estate." We think the court erred in not sustaining the objection to the question.

We do not think it proper now to consider other errors assigned by either party. The judgment is reversed, and the cause is remanded.

WYNNE v. WILLIS *et al.*

(Supreme Court of Texas. March 31, 1890.)

LIMITATION OF ACTIONS.

Where an assignee for the benefit of creditors has unlawfully paid a dividend on an unsworn claim against the insolvent, who had secretly agreed with the claimants to pay them an additional sum, the statute of limitations begins to run against the assignee's right to sue the claimants for the sum so paid at the time he paid the dividend, and is not interrupted by the fact that he notified the claimants to defend an action brought by the other creditors against himself for the dividend so unlawfully paid.

Appeal from district court, Galveston county; WILLIAM H. STEWART, Judge.

Action by C. E. Wynne, assignee of Hudson & Son, against P. J. Willis & Bro., to recover a dividend unlawfully paid by plaintiff to defendants. Judgment for defendants, and plaintiff appeals.

Robt. G. Street, for appellant. McLemore & Campbell and G. E. Mann, for appellees.

STAYTON, C. J. Appellant, as assignee of the estate of Hudson & Son, insolvent debtors, who had made an assignment for the benefit of some of their creditors as would consent to take under it and release them, paid to appellees, through their order in favor of Kauffman & Runge, the sum of \$8,452.17, which was their *pro rata* of the assigned estate. Appellees were creditors of Hudson & Son in a much larger sum; and they sent to the assignee a statement of the sum due them, but not sworn to as the statute requires, but did agree to take under the assignment, and to release the debtors. Appellant paid as before stated, but other creditors of the insolvent estate brought an action

against him to recover the sum so paid, on the ground that he was not authorized to pay a claim not properly authenticated. They obtained a judgment against him, which was affirmed by this court. *Wynne v. Hardware Co.*, 67 Tex. 40, 1 S. W. Rep. 568. That judgment appellant has never satisfied in whole or in part, but now sues to recover from appellees the sum paid on their claim. The facts here stated, except the non-payment of the judgment, are alleged in the petition. It is not made clearly to appear whether appellant seeks to recover on the ground that he made the payment under mistake of law, having knowledge of all the facts, or on ground thus stated in brief of his counsel: "He shows to the court that the fact is, but was not known to him at the time of the payment, that, before their acceptance of the assignment and filing of their claim, defendants had entered into a secret agreement with Kauffman & Runge and the assignors whereby they agreed, in consideration, among other things, of the payment of \$5,000 by the assignors, to accept the assignment, and agreed to accept said payment of \$5,000, and certain other considerations in the agreement mentioned, in satisfaction of their judgment and in lieu of any benefit or dividend under the assignment; that the said sum of \$5,000 was accordingly paid the defendants under the agreement before their acceptance of the assignment, as well as the further sum of \$2,000 exacted outside the agreement. But he says that the defendants, wrongfully intending to deceive, mislead, and defraud petitioner, concealed said agreement from him, and accepted said assignment, and filed their purported claim with him, wrongfully intending to induce him thereby, in ignorance of the facts, to pay said dividend, whereby he was deceived, misled, and induced to pay the same. He says there was no contract, agreement, or understanding between him and the defendants with respect to the payment of said dividend, other than as stated; and especially was he not privy to any contract, agreement, or understanding, expressed or implied, in the direction, indorsed by defendants on their said receipt, to pay the same to Kauffman & Runge without recourse. He charges the liability of defendants to repay the money so paid them, with interest and counsel fees, demand and refusal."

This action was commenced on June 27, 1887, while the dividend was paid to order of appellees on October 13, 1881, with full knowledge that the claim had not been properly authenticated. On March 3, 1883, creditors of Hudson & Son brought the suit against appellant to recover the sum by him improperly paid to appellees' order, and recovered a judgment on December 7, 1884, against him, which, on appeal, was affirmed October 22, 1886. When suit was brought against appellant, he notified appellees of its pendency, and requested them to refund it; but this they did not. At the time dividend was paid, appellant did not know of the se-

cret agreement pleaded; but he did know of the agreement as early as February 3, 1883. Whether that agreement is susceptible of the interpretation put upon it by appellant, it is not now necessary to determine. Appellees answered by demurrers general and special, thus setting up the statutes of limitation as a bar; and they further answered by a general denial, and pleaded the statutes of limitation of two and four years. Demurrers were all overruled; but, on hearing the facts, the court held that the action was barred by the statutes of limitation.

We do not see any ground on which the correctness of this ruling can be seriously questioned. If appellant ever had cause of action, it accrued more than five years before this action was brought. He had knowledge of the secret agreement pleaded for more than four years before this action was brought, and the fact that he requested appellees to defend the action brought against him in no manner interrupted the running of the statute. The claim was barred within two years after the cause of action arose, and that existed as fully immediately after the money was paid on order of appellees as did it when this action was brought. It is not perceived on what theory it could be held that anything occurring under the secret agreement alleged to have been made between Hudson & Son and appellees gave appellant cause of action. If other creditors consenting to take under the assignment would have a right to recover from appellees any sum by them wrongfully received, through which their dividends were diminished, appellant could not be subrogated to their rights unless he had paid to such creditors or to his successor the sum for which judgment was obtained against him on account of his wrongful payment to appellees. This he has not done, in whole or in part; but had he, as limitation would run in favor of appellees against such creditors as well as appellant, he would have to assert the right acquired by subrogation, subject to all defenses appellees could urge against it, if prosecuted by other creditors. In any event, the claims would be barred by limitation.

It is unnecessary to inquire whether the general demurrer should not have been sustained. There is no error in the judgment, and it will be affirmed.

KAUFFMAN *et al.* v. WOOTERS.

(Supreme Court of Texas. March 21, 1890.)

LEGATEES—LIABILITY FOR DEBTS—LIMITATION OF ACTIONS.

1. Sayles, Civil St. Tex. arts. 1949-1952, which provide that creditors of an estate administered under a will without the probate court, by executors not required to give bond, may require the legatees to give bond, on which suit may be maintained for the recovery of their claims, is not exclusive of the remedy given by article 1817, under which a legatee becomes personally liable for testator's debts to the extent of debt-paying assets received from the estate.

2. Where a sole legatee avails herself of a power conferred on her by the will to take the es-

tate out of the hands of the executors, and makes a voluntary conveyance of a part of it to her son, a creditor of the testator cannot subject the portion in the son's hands to the payment of his claim, where the legatee retains sufficient of the estate to meet the claims of all creditors.

3. In an action on a claim against a testator's estate, evidence that his legatee transferred property acquired under the will to her son, and an admission by the son that he had indirectly received property from testator's estate, is sufficient to warrant the trial judge in assuming in his charge to the jury that the son had received part of testator's estate.

4. Where a defendant dies while the action is pending, and the petition is amended by substituting his legatee and her son as defendants, the statute of limitations ceases to run as against the substituted defendants when the amended petition is filed, though the petition is afterwards again amended, setting up substantially the same facts, and though both amendments are bad on general demurrer as to one of the substituted defendants.

Appeal from district court, Galveston county.

Action by J. C. Wooters against Clara Kauffman, sole devisee of Julius Kauffman, Sr., and Julius Kauffman, Jr., son of the deceased and the defendant Clara. From a judgment in favor of plaintiff, defendants appeal. For former reports, see 3 S. W. Rep. 465, and 11 S. W. Rep. 390. Sayles, Civil St. Tex. art. 1817, provides: "When a person dies leaving a lawful will, all of his estate devised or bequeathed by such will shall vest immediately in the devisees or legatees; * * * but all of such estate, * * * except such as may be exempted by law from the payment of debts, shall still be liable and subject in their hands to the payment of the debts of such testator."

Waul & Walker, for appellants. George Mason and D. A. Nunn, for appellee.

STAYTON, C. J. This action was brought against Julius Kauffman, Sr., on April 2, 1874, to recover the value of cotton hypothecated with him by Duble & Wooters to secure a loan. The cotton belonged to J. C. Wooters & Co., but was shipped abroad and sold by Kauffman, then doing business in the name of Kauffman & Runge; this being done under authority from Duble & Wooters, to to whom the cotton had been assigned by J. C. Wooters & Co. for the purpose of sale in this market. The action pending, on January 17, 1880, Julius Kauffman, Sr., died testate, and, by the terms of his will, all of his estate, wheresoever situated, passed to Mrs. Clara Kauffman, his widow. On January 25, 1884, a petition was filed in the cause making Mrs. Kauffman and Julius Kauffman, the only child of herself and Julius Kauffman, Sr., parties defendant. That petition was amended on October 5, 1885; but the averments of the two petitions are substantially the same, in so far as they state facts to show the liability of Mrs. Kauffman and her son, Julius. That amendment alleges that "Clara Kauffman is the widow and sole devisee and legatee of said Julius Kauffman, deceased, and is in the possession, use, and enjoyment of a large amount of property of

the estate of her said deceased husband, not exempt from the payment of his debts, devised and bequeathed to her by his last will and testament, and of the proceeds of such property so devised and bequeathed to her, and that the said defendant Julius Kauffman is the son of the said Julius Kauffman, deceased, and of the said Clara Kauffman, and is in the possession, use, and enjoyment of a large amount of property of the estate of his said deceased father, not exempt, as aforesaid, heretofore given to him by his said mother, and of the proceeds of such property so given to him as aforesaid."

The petition made a copy of the will of Julius Kauffman, Sr., an exhibit. The petition then alleged that the will appointed three persons named the executors of the will in Texas, and that Mrs. Kauffman was made executrix of the will in Germany; the testator having estate in both countries. That the will provided that no action should be had in the courts other than the probate of the will and return of an inventory, the executors not to be required to give bond. That the will was probated and the appointment of executors confirmed. That the executors named qualified, took possession of the estate, and returned an inventory, which was made an exhibit, and showed an estate in Texas consisting of property, real and personal, amounting in value to \$396,392. The will provided that Mrs. Kauffman, by power of attorney, might take the estate out of the hands of the three Texas executors, if she saw proper to do so, or might take charge of it herself. That in September, 1880, she availed herself of this right, and by her power of attorney "did transfer, make over, and assign and request * * * Texas executors, as aforesaid, to transfer and assign to said defendant Julius Kauffman, all the real and personal estate and choses in action which by said will she might be authorized to do, and made and appointed said defendant Julius Kauffman her agent and attorney to act for her, and in her name, place, and stead, in all matters of the estate of said Julius Kauffman, deceased, with power to sell and convey all her interest therein, with full power of substitution, * * * and that thereby said Clara Kauffman took said estate, and the administration thereof, out of the hands of said * * * executors as aforesaid, and vested the same, and the management and control thereof, in the said defendant Julius Kauffman," whereupon the executors resigned and relinquished "unto the said Clara Kauffman and said defendant Julius Kauffman all their rights as executors in said estate," and notified all persons thereof, "and that there has not since been any legal representation of said estate, but that the same, in the manner aforesaid, passed into the hands, possession, and control of said Clara Kauffman, who, as sole devisee thereof, received and took the same in charge, with and liable and subject to the debts of said Julius Kauffman, deceased. That the

estate * * * in Texas not exempt by law from forced sale or for the payment of debts, so received and taken by her, greatly exceeded in value all claims against said estate, including the amount sued for herein, and was and is assets in her hands, charged with, and liable and subject to, payment of said debts. And plaintiff further says that after the said Clara Kauffman had so received and taken said estate and property, and the title, possession, and control thereof as aforesaid, and while the same was so charged, liable, and subject as aforesaid, she conveyed, transferred, assigned, and delivered, without any valuable consideration therefor, a large portion thereof, situated in said state of Texas, greatly exceeding in value the amount sued for herein, to the said Julius Kauffman, who took and received the same from her charged with, and liable and subject to, the payment of said debts of said Julius Kauffman, deceased, * * * well knowing the same to be so charged, liable, and subject; and said plaintiff charges that said defendants, Clara Kauffman and Julius Kauffman, in manner and form as aforesaid, have confederated together with intent to obstruct, hinder, and delay the said plaintiff as a creditor of said Julius Kauffman, deceased, in the collection of his just claim against said estate."

There was prayer for judgment against both defendants for the cotton or its value, and a judgment was rendered against them for \$20,135.64.

No question is raised on this appeal as to the sufficiency of the evidence to show that Julius Kauffman, Sr., was liable for the value of the cotton; nor can there be any question of the sufficiency of the pleadings and evidence to justify a judgment against Mrs. Kauffman. That the court had acquired jurisdiction as to her was held on a former appeal. *Wooters v. Kauffman*, 3 S. W. Rep. 465.

Mrs. Kauffman received the estate of her husband liable to the payment of his debts in her hands just as it had been in his, but creditors had no lien upon it. *Sayles*, Civil St. art. 1817; *Mayes v. Jones*, 62 Tex. 365; *Webster v. Willis*, 56 Tex. 468. Persons having claims against an estate administered under a will without the probate court, by executor not required to give bond, may require those interested in an estate as devisees, legatees, or heirs to give bond as required by statute, on which suit to recover sum due may be maintained, and, in default of such a bond, may force an administration. *Sayles*, Civil St. arts. 1949-1952. This remedy, however, is not exclusive, and, by reception of the estate, Mrs. Kauffman became as much liable for debts, to the extent of value of debt-paying assets of the estate received, as she and bondsmen would have been had she executed bond, the sole purpose of which is security to creditors. She becomes liable because, as devisee and legatee, she received property liable to payment of debts.

Julius Kauffman filed a general demurrer to the petition, and further questioned its sufficiency on the ground that it did not aver that he, as heir, devisee, or legatee, had received any part of the estate of his father, or that in either of those characters he held possession of any part of the estate. These demurrers were overruled. It is very clear that the petition does not aver that, as heir, devisee, or legatee, he received any part of the estate of his deceased father. On the contrary, it avers that Mrs. Kauffman was sole devisee and legatee; and a copy of the will was made an exhibit, which shows that the averment was true. The averment is that he received as a gift from his mother "a large amount of property of the estate of his deceased father" not exempt from sale for payment of debts, and that "she conveyed, transferred, assigned, and delivered, without any valuable consideration therefor, a large portion thereof, situated in said state of Texas, greatly exceeding in value the amount sued for herein, to the said defendant Julius Kauffman, who took and received the same from her charged with, and liable and subject to, the payment of said debts of said Julius Kauffman, deceased, well knowing," etc. There is no averment that he agreed to pay debts in consideration of the conveyance to him; and, when it is said that he received property charged with payment of debts, we are to understand the pleader to mean that property received by him as a gift from his mother fixed upon him the same liability that would have existed had he received the same property as devisee, legatee, or heir. The demurrer filed by Julius Kauffman questioning the correctness of this proposition was overruled; and the charge of the court, in effect, informed the jury that he was liable to appellee if he received property from his mother, which came to her through the will of his father, in value equal to sum due appellee. If this be not the law, the judgment must be reversed as to Julius Kauffman. When Mrs. Kauffman received the estate of her husband, she made herself liable for debts of the estate to the extent of assets, subject to payment of debts, received by her. To that extent she became a debtor, and the property in her hands liable to sale for payment as was it in the hands of her husband. Her dominion over that property after the executors resigned was as complete as was that of her husband during his life. She could sell it, and title would pass freed from the claim of creditors. She could give it away subject only to the restriction that thereby creditors to whom she had become responsible were not defrauded. Any disposition she might make of it would be valid, if the same disposition would have been valid if made by her husband. If the gifts made to Julius Kauffman by his mother would not have been fraudulent as to creditors had they been made by the father, then they were not fraudulent when made by the mother. It is not unlawful for a parent to make a gift to

a child, and no creditor has right to complain that this is done, if the parent retains ample property to satisfy the claims of all creditors. Plaintiff alleges that Mrs. Kauffman received under the will of her husband an estate, situated in this state, aggregating in value \$396,392, exclusive of some accumulation of interest on notes, bonds, and like interest-bearing securities; but his petition may be searched throughout, and no averment will be found that of this a sum much larger than necessary to meet all claims against the estate did not remain in her hands after the gift to her son. The amount of the gift to him was not alleged, but it was said to be largely more than the sum due to plaintiff, which is less than \$21,000. If Julius Kauffman is liable to plaintiff at all, it is not because he has received a part of the estate from his mother by way of gift, but because he received so much of the estate through a voluntary conveyance that there was not ample left in the hands of his mother to meet the claims of creditors. The law does not presume that such a state of facts existed, and a petition seeking to show that Julius Kauffman was liable to appellee for the debt of his father, which did not state facts showing that the gift from his mother to him was fraudulent as to creditors, was insufficient on general demurrer. The only fair inference from the facts stated in the petition is that Mrs. Kauffman retained of the estate in Texas more than sufficient to meet all debts. No claim against the estate other than that sued on is shown to have existed. There seems to have been an estate in Germany as well as in Texas. He was not liable as he would have been had he received the property as heir, devisee, or legatee; and, when it was shown by the petition that he did not so receive it, it was incumbent on appellee to allege the facts that would render him liable. The general demurrer filed by Julius Kauffman, as well as demurrer numbered "1," should have been sustained to so much of the petition as sought to hold him liable; and the charge of the court which assumed that he would be liable if he received property formerly belonging to his father's estate, though not as heir, devisee, or legatee, without reference to any other fact than the value of the property so received, was erroneous.

It is urged that the court erred in assuming, in charge, that property received by Julius Kauffman from his mother was a part of the estate she received through the will of his father. We think there was no error in this; for he stated that he had indirectly received property from the estate in value greater than sum claimed by appellee, and Mr. Runge, who was a partner of Julius Kauffman, Sr., at the time of his death, and one of the executors, testifies as follows: "I know Mr. Kauffman, Jr., received money by gift from his mother in the summer of 1880. It approximated \$250,000, and was a transfer of an equivalent in cash on our books, to-wit, of firm of Kauffman & Runge as it then

was. It was not a transfer of her interest in the firm of Kauffman & Runge. Her interest had been liquidated. Mrs. Kauffman gave her son a certain amount of money transferred on our books. What he got was less than his mother's share in the estate. Mrs. Kauffman had an amount of money to her credit with the house, and she directed that that be transferred to her son. Amount was \$250,000. The amount of Julius Kauffman's interest in the firm of Kauffman & Runge, acquired by gift from his mother, is largely in excess of the amount involved in this suit. His mother acquired the same by last will of her husband. The property was transferred to Clara Kauffman on the 12th January, 1881. The property given by Mrs. Kauffman to Julius Kauffman was given on the 1st of July, 1880. It was her own property she was giving. Does not know what was Mrs. Kauffman's share in the estate. The estate in Texas alone was known by him. Mrs. Clara Kauffman gave Julius Kauffman an order for the \$250,000, which we placed to his credit as cash; and we placed the amount of her individual indebtedness on our books. Question. Then the property transferred to Mr. Julius Kauffman by his mother was property she received from the estate of her deceased husband by virtue of the will he made? Answer. That may be a correct construction. This transfer was made by Mrs. Kauffman before we transferred the property, and she had a credit with us before. This is my answer made before, and is the correct answer; and the transfer was made to her son on account of her own credit with the house." On re-examination, witness stated Mrs. Clara Kauffman had no credit in the house except what she derived from her husband's will. To the question, "Did she have any credit in that house except what she derived from her husband's estate?" the witness answered, "No, sir." This was the evidence on that question, and clearly shows that the gift here spoken of came from property Mrs. Kauffman received through her husband's will. This evidence, however, was not sufficient to authorize a recovery against him, under the facts alleged by appellee.

The amended petition filed on January 25, 1884, by which Mrs. Kauffman and Julius Kauffman were made parties defendant, based the right of appellee to recover against them on substantially the same facts alleged in the amendment on which the trial was had, and the court informed the jury that the running of the statutes of limitation ceased when the first amended petition was filed. In this there was no error, even though both amendments as to Julius Kauffman were bad on general demurrer. *Killebrew v. Stockdale*, 51 Tex. 529; *Hill v. Clay*, 26 Tex. 650; *Kinney v. Lee*, 10 Tex. 155. Limitation began to run in his favor from the time he received property in gift from his mother, and so continued until January 25, 1884, less such intervening time as he may have been ab-

sent from the state. If, excluding that, two years elapsed between the times named, then the action was barred as to him; but, in view of other questions considered, we do not feel called upon to examine that question of fact. For the errors noticed the judgment will be reversed and cause remanded, unless appellee shall elect to dismiss his action as to Julius Kauffman, in which event it may be reversed and cause dismissed as to him, and affirmed against Mrs. Clara Kauffman.

ELNELL *et al.* v. UNIVERSALIST GENERAL CONVENTION.

(Supreme Court of Texas. March 25, 1890.)

WILLS—DESCRIPTION OF LEGATEES—SUBSCRIBING WITNESSES.

1. Rev. St. Tex. art. 1842, provides that application for the probate of a will may be made by any person interested in the estate. Article 2200 gives any person aggrieved by a decision of the county court the right to appeal to the district court, and article 2207 provides that on such appeal the cause shall be tried *de novo*. Held that, where an application for the probate of a will has been made by a person not interested in the estate, and the contestants have appealed from a decree of the county court admitting the will to probate, the district court has power to substitute the legatee as the applicant for the probate of the will.

2. Where an application for the probate of a will is made and prosecuted by a trustee for the legatee, the legatee's substitution as the applicant, made more than four years after testator's death, is not within the inhibition of Rev. St. Tex. art. 1823, which provides that no will shall be probated after the lapse of four years from testator's death, unless it be shown that the applicant was not in default in failing to present the will within the four years.

3. A bequest to the "Board of Trustees of the General Convention of the Universalists in the United States of America, a corporation, * * * their successors and assigns," is not invalidated by the fact that the corporation had changed its name to the "Universalist General Convention" before the execution of the will.

4. On application for the probate of a will, where two of the three subscribing witnesses could remember neither whether testator had signed the will before they did, nor whether he had acknowledged his signature to them, secondary evidence of testator's signature is inadmissible so long as the non-production of the other subscribing witness is not accounted for.

Commissioners' decision. Appeal from district court, Galveston county.

Application by the Universalist General Convention for the probate of the will R. T. Bilderbach, to which application J. K. Elnell and H. S. Van Hist object. The will was admitted to probate, and Elnell and Van Hist appeal. Rev. St. Tex. art. 1842, provides: "Applications for the probate of a will may be made by the testamentary executor, or by any person interested in the estate of testator." Article 2200 provides: "Any person who may consider himself aggrieved by any decision, order, decree, or judgment of the county court shall have the right to appeal therefrom to the district court." Article 2207 provides: "All causes removed by appeal to the district court shall be tried anew as if originally brought in such court."

Wharton Branch and Howard Finley, for appellants. Wheeler & Rhodes, for appellee.

COLLARD, J. The statute provides that where an application for the probate of a written will, together with the will itself, is filed with the clerk, he shall issue citation to all parties interested in the estate, which citation is required to be served by posting at least 10 days before the first day of the term of the court to which such citation is returnable. Rev. St. arts. 1836, 1837. The notices required were issued and posted upon the application of Sanford Mason to probate the will of R. T. Bilderback, and before any action was taken appellants Elnell and Van Hise appeared, objecting to the probate of the will, and afterwards moved the court to dismiss the application because Mason was not named as executor in the will, and was not interested in the estate. On the following May the will was probated, and the objectors appealed to the district court, where the appellee, the "Universalist General Convention," was allowed to come in and prosecute the proceeding and probate the will. It is contended by appellants that appellee could not intervene in the district court, but should have begun a new proceeding in the county court. In the view we have of the case it will not be necessary to decide whether the facts alleged in Mason's petition entitled him to probate the will as a person interested in the estate, the will and the personal effects having been by the testator confided to him with instructions to have the will carried out. An application to probate the will was made, and the will was filed in the county court, upon which notices were issued and posted; and the matter so put before the court was so far a proceeding *in rem* as to authorize the county court to hear the cause upon the coming in of the real party interested in the estate as legatee under the will; and, inasmuch as the case was properly appealed, that is, in due form by the objectors, where the law required it to be tried *de novo*, the district court had the power to dismiss Mason, and entertain the proceeding at the instance of the legatee, just as could have been done in the county court. Id. arts. 1842, 2200, 2207. In the case of Phelps v. Ashton, 80 Tex. 847, under similar provisions of the statute cited above, where opposition may be filed to the application by any person interested in the estate, the question now under consideration was decided. Justice SMITH, delivering the opinion of the court, said: "The court is not directed to grant letters to the person who may apply for the probate of the will. It will hardly be contended that Michael Ashton could not have become a party plaintiff or applicant in the county court. * * * And as the appeal operated to remove the whole case to the district court for trial *de novo*, every person interested in the estate had a right to be made a party to the proceedings, and be heard, or it must be admitted that the case does not stand in the

district court as it did in the county court to be tried *de novo*, that is, anew, and as in that court it would only be revisory, and only as between those who might join formally in the appeal; * * * hence we must conclude that there was no error in permitting Michael Ashton to proceed with the cause in his name, or in the extension of letters to him as an executor of the will."

It is claimed by appellants that the application of the Universalist General Convention came in too late, more than four years, after the death of Bilderback, and that the statute forbade its probate after such lapse of time. Four years and nine months elapsed after the death of Bilderback to the time appellee came in to prosecute the proceeding and probate the will. Appellee did not ask for letters of administration with the will annexed, but only that the will should be probated. The statute¹ limits the time in which letters testamentary and of administration must be applied for to four years after the death of the testator or decedent, and also declares that no will shall be probated after a lapse of four years from the death of the testator, unless it be shown by proof that the party applying for such was not in default in failing to present the same for probate within the four years. Rev. St. arts. 1827, 1828. In *Ochoa v. Miller*, 59 Tex. 462, it was held that where the will was not under control of the applicant, nor in its proper place of deposit, but was in possession of the opposite party, it might be admitted to probate after the expiration of four years from the testator's death, but that no letters could issue. In the case of *Ryan v. Railroad Co.*, 64 Tex. 289, the testatrix died November 6, 1871. Application to probate the will was filed July 4, 1882. The order probating the will was on 23d September, 1884. As an excuse for not sooner presenting the will for probate, the application alleged that the contestants, in 1878, instituted suit against E. M. Daggett, as heirs of the testatrix; that E. M. Daggett offered the will for probate in 1881, (1871?) which was dismissed by a compromise with contestants; that in June, 1881, contestants sued applicant for partition for 97 acres of land, (which it had purchased of E. M. Daggett in 1875,) which suit was still pending; that Daggett, after his agreement to compromise with contestants, refused to prosecute his application to probate the will, though requested to do so by applicant. It was held that the will was properly admitted to probate to establish a link in applicant's title, but that letters could not issue. In this case, while it was pending in the county court, contestants moved the court to dismiss Mason's application to probate the will, and for letters of administration with the will annexed, because he was not named as executor, and had no interest in the estate; whereupon, in April, 1883, Mason amended his application, declaring that it was made by him

¹Rev. St. Tex. art. 1828, digitized by Google

as trustee in behalf of the board of trustees of the General Convention of the Universalists of the United States of America, and further alleging that the original corporate name had been changed by act of the legislature of the state of New York of May 7, 1872, to the Universalists General Convention. This amendment was filed less than four months after the death of Bilderback, and upon this amendment the county court heard the proof, and probated the will, May 3, 1883, reciting as follows: "This day came on to be heard the application of Sanford Mason, as trustee in behalf of the Board of Trustees of the General Convention of Universalists of the United States of America, whose corporate name is alleged to have been changed * * * to the 'Universalists General Convention.'" No letters were granted. After the case was appealed to the district court the cause proceeded under the style and form, as in the county court until October 10, 1887, when the appellee, in its own name of the "Universalist General Convention," appeared by the same attorneys that had all along represented Mason in the probate of the will, and asked that it be admitted to probate. Mason testified that the will was placed in his hands before the testator's death, while he was about to die, with the request that he have it carried out; that Bilderback told him before that he was going to make him his trustee. The evidence shows that Bilderback turned over all his personal effects to him when he was near his death and believed he was about to die. Whether these facts would be sufficient to authorize the probate of the will upon Mason's application we do not decide; but we do think them sufficient, under the law, to justify the appellee in the conclusion that there was a good application before the court for that purpose, of which it was the beneficiary. There was an application before the court from the beginning for its benefit, which it finally took up and prosecuted in its own name. We do not think that appellee was in default in presenting the will for probate.

We are not called on to construe the will in all its provisions in a proceeding to probate. It seems to be clear that a foreign corporation can take a bequest by a will in New York, and for this purpose, at least, the will may be probated. We waive the other questions involved as to the power to take by devise, as the court should be free to decide when the point is directly in issue. See 2 Williams, Ex'rs, 1114, foot note; In re Fox's Will, 52 N. Y. 530; Sherwood v. Society, 4 Abb. Dec. 231; Chamberlain v. Chamberlain, 43 N. Y. 424; and White v. Howard, 46 N. Y. 144. We are not advised as to what the condition of the law may be in the state of New York as of controlling effect upon this will. We deem it prudent to make no decision touching the right of a foreign corporation to take by devise until the matter is directly in issue.

The bequest was to the "Board of Trustees

of the General Convention of the Universalists in the United States of America, a corporation created in the year 1866 under the laws of the state of New York, their successors and assigns, for the corporate purposes of said board of trustees." The charter was granted on the 9th of March, 1866, to certain-named persons, creating them a body corporate by the name as stated in the will. By amendment of the act in 1872 the corporate name was changed to that of the 'Universalists General Convention.' We think the corporation is sufficiently identified in the will by its original corporate name and its successors. The fact that the name had been changed at the date of the will is immaterial. The will was in favor of the original corporation "and its successors," who are shown to be the applicants. Where there was "a devise to a society for the spread of the gospel, organized and known by the name given it in the will at its date, and prior to the death of the testator it was incorporated under such name, the devise will hold good." 1 Jarm. Wills, 181, note. In the case before us there was no change in the organization, only a change in its name as incorporated. The will was in favor of the same institution, the same corporation, and is not invalid for want of identification of a legatee.

The charge of the court was the law of the case, and needed no amendments, as proposed by the special instructions requested by contestants, which were in the main not the law applicable to the case. Vance v. Upson, 66 Tex. 478, 1 S. W. Rep. 179. The evidence of the sanity and testamentary capacity of deceased was ample, and sustained the verdict of the jury.

There were three subscribing witnesses to the will, two of whom testified on the trial to such facts as they remembered, but they could not state that the testator's name was signed to the will when they signed it, or that he acknowledged to them that he had signed it. They testified to facts and circumstances which might be deemed sufficient proof of the fact that he had signed the will; but in aid of this proof, over objections of contestants, the court permitted one of the subscribing witnesses to state that he believed that the signature of the testator was genuine, from having seen him write, and the testimony of the attorney who drew up the will, which indicated, by the circumstances stated, that the testator had signed it in form as required by law. The objection to this testimony was that the execution of the will must be proved by the subscribing witnesses, one of whom, Bernard, had been called, and who was in the city when the case was being tried, and who could be had in court. A bill of exceptions to this effect was allowed by the court. The meaning of the objections was that the testimony was not the best evidence. The assignment of error upon this ruling of the court is well taken. When the subscribing witnesses fail to remember the facts necessary to probate a

will, are dead, beyond the jurisdiction of the court, or are unwilling, from corrupt motives, to make the proof, any other legitimate evidence may be heard; and it has been decided that a will may be probated by evidence opposed to that of the subscribing witnesses. *Hopf v. State*, 72 Tex. 281, 10 S. W. Rep. 589. But the testimony of the subscribing witnesses, who had been called upon by the testator to attest the due execution of the will, is primary, and must be produced, or the absence of the witnesses accounted for, before other indirect testimony can be offered. When the subscribing witnesses have testified, or their absence properly accounted for, other evidence secondary in character is admissible. We do not intend to say that the evidence, exclusive of that objected to, was insufficient to probate the will, but merely that it was improper to resort to secondary evidence to establish the fact of its due execution as long as there was primary evidence of the fact accessible to the court, there being no cause shown for its non-production. *Sample v. Irwin*, 45 Tex. 567; *White v. Holliday*, 20 Tex. 679; Rev. St. art. 1847; 1 Greenl. Ev. § 518. The testimony of the attorney who drafted the will, identifying it as the one drawn by him at the testator's request, and showing his sanity, was admissible. We deem it unnecessary to discuss any other question raised by the assignment of errors, as they will not, in all probability, occur upon another trial. Because of the error in admitting secondary evidence as above pointed out, we conclude the judgment of the court below should be reversed and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment reversed, and the cause remanded.

PORTER v. MILLER *et al.*

(Supreme Court of Texas. March 28, 1890.)

BOUNDARIES—EVIDENCE—ADVERSE POSSESSION.

1. In trespass to try title it appeared that the north-east corner of plaintiff's land was the north-west corner of defendant's land, but no natural or artificial object was called for by the field-notes. Plaintiff's north-west corner and defendant's south-west corner were well identified, and, following course and distance from the corners, located the boundary line as claimed by plaintiff. Defendant's land was surveyed in 1838, and the line located where he claimed it, which was recognized until 1860, when a new survey was made, and the line established about 847 feet east of the line as first located. At that time, commencing at the well-established south-west corner of defendant's land, defendant's west line could be traced by marks and trees, as called for in the field-notes, to about three-fourths of a mile from the point where the divergence begins. Afterwards another survey was made, beginning at plaintiff's well-established north-west corner, and course and distance were followed for the north-east corner, defendant's north-west corner, and the line was found to be as claimed by plaintiff. Defendant surveyed again in 1887, and located the line as claimed by him. *Held*, that a judgment for defendant was without evidence to support it.

2. Defendant testified that the improvements

made by one S., under whom he claimed, were near the line as claimed by him; that several acres had been inclosed around the house; and that he and his wife had held the land by inheritance since 1872, but that there never was a fence around the land until just before suit was brought. Other witnesses testified that S. occupied a small tract in the upper north-west portion of defendant's survey from 1841 to 1854, and some of the family remained until 1860. Plaintiff and defendant claimed under different grants. *Held*, that defendant's possession was not sufficiently continuous, open, and hostile to sustain the defense of the statute of limitations.

Commissioners' decision. Appeal from district court, Harris county.

E. P. Hamblen, for appellant. *W. H. Crank*, for appellees.

ACKER, J. George L. Porter sued in the usual form of trespass to try title to three acres of land, claimed by him as part of the Tierwester survey, in the city of Houston. The defendants answered by pleas of not guilty, the three, five, and ten years' statutes of limitation, and, specially, that they, and those under whom they claim, have held the land described in the petition for more than 45 years, under established lines, as part of the Luke Moore league. The parties entered into the following agreement: "That the plaintiff has a regular chain of title from the sovereignty of the soil to himself, duly registered, for the land described in his petition; and that the defendants have a regular chain of title from the sovereignty of the soil to themselves to the land in the Luke Moore survey, adjoining the plaintiff's land, and that the issue in this case shall be the true boundary line between the Luke Moore and Tierwester surveys, dividing their lands; the defendants also reserving the right to plead any or all of the statutes of limitation." The trial without a jury resulted in judgment for defendants on the question of boundary, and also on the defenses of three, five, and ten years' limitation.

Appellant's first contention is that "the court erred in adjudging the law of the case to be with defendants on the evidence adduced on the question of boundary." It appears from the evidence that the north-west corner of the Moore is the north-east corner of the Tierwester; but no natural or artificial object is called for at this corner by the field-notes. The south-west corner of the Moore and the north-west corner of the Tierwester are established, well defined, and certainly identified on the ground. Following course and distance from these corners locates the boundary line between the surveys where the plaintiff claims it to be. In 1838 the west half of the Moore survey was subdivided by H. Trott, district surveyor, for the estate of Stephen F. Austin, into tracts of from 88½ acres to 200 acres. Trott made a plat of the subdivisions, which was recorded in Book C of the Records of Harris county. The north-west lot or subdivision, designated "No. 1," contained 88½ acres, the north half of which became the property of A. Seneschal, the father of defendant Mrs. Miller, who inherited in

1872 the N. W. $\frac{1}{4}$, or 11 and a fraction acres of the 44 $\frac{1}{4}$ acres owned by her father. In 1842 the Seneschal 44 $\frac{1}{4}$ -acre tract was surveyed by Bringhurst, county surveyor, who made a map or plat of this survey, introduced in evidence, which does not show whether he recognized and adopted the line run by Trott in 1838 as the boundary line between the two surveys or not. Up to 1860 the line run by Trott as the west boundary line of the Moore was generally recognized as the boundary line between the surveys. In 1860, Gillespie, an experienced surveyor, and Powers, then county surveyor, surveyed the Moore league, and discovered that the line run by Trott was error, and the conflict has been recognized ever since. At that time the west line of the Moore, the boundary between the two surveys, commencing at the well-established and identified south-west corner, could be easily traced by the marks on the trees, as called for in the field-notes, for a mile and a half through the timber, until it struck the prairie, about three-quarters of a mile from the land in controversy. Some of the marks along this line remained at the time of the trial. This line is about 347 feet east of the line run by Trott. Wood, an experienced surveyor, who had followed his calling as such in Harris county for 25 years, who was familiar with the boundary lines of the two surveys, and knew of the conflict between them ever since he had been in Harris county, assisted by Gillespie, surveyed the land in controversy; and, for the purpose of determining the boundary between the two surveys, began at the well established and identified north-west corner of the Tierwester, and ran course and distance for its north-east corner, the north-west corner of the Moore, and found the true boundary line between the surveys to be the line found and identified by Gillespie and Powers in 1860, east of the land in controversy. The defendant Miller testified that he had always understood that the line run by Trott was the true line between the surveys; that in March, 1887, Gillespie, county surveyor, surveyed the land claimed by him, and had followed and adopted the lines and calls of the Bringhurst survey, and given a certificate to the effect that he had correctly established the corner of said land according to map of subdivisions of the Moore league, recorded in Book C; and that he put a fence on the west line as run by Gillespie before this suit was brought. Gillespie testified that he had made surveys by both lines since 1860, as parties desired; that Trott and Bringhurst were early surveyors of Harris county, and recognized as good surveyors. There was no other evidence relating to the question of boundary, nor was there any evidence tending to show that the plaintiff, Porter, or those under whom he claims, ever agreed to, acquiesced in, or recognized the line run by Trott as the boundary line between the two surveys. We think it too clear to require argument that the conclusion of the court on the question

of boundary is not only against the weight of the evidence, but is without evidence to support it.

It is also contended that "the court erred in adjudging, from the evidence adduced, the law to be with defendants on the questions of three, five, and ten years' limitation." The land in controversy commences at the north-west corner of the Moore, and extends down the dividing line, between the surveys, 502 *varas*. The land belonging to defendant Mrs. Miller commences at the same corner, and extends down the dividing line 250 *varas*. The Seneschal 44 $\frac{1}{4}$ acres commenced at same corner, and ran down the dividing line 1,000 *varas*. Defendant Miller testified that the improvements occupied by Seneschal and his family were situated on the lower half of the 44 acres, near the west line of the survey made by Bringhurst; that Seneschal and he claimed the land by the Bringhurst survey; that several acres had been inclosed around the Seneschal house, and fruit-trees and parts of the fence are still there; that he and his wife had held the land by inheritance from her father since 1872; that there never was a fence or other improvement on the upper half of the Seneschal 44 acres, or on or around the land owned by his wife; that there was never a fence around the land in controversy until he fenced it, just before this suit was brought. Several witnesses testified that Seneschal moved on the 44 acres in 1841, and lived there with his family until 1854, and some of his family remained on it until 1860, and that he had an inclosure around the house, and cultivated a part of the land. There was no other evidence upon the question of the possession of defendants, or of those under whom they hold. Plaintiff and defendants claim under different grants; and, to sustain the defense of limitation; there must have been an actual occupancy of the land, beyond which the possession cannot be extended by construction. Such possession must be not only actual, but continued, visible, notorious, distinct, and hostile. *Peyton v. Barton*, 53 Tex. 298; *Bunton v. Cardwell*, Id. 408; *Bracken v. Jones*, 68 Tex. 184; *Blassingame v. Davis*, 68 Tex. 598, 5 S. W. Rep. 402. We think it quite clear that the evidence wholly fails to sustain the pleas of limitation.

We are of opinion that the judgment of the court below should be reversed, and judgment rendered here for appellant.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment reversed, and rendered for appellant.

COMMINGE *et al.* v. STEVENSON.

(Supreme Court of Texas. March 25, 1890.)

NUISANCE—EVIDENCE—DAMAGES.

1. Defendant erected a powder magazine between three and four hundred feet from plaintiff's residence, in which thousands of pounds of powder

were kept stored, and which was left uninclosed, and surrounded by a growth of weeds and grass. Plaintiff testified that the magazine was a constant source of alarm, and that it had caused a very great depreciation in the value of his property, and other witnesses corroborated him as to such depreciation. *Held*, that the evidence was sufficient to show that the magazine was a nuisance.

2. The complaint alleged that because of a powder magazine plaintiff's property had been rendered unsalable at any price, but did not say that he had opportunity to sell it at a price greater than he would be able to sell it for after the nuisance was abated, and there was no evidence to support such an allegation. *Held*, that an instruction "that if the magazine, as a nuisance, prevented plaintiff from selling his property, or any part of it, at a price greater than he will be able to get for it if said magazine is abated as a nuisance, and that but for said magazine plaintiff would have made such sale, then the loss in value, if any, so sustained by plaintiff, would also be a proper element of damages to be considered by the jury," is error. Such damage, not being a necessary consequence of the nuisance, must be specially alleged and proved.

3. Where action is brought to abate a nuisance and recover damages, and the verdict is for plaintiff, the damages may be assessed down to the date of the trial.

4. All persons who aid or assist in creating and maintaining a nuisance are liable for the damages.

5. An instruction that "a nuisance is anything that works hurt, inconvenience, or damage to another, either in his person or property," is not erroneous as ignoring the legal ingredient of a "violation of a right," as the jury would doubtless understand that to authorize a verdict for damages they must believe that the injury was inflicted in violation of plaintiff's right.

Commissioners' decision. Appeal from district court, Harris county.

Goldthwaite & Ewing and *W. N. Shaw*, for plaintiffs in error. *W. H. Crank* and *E. P. Hamblen*, for defendant in error.

ACKER, J. J. L. Stevenson brought this suit against *Comminge & Geisler*, and afterwards, by supplemental petition, against *E. S. Wood & Son*, and the *Dupont Powder Company*, to restrain by injunction the further maintenance of a powder magazine, as a private nuisance, and to recover damages for the past maintenance thereof. The *Dupont Powder Company*, the owner of the magazine and the land on which it was situated, answered by general denial, and special plea not necessary to notice. *Comminge & Geisler* answered by general denial, and, specially, that they were subagents without any discretion or directing control in the premises. *E. S. Wood & Son* answered by general denial, and, specially, that they acted in the premises merely as agents of the *Dupont Powder Company*. The trial by jury resulted in a verdict against defendants for \$100, and declaring the magazine a nuisance; upon which judgment was rendered for the damages found, abating the nuisance, and enjoining and restraining defendants from continuing the use of the property as a magazine, from which this writ of error is prosecuted.

The first assignment of error is: "The verdict is clearly wrong, in that the evidence wholly fails to establish that the magazine in question is a nuisance." The magazine is be-

tween three and four hundred feet from plaintiff's residence, on the prairie, uninclosed, and surrounded by a growth of weeds, grass, and other vegetation indigenous to such outlying lands. The plaintiff testified that the magazine was a constant source of apprehension and alarm; that before it was placed there he had rented his property for \$75 and \$100 per month, but had not been able to rent it at any price since; that to enable him to prosecute this suit he had been compelled to sell an acre of his land for \$180 which would have brought \$1,000 but for the magazine being there. Other witnesses testified to the depreciation in value of the property, and of its use, because of the proximity of the magazine. It appears from the evidence that thousands of pounds of powder are kept stored in it. We think the magazine and its contents afforded sufficient ground for plaintiff's apprehension and alarm, and that it satisfactorily appears from the evidence that the magazine is a "thing that worketh hurt, inconvenience, and damage" to plaintiff in both his person and property, in violation of his right to enjoy his property free from such hurt, inconvenience, and damage. *Rhodes v. Dunbar*, 57 Pa. St. 290; 4 Wait, Act. & Def. 731, 732, 749, 778.

The next assignment of error is: "There is error in the court's charge wherein it instructs the jury that, if the magazine, as a nuisance, prevented plaintiff from selling his property, or any part of it, at a price greater than he will be able to get for it if said magazine is abated as a nuisance, and that but for said magazine plaintiff would have made such sale, then the loss in value, if any, so sustained by plaintiff, would also be a proper element of damages to be considered by the jury." It is said in *Wood, Nuis.* § 871, that "all damages that are the natural and necessary consequence of a nuisance may be recovered under a general allegation of damage; but damages that, although the natural, are not a necessary, consequence, must be specially alleged, or no recovery can be had therefor." This is believed to be an established rule applicable to all actions for the recovery of damages resulting from the wrongful act of another. The depreciation in value of plaintiff's property, and of its use, was the natural and necessary consequence of the nuisance; but the failure of plaintiff to sell his property at a price greater than he will be able to sell it for after the nuisance is abated is not a natural nor a necessary consequence of it. We incline to the opinion that such damage is too remote and speculative; but, if recovery could be had therefor, it was indispensable that it should have been specially alleged. *Railway Co. v. Curry*, 64 Tex. 87; *Furlong v. Polleys*, 30 Me. 491; *Pinney v. Berry*, 61 Mo. 359. It is alleged that, because of the magazine, plaintiff's property had been rendered unsalable at any price, and its value destroyed, but there is no allegation that he had opportunity to sell it at a price greater than he will be

able to sell it for after the nuisance is abated; nor was there any evidence adduced tending to sustain such allegation, if it had been made. On the contrary, the plaintiff testified that he had not offered any of the land for sale, nor had he received an offer for any of it, since the magazines were erected there, except the tract he sold to Weiss. The court should give in charge to the jury the law applicable to the case made by the pleadings and the evidence, and to give a charge not called for by the case so made is error. *Railway Co. v. Rider*, 62 Tex. 270; *Markham v. Carothers*, 47 Tex. 22; *Andrews v. Smithwick*, 20 Tex. 111; *Austin v. Talk*, Id. 164. The charge here complained of authorized the jury to consider as an element of damage matters not alleged, and upon which there was no evidence tending to sustain, and we think it was well calculated to mislead the jury. Appellee insists that if the charge complained of by this assignment is erroneous, it is abstract error, and the verdict, being correct in itself, should not be disturbed. This proposition is doubtless correct where there is no controversy as to the facts, and the verdict is in accordance with the evidence; but in a case like this, where plaintiff's damage was estimated by the witnesses from nothing to total destruction of value, we think it would be difficult to find authority holding such error immaterial.

The fourth assignment of error is: "There is error in the court's charge wherein it instructs the jury: 'And if plaintiff has sold a part of said property at a price much less than he could have gotten for it if the magazine had not been near his property, and got the best price he could, under the circumstances, then if you find for plaintiff, you may allow as a part of the damages the difference between the price obtained and what could have been obtained but for the magazine, if the magazine caused the depreciation.'" It is objected that the petition contains no allegation authorizing this charge, and it appears to us, from an inspection of the record, that the objection is well taken. What we have said in discussing the last preceding assignment disposes of this.

Under the fifth assignment of error it is contended that the court erred in directing the jury to assess damages up to the time of the trial, if they should find in favor of plaintiff, because the recovery could be had for such damages only as had been sustained prior to the institution of the suit. The authorities sustain the proposition that in actions to recover damages resulting from a permanent or continuing nuisance, and the damages are necessarily continuous, the recovery can be had for such damages only as had been sustained prior to bringing the suit. *Wood, Nuis. §§ 869, 870, 873*; *Field, Dam. §§ 748, 749*; *Pinney v. Berry*, 61 Mo. 359. But, when the action is brought not only to recover damages, but to abate the nuisance, as in this case, we think it more in accord with the long-established policy of our laws to prevent, as

far as possible, a multiplicity of suits, to hold that the recovery may be had for all damages sustained down to the trial, rather than put the plaintiff to another action, after the nuisance has been abated, to recover for damages sustained between the institution of the suit and the time of trial.

It is contended that the court erred in instructing the jury to the effect to find against *Comminge & Geisler* and *E. S. Wood & Son*, if they, or either of them, aided or assisted the *Dupont Powder Company* in so managing the magazine as to make it a nuisance, or against the one so aiding or assisting. It appears from the evidence that, while the magazine was built for the powder company under the immediate directions of *Comminge & Geisler*, it was built in pursuance of authority from *Wood & Son*, else why should *Wood* go from *Galveston* to *Houston* for the purpose of "receiving it" when it was finished? *Comminge & Geisler* seem to have had control of the magazine up to the time of the trial. We think all parties who participated in creating and maintaining the nuisance are liable, and that the evidence shows such cooperation amongst the defendants as made them jointly liable. *Wood, Nuis. § 875*.

The remaining assignment of error is: "The court erred in instructing the jury 'that a nuisance is anything that works hurt, inconvenience, or damage to another, either in his person or property.'" It is insisted that this charge is erroneous because "it ignores the legal ingredient of violation of a right." We believe that the average Texas jury would understand from this charge that to authorize a verdict for damages they must believe that the "hurt, inconvenience, or damage" was inflicted in violation of the right of the injured party to be protected against such "hurt, inconvenience, or damage;" but if we are not correct in this view, the special instruction given at request of defendants supplied the omission complained of by this assignment.

The plaintiff's property having sustained no permanent injury, and the cause of the injury being subject to abatement, in view of another trial we deem it proper to say that we think the correct measure of damages is the difference between the value of the rent, or use of the property with the nuisance, and without it. The sale of the land to *Weiss* was neither a necessary nor a natural consequence of the nuisance, and plaintiff is not entitled to recover anything on account of that transaction. *Field, Dam. § 748*; *Wood, Nuis. § 866*; *Francis v. Schoellkopf*, 53 N. Y. 152; *McKeon v. See*, 4 Rob. (N. Y.) 450; *Pinney v. Berry*, 61 Mo. 359; *Park v. Railroad Co.*, 43 Iowa, 636. For the error indicated, we are of opinion that the judgment of the court below should be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment reversed, and the cause remanded.

WESTMORELAND et al. v. CARSON et al.

(Supreme Court of Texas. March 25, 1890.)

MORTGAGES—DESCRIPTION—STATUTE OF FRAUDS—VENDOR AND VENDEE.

1. Defendants agreed to secure their indebtedness to plaintiffs and H. "on about 908 acres of land of the H. headright, in M. county," plaintiffs to be secured on 500 acres of said land, beginning at the west boundary, and extending east sufficiently far to embrace 500 acres. *Held*, in a suit to establish the agreement as a mortgage, and to foreclose the same, that this description was sufficient.

2. Although the description was sufficient, there was no error in admitting, in a suit to enforce the equitable lien, a deed of 908 acres of said headright to defendants.

3. As the description in the agreement was sufficient, and the deed properly admitted, it was not prejudicial to defendants to admit parol evidence of the identity of the land described in the two instruments.

4. As the statute of frauds requires some memorandum of a contract for the sale of land to be in writing, signed by the party to be charged therewith, parol evidence that an agreement to sell land was part of a contract, the only part of which reduced to writing was an agreement to sell goods, is properly excluded.

5. There being no evidence of a valid contract to purchase land, evidence of a tender of a deed was properly excluded.

6. Evidence that a party offered to sell land to which he did not have the title is immaterial to show that he had agreed to purchase it.

Commissioners' decision. Appeal from district court, Harris county.

Hutcheson, Carrington & Sears, for appellees.

ACKER, P. J. J. M. Westmoreland & Co. were merchants, and were indebted to appellees by two promissory notes, for the sum of \$859.83 each. They were also indebted to Halff & Newbouer, and on the 14th day of November, 1887, executed this instrument: "The state of Texas, county of Walker. We hereby sell and deliver into possession of Carson, Sewell & Co. and Halff & Newbouer our entire stock of goods, wares, and merchandise, situated in the store-house now occupied by us in the town of Waverly, Texas. The goods are to be invoiced as soon as practicable by the representatives of said C. S. & Co. and Halff & Newbouer, and all unbroken and undamaged goods are to be invoiced at original cost, and all shelf-worn and damaged goods and remnants are to be invoiced at the market value, to be agreed upon at the time the inventory is being taken; and the aggregate amount of the inventory is to be credited on our indebtedness due said C. S. & Co. and Halff & N., *pro rata*. And the balance due to them we agree to give one twelve-months note for, bearing 8 per cent. interest from date until paid; said note to be secured by deed of trust on about 908 acres of land on the F. K. Henderson headright, in Montgomery county, Texas, in the following proportions: Carson, Sewell & Co. to be secured by deed of trust on 500 acres of said land, beginning at the west boundary, and extending east sufficiently far to embrace 500 acres; and Halff & Newbouer to be secured by deed of trust on balance of tract now remaining

unsold, which we estimate to be about 408 acres." Appellants did not execute the note for the balance due appellees, nor the deed of trust to secure the payment of that balance, and this suit was brought on the original notes for the balance unpaid, after crediting thereon the *pro rata* of the stock of goods received from defendants, and to establish the foregoing instrument as a mortgage, and to foreclose it on the 500 acres of land. The instrument was attached to the petition, and made part of it. The defendants pleaded specially that at the time they sold and delivered the goods, and as part of the same contract, they also sold and delivered to plaintiffs the store-house and lot, with the understanding and agreement that plaintiffs were to accept the house and lot at what they actually cost defendants, and credit them therewith in the same way the goods were to be credited; that the actual cost of the house and lot was \$618; that the sale of the goods and store-house and lot was an entire contract, and that they would not have sold the goods if plaintiffs had not agreed to take the house and lot; that the entire contract was not reduced to writing at the time, because it was not then known what the house and lot cost, and the description of the lot was not accessible; that before the institution of this suit they tendered to plaintiffs a duly executed conveyance for the store-house and lot, which they refused to accept, and defendants tendered the deed with their answer. Plaintiffs replied to the answer by general denial, specially denied the alleged contract to take the house and lot, and specially pleaded that, if such agreement or contract was made, it was a parol agreement for the sale of land, and contrary to the statute of frauds. The trial without a jury resulted in judgment for plaintiffs for the balance due on the notes, and foreclosing the lien claimed, from which defendants prosecute this appeal.

Plaintiffs offered in evidence, in support of their claim of a mortgage, the instrument executed by defendants, and attached to the petition, to which defendants objected, on the ground "that the pretended equitable mortgage claimed by plaintiffs on land under said contract was void for want of description of the land." The evidence was admitted, and the ruling is assigned as error. We think the description of the land sufficient, and that the court did not err in so holding. *Steinbeck v. Stone*, 53 Tex. 382; *Fulton v. Robinson*, 55 Tex. 404; *Watson v. Baker*, 71 Tex. 747, 9 S. W. Rep. 867; *Cattle Co. v. Chisholm*, 71 Tex. 526, 9 S. W. Rep. 479.

Plaintiffs offered in evidence a certified copy from the records of Montgomery county of a deed to defendants for 908 acres of the F. K. Henderson survey, and offered to prove by the witness Chew that it was a copy of the only deed of record in Montgomery county conveying to defendants any part of that survey, and that the land described in the copy of the deed was the same land described in plaintiff's petition; to which defendants

objected, on the grounds that the copy of the deed "was wholly irrelevant to the issues of this case, and that parol evidence cannot be introduced to identify land referred to in written contract to give a mortgage thereon." The objection was overruled, and appellants contend that the court erred in the ruling.

While we think the land against which the mortgage was claimed was sufficiently described in the instrument itself to identify it, we think the copy of the deed was not wholly irrelevant, and was admissible, over the objection urged against it, for the purpose of enabling the court to more accurately define the boundaries of the 500 acres. It appears that the witness Chew represented plaintiffs in making the settlement with defendants, and wrote the instrument executed by them in virtue of which plaintiffs claimed the mortgage lien, and was doubtless qualified to speak with reference to the identity of the land from conversations had with defendants. The record does not disclose the source of his information as to the land described in the deed being the same as that mentioned in the instrument sued on, beyond what appears from the deed and instrument themselves; but, having determined that the description given in the instrument was sufficient, and that the copy of the deed was properly admitted in evidence, the parol evidence objected to was simply cumulative, and could not have operated to the prejudice of defendants.

The defendants offered to prove by the witness Westmoreland a parol contract of sale of the house and lot, to which plaintiffs objected, on the ground that a contract for the sale of land could not be established by parol evidence. The objection was sustained, and the ruling is assigned as error. The statute of frauds, which was specially pleaded by plaintiffs in reply to defendants' answer setting up the parol contract of sale for the house and lot, requires some memorandum of a contract for the sale of real estate to be in writing, and signed by the party to be charged therewith. The parol contract being invalid, and not capable of being enforced, the court did not err in excluding evidence of it. *Garner v. Stubblefield*, 5 Tex. 552; *Ryan v. Wilson*, 56 Tex. 36. But it is contended by appellants that the contract for the sale of the house and lot and goods was one and an entire contract, part only of which had been reduced to writing, and that therefore they were entitled to establish the unwritten part by parol. In support of this contention, appellants rely on the authority of *Thomas v. Hammond*, 47 Tex. 42. In that case the court recognized the exception to the general rule laid down by *Greenleaf on Evidence*, vol. 1, § 284a, but cited with approval the case of *Miller v. Fichthorn*, 31 Pa. St. 260, where the exception to the rule is limited in its application to matters not directly forbidden by law to be proved by parol.

The fourth assignment of error is: "The

court erred in refusing to permit defendants to show by the witness Westmoreland that on the 20th day of December, 1887, the defendants tendered the plaintiffs, and sent to them at Houston by mail, the deed to said store-house and lot, tendered in their pleadings, and in the due course of mail received from plaintiffs said deed and a letter, wherein plaintiffs admitted that they had agreed to buy said property, as shown by bill of exception No. 2." The tender of the deed did not constitute a contract. In the absence of a contract by which the plaintiffs were bound to accept it, the tender was immaterial, and the exclusion of evidence showing the tender was not error. It appears from the bill of exception that the letter to which the excluded evidence related contained an express denial of the contract for the purchase of the house and lot, pleaded by defendants, but contained a proposition to take them at a much less consideration than that alleged by defendants. We are unable to comprehend how this evidence could have benefited the defendants. It did not tend in any degree to establish the contract pleaded by them, or to prove any contract. It was simply a denial of the contract set up by defendants, and a proposition of an entirely different contract. We think the court did not err in excluding the evidence.

The fifth and last assignment of error is: "The court erred in refusing to permit defendants to prove by deposition of S. Brown that at the time he purchased of plaintiffs the goods they offered to sell him the store-house and lot." The testimony of the witness Brown, the exclusion of which is complained of by this assignment, did not tend to sustain any issue in the case, and was wholly immaterial. Plaintiffs may have offered to sell the property to Brown with the expectation of procuring the conveyance from defendants in the event a sale to Brown was consummated. We do not think such offer tended to prove the existence of the contract pleaded by defendant. It is not error to exclude immaterial testimony. We are of opinion that the judgment of the court below should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

PETRUCCIO v. SEARDON *et al.*

(Supreme Court of Texas. March 25, 1890.)

PARTITION—DECREE.

Where, in partition, the judgment determining the rights of the parties, and decreeing that the land be so divided "as to give to each party the land upon which his improvements are situated," appears to have been rendered on a trial on the merits, the court cannot, at a subsequent term, inquire into an agreement of the parties relative to the division, but must have the division made according to the decree.

Commissioners' decision. Error from district court, Matagorda county.

Action by Frank Seardon and others against

Joseph Petrucio for a partition. The division made by the commissioners did not include in the land set off to Petrucio certain land which had been improved by him. In proceedings for another division, parol evidence was introduced of an agreement made by the parties before the entering of the decree that the division should be made as it was made by the commissioners.

Geo. W. & F. J. Duff, for plaintiff in error.
W. S. Brooks and Walter L. Wilson, for defendants in error.

ACKER, P. J. Frank Seardon brought suit against Joseph Petrucio in trespass to try title to two particular tracts of land,—one of 300 acres and the other of 15 acres,—parts of the north one-third of the north one-third of the G. W. Dempsey headright league survey, setting out the boundaries of each tract. On the same day D. E. C. Braman and W. C. Braman brought suit against Joseph Petrucio in trespass to try title to a particular tract of 161 acres of land, also part of the north one-third of the north one-third of the G. W. Dempsey headright league survey, setting out the boundaries of the 161 acres sued for. On June 8, 1887, the defendant, Petrucio, filed a motion to consolidate the two suits, averring that he and the plaintiffs in the two suits owned the north one-third of the Dempsey league in undivided interests; that all parties desired partition; and that it was necessary to consolidate the suits in order to legally effect such partition. There was no objection to the motion, and the order of consolidation was entered, reciting that the parties to both suits owned undivided interests instead of specific parts of the third of the league. On the 9th day of June, 1887, the defendant filed an amended answer in the consolidated suit, alleging that he owned an undivided interest of 1,348 acres, and that the remaining undivided interest in the third of the league was owned jointly by plaintiffs. On the same day judgment was rendered, reciting that all parties appeared and announced ready for trial. No jury was demanded, "and the court, having heard the evidence and argument of counsel, and being duly advised, is of the opinion that the 1,428 acres of land is owned by the plaintiffs and defendant in the following proportions: D. E. E. Braman and W. C. Braman own together an undivided interest therein of 42 acres; Frank Seardon owns an undivided interest of 315 acres; and the defendant, Joseph Petrucio, owns an undivided interest of 1,071 acres;" that the interest of the parties be fixed and established accordingly, and that partition be made, appointing commissioners who were "instructed to so divide the land as to give to each party the land upon which his improvements are situated." On the 6th day of December, 1887, the commissioners filed their report of partition, showing that they had set apart to Frank Seardon 315 acres on the north side of the survey, extending from east to west the length of the league survey;

that they had set apart to the Bramans 56 acres just south of and adjoining the Seardon tract, 84 *varas* wide, and extending 9,366 *varas* east and west, the length of the league survey; that they had set apart to defendant, Petrucio, 22 acres just south of and adjoining the north boundary line of the league survey, making a notch in the north side of the Seardon tract 120 *varas* north and south, and 1,040 *varas* east and west, and also to defendant, Petrucio, 1,092 acres south of and adjoining the 56 acres set apart to the Bramans.

The report of the commissioners was approved and confirmed the day after it was filed, but the decree of confirmation was set aside, on motion of defendant, during the term at which it was entered, and the report rejected. On the 4th day of December, 1888, the defendant filed a motion, asking that other commissioners be appointed to make the partition in accordance with the judgment entered at the June term, 1887. On the 7th day of December, 1888, plaintiffs filed a motion, alleging that they and defendant did not in fact own undivided interests in the land, but that each owned certain interests in severalty, as set forth in their original petitions; that the judgment rendered at the June term, 1887, establishing their interests as undivided, and directing partition, as well as the partition made and reported by the commissioners, was in accordance with a compromise agreement entered into between them and defendant's attorney, of which defendant was fully advised. Prayer that defendant's motion to reappoint commissioners be not granted; that proof be heard; that the action had on the report of the commissioners heretofore appointed be revoked; and that said report be in all things confirmed; but, in the event that said report be not approved, then that all proceedings had by virtue of said compromise be set aside, and especially that the judgment rendered at the June term, 1887, be set aside, and their suits reinstated. On the 7th day of December, 1888, defendant filed exceptions to plaintiff's motion upon the grounds that it was not alleged that defendant's counsel had authority to make the compromise; that the compromise agreement is not averred to have been in writing; and because the judgment of June 9, 1887, is a final judgment, fixing the rights of the parties, and the court has no jurisdiction to set said judgment aside at a subsequent term. On the 8th day of December, 1888, the defendant's motion to reappoint commissioners to make the partition was overruled, and on the same day the court rendered judgment, reciting that "this cause was called for trial, and the parties all appeared by their attorneys and announced ready for trial, a jury being waived; and the court, having heard the evidence and argument of counsel, approves and confirms the report of the commissioners of partition;" from which the writ of error is prosecuted.

It seems too clear to justify discussion of the various assignments that the judgment

is erroneous, and must be reversed. The judgment of June 9, 1887, adjudicating the rights of the parties and directing partition, appears to have been rendered on a trial upon the merits, and, being a final judgment, is conclusive of the questions determined by it. The court had no power to inquire at a subsequent term as to how it was rendered, whether by agreement or upon a trial. There was nothing in it indicating that it was a consent decree, and parol evidence was not admissible to show that it was such, and not in fact what it purported to be,—a decree rendered on a trial upon the merits. The decree of partition being in full force, nothing remained for the court to do but to give it effect by having the partition made in conformity with the directions given in the decree. We are of opinion that the judgment of the court below should be reversed, and the cause remanded.

STATTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment reversed, and the cause remanded.

GALVESTON, H. & S. A. RY. CO. v. SMITH.
(*Supreme Court of Texas. March 25, 1890.*)

NEGLECT OF FELLOW-SERVANT.

1. A road-master in charge of a working train and a working party, with power to employ and discharge the men, is a fellow-servant of a section hand riding thereon under his direction, but not employed under the immediate eye of the road-master, and the latter cannot recover for an injury received in a collision caused by the road-master's negligence.

2. Where, under such circumstances, the collision occurred with a special freight train which had orders to look out for the working train, but the latter, although it was all the previous night at a telegraph station, had no such orders in regard to the former, the neglect of the superintendent to give such orders rendered the company liable.

Appeal from district court, Colorado county.

On November 30, 1886, the plaintiff, Michael Smith, was in the employ of the defendant railway company as a section hand. Early in the morning of that day, he, with other section hands, was carried, in a caboose attached to an engine belonging to defendant, from Smith's Junction, in Colorado county, to Alleyton, in the same county. When they reached Alleyton the train ran on past the station eastward in order to back in upon a switch and get some flat cars lying there to haul sand upon. But as they were backing in, or about to back in, the engine and caboose were run into by a special freight train coming from the east, whereby the plaintiff, being still in the caboose, sustained the injuries complained of. The accident occurred about 7 o'clock in the morning, when it was very foggy. At Smith's Junction the defendant's road-master, John Kennedy, had also got on the train. He was in charge of the working party, and had authority to employ and discharge men engaged in the class

of work the plaintiff was then employed in. There was a conflict of evidences as to whether the road-master had authority over the working train further than to direct the conductor and engineer where the party was to go, and what work was to be done. The plaintiff testified that said road-master had entire charge of all the movements of the train, and was responsible for its management. It was shown, however, that trains generally get the orders for their movements from the operators at telegraph stations; that said orders come from the superintendent of the company, through the train dispatcher, and would be delivered to the conductor and engineer. The orders under which the train was moving when the accident occurred were received by the conductor at the telegraph station the night before, and were as follows: "Work to-morrow, Nov. 30th, between Columbus and Eagle Lake, avoiding regular trains, protecting against specials both ways." The verdict was for the plaintiff. Defendant appeals. Additional facts are stated in the opinion.

Blown & Dunn, for appellant. *Delany, Kennon & Harrison*, for appellees.

COLLARD, J. The court instructed the jury as follows: "(10) If you find from the evidence that plaintiff was injured as hereinbefore stated, and that such injuries resulted from the negligence of defendant's road-master, and that said road-master had full control over the movements of the train on which plaintiff was at the time of collision, (if any occurred,) and did actually direct and control the movements of said train, and that he had general power to employ and discharge men in defendant's employ, working in the same capacity in which plaintiff was then working,—in that case the negligence of the road-master would be deemed the negligence of defendant." On the same subject the defendant requested the following special instructions: "No. 2. You are charged that the plaintiff, being one of the employes of defendant, cannot recover for any injury he may have sustained while in its service, on account of the negligence of another employe, no matter in what grade he may have been; and the fact that such co-employe was in a different grade of defendant's employment from the plaintiff will not affect this rule, and you will find for defendant. No. 3. The plaintiff, by the allegations of his petition, being an employe of defendant, entered its service upon the implied understanding that he would assume all the risks ordinarily incident to such employment, among which were the risks of injuries resulting from the negligence of a fellow-employe. Wherefore, if you believe from the evidence that plaintiff was injured, that such injury resulted from the negligence of either the road-master, John Kennedy, or the conductor in charge of the train on which plaintiff was at the time of the injury, then he cannot recover, and you will find for the defendant." Ap-

pellant assigns the following error: The court below erred in refusing to instruct the jury, as asked by the defendant in its charges No. 2 and No. 3, and in giving in lieu of them the tenth paragraph of the charge asked for by the plaintiff, wherein the jury were told that the road-master's negligence would be the negligence of defendant, for the reason that by the undisputed evidence in the case the road-master was only the fellow-servant of the plaintiff; and if, by the negligence of the former the latter was injured, there would be no liability on the part of the defendant for such injury. As to the road-master's authority over a work train and its operatives we make the following extract from plaintiff's testimony: "All the personal knowledge I have of the amount of authority that Mr. Kennedy has is that he is road-master. If an engineer don't suit him he can send him off and get another, that is, an engineer that is working for him. Every train that I have seen in that business the road-master, as long as he stays with it, has charge of it. As long as the road-master has charge of that kind of a train he has the right to discharge the engineer, or at least to send him off and get another. The road-master would put the conductor off, too, if he did not suit. I know that to be so. I know that he can send the conductor away out of his employ and get another if he don't suit. He can discharge the conductor or engineer out of his employ, but I could not say he could discharge them out of the company's service. The road-master has this authority only when the train is with him."

It is needless to say that this evidence is in conflict with that adduced by defendant. The question presented by the assignment of error is, was the road-master a fellow-servant of plaintiff, and did the charge of the court give the jury the proper criterion to determine the question? There is difficulty in answering these questions because of the contrariety of opinions upon the subject. It cannot be decided by the mere grade of the company's agent charged with the negligence, as almost all grades and ranks in railway service have been considered and decided differently by different courts. See 2 Thomp. Neg. 1028-1038; Patt. Ry. Acc. Law, §§ 324, 325. This variety of decisions grows out of the difference in the application of the principle, which is claimed to be the test of fellow-servant. Mr. Thompson, as a result of his investigation of the authorities, formulates a general rule as follows: "All who serve under the same master, work under the same control, derive authority and compensation from the same common source, are engaged in the same general business, though in different grades or departments of it, are fellow-servants who take the risks of each other's negligence." 2 Thomp. Neg. p. 1026, § 31. The same rule, with some modifications, is given by other authors. 3 Wood, Ry. Law, § 388. As applicable to railroad servants a text-writer furnishes the following rule: "It therefore

may be laid down as the result of the authorities that the common object of railway service, being that of fitting the line for traffic, and of carrying on the traffic, all servants who are working for the accomplishment of that common object are fellow-servants within the rule." Patt. Ry. Acc. Law, § 323. The application of the rule in anything like a strict sense would make all employees and agents of a railway fellow-servants, however distinct their employment, rank, authority, or relation to the company. So nearly all the relations of employees have been decided to create, and not to create them fellow-servants. It has been decided in this state that the negligence of the conductor having control of the train and its operatives is not chargeable to the company, because he is a fellow-servant of the subordinate operatives. Superiority of rank and authority in the service is no test. Robinson v. Railway Co., 46 Tex. 550. We cannot review the authorities holding contrary views concerning the same relations of superiors and subordinates. It is sufficient to say that they cannot be reconciled upon the rules announced and quoted above. The supreme court of the United States were divided as to whether the company was liable for the negligence of the conductor of a train, causing injury to an engine driver by a collision, a bare majority of the court affirming a judgment in favor of the injured party. Railway Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. Rep. 184. In treating the subject of vice-principals Mr. Patterson speaks of the test adopted in some cases, holding that if the company grant to a servant the power of appointing and discharging subordinate servants, the servant invested with such power is a vice-principal, but he says: "A more logical test is to be found in the grant to a servant of that discretionary and supervisory power in the administration of a railway which is necessarily exercised by the controlling authority of the railway, or by some agent to whom it has been specially delegated." Patt. Ry. Acc. Law, p. 322. Again he says: "The general rule in the United States is that which is stated by ALLEN, J., in Malone v. Hathaway, 64 N. Y. 5, in these terms: 'When the servant by whose acts of negligence or want of skill other servants of the common employer have received injury is the *alter ego* of the master to whom the employer has left everything, reserving to himself no discretion, then the middleman's negligence is the negligence of the employer.'" Id. pp. 321, 322. The principles in the above extracts approximate the rule as applied in this state. In Wall v. Railway Co., 4 Tex. Law Rev. 36, the commission of appeals say: "The general test applied is as to whether such employe has the power to employ and discharge the servants who are subject to his control and direction. An agent, having such authority, has been generally considered, as far as the servants under his control are concerned, as in legal effect occupying the position of the master." gle

Justice GAINES, in commenting on this rule in *Railway Co. v. Farmer*, 73 Tex. 88, 11 S. W. Rep. 156, says: "To a limited extent the rule so laid down is correct. When the duty which the agent is required to perform is a direct obligation, which the master owes to all his servants, the doctrine is applicable." The opinion then proceeds to illustrate the point, showing that the company is required to select competent servants, to furnish safe tracks and machinery, and that it owes this duty to all its servants, so that if it should delegate such matters to an employe of any grade, and the employe is negligent in the performance of the duty, the company would be responsible if injury resulted to another servant from such neglect, or want of care. So we see the liability of the company is made to depend upon the servant's failure to exercise proper care in the discharge of such duties as the company owes to all its servants. This rule, as well as others, is ably discussed by George W. Early, of the Chicago bar, in quite a lengthy article found in a note to the case of *Kirk v. Railroad Co.*, 25 Amer. & Eng. R. Cas. 518, and the conclusion obtained after exhaustive research that this is the just rule. He says: "The just rule is to hold the master liable for negligence in the performance of the duties he has impliedly contracted to perform towards his servant, no matter whether he attempts to perform them in person or by another. The true test, then, to determine when the rule being considered applies is to be found in the character of the act performed which causes the injury, and not in the rank, grade, or department of service of the person performing it. If it be a neglect of one of the duties the master has impliedly contracted to perform, the master is liable, no matter what be the rank or grade of the person he has designated to perform it, because that person is an agent, and not a servant; but in all other cases he is not liable because of the application of the rule as to fellow-servants." Our supreme court has adopted this rule in the last case upon the subject, a rule which has the merit of being certain and easily understood. In its application it will only be necessary to ascertain if the injury complained of was the result of the negligent omission of a duty, or the negligent performance of a duty required by law of the master to all his servants. Of course, where the master is himself guilty of negligence, or where the corporate officers of a chartered company commit or omit the act constituting negligence by which a servant is injured, liability would arise in all cases dependent upon other known principles. The rule is intended as a guide in cases of negligent acts of the agent which may be imputed to the principal.

Now, briefly, to apply the rule to this case. If Kennedy, the road-master, had control of the trainmen operating the train and its movements, and had power to employ and discharge the conductor and other operatives, and was guilty of negligence in moving the

train from Columbus without notification as to the approach of specials, with which there was danger of collision, or if his neglect consisted in having the train stopped at Smith's Junction for such time as rendered the danger of collision with other trains between there and Alleyton or at Alleyton imminent, the negligence would be his own, as an employe or servant of the company, and not the negligence of the company, in the same sense that the same negligence would have been that of the conductor under similar circumstances. In either case it was the individual negligence of the servant, a fellow-servant of plaintiff. He was none the less a servant of the company by being its road-master. It was not alleged or shown that he was unfit or incompetent, or that the company was neglectful of its duty in employing him; nor does it appear that his authority to employ and discharge the conductor or trainmen had any relation to the collision, for it is not alleged or proved that the conductor, or any other employe on the train having control of its movements, were incompetent, or that Kennedy's exercise of the authority to employ or discharge the operatives was the occasion of the accident. The court's charge upon this subject was erroneous.

There is another branch of the case not set out in the petition except by general allegation that defendant's negligence caused the injury to plaintiff, but which is shown by the testimony, and specially submitted to the jury in the charge of the court, which charge is made the subject of an assignment of error. The conductor of the special freight train that collided with the work train had orders to "look for engine 69 between Eagle Lake and Columbus after 6:45 A. M. Neither the conductor of 69 nor the road-master had similar orders in reference to the freight train. There was a telegraph office at Columbus, where they stopped all the night previous to the collision on the morning of the 30th November, and from which point the engine with the caboose was moved on that morning. It was proved that such orders were delivered by the train dispatcher, signed by the superintendent of the road. The collision occurred at Alleyton, between Eagle Lake and Columbus, at 7:10 A. M. The superintendent had given general orders to the conductor of the work train to work between Eagle Lake and Columbus, avoiding regular trains, and guarding against specials." Had the superintendent given orders to this conductor to guard against the freight train, the conductor might have avoided the collision. It was impossible for him to flag against the special, because there was not sufficient time to do so after the train reached Alleyton and the collision.

On the question here presented, the duty of defendant to warn its conductors of the movements of other trains, we note the following authorities: In a case in New York, where the superintendent failed to warn a conductor of one train of the dangerous ap-

proach of another that had the right to the track, because of which there was a collision, injuring an employe, it was held correct to submit to the jury the question as to whether "the defendant had omitted the doing of anything which ought reasonably to have been done to prevent casualty." *Sheehan v. Railroad Co.*, 91 N. Y. 332. In another case, in Ohio, where the superintendent of the company was clothed with the power to make and suspend regulations regulating the movement of trains, it was held that, in legal effect, he was the master; and when, as such, by special order, he required a work train to stand on the main track to load gravel, notwithstanding a freight train, on its regular time, was approaching and did run into the work train, causing injury to a laborer thereon, it was held that the order suspending the general regulations was unreasonable, and that the company was liable. *Railway Co. v. Henderson*, 5 Amer. & Eng. R. Cas. 530. In another case, in Kentucky, where the telegraph operator made a mistake in writing out an order for a train which induced the conductor to believe he might occupy the track longer than the time specified in the order, whereby a servant of the company was injured, it was held that the company was liable. *McLeod v. Glinther's Adm'r*, 8 Amer. & Eng. R. Cas. 162. The cases where the superintendent was negligent were put on the ground that he was, by virtue of his powers, the master. But why was he the master, unless because he was in such case clothed with powers that belonged to the company, the careful exercise of which were obligatory upon the company; that is, charged by the company with duties it owed to its servants. Whether we accept the reasons upon which the courts rested these decisions or not, the rule as given in the *Farmer Case* still applies, as it will in the case of the failure of the operator to properly copy the order, which the court put upon the ground that he was a servant in a different department, and therefore not a fellow of the servant injured. Upon the hypothesis that the company is bound to inform its servants, and warn them of what is necessary to avoid collisions with trains, and that it cannot shift its own duty to a servant, and then, in case of injury, claim that it was the result of negligence of a fellow-servant, the foregoing cases will stand upon the same principle. A failure to perform this duty increases the risk of employes on and operating trains, and exposes them to a risk not embraced in their implied contract. The company ought to know where its trains are; and, if the operatives do not know, it is the duty of the company to inform them, and give such orders as are reasonably necessary to avoid increased peril. When the proper servant is so informed and ordered, and he then neglects his duty, or violates his orders, causing injury to another servant, the negligence would be his, and the doctrine of fellow-servants would apply.

It has been said that "it is the duty of rail-

ways to make regulations for the safety of their servants, and to use all reasonable means for the enforcement of those regulations." *Patt. Ry. Acc. Law*, § 296, and authorities there cited. It will not be held that it would not be demanding too much of a railway company to give such information and orders to its servants in charge of its trains as will enable them to avoid collisions. We are of the opinion that this is the duty of the company. The charge of the court made the neglect of the superintendent in this respect the neglect of the company, and in this there was no error. The assignment of error attacks the charge, not upon the ground that the negligence of the superintendent was not particularly pleaded, but on the ground that there was no evidence to justify it. We think there was evidence upon which the charge might have been given. Because of the error in the court's charge, holding the company liable for the supposed negligence of the road-master, we think the judgment should be set aside and the cause remanded.

GAINES, J. At the time the commission returned their report and opinion in this case, the opinion in the case of *Railway Co. v. Williams*, 12 S. W. Rep. 835, decided at the last Tyler term, had not been published. In that case we held that the servant of a railway company, while working under the immediate supervision and control of another employe of the company, was not the fellow-servant of such employe, provided the latter had the power to employ and discharge those who were subject to his orders. We are not now prepared to recede from that ruling. But that case is distinguishable from this. The appellee in the present case, at the time of the accident, was not employed under the immediate eye of the road-master. With the qualification, that we do not approve any expressions in the opinion of the commission, which may seemingly conflict with the opinion in *Railway Co. v. Williams*, supra, we adopt their opinion, and reverse and remand the case.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment reversed and the cause remanded.

SAN ANTONIO & A. P. RY. CO. v. WALLACE *et al.*

(Supreme Court of Texas. March 25, 1890.)

CONTRIBUTORY NEGLIGENCE.

The conductor of a freight train, having stopped his train on one end of a bridge, climbed to the top of a box-car as the train moved on, being prevented by obstructions along the track from going back to the caboose, and was knocked off and killed by a scaffold suspended over the bridge. The scaffold could have been raised three or four feet higher; and the attention of the boss had been called to that fact, but he said it was high enough. It was customary and sometimes the duty of freight-car conductors to stand on the top of box-cars when assisting in braking and signaling. A rule of the company had been furnished

deceased which prohibited all persons from standing on the top of box-cars while passing through bridges of that class, and from boarding trains while in motion. *Held*, that the deceased was guilty of contributory negligence.

Commissioners' decision. Appeal from district court, Colorado county.

S. C. Patton, for appellant. *Foard, Thompson & Townsend*, for appellees.

HOBBS, J. Frank Wallace, while employed as conductor on a freight train of appellant, was knocked off the top of a box-car on which he was standing by a scaffold suspended from the upper portion of a truss-bridge spanning the Colorado river, and on which appellant's railroad was constructed and crossed said stream. From the injuries then received, Wallace died; and this suit is the result, in which the plaintiffs (appellees here) recovered damages in the sum of \$15,000, apportioned among them as follows: To each of the deceased, seven surviving children, \$1,750; to his surviving widow, \$2,750. The defendant appeals, and, as grounds for a reversal of the judgment, assigns several errors, all of which it may not, we think, be essential to discuss.

The bridge above referred to, although newly constructed, had been in use for some time; and appellant's trains had been crossing said river on it as the business of its road demanded. But the arches on the east span, it appears, were not completed. For the purpose of completing them, a scaffold was used. This scaffold was suspended by ropes, and hung on blocks and tackle so, in the language of one of the witnesses, "it could be raised or lowered so it would not strike a smoke-stack or knock anybody off." On the 21st of July, 1887, at about 2 o'clock P. M., the train of which Wallace was conductor and in charge approached the bridge from the west, going east, and stopped on the west side of the bridge and river to discharge a small quantity of freight. It consisted of the engine, (which, when stopped, was standing on the west end of the bridge,) about five box and eight flat cars, and the caboose. When the freight was put off, Wallace, who was standing near the track, signaled the engineer to proceed, in obedience to which signal the train moved slowly across the river on the bridge, at the rate of about two or three miles an hour. From the point where Wallace stood to the caboose, a distance of about 40 yards along the side of the track, it was impassable, says a witness, in the night-time, by reason of bridge timber, ties, etc., scattered about. Wallace caught the ladder of the second or third box-car from the engine as it passed by, and climbed up on the top of the car. When this car, on which Wallace stood, passed under the scaffold, suspended as before explained, he was knocked off by it, his leg or foot crushed, and other injuries sustained by him, resulting in his death a short time after reaching Eagle Lake station. There was evidence that he could have boarded the flat-cars and

walked, without danger, to the caboose on them. There was testimony to the effect that it was customary and sometimes the duty of the conductor of a freight train to stand on the top of a box-car, when necessary to assist in braking, signaling, or coupling, or when switching at stations. Rule 26 of the company, which, it was shown, had been furnished to Wallace, and his attention called to it, prohibited all persons from standing on top of covered cars while passing through truss-bridges. This bridge belonged to that class. Rule 23 strictly forbade all persons from boarding engines or cars while in motion, and, "under no circumstances are they to stand on the track and board engine or cars when the same are approaching them." Wallace had been in the service of the company for some time, and a conductor of a freight train for about two weeks, and had crossed on this bridge often. The scaffold had been raised the day before, when the hands quit work on the bridge, but not as high as it could have been. When the boss' attention was called to that fact, he said it was high enough. It could have been raised three or four feet higher. It was high enough not to knock a man off of a box-car if he was sitting down. For the three days the scaffold had been on that end of the bridge the orders were to raise it at night so as to be clear of smoke-stacks and brakes. Our view of the case makes it unnecessary to recapitulate further the testimony.

Appellant's third and eighth assignments raise the question of the right of the appellees to recover under facts showing that the injuries resulting in Wallace's death were caused by his own negligence contributing thereto, by reason of his disobedience of a reasonable rule of appellant which was known to him. Whether the scaffold was as high as it might have been, or whether there was negligence in the appellant, under the circumstances, in not raising it higher, there can be no doubt, we think, that the proof shows that the position occupied by Wallace on top of the box or covered car was an act of negligence on his part, without which the injuries could not have been inflicted which caused his death. It is equally clear, in our opinion, that he was there in direct violation of a rule of the company, which, it is shown, he was furnished with, and was known to him. The argument in reply to this is that there was evidence to the effect that it was customary and sometimes the duty of a conductor to be on top of a box-car. This may be true. But the evidence of the circumstances under which a conductor might have claimed that it was his duty to be there showed that they were when it became necessary to assist in braking, coupling, and signaling, or in making switches at stations. Neither of these conditions existed at the time he was on the box-car on the bridge; and it cannot be fairly claimed that the facts in this case tend to show that, at the time of the in-

juries sustained by Wallace, his duties required his presence on the top of the car. It was further shown by the proof, we think, that he was violating rule 28 of the company, above referred to, in boarding the car under the circumstances stated by the witnesses. It is contended, however, by appellee, that the "piling, ties, timber," etc., scattered along the track rendered it impossible, and Wallace could not, in the night-time, go back to and board the caboose. But it is, on the other hand, stated by a witness in a position to know, that Wallace could have boarded one of the flat-cars in rear of the box-cars, and could have walked, without danger, on them to the caboose. It is not important to determine whether this be true or not; but it was certainly his duty, and manifestly within his power, to have had the caboose stopped when it reached him, and then to have boarded it. It was shown that the train had ample time to make the next station, and no good reason was shown for Wallace to mount the box-car. The legal principle applicable to the facts of this case we believe to be substantially as follows: That the mere fact, alone, that the injuries were inflicted while the employe was acting in disobedience of known rules would not relieve the master of liability, but, if the violation, in whole or in part, of such rules was the cause of the accident or injury, it would prevent a recovery by him. *Railroad Co. v. Thomas*, 51 Miss. 640; *Wood, Mast. & Serv.* § 999, and cases cited. Under the facts of this case, this rule, in our opinion, presents an insurmountable barrier to a recovery by appellees. We do not deem it important to discuss the other assignments, because, if the views above expressed be correct, it is immaterial whether they are tenable or otherwise. The judgment, we think, should be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment reversed and cause remanded.

WYGAL et al. v. MYERS et al.

(Supreme Court of Texas. March 25, 1890.)

INFANCY—JUDGMENT—PLEADING AND PROOF.

1. A judgment for plaintiff in an action brought by one styling herself the mother and next friend of her minor children against the administrator of their guardian, belongs to the minors, and the mother, having no interest in it, is not a necessary party to an action to enforce it.

2. The complaint alleged that the minors recovered the judgment against the estate of their guardian, but the judgment was in the name of their mother as their mother and next friend. Held, that the rule that the allegations and proof must correspond was not violated by admitting the judgment in evidence, as the minors had the exclusive interest in it.

3. A judgment against the administrator of a deceased guardian decreed that it be satisfied by the foreclosure of a mortgage executed by the guardian to his bondsmen to indemnify them in case of loss; but afterwards a private settlement was made between the mother of the infants and the administrator, by which a part of the land was

conveyed to the mother, and she gave her receipt in full satisfaction of the judgment, styling herself the guardian of the minors. Afterwards the minors brought an action of forcible detainer against one in possession of the land, alleging that they were landlords, but not alleging that they claimed by virtue of the settlement. Held, that the action of forcible detainer did not amount to a ratification of the illegal settlement.

4. Where a judgment is recovered in the district court in favor of minors represented by their next friend, the failure to appoint a guardian *ad litem*, as required by the statute, is a mere irregularity which does not invalidate the judgment.

Commissioners' decision. Appeal from district court, Wharton county.

In August, 1873, F. G. Franks qualified as guardian of the estate of the appellees, who were minors, and gave to his bondsmen a mortgage on 1,107 acres of land to secure them against loss. On June 11, 1874, Franks died, and Jackson Rust qualified as his administrator, and acted in that capacity until March, 1887, when he was removed by order of court, and B. D. King appointed in his place. Between June 11, 1874, and December 12, 1874, Lucretia Johnson, styling herself as the mother and next friend of the appellees, brought suit in the district court of Wharton county against Rust and his bondsmen on the guardian bond, alleging a *devastavit*. This suit terminated on the 12th day of December, 1874, in an agreed judgment between the parties against the administrator for \$1,760.90, and a foreclosure of the mortgage upon the 1,107 acres of land. The judgment was in favor of Lucretia Johnson, the mother and next friend of appellees, and decreed that the administrator sell the land, and apply the proceeds to the payment of the judgment. The land conveyed belonged to the estate of Franks. This order of court was never obeyed; but on January 4, 1876, a pretended settlement was made between Lucretia Johnson and Rust, by which Rust conveyed to her 334 acres of the land, and she gave her receipt acknowledging full satisfaction of the judgment, styling herself as the guardian of appellees. Afterwards appellees brought an action of forcible detainer against Morgan Jackson and others, claiming possession of the land as landlords, but not alleging that they claimed by virtue of the settlement. On June 1, 1888, appellees filed their petition in the county court of Wharton county for an order to King, administrator *de bonis non*, to sell the land described in the judgment in order to satisfy the same. The complaint alleged that appellees recovered the judgment against the estate of Franks, their guardian. The appellants claimed title to the land by purchase from the heirs of Franks.

R. M. Brown and Pearson & Ballowe, for appellants. G. G. Kelley and Hawes & Carpenter, for appellees.

COLLARD, J. Appellants contend that the court erred in holding that the judgment rendered in the district court of Wharton county December 12, 1874, in favor of Lucretia Johnson, the mother and next friend of the minors, Scott, Posey, Forest, and Lilly My-

ers, against the estate of Jackson Rust, deceased, was a valid and subsisting claim against said estate in favor of claimants; the judgment being in favor of Lucretia Johnson, by whom no rights under the judgment are claimed in this proceeding, she not being a party to this suit. We deem it sufficient, in response to this assignment of error, to say that it is apparent that Mrs. Johnson sued for a right of the minors, styling herself their mother and next friend. As such, she recovered judgment. She acquired no interest in the judgment, has none, and was not a necessary or proper party to this proceeding. The minors were the only beneficiaries.

The appellant cannot complain that the court admitted the judgment in evidence, because it evidenced only a right in the minors whose application was before the court, and corresponded with the allegations made. For the same reason, it was not necessary, in reply to contestant's plea of limitation, to set up any disability in her to sue.

Besides this, limitation did not apply to the judgment. It was rendered against the administrator of the Franks estate, which was in course of administration in the courts under the probate laws of the state, which withdrew it from the operation of laws ordinarily controlling as to dormancy of judgments, and their period of limitation. *Birdwell v. Kauffman*, 25 Tex. 191. When once the claim was duly established as a valid claim against the estate, the laws of limitation could no longer apply while the estate was being administered under the probate law. The judgment needed no revival as against the estate. Executions could not issue, and the laws requiring them to issue to keep the judgment alive, and to prevent its being barred, were, so far as the estate was concerned, suspended during administration. There was and had been no reason to revive the judgment by *scire facias* against the estate. Had there been an application to revive the judgment against the sureties on the bond, that proceeding might have required the estate to be joined, in order "to preserve the nature of the original judgment." *Austin v. Reynolds*, 13 Tex. 544; *Carson v. Moore*, 23 Tex. 450; and *Henderson v. Vanhook*, 24 Tex. 358. Of this, we express no opinion. The law in force at the time the judgment was rendered (the act of 1870) as to probate matters declared that when a judgment was rendered against the estate the claim was established, (2 Pasch. Dig. 5667;) and we do not think its validity as such claim was affected by the provision of the same act that required such a judgment to be filed and classified by the probate court, (Id. 5661,) nor was it affected as to limitation by the act of 1876, (carried into the Revised Statutes by article 2029,) which required it to be filed with the county clerk within 30 days after its rendition, entered on

the claim docket, and classed by the probate judge so as to give it the same effect as if allowed and approved. The claim had been duly established by the laws in force at the time the judgment was rendered, and that was sufficient, so far as limitation could affect it. It was filed and classified under King's administration in this proceeding, and the administrator ordered to sell the land in accordance with the foreclosure; and nothing more was necessary.

The applicants cannot be held to have ratified the illegal, pretended settlement of the judgment by their mother, who executed a receipt to the administrator in payment of the debt for a tract of land belonging to the estate, by their complaint of forcible detainer of the land. The estate of Franks was not bound by the settlement. Rust, the administrator, had no authority, without an order of the court, to surrender the land, or any part of it, in satisfaction of the debt; and the proceeding by the heirs of forcible detainer could not have bound the estate, and conferred upon them the title. The proceeding stopped with the complaint.

Appellants contend that the suit in the district court by Mrs. Johnson as next friend of her minor children could not be maintained, because she was not their legal guardian, and had not at any stage of the suit been appointed their special guardian or guardian *ad litem*. It was decided by the supreme court in the case of *Brooke v. Clark* that, where the statute requires the appointment of a guardian *ad litem* to represent a minor in a suit, it should be strictly followed; "yet, when a judgment was rendered in the district court in favor of a minor represented by next friend, no special guardian having been appointed, the next friend being recognized by the court below throughout the cause as the proper representative of the minor's interest without objection by the adversary, the failure to appoint a special guardian will be regarded as an irregularity only, and not such as to require a reversal of judgment, when urged for the first time after appeal." 57 Tex. 105; Acts 1870, (Pasch. Dig. art. 6969-6978.) In the case before us, there is a much stronger reason for sustaining the judgment, because the question is here raised in a collateral attack upon the judgment. The judgment was final; and we cannot hold that it was void, or that it should not be enforced, because rendered in favor of a next friend of minors.

We have disposed of all the questions of any importance raised by the assignment of errors, and, finding no error in the judgment of the court below, conclude it should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

WYGAL *et al.* v. WOODLIEF'S HEIRS *et al.*

(Supreme Court of Texas. March 25, 1890.)

ADMINISTRATORS—ALLOWANCE OF CLAIMS—LIMITATION.

1. Act Tex. 1870 provides that at each term of court all claims against a decedent's estate which have been allowed and filed shall be examined and approved or disapproved by an order duly entered, and that the order of approval of a claim has the force and effect of a judgment. Act May 27, 1873, authorizes the clerk of the district court to approve and disapprove such claims in vacation, and requires the approval to be entered on record. *Held*, that the allowance of an account by the clerk during vacation, and the indorsement of his approval thereon, sufficiently establishes it as a claim to stop the running of the statute of limitations during the pendency of administration, though it is not entered on the record; such requirement being merely clerical.

2. Under the above provisions, an account which was not approved by the district court until after it was barred is not a claim against the estate; the order of approval being necessary to establish it as such.

Commissioners' decision. Appeal from district court, Wharton county.

A. M. Brown and Peareson & Bullows, for appellants. *Hawes & Carpenter*, for appellees.

COLLARD, J. This case grows out of the administration of the estate of F. G. Franks, a partial history of which is given in the statement of the case of Wygal v. Myers, (decided at the present term of the court,) ante, 567, which need not be repeated. After B. D. King was appointed administrator *de bonis non*, that is, on June 1, 1888, he filed in the probate court an application for an order to sell 600 acres of land out of the J. C. Clark league to pay certain debts of the estate; and on same day the heirs of Matt Woodlief, holding an unpaid judgment against the estate formerly rendered in the district court against the administrator Rust, also made application to sell the same land to pay their judgment. The administrator's (King's) application was to pay quite a number of debts, among which were the following: A judgment in favor of Matt Woodlief, of date August 11, 1875, rendered in the district court of Wharton county against Rust, the former administrator, for \$1,218.28 and interest; a judgment in favor of C. R. Johns & Co., rendered by the same court, against Rust, the administrator, of date December 10, 1874, for \$458 and interest; an open account in favor of W. J. Clayton for \$69.50, allowed February 15, 1875, which does not appear to have been acted on by probate authority until January 10, 1889, when it was rejected by the probate judge because it was barred by limitation; an open account of B. Odom for \$81.90, allowed by Rust, the administrator, on the 30th day of March, 1875, and approved by the district clerk of Wharton county on the same day as a claim of the sixth class. Appellants, claiming to have bought of the heirs of Franks all their interest in the estate, appeared in answer to the applications, and objected to the granting of the order to sell the

land because the claims for the payment of which the sale was asked were stale demands, and barred by the statute of limitations. The county probate court disapproved all the claims except that of Odom, and refused to order the sale. There was an appeal to the district court, where the four claims mentioned were approved and classified, and the 600 acres of land ordered sold to pay the same. Contestant appealed.

Questions as to limitation against the two judgments, and the necessity of having them filed and classified in the probate court, have been decided adversely to appellants in the case of Wygal v. Myers, already referred to.

As to the claim of B. Odom, it was not affected by limitation. Under the act of 1870, (section 192, Pasch. Dig. 5660,) it was provided that at each term of the court all claims which had been "allowed and filed should be examined and approved or disapproved by an order duly entered," and in another section (197) of the same act it was provided that the order of approval of a claim had the force and effect of a judgment. By the act of May 27, 1873, the clerks of the district courts were authorized to approve and disapprove claims against an estate in vacation. Odom's account was, as we have seen, then duly allowed and approved by the clerk, but was not spread upon the record, as seems to be required in the latter part of the section cited. The approval was indorsed on the account, and we think this was sufficient to establish the account as a just claim against the estate, so as to stop the running of the statute of limitations during the pendency of the administration; the entry in the minutes being a clerical requirement, only.

The account of Clayton does not rest on the same facts. It was not approved until in 1889, in the district court, in this proceeding, after it had been declared barred by the county judge. It was not established then until after it was barred. The order of approval was necessary to establish it as a claim against the estate, and to put it on a footing of a judgment. Hence, we must hold that the statute of limitations pleaded to this account ought to have been sustained.

We conclude that the judgment of the court below adjudging that the judgments in favor of Woodlief and C. R. Johns & Co. and the Odom account were valid and subsisting claims against the estate, and ordering the sale of the 600 acres of land, should be affirmed, but reversed as to the Clayton account. It seems that Clayton did not appeal from the judgment of the county court, but that the appeal was by the other three creditors and the administrator, King. Under these circumstances, and considering the fact that the judgment of the court below is in the main affirmed, we conclude that the costs of this appeal should be paid by the appellants.

appeals examined, their opinion adopted, and the judgment affirmed in part and reversed in part.

O'SHAUGHNESSY et ux. v. MOORE.

(Supreme Court of Texas. March 25, 1890.)

APPEAL—WRIGHT OF EVIDENCE.

Where the evidence, though conflicting, is sufficient to support the finding, the judgment will not be disturbed.

Commissioners' decision. Appeal from district court, Galveston county.

Action by James Moore against J. P. O'Shaughnessy and wife, to enforce a vendor's lien. Defendants appeal. For former report see 11 S. W. Rep. 153.

A. Sampson, John Lovejoy, W. M. Jerdone, and James B. & Charles J. Stubbs, for appellants. Geo. W. Davis and Davidson & Minor, for appellee.

HOBBY, J. It appears from the record in this case that J. P. and Mary O'Shaughnessy, who were husband and wife, and resided on and owned lots 8, 9, 10, 11, and 12, in outlot 138, in the city of Galveston, as their then homestead, executed, on April 3, 1886, to W. B. Denson, an attorney of said city, a power of attorney, properly acknowledged, and authorizing him to sell and convey said property. It was understood between the parties that the property was to be sold for not less than \$4,000. On April 9, 1886, Denson, as attorney in fact for J. P. and Mary O'Shaughnessy, conveyed the same to appellee, for a recited consideration of \$4,000. On April 10, 1886, appellee, Moore, conveyed the same property to said J. P. O'Shaughnessy, for a recited consideration of \$2,200, acknowledged to have been paid to Moore by O'Shaughnessy, and the execution and delivery by the latter to Moore of four promissory notes for \$1,800, bearing 12 per cent. interest, and due, respectively, in 6, 12, 18, and 24 months from date, reserving therein a vendor's lien on the land and improvements. On the same day, and to secure the payment of these notes, O'Shaughnessy executed a deed of trust, conveying said property to one A. P. Luckett, as trustee, to secure the payment of the notes. The first note was paid by Mrs. O'Shaughnessy, and also \$100 on the second. To enforce the payment of the two remaining notes, one for \$500, and the other for \$300, and to foreclose his vendor's lien on said property, appellee, on November 28th, 1887, instituted suit against J. P. O'Shaughnessy, the maker of the notes, and Mrs. Mary O'Shaughnessy, who had moved off of the premises. She, however, returned in a short time, and was in possession of the property, and was joined in the suit. The answer of Mrs. O'Shaughnessy to the petition of Moore alleged, in substance, that the conveyances from their attorney in fact to Moore, and from Moore to O'Shaughnessy, were made without her knowledge or consent; were pretended and fictitious; that the recited considerations therein were false

and pretended; that no *bona fide* sales were intended or executed; but that the same were devised as a sham and pretense, and were in fraud of her homestead rights, and were concocted and contrived to enable the said J. P. O'Shaughnessy, her husband, to borrow, and appellee, James Moore, to loan, \$1,800 at high interest, to-wit, 12 per cent., and were intended to evade the provisions of the constitution prohibiting the raising of money on the homestead by any pretended sale, with conditions of defeasance; that the trust deed to A. P. Luckett to secure said four notes executed by J. P. O'Shaughnessy was of the same character, and altogether void, as were said other conveyances; that said pretended sales and conveyances and said trust-deed operated as a cloud upon her title, and she prayed the same might be declared void and annulled. J. P. O'Shaughnessy adopted her answer, and alleged homestead in the premises for many years, and continuous possession of same, and no other homestead. The cause was tried at the February term, 1888, of the district court, and judgment rendered in plaintiff's favor for the amount claimed by him, together with a foreclosure of the lien. From this defendants appealed, and at the Galveston term, 1889, the supreme court reversed the case on the facts, and remanded it for a new trial. 11 S. W. Rep. 153.

On July 15, 1889, Honora Cobb, joined by her husband, Thomas A. Cobb, and Mary Ann O'Shaughnessy, appeared in the cause, and made known to the court that defendant Mary O'Shaughnessy, their mother, had died intestate on June 19, 1889; that they, Honora and Mary A., were her children and only heirs; that there was no administration on her estate, or necessity therefor; and they made themselves parties. As Mary O'Shaughnessy was a minor, a guardian *ad litem* was appointed, who represented her on the trial. The minor, after due service, having appeared at the October term, alleged, through her guardian *ad litem*, that she and Mrs. Honora Cobb, as the only children and heirs of the deceased Mary O'Shaughnessy, succeeded to all her rights to the property in question; that said minor and her father, J. P. O'Shaughnessy, defendant, then, and for more than five years prior thereto, occupied, used, and enjoyed the premises as a homestead; that he was the head of a family so constituted; that her mother, for more than five years preceding her death, had also continuously used, occupied, etc., said premises as a homestead, and joined in the previous defenses interposed. Plaintiff filed a second supplemental petition, renewing the averments of the petition, and traversing the answers filed, claiming that Mary O'Shaughnessy and her heirs were estopped from denying the validity of plaintiff's lien, and ought not to be heard to resist the foreclosure thereof because of the receipt of \$1,800 of the purchase money paid by appellee, and no part of the same is tendered back, etc. The cause was again tried by the court on No-

venber 16, 1889, and judgment rendered against J. P. O'Shaughnessy in favor of appellee for \$1,794.81, with interest from that date at the rate of 12 per cent. per annum, etc., and the vendor's lien on the premises was foreclosed, together with the deed of trust, and an order of sale and writ of possession, etc., directed to issue. From that judgment this appeal is prosecuted upon several assignments, the first six of which are grouped together as embodying substantially the same doctrine.

The question raised by the first six assignments in appellant's brief, and upon which, in our opinion, this case necessarily turns, is whether the court "erred in finding by its judgment that the several conveyances, to-wit, the deed from W. B. Denson, attorney in fact, etc., for J. P. and Mary O'Shaughnessy to appellee, James Moore, and the deed from Moore to J. P. O'Shaughnessy, and the trust-deed from J. P. O'Shaughnessy to A. P. Luckett were in fact what they purported on their faces to be, *bona fide* conveyances; and in refusing to hold and find from the evidence that said instruments were all contemporaneous, and parts of the same preconcerted and illegal scheme, devised, etc., between the parties thereto, and by means of which Moore should be enabled to loan to said J. P. O'Shaughnessy the sum of \$1,800, at 12 per cent. interest, on the security of lots 8, 9, 10, 11, and 12 in said outlot 188, which were the homestead of J. P. and Mary O'Shaughnessy." And also erred in not finding from the evidence, as to the execution of the instruments referred to, that it was "but an attempt to evade the imperative provisions of the constitution, inhibiting any species of conveyance of the homestead, having for its purpose the borrowing of money upon it as security," etc.

Upon the former appeal in this cause, the supreme court, with the facts then before it, held that "the testimony offered for the defendants [appellants] shows clearly that the whole transaction, while assuming the form of an absolute sale of the homestead, was intended and understood by appellee J. P. O'Shaughnessy [Moore] and the attorney who negotiated the transaction as but a means whereby a loan of \$1,800 by appellee to J. P. O'Shaughnessy should be secured; of all of which Mrs. O'Shaughnessy was kept ignorant." In opposition to this, "the testimony for appellee," it was said, then before the court, "tends to show that the sale of the homestead was real; but it develops such facts as are inconsistent with such a conclusion." 73 Tex. 111, 11 S. W. Rep. 154. With this evidence, tending only to show a character of conveyance of the homestead recognized by the constitution and laws as valid, opposed to testimony clearly establishing a species of conveyance or transaction with reference to the homestead prohibited by the constitution, it was well held by the court that the "evidence offered is such as to forbid the affirmance of the judgment of the

court below." 73 Tex. 112, 11 S. W. Rep. 154. The evidence contained in the record now before us is in many important features entirely different from that shown in the statement on a former appeal. It is direct and positive in support of the claim alleged by appellants that the entire transaction was but a conveyance of the homestead to secure the payment of a loan of \$1,800, with interest, etc. Equally emphatic and direct is it, on the other hand, in sustaining the position of appellees that it was an absolute *bona fide* sale and conveyance of the homestead by the attorney in fact of J. P. and Mary O'Shaughnessy to appellee, Moore, and by the latter to J. P. O'Shaughnessy.

The testimony in the case is voluminous, covering more than 100 pages of the printed record. A reproduction of it here would accomplish no good purpose. It is only necessary to say of it, that O'Shaughnessy's evidence, supported by other testimony, is clearly to the effect that the conveyances executed on April 9 and 10, 1886, to-wit, the conveyance from Denson, as attorney, to appellee, and from appellee to himself, was, as contended by appellants, for the purpose of securing the payment of a loan of \$1,800, with 12 per cent. interest, made by Moore to said O'Shaughnessy, and that this was understood and agreed upon between said attorney, appellee, and himself; and, further, that it was well understood between them that it was to be kept secret from Mrs. O'Shaughnessy. The evidence of the attorney in fact for J. P. and Mary O'Shaughnessy, and that of appellee, Moore, is unqualified to the effect that the conveyance to Moore by the attorney was absolute, real, and a completed sale, and possession delivered of the property to appellee by J. P. and Mary O'Shaughnessy; that she understood and was fully cognizant of the entire transaction; and that nothing was kept secret, or agreed to be so kept, from her; that no question of a loan upon the property as a security, therefore, was brought into the case; that the sale by the attorney to appellee was complete before appellee sold to J. P. O'Shaughnessy; that there was no understanding that the latter was to have the property back when appellee bought. The deed to appellee was executed on the 9th April, and that from him to O'Shaughnessy on the 10th April, 1886. Both were acknowledged on the 10th April, 1886. O'Shaughnessy delivered the keys of the house to appellee, and moved out. It appears to have been arranged between O'Shaughnessy and wife that they should separate and live apart, and that, as he was to assume the payment of the community debts, he was to receive \$2,200 of the \$4,000 to be paid by Moore; and she was to receive \$1,800 after deducting the attorney's fees, etc. There is evidence to the effect that she did receive her portion of the recited consideration of \$4,000. The \$2,200 was not paid to O'Shaughnessy by Moore, but was subject to the demand of the attorney from the time of the execution of the

deed. This amount not having been paid to O'Shaughnessy when Moore sold the place to him, he credited O'Shaughnessy with the \$2,200, and took his notes for the balance, \$1,800, with interest at 12 per cent., as before stated. This interest on the deferred payments appellee testifies was what he made in the transaction.

From the foregoing brief recital of the testimony in this case, as disclosed in the record before us, it is obvious that it is wholly irreconcilable. It is apparent from the proof that, if appellant's testimony is to be believed, the transaction was a device contrived to negotiate a loan by appellee of \$1,800 to O'Shaughnessy, to secure which the trust-deed was executed. If appellee's evidence is accepted, it was a real sale of the property in due form of law, and the possession delivered by the parties to him. The witnesses testifying were before the court, and their evidence was passed upon.

The sole question now presented for our decision, as the cause now stands, is simply whether there is evidence authorizing the decree of the court below. That the conclusion of this court may have been otherwise is not the true rule applicable to cases of this character, as is well known. But the question is, is there sufficient evidence to support the judgment? Unless we can say that there is not, then to set the judgment aside on that ground would be violative of a principle established by a greater number of cases probably, than any other in our state. As we cannot say, then, that the evidence does not support the judgment, it should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment affirmed.

EAST TEXAS FIRE INS. CO. v. BLUM et al.
(Supreme Court of Texas. March 28, 1890.)

INSURANCE POLICY—OTHER INSURANCE—AGENCY.

1. A policy of insurance for \$1,000 was issued upon property already insured for \$3,000, and provided that if other insurance were obtained without consent of the company the contract should be void. Additional insurance for \$1,000 was obtained. Upon the policy in question, detached from other parts of it, were the words: "Total concurrent insurance, \$4,000." *Held*, the words included the amount of the policy on which they were written, and therefore implied no consent to the additional \$1,000.

2. A person who is applied to for insurance in a given amount, and who obtains a policy therefor from the agents of the company to which he is a stranger, and forwards it to the applicant, is agent for the latter; but his agency terminates when he delivers the policy, and notice to him of its cancellation is not notice to the policy-holder.

3. One who is agent for an insurance company only for the purpose of collecting and forwarding the premium, cannot, in its behalf, consent to additional insurance.

4. An insurance company cannot be held to have consented to additional insurance because its agent, long before the policy was issued, promised that consent would be given.

Appeal from district court, Galveston county.

Whitaker & Bonner, Davis & Davidson, and F. D. Minor, for appellant. Scott & Levi, for appellees.

STAYTON, C. J. This is an action by appellees on a policy of insurance issued to A. T. Glen & Son by appellant on October 2, 1886, which was transferred to appellees after the destruction of the goods covered by it. Glen & Son did business at the town of Buffalo, and prior to the issuance of the policy in question had obtained three policies on their stock of goods, each for \$1,000. These policies had been obtained through E. L. Bridges and other fire insurance agents residing at Navasota and other places, who, it seems, had solicited the business of Glen & Son. T. L. McNair, after stating that he was a clerk in the office of Bridges, and not the agent of any insurance company, testified that "at or about the latter part of September, 1886, a letter was received at our agency from A. T. Glen & Son, Buffalo, Tex., applying for \$1,000 additional insurance on their stock of merchandise. Shortly after the receipt of this application, I wrote to Lofland & Menard, of Galveston, Tex., for said insurance, and, I think, inclosed them a copy of Glen & Son's previous application. Several days after this, our agency received a policy from Lofland & Menard for A. T. Glen & Son in the East Texas Fire Insurance Company. * * * After the issuance of the said East Texas policy, there was additional insurance obtained on said merchandise by said Glen & Son, and, to explain my knowledge of the matter, will state that, on the evening of the night of the fire which consumed the stock of Glen & Son, a letter was received at our agency from said firm notifying us that they had taken out additional insurance in the National Insurance Company of Salina, Kan., to the amount of one thousand dollars on stock. I do not know the date of said National policy, nor where it was obtained. The facts are that no consent of the East Texas Insurance Company was obtained for such additional insurance, nor was said company notified previous to the time the fire occurred. A. T. Glen & Son wrote a letter in regard to such additional insurance in the National Insurance Company of Salina, Kan., and that letter was received at our agency on the evening of the night of the fire. * * * This letter was the first intimation we had, so far as I am aware, of his additional insurance." On cross-examination the witness stated: "I was not the agent of the defendant company at, before, or after the issuance of the policy sued on. The premium on policy referred to was paid to my employer, E. L. Bridges, some time after the fire. Don't know when or how. * * * The said policy was mailed to Glen & Son from our office, Bridges being absent at the time. Mr. Bridges being absent at the time when Glen & Son's letter was received at our office applying for the insurance, I applied to Lofland & Menard, at Galveston, for the insur-

ance desired by Glen & Son; and they forwarded to our office a policy in the East Texas Insurance Company, which I mailed to Glen & Son, at Buffalo, Tex. We kept separate registers for the companies represented by Bridges as a commissioned agent, and also a general register in which is recorded copies of policies obtained by us in companies we do not represent as agent. * * * All policies of the East Texas Fire Insurance Company sent to us were entered in our general register." Having received information that Lofland & Menard, who were the agents at Galveston of appellant company, had issued the policy sued on, the company wrote to them, on October 4, 1886, declining the risk on several grounds, one of which was that the agents of the company for the territory within which the insured property was situated were Anderson & Robertson, for whom only policies would be there written. By the terms of the policy, the company had the right to cancel it; and, on receipt of its letter, Lofland & Menard, on October 5, 1886, wrote to Bridges, asking him to take up the policy and return it. Bridges, by McNair, replied on October 7th that the policy had been sent for, and would be returned as soon as received.

McNair, continuing his testimony, said: "I will state that on receipt of Lofland & Menard's order to take up [policy] I did not notify Glen & Son, but applied to Hughes & Stowe, at Galveston, for a policy for Glen & Son for the same amount, intending, upon receipt of it, to send it to Glen & Son, and ask them to return the East Texas policy; and the matter was in suspense at the time the fire occurred. I will state further that I did not have time to notify Glen & Son that the East Texas desired to cancel their policy after Glen & Son notified us of having taken out additional insurance, as I was notified by a telegram from Glen & Son of the loss before the next mail. * * * The order of Lofland & Menard to take up this policy was by letter of date October 5, 1886."

E. L. Bridges, after stating that he was agent for four fire insurance companies, named, when policy was issued, testified as follows: "I first learned of the issuance of the policy of this defendant company which is now in suit after the burning of the property. After the fire, my clerk informed me that on or about October 4, 1886, he received through the mail, from Lofland & Menard, * * * the policy; that on its receipt he forwarded it by mail to Glen & Son, at Buffalo, Leon county, Tex. * * * I left home several days before the fire, and returned on Sunday, October 10, 1886. I learned that the policy had been received and forwarded by my clerk." He then produced the letter which induced the clerk to apply to Lofland & Menard for insurance. That was of date September 22, 1886, and simply sought \$1,000 additional insurance, but named no company in which it was desired. Continuing, he said: "I was not personally

aware of the issuance of the East Texas policy until October 11, 1886. On October 11, 1886, I received a letter from Glen & Son, dated Buffalo, October 7, 1886, addressed to me, which was as follows: '* * * We have to advise you that we have increased our insurance \$1,000.00 in the National Mutual of Salina, Kan., making total amount of insurance on stock of merchandise five thousand dollars. Yours, truly, A. T. GLEN & SON.' I am not aware of any consent being given by the defendant company to the additional insurance above referred to. This letter before mentioned, of date October 7, 1886, and received by me on October 11, 1886, after the fire, was the first information I had of such additional insurance." This witness then produced a letter of date October 11, 1886, from Lofland & Menard, in which they acknowledge information from him, by telegram, of the loss sued on, which contained the following: "As to this last, we must acknowledge we do not understand how the East Texas can be involved. We instructed you several days since to take up this policy, and have your reply acknowledging receipt of said instructions, and saying that said policy should be returned to us. You, under same cover with above-mentioned acknowledgment, returned to us the East Texas policy on Pearlstone, for which we had sent you an Anglo Nevada policy to replace it, and which we had requested you to take up at same time we had the Glen policy. * * * We embrace the first opportunity to write you in regard to this matter, and ask the question if you are not in error in reporting the East Texas on this risk." On cross-examination, he stated: "I was not the agent of the defendant company at or before the issuance of the policy of insurance sued upon. I did receive the premium upon said policy in this way, to explain: \$150 was paid to me by Glen & Son; and, as nearly as I can recollect, the balance, \$50, was paid by draft of Glen & Son on L. & H. Blum, Galveston, Tex., on or about October 20, 1886. If the matter had been finally consummated by the company's acceptance of the premium, I would have retained 15 per cent. of the same as my perquisite." He then stated the same facts in regarding to keeping two registers stated by McNair, and that the entries of policies issued by defendant company were all made in the general register, which did not show the business done with companies for which he was agent. "* * * I did not know that the policy sued on was in existence till after the property was destroyed. I did not collect the premium till about October 20, 1886, which was subsequent to the fire. This premium, less exchange, was transmitted to Lofland & Menard, of Galveston, Tex., and by them returned to me, at which time I sent Glen & Son \$51.50, as the agents of the company declined to receive the money. * * * As to whether or not it is true in regard to my knowledge of the intention of the East Texas Insurance Com-

pany to cancel their policy, will say that I did not know of the existence of said policy until October 11, 1886."

A. T. and S. G. Glen, after testifying to the insurance held by them, and that the property was destroyed by fire on October 9, 1886, testified as follows: "The circumstances under which the policy of the defendant company was issued were as follows: A short time before the fire, E. L. Bridges, of Navasota, Tex., was around soliciting insurance. We were not ready at that time to take out more insurance, but told him (Bridges) that when we wanted more insurance we would write him, which Bridges insisted on us doing, saying he would give us until November, 1886, to pay the premium. E. L. Bridges was the agent of the defendant company in procuring the insurance. The policy of defendant company was received from E. L. Bridges a short time before the fire,—don't remember exact dates,—and the premium paid a few days after the fire. We gave a check on L. & H. Blum for \$50, and paid the balance in cash to Bridges. No demand was ever made for payment of the premium until a few days after the fire, when Bridges came to Buffalo, and told us that he wanted to get his hands clear of the matter, and asked us to pay the premium before it was due, which we promptly did. * * * Bridges came to Buffalo after the fire, and told us, at the time he made demand for the premium, that he had received notice from defendant company to cancel their policy; and, owing to his absence from home, his clerk had neglected to cancel the East Texas policy and write us up in some other good company, and insisted on our paying the premiums, as before stated. Some time after Bridges collected the premium, he expressed it back to us, and wrote us that the company would not receive it." They denied having notice that the company had canceled the property, and an averment that they had not paid premium, and then continued: "As regards additional insurance, Bridges told us, when we wished to take out additional insurance, to do so, and notify him by letter, which we promptly did. * * * E. L. Bridges acted as the agent of the defendant company in the issuance of the policy by that company to us, in insuring our stock of merchandise at Buffalo. * * * We don't remember the exact dates of the notice to Bridges, but we are positive we notified him as soon as we received the additional insurance in the National Mutual Insurance Company of Salina, Kan., as per instructions of Bridges to always notify him as soon as we received additional insurance. There was \$4,000 of insurance on stock other than the \$1,000 in defendant company."

John Stubbs, cashier and corresponding clerk for Lofland & Menard, testified that "E. L. Bridges was never the agent of defendant company at Galveston, Tex., or elsewhere, but was the agent of some other companies at Navasota, Tex., and at times would make application to Lofland & Menard for insur-

ance upon property not covered by his companies. Lofland & Menard would sometimes insure property upon such applications by him. Under this arrangement, we would write up and sign the policies, and send them to Bridges. We had nothing to do with the assured, and did not know them in the matter. When the premiums on such policies were paid, we permitted Bridges to retain 15 per cent.; and the policy in question was issued under these circumstances. As soon as we issued this policy, and on the same day, we reported it to the company at Tyler, Tex., and the company, by letter dated October 4th, instructed us to cancel this and some other policies then reported, which we accordingly did by letter of October 5th, addressed to E. L. Bridges."

The policy contained the following provisions: "Total concurrent insurance, \$4,000." "This policy shall become void unless consent in writing is indorsed by the company hereon in each of the following instances, viz.: Section 1. * * * Sec. 2. If the assured have, or shall hereafter obtain, any other policy or agreement for insurance, whether valid or not, on the property above mentioned, or any part thereof." "This company shall not be bound under this policy by any act of, or statement made to or by, any agent or other person, which is not contained in this policy, or in any written paper above mentioned, or attached thereto." "If any broker or other person than the assured have procured this policy, or any renewal thereof, or any indorsement thereon, he shall be deemed to be the agent of the assured, and not of this company, in any transaction relating to the insurance." The policy was transferred to appellees on October 12, 1886. Whether Lofland & Menard knew that there was \$3,000 insurance on the property when they issued the policy does not appear, but Bridges had knowledge of that fact. The cause was tried without a jury; and, although requested to do so, the judge failed to file conclusions of fact and law on which the judgment was based. As the court below declined to find conclusions of fact and law, we cannot know on what issue or issues the cause was decided.

It is contended for appellant that Bridges was the agent of the assured for all purposes, and that notice of cancellation to him was notice to them; while it is claimed for appellees that Bridges was the agent of appellant for all purposes. In this contention, no question is made whether the acts of McNair, the clerk of Bridges, and notice to him, are to be deemed as binding on each party as though his act was the act of Bridges, and notice to him as fully binding as would have been actual notice to Bridges. We are of opinion that the claims of neither party, in their entirety, can be sustained, but that in some respect Bridges, if we assume that he and his clerk are to be treated as one, was the agent of each. In making application to him for insurance, he was not treated by

Glen & Son as the agent of appellant. They wrote to him, asking insurance, but designated no company in which they desired it, nor did they fix rates with him; but they did empower him to obtain a policy for them. In so far as he acted in doing this, he must be treated as the agent of the assured. He was essentially an insurance broker. In *Standard Oil Co. v. Triumph Ins. Co.*, 64 N. Y. 85, it was held that such a broker may be regarded by the insurer as clothed with full authority to act for his principal in procuring, modifying, or canceling a policy obtained through him, and that his acts in these respects are binding on his principal. The broker, in that case, seems to have had entire control of the oil company's insurance business, with power to place and keep upon its property a large line of insurance. In a more recent case the same court held that the authority of a broker who is not a general agent to place and manage insurance on his principal's property, but is specially employed to procure insurance on certain property, terminates with the procurement of the policy, and that no authority to discharge the contract could be implied from the original employment. *Hermann v. Insurance Co.*, 100 N. Y. 411, 3 N. E. Rep. 341. That case, in some of its facts, was very similar to the present. In disposing of the case, the court said: "The defendant reserved the right to cancel the policy on notice to the insured. This condition would be satisfied by personal notice to the plaintiff, or to an agent authorized to receive it. But the authority of a broker employed to procure insurance for his principal, such broker not being a general agent to place and manage insurance on his principal's property, terminates with the procurement of the policy. It cannot, in reason, be held to continue after the insurance has been procured and the policy has been delivered to the principal. An agent to procure a contract has no power to discharge it implied from the original authority, merely. If he possesses that power, it arises from some actual or apparent authority superadded to the mere power to enter into the contract. In this case * * * [the brokers] had no general authority to represent the plaintiff in all matters relating to the insurance, as did the agent in the case of *Standard Oil Co. v. Triumph Ins. Co.*, 64 N. Y. 85, nor had they any apparent authority to accept notice of cancellation. * * * The defendant relies upon a special clause in the policy which declares that 'it is a part of this contract that any person, other than the assured, who may have procured this insurance to be taken by this company shall be deemed the agent of the assured named in the policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance.' This clause was primarily intended, no doubt, to define the relation of the insured to a person who applied for and procured the insurance, in a case where the same person was also

agent for the insurer in taking risks and soliciting insurance; or, in other words, in a case of double agency. The obvious meaning of the clause is that the person procuring the insurance shall, in respect to that matter, be deemed the agent of the insured, whatever his relation to the company in other respects may be, and that, in any transactions in respect to the particular insurance, he shall not be deemed the agent of the company by reason of any such other relations." This last case seems to us to establish the rule consonant with reason as well as authority. *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. Rep. 207; *Insurance Co. v. Hartwell*, 100 Ind. 566; *Devens v. Insurance Co.*, 88 N. Y. 169; *White v. Insurance Co.*, 120 Mass. 333. The case of *Insurance Co. v. Reynolds*, 86 Mich. 504, was in its facts much like the case of *Standard Oil Co. v. Triumph Ins. Co.*, above cited; and practically the same ruling was made. We hold that Bridges was the agent of assured to procure the policy, but that with its procurement his agency ceased; hence notice of cancellation given to him was not notice to assured.

The next question is, how far was he the agent of the insurance company? There is nothing in the entire record from which it can be held that he was the agent of the insurance company for any purpose other than to receive and remit the premium. So far, as between the company and himself, the duty to do this would be implied from the facts. There can be no reasonable claim that he had power to issue a policy or to consent to further insurance. The want of such power compelled him, as agent for the assured, to apply for a policy to those who apparently had such power. His own testimony, that of his clerk, the course of business, and all the attendant circumstances, show that he was not the agent of the company clothed with any such power as was requisite to the giving of consent to additional insurance. The broad declarations of the assured that he was agent, unsustained by a single fact tending to show their means of information or the grounds for their declarations, cannot be given weight against overwhelming facts. He knew not of the existence of the policy until after the property had been destroyed; and there can be no pretense that he, or even his clerk, gave consent, in any manner, to additional insurance after the policy issued. Had he been agent of the company at the time it is claimed that he promised to permit further insurance, it could not be held that such a promise, made long before the policy issued, would bind the company.

At the time it is claimed that promise was made, assured held policies for not more than \$3,000; and then the company, or any authorized agent, might be willing to consent to additional insurance which would not be consented to after the additional insurance given by the policy in question existed. Whether consent to additional insurance

would be given, would depend on the insurance and value of stock existing when consent to additional insurance was asked. The policy provided that if other insurance was obtained without consent of the company the contract of insurance should cease. Additional insurance was obtained without the consent of the company; and, in accordance with its terms, the policy became void, unless the insertion in the policy of the words, "Total concurrent insurance, \$4,000," gave to the assured the right to procure other insurance without further consent of the company. These words are detached from every other part of the policy, and are not used in any connection which illustrates clearly the purpose of their insertion. In view of the provision in the policy that it should become void "if the assured have, or shall hereafter obtain, any other policy or agreement for insurance, whether valid or not, on the property above mentioned, or any part thereof," unless consent thereto was given and evidenced in the manner provided, they may have been inserted for the purpose of determining that the procurement of insurance in excess of \$4,000 without consent was a breach of the policy, to determine what, within the intent of the parties, should be deemed other insurance. That view receives support from the fact that, with the policy in question, Glen & Son had, when it was issued, policies covering the sum named. It seems to be contended by appellant that these words limited the total insurance to \$4,000 unless consent to additional insurance was expressly given, and by appellees that these words gave to Glen & Son the right to take out policies to the extent of \$5,000 without consent of appellant. If the words evidence any agreement at all, or are to be given any effect, then it becomes necessary to construe them. If they are used for the purpose of limiting the right of assured, with or without consent, to procure other insurance, what do they mean? The word "total" means "all," "the whole," which sum is \$4,000. This sum, however, must be made up of insurance concurrent. The word "concurrent" means, literally, "running together," and, in the connection here used, has the sense of "co-operating," "contributing to the same event." Worcester. "Acting in conjunction; agreeing in the same act; contributing to the same event or effect; co-operating; accompanying." Webster. In the absence of something in the context showing that the word was not used in its ordinary sense, it must be understood so to have been used; and nothing of that kind is found. To be concurrent, the insurance must operate at the same time, upon the same property, and look to the indemnity of the insured in case of its loss or destruction from casualty insured against. The three policies held by Glen & Son, amounting to \$3,000, were concurrent with the policy sued on, and, with it, made total concurrent insurance \$4,000; and that subsequently obtained, if all the policies are permitted to stand, would

give that concurrent insurance \$5,000. From this it follows that if the words evidence an agreement, and do not simply declare a fact, it was necessary that the consent of the company to subsequent insurance should have been obtained. If they were used simply to declare that the policy in question, with others existing, gave \$4,000 insurance on the property recognized to be valid, the same result follows.

Some other questions, unnecessary to discuss, are presented; but, looking to the case made, the want of consent to insurance obtained after the policy sued on was issued required a judgment for appellant. The judgment will therefore be reversed, and judgment here rendered for appellant. It is so ordered.

RANDALL et al. v. MEREDITH et al.

(Supreme Court of Texas. March 20, 1890.)

MINING PARTNERSHIP—POWERS OF PARTNERS—NEW PARTIES.

1. Where the managing member of a mining partnership, in disregard of positive instructions from his copartners, borrows money for partnership purposes, but solely on his own credit, and without their knowledge, it is error, in an action against the partnership for the money, to instruct that the copartners are liable if the act was "necessary for carrying on the business of the partnership." The implied power of a member of a mining partnership to borrow money so as to bind the firm depends on the question whether such an act is usual in the ordinary conduct of the business.

2. Where there is no evidence that the managing partner had ever before borrowed money for the partnership within the knowledge of his copartners, or that it was usual for one member of a mining firm to borrow money to carry on the firm business, it is error to charge that the copartners are liable if the act was "done in the usual course of the business."

3. Though it may be irregular, on the suggestion of a sole defendant that others are liable with him, to cite in such others as defendants before plaintiffs amend their pleadings, yet the irregularity is cured by the answer of the additional defendants, and a postponement of the trial until a subsequent term.

Appeal from district court, Galveston county.

Ballinger, Matt & Ballinger, for appellants.

One of several partners in a mining firm has not, as such, any implied authority to pledge the firm credit for money borrowed for partnership purposes. *Ricketts v. Bennett*, 56 E. C. L. 686; *Dickinson v. Valpy*, 10 Barn. & C. 128; *Tredwen v. Bourne*, 6 Mees. & W. 461; *Hawtayne v. Bourne*, 7 Mees. & W. 595; *Brown v. Byers*, 16 Mees. & W. 252; *Skillman v. Lachman*, 23 Cal. 200; *Breed v. Bank*, 4 Colo. 481; *McCullough v. Moss*, 5 Denio, 567; *Mining Co. v. Bank*, 2 Colo. 248, 565; *Charles v. Eshleman*, 5 Colo. 112; *Manville v. Parks*, 7 Colo. 128, 2 Pac. Rep. 212.

F. Charles Hume, for appellees.

STAYTON, C. J. *Meredith & Allman* brought this action against *Bernard Tiernan*, to recover \$2,815.67, which on his checks they had loaned to him during a period be-

tween October 20 and December 31, 1885. They were bankers, doing business in New Mexico, where Tiernan was engaged in developing a mine owned by Sawyer, Randall, Dyer, and himself in unequal shares. The money was loaned to Tiernan, to whom alone credit was given; appellees not knowing that appellants were interested in the mining enterprise in which Tiernan used the money loaned. The action having been brought against Tiernan alone, he suggested by pleading that Sawyer, Randall, and Dyer were equally liable to appellees with himself, and asked that they be made defendants. They were cited before any amendment to the pleadings of the plaintiffs was made, and answered, and some question is made as to the regularity of the proceedings in this respect. Meredith & Allman amended their pleading on the coming in of the answer of Tiernan, and alleged that when they brought the action they were not aware of any liability on the part of Sawyer, Randall, and Dyer, but then set up their liability as partners of Tiernan. There was a judgment for sum claimed against all defendants.

That appellees loaned the money to Tiernan is not questioned, and that he used it in developing the mine owned by them is made clear. It seems that the development of the mine began in 1883, and was continued until some time in spring of 1886.

It appears from the evidence of Tiernan and the other defendants that an estimate was made each year of the work that should be done and money expended, and that to meet this each contributed in proportion to his interest. When the money thus contributed for the years 1883 and 1884 was expended, it seems that, in accordance with agreement, the work ceased. There, however, at the close of work in three years, may have been some indebtedness subsequently paid by defendants. Whether such balances were for labor or material or for borrowed money does not appear, nor does it appear what such balances were. The statement of Tiernan in reference to that is: "When I needed money to continue the work, I would notify my associates, when they would supply me with money until this last indebtedness. Under the agreement or understanding I had with my associates, I was to manage the workings of the mines, and look after their and my interests out there generally. I had everything to do. No one had anything to do with it but myself. Prior to the accruing of the amount sued on, I sometimes had occasion to procure advances out at the mines beyond the amount of money contributed by my associates for the advancement of the work. I don't know that I ever communicated that fact directly to my associates. I told them in a general way that I could get a few hundred dollars out there when I was short. There was nothing disapproved that I did. To pay the debts contracted in that way, from time to time, money was contributed by Captain Sawyer, Dr. Randall, and Mr. Dyer.

These were the sources the money had to come from."

During the year 1885, prior to October 10th, an indebtedness of \$3,700 was incurred in the work in excess of sums provided for that purpose. At that time Tiernan was in Galveston, and, according to his statement, it was then agreed between the four persons interested that each would contribute in proportion to his interest to make up the sum of \$5,000, with which this indebtedness should be discharged, and some other work agreed upon done. There is a conflict in reference to this matter between the evidence of Tiernan and Sawyer; the latter denying that he made any such agreement, and the former stating that he did. All the parties except Sawyer furnished money in accordance with that agreement, but he did not. His share would have been \$1,406.25. The indebtedness of \$3,700 seems to have been for wages of miners, coal, wood, and other expenses of developing the mine, and was paid with money furnished under agreement of October 10, 1885. The testimony of Tiernan is voluminous, and shows that he had the entire supervision of the work; that he gave his personal attention to it for years, sacrificing his time and comfort to that end. Extracts from his letters written during the year 1885 will illustrate the manner in which the business was conducted, as well as the understanding of the parties as to the conduct of the business on a cash basis. Sawyer seems to have been the correspondent from this place, and on May 23, 1885, he wrote to Tiernan: "I notice the work is using up your cash faster than you expected, and also what you say that no provision has been made for other work than in the King mine cross-cuts, which is true. The objective point in your developments is to cut the vein or seam to the north-west of the deep shaft at the 150-foot level, or determine that there is no seam or vein there within a reasonable distance; and the means to do this is the \$4,000 raised and handed you, and whatever you could make out of the ore on your dumps. I will inform our partners of what you write, and your opinion as to stopping before you are satisfied about it. It might, perhaps, be prudent to concentrate your funds in the N. W. cross-cut, but I am not authority, and can only say it was very inconvenient for me to put up the \$1,125 on my proportion of the \$4,000, and it becomes a very serious question about my being able to furnish another dollar this season; but I will consult our partners, without reference to my own inability to furnish further means for any purpose." In letter of date July 27, 1885, transmitting a part of \$1,500 which the parties had agreed to furnish in addition to the \$4,000 before referred to, Sawyer said: "You will please understand that we, Randall, Dyer, and myself, have, in furnishing this last amount, gone to the full extent we will go in expenditures on the King group of mines at this time; and, after disbursing this

amount, you will please make no further contracts, or do any more work, or make any further expenditures, for our account." In reply to this, on August 3, 1885, Tiernan wrote to Sawyer: "I am pegging away on the drift and cross-cut. As it takes same fuel, engines, and top men to run one, so I concluded that until I stopped for good it was cheaper to run both works at the same time. Ten or fifteen feet may lead us to ore in the drift, and a change may take place in the cross-cut for the better. * * * I will send statement of expenses for month ending July 31. I believe firmly that we will get ore in the drift that will be some account, and may bring us out all right. We can do this work for less money now than we ever can after stopping work, by at least 66 $\frac{2}{3}$ per cent. cheaper. It may take to the 10th of this month to determine. If nothing is found by that time to pay us, we close on the King mine for this year. * * * I trust this will be satisfactory to our partners all around. Our chances are good." On July 30, 1885, Sawyer wrote: "I wrote you an official letter on 27th, which I trust reached you safely. While regretting that the pushing of the N. W. cross-cut was not prosecuted in preference to any other work, and thereby solve the problem you intended to demonstrate when you left home, * * * still it has not been done, and if the money is exhausted that we and you have furnished for that purpose, and the proceeds of the ore on your dump is not sufficient to do it, it of course will not be done now; and, judging from what I know of myself and our partners, the only thing now, and for some time to come, is to lie still, and to let the property lie still." On August 7, 1885, he again wrote: "I have your favor of the 3d, and note carefully what you say in it, as well as from extended remarks of the 31st. My statements to you on the financial question were intended to make our conditions and intentions unmistakable, and I now understand by your letter that if you do not meet with promised success by the 10th that you will close down." On November 18, 1885, he wrote: "I tried in every way to prevent you from working on, and instructed you not to expend any money beyond the \$1,500 for our account, knowing well that I had no money, and that my credit was strained; so you must do the best you can, inasmuch as you took the chances of expending the money against my protesting." On November 28, 1885, Sawyer again wrote: "Notice what you say about having prosecuted the work of development beyond the intention at the time you left last spring. I understand it, as you do, that you took the chances, without authority from me, and against my wishes and instructions, to expend more money for our account, and for the reasons given in your letters, before me. I understand, also, my responsibility in the business, and will, when I can do so without sacrifice of property or credit, come up for what I am obligated for; but as

I wrote you then, I will repeat, I cannot send you any money now. I stood in at the time for more than I could consistently do, and haven't yet paid that; so, having taken the responsibility to expend the money, you must take care of it until I can reimburse you."

The following statement from brief of counsel, while not in all respects in the language of the witness, nor entirely complete, is correct in reference to essential matters: "Tiernan further says: 'October 10 there was a meeting at Sawyer's office, Dyer, Sawyer, and himself being present; and they agreed to go on with the \$5,000. It was to be the last; just like we had done at all other times. Gave Dyer a release October 10, 1885, stating: "From and after this date no installment on demand of any kind shall be made by me or through me, directly or indirectly, on Mr. I. Dyer, joint owner with S., R., and myself in certain mines in New Mexico, unless fully sanctioned by said I. D. in writing," etc. Said nothing to Dyer about assessments of R. or S. He asked mesomething about Sawyer, but I don't recollect what it was. In 1883 and 1884 we closed up the mine for the season. In 1885 we kept right along. When I came to Galveston that trip, \$3,700 was due to the miners for labor, and for wood and coal, and al. expenses at the mines. After I returned to the mines, with such money as I had, I commenced to do the usual work of developing the mines. I had a lot of miners that were running drifts. We run in on the south-east about fifty or fifty-five feet, on the north-west about eighty-five or ninety feet, to the north-east about eighteen or twenty feet, hoping to find ore. Still kept on with the black rock business to 127 feet. This work I speak of is what was done from the first. Don't know how much I did after I got back in October. After I got back, I think on the contract I run in from eighteen to twenty feet. On the south-east drift I might have gone in about eighteen feet. The black rock was a cross-cut. Did some work on it, but cannot say how much. My share, \$1,675, was in bank-bills. Suppose they were \$5, \$10, or \$20 bills. I got the money out of my business in Galveston, not out of a bank. I don't remember what Sawyer's excuse was for not paying his share. I think he said he could not pay it. I went on and collected the other shares. I don't think I mentioned to the other parties that Sawyer said he could not pay his share. At the meeting Sawyer was chairman. Of course he was to pay. Afterwards, when I went to collect the money, he said he would not pay. The receipts given to Dyer and Randall, dated October 10th, signed by Sawyer, express that the amounts are for expenses already incurred, and for running a drift about twenty feet, and doing assessment work on four claims at Eureka, the aggregate expense of which is \$5,000.' Repeats statement of the meeting on October 10th between Sawyer, Dyer, and himself, and agreement by each to

contribute his proportion of \$5,000. 'Afterwards Sawyer told me he would not pay his portion. I think it was at the time he wrote me the receipts for Dyer and Randall. I think it was down stairs he told me. I think it was the same day of the meeting; all finished up that day, October 10th. Sawyer told me he would pay no more. I most certainly did contribute my own share. Sawyer has never paid his, \$1,406.25. I applied what I collected to the debts and for the general use of the King mine. I did not have any left for continuance of the work, because Sawyer had not come up with his share. I, however, still went on with the work. I got the money from Meredith & Ailman. They paid the checks, and that is how the debts originated. As I did not have S.'s part, I went to the bank, and got advances from M. & A. The money I got from them was expended on the mine for the general account of us all.'

Sawyer testified: "It was agreed at a meeting of us four—Randall, Tiernan, Sawyer, and Dyer—that in the event of a purchase of King's interest we would, in addition to the amount paid for King's interest, furnish \$10,000 for machinery, etc., for developing this mine; and, inasmuch as Mr. Tiernan had reported that surface development work was nearly exhausted upon the King mine, that a test of its value should be made by sinking a shaft of 250 feet. Ten thousand dollars, in Tiernan's judgment, was sufficient to perform this work. It was further agreed in that meeting, as it was at every subsequent meeting, that a certain amount of work was to be done the succeeding season, and that the \$10,000 was all that was to be expended; and I went into it on that basis. I told Tiernan, and he understood very clearly and distinctly, that, while I put that money in the King mine as an investment, that I did not put anything into mines that I could not afford to lose, and that my proportion of \$10,000 was as much as I could stand. We accepted his judgment as to the proper course to pursue and the proper work to be done, and he made an estimate in every instance of what it would cost, and then we agreed upon it, or did not agree, as the case might be. When the amount was about exhausted, Tiernan, recognizing his obligation to cease work on the property when directed, came home. That was October, 1883. That winter they agreed with the Massachusetts company, owning an adjoining mine, to put in \$6,000 to go down to a level of 400 feet,—the Massachusetts company to pay \$2,000, the other their proportion. The Massachusetts company failed to pay. Tiernan was very confident that by spending \$4,000 more they would succeed, and then appellants agreed to advance, and did advance, their proportion of that sum; but it also proving a failure, they refused to furnish more money, and Tiernan came here in October, 1884. In the spring of 1885 it was determined to run a cross-cut from 150-foot level in the deep shaft. We

had three meetings about that before we decided to do anything about it. Tiernan thought he could raise \$3,000 out of the dump ore, and we decided to raise \$4,000. Afterwards they decided to raise \$1,500 more, and notified him that was all he should expend for our account. In 1883 and 1884, when we told him to stop work, he complied, but in 1885 he did not. He gave his reasons for not stopping the work, and went on with it, notwithstanding our requests to stop, and protests not to do any more on it. Tiernan came to Galveston in October, 1885. My recollection of the meeting of October 10th is different from Mr. Tiernan's. We had no meeting then. Mr. Tiernan came down to the office and saw me, and told me that he had done this work, and it had to be paid for, and that he owed so much money up there, and that he required \$5,000 to pay the debts and do the work that remained to be done. I told him that I had written to him that I had put in as much money as I could that season, and could not put in any more. He was earnest and vehement, and became warm. A day or two after that he told me that Randall and Dyer were willing to put in their proportion of the \$5,000. I told him I could not, and would not, put in any more. If R. & D. wanted to continue this work, I would not influence them, or stand in their way. I was going to New York. He said he wanted these proportions passed through the same channel they always had, and asked me to write the receipts, and he would collect the money from R. and D. That was carried out, and he went up to the mines, and he continued to work on, and to report to me what he was doing from time to time. He wrote me he was doing the work on his own responsibility. If he struck rich ore, everything would be overlooked. If he did not strike paying ore, he expected to suffer for it. When he came back the last time he said I would have to pay my proportion of the work that had been done, and that the courts would make me do it. I told him that if he was going to take it into the courts let us have no more conversation about it. He said he had heard from his foreman, and that he was getting out some very rich ore. I said, 'You are not working on my account;' and he said, 'No,' but on his own. From the time of the purchase of King interest in the King grant, T. has received from D. \$9,356.87, from R. \$10,174, from me \$10,335.90, less \$2,500, cost of machinery, paid for by me. During all that time he has never rendered a statement, a voucher, or figures, except as to his indebtedness, and the money he wanted. Mr. T. was intrusted to do the work up there according to his judgment, up to the amount of money we agreed to furnish each year upon his estimates, and he was not to exceed that. He understood from me personally, and from the others, that was all we would be willing to expend during the season succeeding. If the mine showed up well, all right; but not to go beyond what we

agreed upon. These were not the words, but that was the understanding. There was never any letter written by me or any authority given him to make any debts or borrow any money on my account; and I am pretty sure there was no such authority from R. or D. Prior to commencing the season's work we all had a meeting, and his views were formally presented. His estimates showed that it would take so much money to do so much work. Then the question was whether we would or could contribute the necessary funds. We would finally agree upon the amount of work, and the manner in which it was to be done. He could change the manner of the work when he got there until the level was reached, or the money exhausted we had agreed to put in. The transactions were cash. He had no authority to go beyond the agreed amount of money to be expended. He certainly had no authority to borrow money for my account, and to my knowledge he had no such authority from the others."

E. Randall testified: "Every year, when Mr. T. came down, we got together early in the spring, and agreed upon the work to be done, and the amount of money we would contribute. It was the understanding between us all that that was to be the limit. It was plainly understood that he was not to go beyond what was agreed upon. I never gave him any authority to borrow money on my account. It was the understanding everything was to be done on a cash basis. There was to be no credit at all. Of course, as in all transactions, the work might overrun the estimates a little, and, when Mr. Tiernan came home at the close of the season, we agreed to pay up what was owing. He obeyed instructions in 1883 and 4 to stop work, but in 1885 he continued on with the work, and came down here, and we told him distinctly it did not make any difference what was ahead, we were not going to spend another dollar, and that I, for one, could not raise the money. There was no man on earth that had authority from me to make a single dollar credit on my account. He said he owed so much money up there at the mine; that they were rough fellows, and a man should always pay his debts promptly; and he wanted to come out of the mine perfectly clear of debt. Tiernan came to see me on October 10th, stating that he had been to Mr. Sawyer and to Mr. Dyer, and there had been an agreement to pay off this debt; raise \$5,000, pay off every cent we owed, and do a little more work that would be more satisfactory to have done, and he could come out of the mountains not owing a cent. He said Sawyer had left that day, and had given him two receipts,—one to Dyer, for his money, and one to me. From the conversation of Tiernan I was led to believe that Sawyer had paid his proportion and Dyer his. I agreed to pay my proportion of the \$5,000. In the above time I have never seen a statement of account from him, except of what money he

wanted to carry on the work with. I asked him for a statement, and to keep books of accounts and show his expenditures."

I. Dyer testified: "When I entered this business, I understood it was to be a strictly cash affair, and 'pay as you go.' I was always willing to pay my proportion when the others agreed to anything, but I did not want any credit business. We furnished him with the means, as stated by the other witnesses, to carry on the work, and I believe what they have stated was about what was done. In October, 1885, when he came down, I declined to pay any more. As there was \$5,000 to be raised to pay off what was owing at the mines, and to conclude some little work to be done, I agreed to contribute my proportion, \$781.25, I think, but with the distinct understanding that I was not to be called upon for any more, and should be entirely released. Tiernan said he was sick of the business, and did not intend to do any more work; and I understood from him distinctly the \$5,000 was to pay everything and do what work was to be done. Mr. Tiernan had stated that previous to October 10, 1885, when he came down here, there was a meeting held at which I was present. If there was any such meeting, I know nothing of it. It has certainly escaped my memory. I think I would remember it were there such a meeting. I supposed when I paid my proportion Mr. Sawyer had or would pay his. Subsequently I heard Sawyer say he would not pay it. The receipt was delivered me by Tiernan. Said he was anxious to get the money and get away, and was collecting it himself. I did not see Sawyer on that day, or for several days previous. I was not at any meeting that might have been held previous to that. If there was any losses, I was to pay my proportion of such losses. I did not consider I was a partner in any concern, but I considered I owned a certain interest with the other three, and did not consider there was any partnership further than that. None of these gentlemen had authority to trade on my credit for anything, or represent me in borrowing money for that mining business, or anything else. I never held myself before the world as a partner in this business. As I stated before, I went into it on a cash basis, and would not consent to any credit business." Every item sued for is for money loaned and interest thereon, and protest fees of bill of exchange.

While the manner in which appellants were brought before the court may have been irregular, yet they answered, and the cause was not tried until a succeeding term, which cures any irregularities that may have occurred.

The vital questions involved in this cause arise mainly on assignments of error which question the correctness of the court's rulings in giving and refusing instructions. After instructing the jury as to the facts which would constitute a partnership, and as to the liability of members of trading partnerships, the court gave the following charges: "But in mining partnerships, the

acts of one partner, to be binding upon the other copartners, must be shown by proof to have been done in the usual course of the business, or necessary for carrying on the business of the partnership. To constitute either a commercial partnership or a mining partnership, it is necessary that the parties be entitled to share in the profits of the business, and be sharers in the business losses." "If you believe from the evidence that the defendants purchased the King mine grant jointly, each acquiring a certain proportion of the whole, and that, after said purchase, they held said property jointly each owning and holding certain proportions of the whole, and if you believe from the evidence that they held said property with the agreement and purpose to work said mine for profit, each to share in his proportion in the profits to be derived from the work, then the defendants would be mining partners in such property, and in such mining adventure, and would be liable for debts necessary to be incurred in carrying on said work, and for losses necessarily incurred in the prosecution of said work." "If you believe from the evidence that the defendants were mining partners, and that Tiernan was the acting managing partner, having charge of and directing the work, and that the account sued on was incurred by him, acting as such partner, in conducting the work, or in paying the expenses thereof, and such work was done in the usual course of business, or was necessary for the conduct of the partnership business, then you will find for the plaintiffs." "If the defendants were mining partners, as aforesaid, when Tiernan incurred the indebtedness sued for by the plaintiffs, and said indebtedness was contracted by him for and on account of the mining work done by him for himself and associate co-defendants as partners, and if such work was done in the usual course of the business, all and each of the defendants are liable to the plaintiffs for the proven amount of the account sued on, with 8 per cent. interest, calculated as aforesaid; and this would be so, though the evidence should show that Tiernan's co-defendants had instructed him from the doing on their account of the work, or the incurring on their account of the expenses to pay for which the account sued on was contracted, even though the plaintiff in making the advances may not have known who composed the partnership, and may not have known that any partnership existed, and although the partner obtaining such advances obtained them in his own name, and without disclosing the names of his partners, and without discovering the fact that they were partners; and although in obtaining such advances said partner Tiernan may have violated his express and written promise to his partners that he would not incur such liability, and in violation of his express and written promise to his partners that they should not be called on for money to carry on said business, unless the party making such advances had knowledge or no-

tice at the time of making the same of such promise or agreement."

It is urged that the court erred in giving those charges, and in refusing to give the following: "If the jury believe from the evidence that B. Tiernan and the other defendants agreed with each other to purchase the interest of King in the King mines, and to develop the same, each of the defendants agreeing to pay a certain amount in proportion to the interest held by him in the purchase so made, and it was further understood that the purchase of the mines was to be made for cash, and that all work was to be done for cash, and that when the cash so furnished was spent, the work was to stop, then neither, without express authority, would have the right to borrow money or incur any liability which would be binding on the other owners." "If the jury believe that Meredith & Ailman agreed to lend the defendant Tiernan the money sued for in this action, upon the individual responsibility of Tiernan, and they were ignorant of the connection and the names of the other defendants, they cannot recover of such other defendants without showing affirmatively that Tiernan had authority from the defendants to borrow money on the credit of the defendants for the business in which they were engaged." The conclusion of the charge given was: "But, unless you believe from the evidence that the defendants were mining partners, as aforesaid, the verdict should only be against the defendant Tiernan; and unless you believe from the evidence that the work for which the indebtedness accrued was necessary for the carrying on of the business, or was in the usual course of the business, the verdict should be only against the defendant Tiernan for such of the account as is proven."

Under the uncontroverted facts, it must be conceded that appellants are not liable by reason of holding themselves out to be partners of Tiernan; for appellees did not give credit upon the faith of the existence of a partnership, but to Tiernan alone, not knowing of the partnership. It must further be conceded that Tiernan was not expressly given power by his associates to borrow money to be used in the mining enterprise. If it be conceded that a partnership existed between Tiernan and his associates, it is clear that he had only such powers as are to be implied from the nature of the business in which they were engaged. Between partners themselves, and between the firm and persons dealing with the firm, it must be presumed that each partner is the agent of the firm, empowered to carry out its objects, and to transact the business for which the partnership was formed, in the usual and customary way pursued by other firms engaged in a like business; and, in the absence of restrictions on this power, rights must be adjusted in view of its existence. Third persons dealing with a member of a firm in reference to partnership matters, in the absence of power expressly conferred, must recognize the fact

that the partner's power to bind his firm is restricted to the doing of such things as are within the scope of the particular business. Between the partners themselves, and between the firm and persons dealing with it through a partner, there is no doubt that the usages of firms engaged in the same character of business in the same country, as well as the general usage of the firm in the conduct of its business, may be looked to to ascertain the implied powers possessed by a partner. If the power exercised in a given case be one usually exercised by partners in a like business, all the members of the firm must be supposed to have intended to confer a like power on each other. If the power be habitually exercised by a partner, and acquiesced in by the other members of the firm, it is but fair to conclude that the members of the firm intended it to be exercised.

There is no evidence in this case, however, which shows that it was usual for one member of a mining firm to borrow money; nor is there evidence that, within the knowledge of appellants, Bernard Tiernan had ever borrowed money for partnership purposes before he borrowed the money from appellees. There is no evidence that he had before borrowed money, with or without the knowledge of his co-partners, for partnership purposes; but, were this otherwise, as he borrowed the money in the face of positive knowledge that his partners did not desire this to be done, they would not be responsible to him for it, although it may have been used, without their knowledge, for partnership purposes; hence appellees can claim nothing through rights he might have had if he had borrowed the money in pursuance of a course of business theretofore recognized by his associates. If Tiernan had not the implied power to borrow money, resulting from the nature of the enterprise in which he and associates were engaged, then appellees have no just claim against the latter; and the usual course of business of such partnerships, or of this particular firm, could have no bearing on any question involved in this case, except to furnish the measure of the implied power held by him. To the extent of such power possessed and exercised by him, all other partners are bound, whether appellees knew or did not know of the existence of the partnership when they loaned the money. It is well settled that members of trading partnerships have power to borrow money to be used for partnership purposes; and it is as well settled that members of what are termed "non-trading partnerships" have not such implied power. There is some difficulty in determining in all cases whether a partnership belongs to the one class or the other. In *Kimbro v. Bullitt*, 22 How. 268, it was said that, "wherever the business, according to the usual mode of conducting it, imports, in its nature, the necessity of buying and selling, the firm is then properly regarded as a trading partnership, and is invested with all the powers, and subject to all the obligations, incident to that relation." A recent

writer suggests perhaps a fuller definition as follows: "If the partnership contemplates the periodical or continuous or frequent purchasing, not as incidental to an occupation, but for the purpose of selling again the thing purchased, either in its original or manufactured state, it is a trading partnership; otherwise, it is not." Bates, Partn. § 327. There is no doubt that all partnerships which fall within this definition are trading partnerships, and it may be that it is broad enough to cover all that should be so classed. If these were not embraced within this definition, in which each partner is clothed with power to borrow money, they may be recognized by the character of the business pursued, which makes frequent resort to borrowing a necessity, not existing by reason of embarrassments, or on account of some fortuitous event, but for the advantageous prosecution of even a prosperous business. It has been generally held that mining partnerships are non-trading partnerships, and the individual members of the firm without power to borrow money on the credit of the firm, unless the power be given otherwise than by implication from the ordinary nature of the business. Bates, Partn. §§ 329, 371; Lindl. Partn. 266-270; Colly. Partn. 658, 686, note 2; Pars. Partn. 108, 218 and note; Story, Partn. § 126; 1 Story, Cont. 279; Daniel, Neg. Inst. §§ 357-359. These authors, as well as brief of counsel, cite many cases bearing on the question. The evidence in this case shows at least a *prima facie* want of power in Tiernan to borrow money for the firm.

The first part of the charge given informed the jury that to make the act of one member of a mining firm binding on it the act must have been done in the usual course of business. This was correct; but the charge went further, and informed the jury that this or another state of facts must have existed to fix the liability, which was that the act must have been "necessary for carrying on the business of the partnership." This carried the implication that the act of the partner bound the firm if it was necessary for carrying on the business. An act may be necessary for the carrying on of the business of a partnership, but when done by one partner the firm cannot be bound by it, unless he has express or implied power to do the act. Whether he has the implied power depends on whether the act be "necessary to carry on the business in the ordinary way. A partner's power is to do only what is usual, and not what is unusual, because necessary." Bates, Partn. § 320. This charge was objectionable for the further reason that there was no evidence from which the jury would have been authorized to find that it was usual for such firms to borrow money.

The second paragraph of the charge given was subject to a like objection.

The third paragraph, in effect, informed the jury that appellants would be liable if the "work was done in the usual course of business, or was necessary for the conduct of the

partnership business." provided, the "account sued on was incurred by him, [Tiernan,] acting as such partner, in conducting the work, or in paying the expenses thereof." Whether the work was done in the usual course of business, or was necessary, was not the inquiry to which the mind of the jury should have been directed. The work may have been done in the usual course of business, or necessary, but this would not confer on the partner power to borrow money to pay for it, unless the exercise of that power was usual in the ordinary conduct of such a business.

The fourth paragraph on the same subject was still more objectionable. The first part of that was: "If the defendants were mining partners, as aforesaid, when Tiernan incurred the indebtedness sued for by the plaintiffs, and said indebtedness was contracted by him for and on account of the mining work done by him for himself and associate co-defendants, as partners, and if such work was done in the usual course of the business, all and each of the defendants are liable to the plaintiffs for the proven amount of the account sued on." Now, the simple fact that the work may have been done in the usual course of business was declared to fix on appellants liability, if the indebtedness was contracted on account of the work. The instruction contained in this and the preceding paragraph would have been correct had the defendants composed strictly a trading partnership, for whose use the money was borrowed; but, assuming, as they did, that liability existed if the money was borrowed and spent on work done in the usual course of business, they were erroneous when applied to a non-trading partnership. They assumed the implied power to borrow money to exist, because work done in the usual course of business may have been paid for with money borrowed.

The last paragraph in the charge given has the vices of all the others. If a partner be not given express power to borrow money, and the business or course of business of the firm or like firms be not such that therefrom such a power may be implied, then there is no reason for holding a firm bound for a loan made to and on the sole credit of one partner, simply because he may have used the money for a partnership purpose. No facts being shown from which it could have been found that Tiernan had implied power to borrow the money for the firm, the court with propriety might have given the first charge requested and refused, while, under a different state of facts, to have given the charge would have been erroneous.

The second charge asked and refused might with propriety have been given for the same reasons, while, had there been evidence from which power in Tiernan to borrow money might have been implied, it would have been erroneous to have given the charge, unless the jury had been informed how it might be "affirmatively shown that Tiernan had au-

thority from the defendants to borrow money."

This case well illustrates the importance of denying to partners in mining enterprises the power to borrow money on the credit of the firm, unless the power be expressly conferred by the other partners, or fairly may be implied from the usual course of business. Appellants had emphatically refused to furnish more money for the prosecution of an enterprise, success in which, of all classes of enterprise, is most doubtful. They had furnished as much as they were willing to stake on the venture. Yet the claim is that the one partner had the implied power to compel them to go further without proof of any fact tending to show that the partners could have intended this, or that third persons could have believed that they so intended.

We have not deemed it necessary to consider whether there is anything in the peculiar relations between mining partners which should influence the decision of this case, but have considered it solely from the stand-point of a non-trading partnership.

For the errors noticed, the judgment will be reversed, and the cause remanded.

KENDALL et al. v. CLARK.

(Court of Appeals of Kentucky. April 24, 1890.)

LIMITATIONS—PARTIAL PAYMENT—EVIDENCE.

1. The indorsement of a partial payment upon a note given for purchase money of lands does not suspend the operation of the statute of limitations as to the whole contract, so as to keep alive the vendor's lien upon the land, when in the hands of a subsequent purchaser not a party to the transaction.

2. Where an indorsement of a partial payment upon a note is relied upon to suspend the operation of the statute, and the fact of payment is denied by the answer of the payor, the burden of proof rests upon the plaintiff.

3. Where a partial payment on a note was relied on to suspend the operation of the statute, the testimony of the plaintiff and another witness, both parties to the transaction alleged to result in the payment, is not sufficient to establish the fact, against the positive denial of the payor and of a disinterested third person, through whom, if at all, the payment was made, when their testimony is supported by circumstances, and by other evidence.

Appeal from circuit court, Fleming county.
"To be officially reported."

W. G. Dearing and Wm. J. Hendrick, for appellants. W. A. Sudduth, for appellee.

LEWIS, C. J. Appellee, John Clark, instituted this action May 1, 1885, to recover judgment as assignee on a note for \$200, payable December 25, 1869, by A. J. Royse to Nancy A. Jones, in part consideration for a tract of 188 acres of land, and to enforce vendor's lien as well upon 76 acres thereof, sold to one Ham, who afterwards sold to appellant Campbell, as upon the residue of the tract owned by Royse, now deceased, when the action was commenced. It is obvious more than 15 years had elapsed from the time the note fell due

until the action was instituted, but, to avoid the plea of limitation, a credit of \$18.80, indorsed on the note as of January 2, 1882, is relied on, and seems to have been considered by the lower court sufficient for the purpose. Whatever may be the operation of the credit, so far as Royse, while living, and his personal representatives and devisees afterwards, might have been, it certainly did not nor should have the effect to continue beyond the period of 15 years the lien on that part of the land purchased by appellant Campbell, for it was expressly decided by this court in *Tate v. Hawkins*, 81 Ky. 577, that while a partial payment made by the original vendee on a note for the purchase money within 15 years would have the effect, as to him, to suspend operation of the statute of limitation, between accrual of cause of action on the note and date of payment, the rule could not be applied to the prejudice of a remote vendee not a party to the transaction. Consequently the statute of limitation is as to Campbell clearly a bar, and it was error to enforce the alleged lien on, and the subject to satisfaction of the note, any portion of the original tract owned by him. As defense to the action, A. J. Royse while living, and his personal representative afterwards, pleaded payment of the note, and also limitation. The evidence tends to show the note had been paid off previous to 1882, but it is not necessary to reverse the finding of the lower court on that issue of fact. It was alleged in the answer that the indorsement on the note of a payment of \$11.80 as of January 2, 1882, is false, and made with fraudulent intent to avoid operation of the statute; to which the plaintiff replied that the credit was the amount found due to Royse upon a settlement then made between him and J. W. Crain, at the time joint owner of the note, and was, in the presence and by direction of Royse, indorsed on the note as partial payment thereof. Both plaintiff and Crain testified as witnesses the alleged settlement was made at the date mentioned, that the sum mentioned was then found due, and agreed between them and Royse to be there placed as a credit on the note, and was done. But Royse, who before his death, gave a deposition, swore he never had such settlement, nor authorized or knew the credit was placed upon the note, but that he had been furnished by Crain with a statement of his indebtedness, which, together with receipts of payments in his possession, he delivered to one John D. Secret to enable him to make the settlement. Secret testified the papers were, as stated by Royse, delivered to him for the purpose, and he did attempt to make a settlement with Crain & Clark, but that they differed upon a basis of settlement, as to the manner of applying credits claimed by Royse, whether on the notes they held against him, or upon open accounts, and also as to the amount of such credits, and consequently never did make a settlement, or agree upon how much of the notes were unpaid, or

that there was in fact any part of either of them unpaid. He also stated the credit of \$11.80 was never ascertained or agreed upon as a partial payment of the note sued on, nor was it in his presence or by his direction indorsed on the note. Nor is it satisfactorily explained by either Clark or Crain by what process the precise sum of \$11.80 was ascertained to be a proper credit on the note. The testimony of Secret, a disinterested witness, being direct and consistent, and, besides, supported by circumstances and evidence of other witnesses, it seems to us should be taken as satisfactory proof the credit mentioned was never agreed upon by Royse as a partial payment of the note, and was placed thereon without his knowledge or consent; for the only evidence to the contrary is the improbable and unsupported testimony of Clark, the plaintiff, and Crain, assignor of the note. The rule is that an "admitted payment * * * within fifteen years before the institution of the suit, not qualified or restricted by the evidence in its legal import or effect, is *prima facie* evidence of an acknowledgement, as of the date that the residue of the debt, as appearing from the note, remained unpaid, and of continuing liability therefor, and consequently sufficient to suspend the operation of the statute between the accrual of the cause of action on the note and the date of the payment." *English v. Wathen*, 9 Bush, 387. But, when there is a denial by the payor that an alleged partial payment was made, no presumption arises that the indorsement on the note was made with his privity; for "the party in possession of the note must be presumed to know when and by whom the payment was made and the credit entered, and the mere indorsement of a credit, although apparently against the interest of the obligee at the time it purports to have been made, cannot be regarded as sufficient evidence of payment by the obligor, when that fact is controverted by answer." *Frazer v. Frazer*, 13 Bush, 397. It thus results that, in order to continue liability on the note beyond the statutory period of 15 years, the burden rested on the plaintiff to show, the fact being denied, that the amount indorsed as a credit was a partial payment made by Royse. But, instead of doing so, the contrary appears to us clearly established, and consequently no judgment ought to have been rendered either for the debt or enforcement of a lien on any part of the land, even if the devisees of A. J. Royse, owners of the land, and necessary parties, had been before the court. It appears that, in pursuance of the judgment, the entire tract of land was sold and purchased by the plaintiff, Clark, and that exceptions to report of sale were filed, but erroneously overruled. Wherefore the personal judgment against the administrator, judgment for sale of the land, and confirmation of report of sale are reversed, and cause remanded, to set aside the sale and dismiss the action.

HARTFORD LIFE & ANNUITY INS. CO. v.
HAYDEN'S ADM'R.

(Court of Appeals of Kentucky. March 20, 1890.)

LIFE INSURANCE—AGENT—WAIVER—EVIDENCE.

1. In an action on a policy of life insurance it appeared that the application provided that agents could collect "admission fees" only; that all other payments should be made at the home office; and that, in case any of them were not paid, the policy should be void. The policy contained similar provisions, and further provided that agents were not authorized to vary its terms. The insured died two months after the policy was issued. At the time of receiving the policy the insured paid to the local agent who effected the insurance an amount sufficient to carry the policy four months. This amount was due on the first of the month after the policy was delivered, but it was not tendered to the company by the agent until after deceased's death, and was not accepted by it. The general manager of the company for that section of the country publicly announced that the local agent had authority to receive the dues. Held, that this operated as a waiver of the restriction in the application and policy as to the agent's powers, and estopped the company from denying them.

2. The term "agent," in an application and policy of insurance providing that agents are not authorized to vary the terms of the policy, or to receive dues, does not apply to a general agent.

3. Where the home office of an insurance company is remote from that in which the insurance is effected, the insured has a right to believe that one intrusted with the general management of the company's business in the latter state has the full powers of a general agent.

4. In an action on a life policy, statements of the agent, relative to his insuring the deceased, made subsequent thereto, cannot be proven against the company, as a part of the *res gestæ*.

5. The admission of such evidence, however, is not ground for reversal, where the substance of it was otherwise proven by competent evidence.

Appeal from circuit court, Marion county.

"To be officially reported."

Action on a life insurance policy brought by the administrator of D. W. Hayden against the Hartford Life & Annuity Insurance Company. There was a judgment for plaintiff, from which defendant appeals.

Avritt & Russell, for appellant. *Rides & Spalding*, for appellee.

HOLT, J. April 4, 1887, D. W. Hayden made written application to the local agent, J. J. Pursley, for an insurance upon his life of not over \$4,000, in the safety fund department of the Hartford Life & Annuity Insurance Company. It stipulated that, if the insured should fail to make any required payment, then the policy should be void, and that agents were authorized to collect "admission fees" only, all other payments to be made by the insured at the home office in Hartford, Conn. April 18, 1887, the company issued the policy at its home office for said sum. It was sent to the local agent, and he delivered it to the insured. By its terms the insured, among other payments, was to pay to the company "expense dues" of \$3 annually upon each \$1,000 of insurance, the first payment to be made upon the first day of the month succeeding the issue of the policy, "or by quarterly or other *pro rata* installments of the same in advance for periods of less than a year." The policy further provided that "agents" of

the company were not authorized to vary its terms; and that, after an agent had delivered the policy and collected the "admission fee," no other payment under the policy could be made to him without the production of a receipt signed by the secretary of the company, but must be made at the home office. It appears to have been left to the agent to fix or agree with the insured upon the "*pro rata* installments" in paying the "expense dues," and neither the application nor the policy states the amount of the "admission fees." The insured died on July 8, 1887. In this action by his personal representatives to recover the insurance it is claimed by the company that the policy had become void before his death by reason of his failure to pay at the home office the first installment of four dollars of "expense dues," which it claims became due on May 1, 1887. The petition avers that the insured, at the time the insurance was taken, paid Pursley \$18. The evidence upon the part of the company shows that this was the sum charged as an admission fee, and that it went to the agent, if he was at work upon commission. The company says—*First*, that no expense fees were paid to Pursley; and, *second*, if there were, then he had no authority to receive them, and that the insured was so notified by the provisions of both the application and the policy. In other words, that he was a special agent, with limited powers, and, this being known to the one dealing with him, the principal cannot be held for anything done in excess of his authority. Undoubtedly the company could limit the power of Pursley, who was but a special agent; and if one dealing with him as such agent knew it had done so, or as a prudent person should have so known, then he did so at his peril as to matters beyond the agent's authority.

Waiving whether the insured had a right fairly to understand that the term "admission fees" embraced the first installment of the "expense fees," yet it is shown by the evidence that when the payment was made to Pursley by him it was agreed between them that the insured had made all necessary payment to carry the insurance to September 1, 1887. In other words, that all fees or dues were paid up to that time. A day or so after the insured had paid Pursley, the latter went back to him, claiming that by mistake he had failed to pay him enough by four dollars, and the insured paid him this additional sum, and then the agreement between them above named was made. Whether the agent agreed to commute a part of the admission fee, and which was coming to him, or not, does not appear. He is dead, but it is shown that he did not, during the life of the insured, account to the company for the four dollars, which was the amount of the installment of the expense fee due on May 1, 1887. After the death of the insured, and in August following, Pursley, who had been discharged from the service of the company in May previous, sent it to the company, but it refused to re-

ceive it. It is suggestive that the sum which the agent claimed the insured through mistake still owed him after the first payment, and which he collected, was the exact amount of the installment of the expense due. In any event, we think it is satisfactorily shown he agreed with the insured that the latter had paid all that was necessary to tide the policy to September 1, 1887.

The appellees were improperly allowed to prove some statements of Pursley relative to insuring the deceased, made after it had been effected. The acknowledgments of an agent made subsequent to the transaction in which he acted as agent cannot be proven against the principal. They are not a part of the *res gestæ*. Whatever the agent does in the prosecution of the principal's business is the act of the principal, and therefore what he may say relative to it while so engaged—*dum ferret opus*—is competent evidence against the principal. 1 Greenl. Ev. § 118. In this instance, however, the matter to which they related was otherwise shown by competent evidence. Their admission was not, therefore, prejudicial to the substantial rights of the appellant, and the exception is not, therefore, to be regarded. Civil Code, § 338.

The question at last in the case is, had the insured made such a payment of his dues that the policy was in force at his death? Conceding that he had notice from the application and the policy that Pursley had no right to collect the expense dues, yet it appears that one Hamilton, who was the general manager of the company for Kentucky and several other states, went with Pursley to the town where the insurance was taken upon the life of the deceased, and together they solicited insurance there. They distributed the cards and printed statements of the company, showing that Hamilton was such manager, and he gave it out publicly that Pursley was the agent of the company, and authorized to receive the fees and dues for insurance in it. There is evidence showing that he did collect them, including the "expense fees," with the knowledge and consent of Hamilton. It is true there is some evidence *contra*, but there was sufficient testimony to authorize the jury to find against the company upon this point. Upon this state of case the lower court instructed the jury as follows: "If the jury believe from a preponderance of the evidence that J. J. Pursley, at the time of delivery of D. W. Hayden's policy, collected from him an amount of money estimated and fixed by said Pursley as sufficient to keep the policy in force until September 1, 1887, and that said Pursley was held out by the company, or its general agent, F. B. Hamilton, as its duly accredited agent, having authority to estimate, fix, and collect from applicants the first payment on delivery of policies, they must find for plaintiffs the amount claimed, to-wit, \$4,000, and interest thereon from October 27, 1887; otherwise they should find for the defendant." This instruction embodied the whole law of the

case in pointed and concise language. Although the printed forms of the applications and policies of the company notified its patrons that its agents had power to receive only the "admission fees," and conceding that this might not be fairly understood to include the first payment upon the "expense fees," yet the company could undoubtedly either expressly or inferentially, by conduct, waive this limitation upon the power of its agent. It could act only through natural persons, and here was its general manager upon the ground, and saying to the public, by both word and conduct, that payment of all or any of the fees for insurance in it could be made to the local agent, and that it would be all right.

It is said, however, that this action is upon a written contract; that no fraud or mistake as to it is pleaded; and that its terms cannot, therefore, be varied by oral evidence of what occurred contemporaneous with the making of it. This rule was designed to prevent fraud and further justice. If it were applicable and controlling under circumstances like those now presented, it would be promotive of injustice. Here the general manager, who must be regarded as standing in the place of the company, publicly authorized the local agent receive all dues. He held him out to the public as so authorized. This operated to waive the restriction in the application and policy as to his powers in this respect, and estops the company from now denying it. The insured and the public had a right to regard the conduct of Hamilton, and his direction as to the payment of the insurance dues to the local agent, as a subsequent parol alteration *pro tanto* of the contract of insurance, and the company itself must be regarded as having thereby created an honest belief that the limitation upon his power in this respect had been waived. If it were not, therefore, estopped to now deny it, a fraud would practically result, and the injured party be remediless.

It may be said, however, that Hamilton was but an agent. Grant that as between him and his principal his powers were limited, yet the insured should not be treated as having notice of it from the terms of his application and the policy, because the term "agent," as therein used, should not be regarded as applying to a general manager of the company. He represents it generally. It is present in him. The public naturally rely upon him as having full power in reference to its business, and he should in fairness be regarded as so held out to the community by it. Especially should this be so where the home office of the company is located in another state. Restrictions and terms in a policy will be construed most strongly against the company, and in favor of the agent's powers as to those dealing with it. In *Carigan v. Insurance Co.*, 53 Vt. 418, the policy provided that no agent had the power to waive any of the conditions of the policy; and the provision was held to apply to local,

but not general, agents, the latter being presumed to possess authority to transact the business of the company generally. Where a company is located in a state remote from that in which the insurance is effected, one intrusted with the general management of its business in the latter state should be regarded as a general agent, (*Insurance Co. v. Booker*, 9 Heisk. 606,) and possessing all the powers of those in charge of its business at the head or home office. Both the interest of the company and the protection of the public require this to be the rule; and as held in *Marcus v. Insurance Co.*, 68 N. Y. 625, a clause in a policy that "agents" are not authorized to make, alter, or discharge contracts should not be regarded as applying to general agents. The public had a right, owing to the conduct of the appellant's general agent, to believe that the local agent had a right to receive all the fees for the insurance. The company, therefore, so held him out to the insured and the public, and this worked a waiver of the restriction in the policy, granting it to be as extended as claimed by the appellant. The ruling of the lower court was in conformity to this view of the law, and the judgment is therefore affirmed.

ROGERS et al. v. TRUSTEES GRADED SCHOOL.

(*Court of Appeals of Kentucky*. April 10, 1890.)

SCHOOLS—LEVY OF TAXES—CONSTRUCTION.

1. Act Ky. March 2, 1888, to establish public graded schools in Carlisle, appointed trustees, with authority to issue bonds of the district, not exceeding \$12,000, for the purchase of grounds and buildings, and to levy a property tax not exceeding 50 cents on the \$100, and a poll-tax not exceeding \$2, to pay teachers and maintain schools, said measures to be approved by a majority of the voters at an election ordered for that purpose. *Held*, an issue of bonds for a lesser amount, and the levy of a tax at a lesser rate, when so approved, are valid.

2. Section 16 authorizes the trustees to admit children residing outside of the district, "upon such terms and conditions, and upon payment of such charges, as the said board may deem right." *Held* no objection can be made to the admission by the trustees of non-resident children upon payment of tuition.

Appeal from chancery court, Nicholas county.

"Not to be officially reported."

John P. Norvell, for appellants. *Ross & Owens*, for appellees.

PRYOR, J. An act to establish a system of public graded schools in the town of Carlisle was approved March 2, 1888, by which certain citizens of the school-district, or of the town, were named as trustees, and invested with the power to issue the bonds of the district, not exceeding \$12,000, for the purpose of providing grounds and school buildings. They were also authorized to levy an annual tax, at the rate of not exceeding 50 cents on the \$100 of property, and a poll tax of not exceeding \$2, to pay teachers and maintain the school. This levy of the tax and issuance of the bonds was not to be made unless first

approved by a majority of the votes cast in the district at an election to be held for that purpose. The trustees made an order for an election as provided by the act authorizing the issuing of bonds amounting to \$12,000, and the tax to meet the indebtedness, when complaint was made that the sum was too large, and an agreement entered into between the trustees and the tax-payers, or some of them, by which it was agreed that the amount should be \$8,000, 35 cents on the \$100, for school purposes, and \$1 capita-tion tax. The election was then held on the day fixed, imposing a less burden on the tax-payers than the act authorized, and a majority of all the voters favored it within the district; there being 146 for the tax, and 36 against it. We see no reason why the tax-payer should complain of having to pay a less tax than that authorized to be imposed. The trustees could not, under the act, exceed the sum of \$12,000, but had the power to submit the question for a less sum; in fact, it was their duty to do so, if a less sum answered the purposes of the act. The legislature had the right to name the trustees, and to invest them with full power to act until their successors were elected and qualified, and therefore the election ordered was valid; because (1) the trustees had the power to order it; (2) because a majority of the votes cast favored it. The tax-payer has imposed the burden, and not the trustee. The fact that children outside of the district are allowed to attend the school is not objectionable, because they are required to pay their tuition, and are not allowed to enjoy the benefits resulting alone from the imposition of this tax. They are made to pay, and must be compelled to pay as the act provides. Judgment affirmed.

WEBER v. KANSAS CITY CABLE RY. CO.

(*Supreme Court of Missouri*. March 23, 1890.)

APPEAL—EXCEPTIONS—DEMURRER TO EVIDENCE.

1. A statement in a bill of exceptions that the court refused to give certain numbered instructions asked by defendant, "to which refusal of the instructions thus asked the defendant by its counsel then and there excepted at the time," will not be treated as a general exception to the action of the court in refusing the instructions as a whole, but will entitle defendant to have each refused instruction considered by the supreme court.

2. Defendant does not waive a demurrer to plaintiff's evidence by putting in his own evidence; but the supreme court, in reviewing the ruling of the lower court, will do so in the light of all the evidence, no matter by whom or when offered; and if there is a case to go to the jury the supreme court will not reverse, though the demurrer to plaintiff's evidence should have been sustained as the case stood when it was interposed.

On motion for rehearing. See 12 S. W. Rep. 804.

Johnson & Lucas, for appellant. *Wash Adams*, for respondent.

PER CURIAM. So far as the merits of this case are concerned, we deem it unnecessary to add anything to the opinion heretofore

filed. A complaint is made that the court did not give full consideration to the point made in the respondent's brief that exceptions were not properly saved by appellant to the action of the circuit court in refusing certain instructions, among which was one to the effect that, upon the pleadings and evidence, the plaintiff could not recover. This instruction is numbered 10, and is one of 18 asked by defendant, but refused by the court. In respect of these refused instructions the bill of exceptions says: "And said instructions Nos. 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22, as asked, the court refused, to which refusal of the instructions thus asked the defendant by its counsel then and there excepted at the time." The argument is that there is here but a general exception to the refused instructions as a whole, and if any one instruction was properly refused, the exception must fail. Authorities are cited from other states which favor the position taken by the respondent, but such is not, and never has been, the rule of practice in this state. Under our Code of Civil Procedure¹ either party may, after the close of the evidence, move the court to give instructions, which are usually prepared by counsel, and must be in writing; and the practice is to number them, as was done in the present case. The refused instructions must be set out in the bill of exceptions, and a formula often used for saving the exceptions is, "which instructions the court refused, to which refusal of the instructions thus prayed the defendant by his counsel then and there excepted at the time." *Whittlesey*, Pr. 482. Such an exception entitles the party to have each refused instruction considered in this court. Whatever may be the ruling of other courts, we must follow the rule which has heretofore prevailed in this court, and we see no reason to depart from it if we were at liberty to do so. This form of saving exceptions is quite as well understood as if the objector had said he excepted to the action of the court in refusing to give said instructions, and each of them. There is nothing in *Harrison v. Bartlett*, 51 Mo. 170, or *City of St. Joseph v. Ensworth*, 65 Mo. 628, which conflicts with what has been said in this case.

One of the grounds assigned for a new trial was "because the court erred in refusing to give instructions Nos. 10 to 22 inclusive, asked by the defendant." This was sufficient.

Again, counsel for the respondent are in error in supposing that defendant waived its objection to the action of the court in overruling the demurrer to plaintiff's evidence by putting in its own evidence. When such a demurrer is made and overruled, and the defendant puts in its evidence, this court in reviewing the ruling will do so in the light of all of the evidence. If, upon all the evidence, no matter by whom or when offered,

there is a case to go to the jury, we do not reverse, though the demurrer to the plaintiff's evidence should have been given as the case stood when it was interposed. With these qualifications, the demurrer to the plaintiff's evidence will be considered here, though the defendant should offer evidence after it is overruled. *McPherson v. Railway Co.*, 97 Mo. 254, 10 S. W. Rep. 846. The motion for rehearing is overruled.

CARSON v. MEMPHIS & C. R. CO.

(Supreme Court of Tennessee. April 17, 1890.)

GARNISHMENT—EXEMPTION—FOREIGN JURISDICTION.

1. A railroad company garnished in another state for a debt owing by one of its brakemen residing in Tennessee is under no obligation to claim for him the benefit of Mill. & V. Code Tenn. § 2931, which exempts \$30 of the wages of every laboring man from seizure by garnishment or otherwise.

2. As exemption laws have no extraterritorial force, the brakeman himself could not have successfully set up the exemption law as a defense to the garnishment proceeding in the other state, and consequently the railroad company is not liable for its failure so to do.

Appeal from circuit court, Shelby county; L. H. ESTES, Judge.

Watson & Hirsh, for plaintiff. *Poston & Poston*, for defendant.

CALDWELL, J. This is an action of debt, tried below and here on an agreed state of facts. The plaintiff, Sam Carson, was in the service of the defendant, the Memphis & Charleston Railroad Company, as brakeman on one of its trains running from Memphis to Chattanooga, and back again through Mississippi and Alabama. He was a citizen of Tennessee, made his contract of employment here, and usually received his wages at Memphis, though no place of payment was named in the contract. While so employed the plaintiff, in the month of May, 1888, earned \$20.45, which, by the custom of the company, became due and payable on the 10th of June following. On the 28th of May, Prout, a citizen of Alabama, sued out an original attachment in that state against Carson, on the ground of non-residence, to collect a debt of \$21 contracted there; and on the same day a writ of garnishment issued on the attachment against the Memphis & Charleston Railroad Company to reach a sufficiency of Carson's wages to pay his debt to Prout. Proper publication was made for Carson, and by that means, or some other, he had actual notice of the pendency of the attachment and garnishment proceedings; but he failed to make defense. The garnishment process was served on the company's agent at Tusculumbia, and on the 11th of June, one day after Carson's wages became due and payable, the company answered that it owed him \$20.45 for wages due him as brakeman. Trial was duly had, and judgment rendered against the garnishee for the \$20.45. This judgment the company paid. Thereafter, on the 28th of June, 1888, Carson brought the present suit before a jus-

¹ Rev. St. Mo. 1879, § 8635.

tice of the peace, at Memphis, to recover the same wages from the railroad company. The fact of the proceedings in Alabama, and the payment of the judgment there, was interposed as a defense to the action. The justice of the peace, and after him the judge of the circuit court, adjudged the defense a good one, and rendered judgment for the defendant. Carson has appealed in error.

It is agreed that the attachment and garnishment proceedings were in strict conformity to the laws of Alabama. From this concession, it follows that the garnishee was completely discharged from all liability by payment of the garnishment judgment, unless there be something in the question of exemption to take the case out of the usual rule, and prevent that result. It is earnestly urged by Carson's counsel that this is an exceptional case, made so by the fact that, under the law of this state, (Mill. & V. Code, § 2931,) his wages to the extent of \$30 were exempt from seizure by garnishment or otherwise. The position, briefly stated, is that it was the duty of the garnishee to claim the exemption for Carson, and thereby prevent judgment against it on the garnishment process, and that, having failed to do this, the company's indebtedness to him remains unchanged and unsatisfied. To our mind, this position seems altogether untenable, for more reasons than one.

1. There was no peculiarity about this indebtedness to Carson,—no inherent quality or superadded responsibility to distinguish it from any other debt, so far as the company was concerned. It owed this debt as it owed any other debt. It had assumed no other obligation than that of payment of a particular sum at a specified time. The contention of Carson would make the obligation greatly more burdensome, by throwing upon the company the additional responsibility and expense of knowing, at its peril, that there was an exemption law in his favor, and of claiming the benefit of it for him. Such a requirement would be unjust and unreasonable. In *Davenport v. Swan*, 9 Humph. 186, the garnishee stated in his answer that a horse of a debtor in his possession was exempt from execution, whereupon he was discharged, because his answer, which was conclusive, did not contain a sufficient admission to charge him. That case does not stand in the way of the views just expressed. There the garnishee volunteered to set up the fact of exemption. He was not required to do it; nor was it decided or intimated that it was his duty to do so, or that, in case of failure to do so, he would have been liable to the garnishment debtor for the value of the horse. No such question was before the court. The question of the right or duty of a garnishee in this state to plead the exemption law of another state in favor of its creditor, the garnishment debtor, who resided in the other state, was expressly reserved by this court in the case of *Holland v. Railroad Co.*, 16 Lea, 418, 419.

2. Had the railroad company made the claim of exemption ever so formally for Carson, it would have availed him nothing. Exemption laws have no extraterritorial effect. Their operation is restricted to the states in which they are enacted. *Freem. Ex'ns*, § 209; *Thomp. Homest. & Ex.* § 20. Carson was a citizen of Tennessee, and in the courts of this state would have been entitled to the exemption, had he claimed it; but the suit was in Alabama, where even he could not have made the claim successfully. Then, of course, the garnishee could not have done so for him, and ought not to suffer for failing to make the effort. Non-residents of this state cannot avail themselves of the benefit of our exemption laws, either as to personalty, (*Hawkins v. Pearce*, 11 Humph. 45; *Lisenbee v. Holt*, 1 Sneed, 50;) or as to homestead, (*Prater v. Prater*, 8 Pickle, 83, 9 S. W. Rep. 361; *Emmett v. Emmett*, 14 Lea, 370.) Learned counsel for Carson relies on certain authorities which are yet to be noticed. Mr. Smyth, in his work on *Homestead and Exemption*, (section 562,) says: "A garnishee who pays over money which constitutes a part of the personalty exemption of the debtor does so at his own risk. He will be liable to the debtor (his creditor) for the full amount of the money he has paid. A person who has been brought into court as garnishee may answer that the property of the debtor in his hands, or his indebtedness to such debtor, is exempt by law from seizure on attachment or execution, and he is bound to bring the fact to the notice of the court; otherwise the judgment against such garnishee, and the satisfaction thereof, will not bar an action against him by the attaching debtor." For these propositions the author cites *Watkins v. Cason*, 46 Ga. 444, and *Pierce v. Railroad Co.*, 36 Wis. 288. We have not had access to the former of these cases, but the latter we find to be an authority for the text, and very similar to the one at bar; the difference being that the creditor of the garnishee in that case had no notice of the suit pleaded in bar. That case has attracted wide attention, and received very unfavorable comment from courts of last resort and text-writers. It cites no precedent to support it, and, so far as we know, has not itself been followed by any subsequent case. In note 2 to section 209 of his work on *Executions*, Mr. Freeman says it is "utterly indefensible." Mr. Thompson likewise assails it as unsound, and assigns his reasons at some length in section 866 of his work on *Homestead and Exemptions*. The cases of *Railroad Co. v. Thompson*, 1 Pac. Rep. 622, *Mooney v. Railway Co.*, 14 N. W. Rep. 343, and *Eichelburger v. Railway Co.*, 9 Amer. & Eng. R. Cas. 158, decided, respectively, by the court of last resort in Kansas, Iowa, and Ohio, are in conflict with the Wisconsin case, (the last one expressly denying its soundness,) and in harmony with our holding herein. Let the judgment be affirmed.

RHODES v. RHODES et al. •

(Supreme Court of Tennessee. April 15, 1890.)

RELIGIOUS SOCIETY — CHARITABLE BEQUEST — TRUST.

1. Mill. & V. Code Tenn. §§ 2006, 2007, which provides for the acquisition and holding of land for the purpose of public worship, by religious denominations, whether incorporated or not, do not empower an unincorporated local religious association to take a bequest of personal property.

2. Mill. & V. Code Tenn. § 2008, which provides for the conveyance by the proper church officers of land held for the purpose of public worship, does not enlarge the capacity of an unincorporated local religious association to take personal property under a will probated before the section was enacted.

3. A bequest of a \$1,000 bond to a designated church, "the interest to be applied to the church annually, or as fast as due," is a direct bequest to the church, and not to the executor, as trustee, to hold the bond, and pay over the interest.

4. The bequest, being to an unincorporated local religious association, and failing to define how the interest should be applied, would be void for indefiniteness, even though the executor had been expressly appointed trustee, and therefore it cannot be saved by the appointment of a trustee by a court of equity.¹

Appeal from chancery court, Fayette county; HENRY J. LIVINGSTON, Chancellor.

H. C. Moorman, for complainant. H. B. Folk, for defendants.

LURTON, J. The will of Mrs. Ada Murphy was admitted to probate, December, 1881. The question for decision is as to the validity of two bequests contained in the following clause of her will: "I want a U. S. one thousand dollar bond given to New Castle Church, in Hardeman county, Tenn.; want it registered in Wm. Murphy's name, and the interest applied to the church annually, or as fast as due. I also want a one thousand dollar U. S. bond given to Mt. Moriah Church, Fayette county, Tennessee; want it registered in my name, and the interest applied to the church as fast as due." The churches thus designated as donees are unincorporated voluntary religious organizations, and under the well-settled rule are not capable of taking such a bequest. *Green v. Allen*, 5 Humph. 169; *Reeves v. Reeves*, 5 Lea, 644; *Daniel v. Fain*, Id. 324; *White v. Hale*, 2 Cold. 77. The testatrix is shown to have owned United States bonds, registered in her name. William Murphy, in whose name she directs that the bond given to New Castle Church shall be registered, was the deceased husband of the testatrix, and in his life-time had been a member of that congregation, while she had been a member of Mt. Moriah Church, to whom the other bond is given.

It has been earnestly argued that while these churches are not strictly corporations, yet they are *quasi* corporations, empowered

to take and hold real estate as legal entities, under sections 1508 and 1509 of the Code, and that this capacity to take and hold real estate constitutes them, in a limited or qualified sense, corporations with capacity to be the recipients of a bequest such as that contained in this will. To support this position, counsel rely upon the case of *Heiskell v. Chickasaw Lodge*, 3 Pickle, 685, 11 S. W. Rep. 825. The sections of the Code relied upon as giving capacity to these voluntary religious organizations to take this charitable bequest, read as follows: "Any religious denomination or society, whether incorporated or not, may take, by deed or otherwise, and hold, not exceeding five acres of land at one place, for purposes of public worship." Mill. & V. Code, § 2006. "All lands bought or otherwise acquired by any religious denomination or society shall be vested in a board of trustees or other persons designated by the members of such denomination or society, for the use and benefit thereof." Id. § 2007. By the act of 1883, c. 37, carried into the Code of Milliken & Vertree at section 2008, provision is made for the conveyance of land so held by such church officers as may, by the rules of discipline of such churches, be authorized to make such conveyance. This provision, however, being enacted after the probate of Mrs. Murphy's will, cannot enlarge in any way the capacity of these churches to take the bequests now in question. The charity must stand or fall as it was found to exist at the date of the death of the testator. *White v. Hale*, 2 Cold. 77; *Daniel v. Fain*, 5 Lea, 325.

The capacity to take and hold real estate conferred by the sections of the Code quoted, operates to confer upon such a voluntary religious society the corporate right of existing as a legal entity for the purpose of holding and conveying, as defined in the statute; and a devise of land for a church-site, to be conveyed when a church building should be erected thereon, has been sustained as valid. *Reeves v. Reeves*, Id. 644. But this does not constitute such local church a corporation, save in an extremely qualified sense. The power or capacity has been expressly limited to an authority to take land for the purpose of a church-site. Id. 644. Indeed, in the case last cited, this power was so narrowly construed as to prevent such a *quasi* corporation from taking a devise of a house and lot to be used as a church parsonage. This view would seem to be hardly sustainable, inasmuch as a parsonage, in connection with a church, might be well deemed to be within the power to take land "for purpose of religious worship." However this may be, there can be no doubt but that a statute conferring *quasi* corporate capacity, upon such an unincorporated body, to take land for purposes of public worship, cannot, by the most liberal construction, be so extended as to confer power to take personal property. The reason for conferring power to take the one kind of property may operate as strongly in favor of

¹ On the subject of certainty of beneficiaries as affecting charitable bequests, see *Trustees v. Guthrie*, (Va.) 10 S. E. Rep. 818, and note; *In re Fisher's Estate*, 8 N. Y. Supp. 10; *In re Fuller's Will*, (Wis.) 44 N. W. Rep. 804; *Dulany v. Middleton*, (Md.) 19 Atl. Rep. 148.

the grant of power to take another sort of property; but such reasons should be addressed to the legislative authority, and not to the judiciary, whose duty is limited to the construction of the law, as enacted by the legislative department of government. That this capacity to take land does not include capacity to take a bequest of personalty was expressly decided, and a bequest of a library to such an unincorporated religious body was held void. *Reeves v. Reeves*, 5 Lea, 644. The case of *Helskell v. Chickasaw Lodge* is not in conflict with *Reeves v. Reeves*. Subordinate lodges of Odd-Fellows were by the act of 1847 empowered to take both realty and personalty, not exceeding \$10,000 in value. We held that, while this power did not constitute them corporations, it did clothe them with the qualified power of taking property as if a corporation, for any purpose germane to the objects of their existence. *Id.*, 3 Pickle, 685, 11 S. W. Rep. 825.

It is next insisted that, by construction, the executor is constituted a trustee to take and hold these bonds, and pay over the interest to these churches. The rule is well settled that if the devise be to a trustee, to be managed and controlled by him for a definite and lawful charitable use, the gift will be valid, though there be no person in being capable of suing for the enforcement of the trust. *Dickson v. Montgomery*, 1 Swan, 366; *Cobb v. Denton*, 6 Baxt. 235. We are of opinion that under no rule of construction can this bequest be held to constitute the executor a trustee to hold these bonds, and collect and pay over the interest to these churches. The bequest is direct to the churches, and not to the executor in trust for them. Owning registered bonds, her purpose was that the bonds given should be held by the churches, and the interest only used by them.

But it is insisted that a court of equity will not suffer a valid trust to fail for the want of a trustee, and that this trust should be saved by an appointment now made. This is not such a definite trust as could be executed by and through the chancery court. Such a trust would fail if the executor had been expressly appointed and named as trustee, for the reason that the direction as to the application and use of the income is too vague and indefinite. The executor would discharge his duty when he paid over the interest to the officers or members of this church. No direction is given by which he may see to its application and administration. Whether it should be applied to charity, to the employment of a minister, to the erection or maintenance of the church building, or be distributed among the members of the church, would depend upon the will of the church members when received. Having no corporate capacity, there would be no responsibility, and there could be no supervision of the use of the charity by the trustee, or by the chancery

court. Capacity in the church to take and administer the annual interest upon this bequest, would imply capacity to take and hold and administer the principal itself. When the charity is so indefinite, and the beneficiary is incapable of taking, the bequest must fail, although the fund be given to a trustee. In the *Reeves Case* a similar question arose. By the third clause of the will there construed, certain shares of stock were given by the testator to be held by his wife, "as agent for the Christian Church of the United States of America," with directions that she should pay over the proceeds or income "to an authorized trustee to be appointed by said church, and my direction and request to said trustee and church as aforesaid is that such funds be used in a manner best to promote the general interest of said church." The church thus made the beneficiary being an unincorporated body, this bequest, though made to a trustee for its use, was held void, because indefinite, and therefore incapable of supervision by the trustee or the chancery court. 5 Lea, 650, 651. In the case of *Dickson v. Montgomery* the devise was to the treasurer of Clark and Erskine College, and his successors in office, in trust, one part of the interest for the endowment of the college, and the remainder for certain definite religious uses, under the direction of the "Associate Reformed Synod of the South." These bequests were saved, because both the college and the synod were incorporated bodies. 1 Swan, 348. In *Cobb v. Denton* there was a devise of lands for the benefit of Friendship Church, an unincorporated religious association. The devise was held valid because the executors were expressly required to take and hold the land in trust to apply the rents in the employment and payment "of a competent minister for said church." The object of the charity being expressly defined, and the executors being constituted trustees to hold the property in trust for this specific object, the devise was held to be good. In the case of *State v. Smith*, when the will of Bolton was construed, a devise to the county judge of Shelby county in trust, the interest to be applied to the education of the poor white children of the first district of that county, was sustained because the education of the poor children of a particular district was a definite charitable object, and as such capable of being administered by the trustee, and supervised by the chancery court. 16 Lea, 662. A bequest to an unincorporated religious local association, without defining how such bequest is to be applied, would not be saved, even if to a trustee, the income to be paid over to such church. Such a charity is too indefinite, and, the beneficiary being incapable of suing, the bequest must fail. Under the well-settled rule as repeatedly announced by this court, we are reluctantly constrained to affirm the decree of the chancellor holding these bequests void.

COCKRUM v. WILLIAMSON.

(Supreme Court of Arkansas. April 12, 1890.)

TRESPASS—JUSTICE'S JURISDICTION—OPENING ROAD.

1. A road overseer who removes a fence on plaintiff's land in pursuance of a valid order of the county court opening a road across it is not liable for injury occasioned by stock entering plaintiff's premises thereby.

2. If the order under which the overseer acted is void, the entry constitutes a trespass on realty, of which a justice has no jurisdiction.

Appeal from circuit court, Baxter county; R. H. POWELL, Judge.

Action by A. T. Cockrum against Jasper Williamson, a road overseer, for removing a fence around land claimed by plaintiff, in consequence of which it was entered by stock, which destroyed plaintiff's cotton. The evidence on the part of defendant tended to establish that defendant, at the time of the breaking of plaintiff's fence, was road-overseer, and that the road composing his road-district had been changed by order of the county court, and so located as to cross the plaintiff's premises at the place where the fence was broken, and that in breaking the fence he was opening a public road at the place designated in the order of the county court. The court refused to give the following instruction requested by defendant: "The jury are instructed that, if they find from the evidence that the county court of Baxter county had made an order establishing a public highway through the lands of the plaintiff, and that the defendant was road overseer of the district of which said road constituted a part, and that, in doing the acts for which the plaintiff seeks to recover damages, he was opening and working said road at the place where the same had been located by said order of said court, they will find for the defendant." Verdict for plaintiff; and from the judgment thereon, and an order overruling his motion for a new trial, defendant appeals.

Horton & Horton, for appellant.

PER CURIAM. If the order of the county court opening the road was valid and binding upon the land-owner, as the plaintiff seems to concede, then the road overseer, who entered upon the land in pursuance of the order, had authority to remove the fence where it obstructed the highway without becoming responsible for injury done to the plaintiff's personal property by stock entering the premises.

If the order was void, the entry of the overseer was a trespass on realty, and the justice had no jurisdiction to try the cause.

In neither event could the plaintiff recover. Reverse the judgment.

WEED et al. v. DYER et al.

(Supreme Court of Arkansas. April 19, 1890.)

CONTRACT—ESTOPPEL—WARRANTY.

1. Where a contract for publishing a book fixes its cost at \$1.89 per page, each page to contain 42

lines, consent by the author to a change of 80 lines to the page, after being informed by the publishers that it would not increase the cost, does not estop him from resisting an increased demand by the publishers on account of the change.

2. A contract for printing and binding books implies a warranty that they will be merchantable when delivered.

3. An acceptance of the books with knowledge of their inferior quality is not a waiver of the right to recoup for the defect in an action for the contract price, but it is a circumstance to be weighed by the jury in determining whether there was in fact a breach of warranty.

4. Where the author has approved a statement of the account delivered to him by the publisher, subject to future examination and correction, his acceptance, several weeks later, of a draft in payment of the account, implies a promise to pay as upon an account stated, which can be corrected only for fraud or mistake.

Appeal from circuit court, Yell county; G. S. CUNNINGHAM, Judge.

Action by Weed, Parsons & Co. against A. J. Dyer and John Hallum on an acceptance for \$800 given in part payment for publishing the Biographical and Pictorial History of Arkansas. Their joint answer admitted the acceptance of the draft, but set up failure of plaintiffs to comply with their contract, and overcharge for work done. Plaintiffs introduced the draft, certificate of protest, and statement of account, showing \$1,842.66 due, which had been rendered Hallum, and he had executed his note for \$242.66, the excess over \$1,600 assumed by Dyer, and indorsed the account as follows: "Dr. Dyer: This account is correct. JNO. HALLUM." Plaintiffs also introduced the written contract of August 31, 1887, which, omitting the caption, was as follows: "As per the following specifications, to-wit: One thousand copies, composition and electrotyping 450 pages, small plea type, corresponding in size to the specimen hereto attached, marked 'Exhibit A,' as a part of this contract, but it is distinctly understood and agreed that the pages are to contain each forty-two lines, being six more lines than the specimen page contains; and it is further understood and agreed that said work is to be printed on 60-pound, S. & C. tinted paper, and folded ready to bind, at \$1.89 per page, \$850.50; each volume to be bound in full law sheep at 40 cts. per volume, \$400; boxes for plates, 450 pages, \$10. And it is further understood and agreed that for every eight pages additional the sum of \$14.12 shall be added, and for every eight pages less than the estimated 450 pages the sum of \$14.12 shall be deducted. * * * Party of the first part hereby agrees to pay the parties of the second part as follows: On the delivery of said work at their place of business in the city of Albany, N. Y., boxed ready for shipment as party of first part may direct, one-half in two and one-half in four months after delivery of said work, with six per cent. interest from date of delivery of the work; the party of second part to draw two several drafts on party of first part, payable at two and four months after date, to be accepted and paid by party of first part, the amount of the drafts to be determined by the work done

by parties of second part as per specifications. * * * And it is understood and agreed that the printing of the electrotype portraits and illustrations, not exceeding 100, is to be arranged and agreed by the parties of the second part and Jno. Hallum, as the agent of said Dyer, and to be paid for as extra and additional to the work specified above, and that pay for this extra work is to be included in the two drafts above provided for, and that the liability of Andrew J. Dyer, party of the first part, in no event is to exceed \$1,600. [Signed] A. J. DYER." Hallum testified that the draft sued on was accepted by Dyer under the written contract, and that plaintiffs had not complied with same; that the book was printed with 39 instead of 42 lines per page, entailing an extra cost of \$81.27 for printing and \$21.50 for extra plates; that printing portraits, seventy-five in number, left open in the contract, was agreed upon at the cost of necessary paper and press-work, and that \$50 would have been ample pay therefor, whereas plaintiffs had charged \$200, and that plaintiffs owed him \$29.82 on express charges; that his "design was to have the work executed by plaintiffs first-class in every particular;" that while at Albany several weeks, correcting proof, he objected to the 39 instead of 42 lines per page, but was told the change would not increase the amount of composition; that he received 20 volumes of the work by October 1, 1887, and the remainder was bound and shipped "green" between the 1st and the 13th of October, whereby the whole edition, or the 600 volumes examined by him, was damaged \$1.50 per volume; that he received a letter from plaintiffs dated October 13, 1887, inclosing the two drafts for acceptance, and stating that all books had been shipped; that they arrived about November 15, 1887; that he did not notify plaintiffs of the defective binding for fear they would transfer the draft to innocent parties; that 19 volumes were ruined in shipping; that he wrote plaintiffs as to 2 books returned him which had fallen apart, and they answered, October 24, 1887, offering to make good all such defects; that he signed the account as correct, and the note, without examination, and when sick, reserving right of correction if wrong, and that when Dyer signed drafts 980 volumes had not been received; that the portraits were printed on separate sheets at his request, and the whole work was on extra fine paper. The court refused the following instructions asked by plaintiffs, and they excepted, viz.: "(1) If the jury believe Hallum was the real party in interest, and that Dyer was concerned in the matter only for the purpose of securing the price of the books; and if you further believe Hallum was at Albany, N. Y., and examined the proofs, and by his silence, or otherwise, consented to thirty-nine instead of forty-two lines to the page,—then he waived that part of the written contract, and is not entitled to recover any damages on account of the books having been published with a less number of lines to the page. (2)

If you find there was any defect in the binding of the books, and that the defect was of such a character that ordinary prudence and examination would have discovered it, and defendants accepted the books and used or sold them, or part of them, without notifying plaintiffs, or offering to return them, so that plaintiffs could comply with the contract, then you will find for plaintiffs in the full sum sued for. (3) If the jury find that, when Hallum was at Albany, N. Y., plaintiffs delivered him a statement of the account, showing an extra charge for printing additional pages and portraits, and made no objection to the claim, he is now estopped to deny the account." The court then gave on its own motion a modified instruction, by striking out all after the word "claim" in the one last above, and substituting the words, "the law presumes that the account was correct, but presumption may be removed by evidence." The court then gave two instructions, at request of defendant, to the effect that if they found the work was not done according to contract, and defendants were damaged by reason of its defective execution, they would credit defendants with the difference of the work as contracted for and as delivered. To the giving of all of which, exceptions were saved. There was verdict and judgment for plaintiffs for \$75 and costs. They moved for a new trial on the grounds that "the court erred in instructing the jury on the law of the case," and because the verdict of the jury was contrary to the law and evidence in the case," which being overruled, and exceptions saved, an appeal was taken to this court.

Marshall & Coffman, for appellants. *John Hallum*, for appellees.

HEMINGWAY, J. The court declined to give two instructions asked on behalf of the appellants, and gave one of its own motion. Its action in each particular is relied upon as ground for reversal.

1. It may be that the first of the instructions refused correctly stated the law on a state of case to which it was applicable; but, as the appellee was not seeking to reduce the price to be paid, and only resisted the attempt of appellants to increase such price on account of a change in the contract, it was not a proper instruction to be given in this case. Although Hallum knew and consented to the change, he was informed by appellants, as he says, that it would not increase the cost of the book. He is, therefore, not estopped by such knowledge to decline to pay the increase claimed.

2. The second of the instructions refused presents a question which has not been expressly adjudicated by this court. In *Plant v. Condit*, 22 Ark. 454, the court ruled that for breach of warranty of soundness the vendee may make his election to rescind the contract or keep the property, and, when sued for the price, set up the false warranty by way of recoupment. Mr. Benjamin declares it to be the general rule, and it has

been for a long time approved by the supreme court of the United States. *Benj. Sales*, § 893; *Withers v. Green*, 9 How. 226. But, as he states the rule, the vendee is required to give notice to the seller only when he rejects the goods and elects to rescind the purchase, and the notice is regarded as the legal equivalent of a return of the goods; and the buyer may insist on his defense without returning, or offering to return, the goods, and without notice to the seller. *Benj. Sales*, § 899. Acceptance of the goods when the buyer knows that their quality is inferior to that warranted implies an agreement to take them notwithstanding the defect, and waives the right to reject them, but does not waive the right to a reduction when sued for the price. *Id.* § 901. In the case of *Wheat v. Dotson*, 12 Ark. 699, this court, in discussing the right of recoupment in a similar case, said that it did not rest on the ground that the contract had been rescinded, and that a return, or an offer to return, the property, was not a prerequisite to the admission of the defense. It does not refer to the necessity for notice; but, as notice is the equivalent of a return, it must have been in the mind of the court as not a prerequisite to the admission of the defense. The notice required is a notice of rejection, and, in the nature of things, would be inapplicable where the goods are accepted; and it is only in the latter class of cases that recoupment is sought. In most cases the buyer, when he discovers that the quality of the goods is inferior to that warranted, would feel impelled by a sense of right and fair dealing to notify the seller of the fact, (1) that he might satisfy himself of its existence; (2) that he might cure it. But in many cases this course might be found impracticable or even impossible; and, while the failure might be a circumstance for the jury to consider in ascertaining if there was in fact a breach of warranty, it could not defeat the recoupment if the breach was proved. How far such failure should weigh with a jury would vary with the circumstances of each case, and in all cases be a matter for their determination. *Benj. Sales*, § 900; *Lewis v. Rountree*, 78 N. C. 323; *Brantley v. Thomas*, 22 Tex. 270; *Flint v. Lyon*, 4 Cal. 17.

It seems to have been conceded in the court below that the contract implied a warranty of the quality of the books, but it is contended here that no such warranty was implied. We think the concession was right, and that the contention cannot be sustained. Whether the relation of the parties was that of vendor and vendee, or employer and contractor, there is an implied warranty of quality. The rule *caveat emptor* had its origin in the fact that the buyer enjoyed the opportunity of inspection, and applies only to sales of specific chattels in existence; for in no other cases is the opportunity afforded. Where a manufacturer contracts to make and sell goods, or a contractor to perform and deliver work, the opportunity of inspection is not afforded the vendee or employer; and the law implies a

warranty that the article shall be merchantable, and reasonably fit for the purpose for which it was intended. *Manufacturing Co. v. Williams*, 48 Ark. 325, 3 S. W. Rep. 517; 2 Suth. Dam. 479-482.

When the appellants delivered to Hallum a statement of his account, he approved it, but says that he did so with the understanding that it was subject to his future examination and correction. It then became his duty to examine the statement, and notify errors within a reasonable time; and his failure to do so would be deemed a ratification of his prior approval. He indicated no errors, but several weeks afterwards the instrument in suit was given, and this implied a ratification. The indorsement of his approval after ratification implies a promise to pay the amount as upon an account stated, and an account stated can only be corrected for fraud or mistake. *Lawrence v. Ellsworth*, 41 Ark. 502; *Oil Co. v. Van Etten*, 107 U. S. 325, 1 Sup. Ct. Rep. 178; *Moscowitz v. Lemp*, 12 S. W. Rep. 781. The instruction given permitted the defendant to contest the validity of the various items of the account for any reason that would have been availing if there had been no statement of it, and in this there is prejudicial error. If there was an account stated without fraud or mistake, the appellant is entitled to the amount thereof, subject to deduction for any damage Hallum may have sustained by breach of contract as to the quality of the books.

Reverse, and remand for new trial.

LOTH *et al.* v. MOTHNER *et al.*

(Supreme Court of Arkansas. April 5, 1890.)

PAYMENT—NEGOTIABLE PAPER—ORDER.

Where the drawers of an order had funds in the hands of the drawee on its presentation, a waiver by the payees of a cash payment, and an acceptance of a bill of exchange instead, extinguishes the debt, though the exchange proves worthless.¹

Appeal from circuit court, Miller county; C. E. MITCHELL, Judge.

Action by Loth & Son against Mothner & Co. Judgment for defendants, and plaintiffs appeal.

Arnold & Cook, for appellants.

PER CURIAM. The appellees gave appellants a written order on their banker at Texarkana to pay an account. The order was presented for payment at a time when the bank had money of the drawer for its payment. The payees waived their right to demand cash, and for their own convenience

¹ As a general rule, the acceptance of a negotiable instrument for a precedent indebtedness operates as a conditional payment only, and, unless it is afterwards paid, an agreement to receive it as absolute payment must appear. See *Comptoir D'Escompte De Paris v. Dresbach*, (Cal.) 20 Pac. Rep. 28, and note; *Good v. Singleton*, (Miss.) 40 N. W. Rep. 359, and note; *Bank v. Bornman*, (Ill.) 10 N. E. Rep. 552, and note; *Owen v. Hall*, (Md.) 16 Atl. Rep. 876, and note; *Holmes v. Briggs*, (Pa.) 18 Atl. Rep. 923, and note.

asked payment in St. Louis exchange, which was given them. Having elected the mode of payment, they cannot now repudiate it because the exchange proved worthless, but the appellees' debt is satisfied. Byles, Bills, 389; Smith v. Ferrand, 7 Barn. & C. 19; 3 Band. Com. Paper, § 1551. Judgment affirmed.

MALIN et al. v. RALFE et al.

(Supreme Court of Arkansas. March 29, 1890.)

HUSBAND AND WIFE—SEPARATE ESTATE—DEED.

The granting clause of a deed began: "I, L. H., for and in consideration of * * *, have granted * * *, and by these presents do grant, * * * unto said B., * * * the lands and tenements following, to-wit,"—describing them. The deed concluded: "Now, I, M. H., wife of the said L. H., for the consideration above set forth, do hereby assign, release, relinquish, and quitclaim all my right, title, interest, and ownership to the said B. * * * Therefore we, L. H. and M. H., as man and wife, have this * * * day * * * set our hands and seals." The certificate of acknowledgment was to the effect that both parties grantor acknowledged that they had signed the same for the uses, purposes, and consideration therein set forth. Dower was not mentioned in the deed or acknowledgment. *Held*, that the words used by M. H. referred to the lands described in the deed, and were sufficient to and did convey her separate estate therein.

Appeal from circuit court, Cross county; J. E. RIDDICK, Judge.

Block & Bridges and Sanders & Watkins, for appellants. *N. W. Norton*, for appellees.

HUGHES, J. This is a suit in ejectment, in which the only question to be determined here is as to the sufficiency of a deed in trust executed by L. T. Head and Mollie A. Head, his wife, who was the mother of all the appellees save Ralfe, who was their tenant, to John B. Bruner, as trustee of the appellants, which deed formed a part of the appellants' claim of title, a copy of which was exhibited with their complaint. The deed bore date the 15th day of March, 1884, and was made to secure the payment of a debt which L. T. Head owed appellants, and authorized the trustee, Bruner, upon default, to sell and convey the property, which he executed by selling and conveying the property to the appellants, who were the purchasers at the sale. Possession was admitted by the appellees, and appellants' rights to possession denied. The exceptions to this deed were, in effect, that Mollie Head joined in the deed only for the purpose of relinquishing dower to such property therein described as belonged to her husband; that she did not join in the granting clause of the deed; and that as to her separate property described therein said deed was void; that it contained no words sufficient to pass her title; and that the clause in said deed, in reference to Mollie Head, contained no description of property, or reference to property elsewhere described. The exceptions were sustained, and appellants excepted. A trial was had before

the court sitting as a jury, and appellants offered to read in evidence said deed of trust, which was excluded by the court upon the trial, to which appellants excepted. Judgment was rendered for appellees, and an appeal was taken by appellants. The question to be determined is presented by the record, and there is no bill of exceptions. After reciting the premises, the granting clause in the deed by the husband begins: "Now, therefore, I, L. T. Head, for and in consideration of the premises and the sum of one dollar to me paid by John Bruner, as trustee, have granted, bargained, and sold, and by these presents do grant, bargain, sell, and convey unto said John B. Bruner and his assigns, as trustee, the lands and tenements following, to-wit." Then follows a description of the town lots, and the provisions for sale and conveyance by the trustee of the property, upon default of payment of the amount secured by the deed of trust; after which the deed concludes in these words: "Now, I, Mollie Head, wife of the said L. T. Head, for the consideration above set forth, do hereby assign, release, relinquish, and quitclaim all my right, title, interest, and ownership to the said John B. Bruner, as trustee, conditioned as aforesaid. Therefore we, L. T. Head and Mollie Head, as man and wife, have this the 15th day of March set our hands and seals." The certificate of acknowledgment is: "Come the parties grantor, and both acknowledged that they had signed the same for the uses, purposes, and considerations therein set forth, and desired me to so certify." Dower is not mentioned in the deed, or certificate of acknowledgment. Did the deed operate to convey the estate or interest of Mrs. Head in the lots described therein. Since the adoption of the constitution of 1874, a married woman can convey her separate property as if she were single. *Bryan v. Winburn*, 43 Ark. 28; *Stone v. Stone*, Id. 160. The law will construe a deed most strongly against the grantor, and that part of a deed will be construed to precede which ought to take precedence, no matter in what part of the instrument it may be found. *Doe v. Porter*, 3 Ark. 18; *Jackson v. Myers*, 3 Johns. 388. A deed is to be so construed as, if possible, to give effect to it, as a conveyance; hence it will be allowed to have this effect, although it may lack formal words, if it contains sufficient words to convey the estate. 1 Devl. Deeds, § 212. If a married woman joins her husband in a conveyance as grantor, her estate passes. *Johnson v. Parker*, 51 Ark. 420, 11 S. W. Rep. 681. We are of the opinion that the words used by Mollie A. Head in the trust-deed were sufficient to convey her estate in, and that they referred to, the property elsewhere described in the deed, and that the deed operated to convey her estate therein to the trustee, John B. Bruner. There was error in the judgment of the court below in sustaining the exceptions to the same, and in excluding it as evidence

upon the trial. The judgment is reversed, and the cause is remanded for further proceedings.

HEARN v. COY.

(Supreme Court of Arkansas. April 5, 1890.)

MALICIOUS PROSECUTION—INSTRUCTIONS.

In an action for malicious prosecution, where the court has charged that "legal malice is made out by showing that the proceeding was instituted from any improper or wrongful motive," and that the term "malice" is not to be considered "in the sense of spite or hatred against the individual, but as denoting that the party is actuated by improper and wrongful motives," plaintiff is not prejudiced by a refusal of the court to charge that "'malice,' in its legal sense, is any wrong act, done intentionally, without legal justification or excuse. It is not what is called 'malice' in its common acceptation, as ill will against a person."

Appeal from circuit court, Pulaski county; J. W. MARTIN, Judge.

Action by Mollie Hearn against L. W. Coy for malicious prosecution. Plaintiff was a servant in defendant's family. Several minor articles of wearing apparel being missed, suspicion fell on plaintiff, her trunk was searched, and the articles found. Shortly afterwards defendant missed some silverware, and, believing plaintiff to be guilty, he went to the chief of police, made a full statement of all the facts, and placed the matter in his hands to investigate as a public officer. At the request of the chief of police, defendant swore out a warrant against plaintiff.

At plaintiff's request, the court instructed the jury as follows: "If the jury find that L. W. Coy, the defendant, made the affidavit before J. G. Yeiser, justice of the peace, accusing the plaintiff of grand larceny, and caused said justice to issue a warrant, by virtue of which she was arrested, imprisoned, and brought before him, when on a subsequent day said charge was dismissed by said justice for want of prosecution, and she was discharged and acquitted, such discharge and acquittal are *prima facie* evidence of the want of probable cause sufficient to throw on the defendant the burden of proving the contrary, and that it is competent for the jury to infer malice from the want of probable cause, as the same is defined in the following instruction, unless such inference is repelled by the facts of the case."

Plaintiff also requested the court to charge as follows: "'Malice,' in its legal sense, is any wrongful act done intentionally, without legal justification or excuse. It is not what is called 'malice' in its common acceptation, as ill will against a person." This instruction the court refused, but of its own motion gave the following instructions: "Legal malice is made out by showing that the proceeding was instituted from any improper or wrongful motive, and it is not essential that actual malevolence or corrupt design be shown. Any prosecution carried on wantonly, and for no purpose of justice, is malicious. The term 'malice,' in this form of action, is not to be considered in the sense of spite or

hatred against an individual, but as denoting that the party is actuated by improper and wrongful motives." There was a verdict in defendant's favor, and from an order overruling her motion for a new trial plaintiff appeals.

Lea & Trimble and T. J. Oliphint, for appellant. *Eben W. Kimball*, for appellee.

PER CURIAM. The only question presented by the abstract of the appellant is the refusal of the court to give an instruction defining "malice." But the court gave an instruction upon the subject embracing all the appellant desired the court to charge. She was not prejudiced by the refusal. Affirm.

KELLY et al. v. SALINGER et al.

(Supreme Court of Arkansas. April 5, 1890.)

TAXES—FORFEITURE—DESCRIPTION.

A forfeiture to the state, for non-payment of taxes, of a particular quarter section of land, will not divest title to the land, when the taxes on it have been duly paid under the description, "blocks 73 and 74, town of B," that being sufficient to identify it.

Appeal from circuit court, Monroe county; M. T. SANDERS, Judge.

Ejectment by Bridget Kelly and others against L. Salinger and others. Defendants filed an equitable answer, to which plaintiffs demurred. The demurrer being overruled, judgment was rendered for defendants, and plaintiffs appeal. It appears from the record in this case that W. S. Dunlop purchased from the state of Arkansas the E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 10, 8 N., 2 W., containing 80 acres of land, forfeited to the state for the taxes of 1876, by deed of September 1, 1879; that he sold an undivided half of the same to A. McMurtry by deed of September 4, 1879; and that Dunlop and McMurtry, by their deed of 1st of January, 1884, sold to appellant Bridget Kelly the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section 10. It appears from the equitable defense and counter-claim that at the bringing of this suit appellees were in possession of that part of said 40 acres described in the complaint, and they claim that their part of said 40 acres did not pass under the forfeiture to the state, because Gunn & Black had paid the taxes thereon for said year 1876, under the description of blocks 73 and 74 of the town of Brinkley.

John C. Palmer, for appellants. *J. N. Cypert*, for appellees.

PER CURIAM. The description of the land in controversy as "blocks 73 and 74 of the town of Brinkley," it appears, is sufficient to identify it. The payment of the taxes charged against it by that description, for the year 1876, rendered the subsequent sale or forfeitures of it for the taxes of the same year illegal and void. *Hershey v. Thompson*, 50 Ark. 484, 489, 8 S. W. Rep. 689.

Judgment affirmed.

MILLER v. REYNOLDS et al.

(Supreme Court of Arkansas. April 5, 1890.)

Tax-Title—CONFIRMATION OF SALE—DONATION.

1. A donation deed from the state, executed after the land had been sold for taxes under a decree condemning the land under the overdue-tax law, (Laws Ark. 1881,) conveys no title to the donee, as the state's interest has already been divested by the sale.

2. Where land is sold for taxes, and a decree confirming the sale is made by a court not legally constituted, but afterwards a deed is executed in pursuance of the sale by order of the proper court, and an order for the possession entered, it amounts to a confirmation of the sale, and validates the title.

Appeal from circuit court, Chicot county; C. D. Wood, Judge.

Action by M. J. Miller against D. H. Reynolds and another to remove a cloud on her title to certain land. Plaintiff alleged that she was the owner of the land, and set out her chain of title, which consisted of a donation deed from the state to Phillip McDermott, and a deed from McDermott to plaintiff. Defendant Reynolds claimed title by virtue of a tax-deed executed to him by a commissioner under a decree of court in a proceeding by the county to have the land sold for taxes under the overdue-tax act of 1881. The confirmation of the sale for taxes was made by a special judge at July term, 1884, while the regular circuit judge was engaged in holding the regular term of Bradley county circuit court; but afterwards the commissioners' deed was confirmed, and a writ of possession ordered, at a regular term of the court.

J. W. Dickinson, for appellant. D. H. Reynolds, for appellees.

PER CURIAM. The appellant was never the owner of the land in question. He took nothing by his donation deed, because when it was executed the state's only right to the land had been sold under a decree condemning the lands under the overdue-tax law. It is argued that a confirmation of the sale was made at a term of court not held in accordance with law, and is therefore void. Conceding the contention to be true, the appellant cannot take anything by it, if for no other reason than that at a subsequent regular term of the court a deed in pursuance of the sale was executed by order of the court, and an order for the possession of the land was entered. That was tantamount to a confirmation of the sale. *Livingston v. Cochran*, 38 Ark. 294. Affirm.

SMITH v. HUDSON et al.

(Supreme Court of Arkansas. April 26, 1890.)

EXECUTION SALE—BOND OF MARRIED WOMAN.

A statutory bond executed by a married woman, on purchasing land at an execution sale, under *Manuf. Dig.* §§ 3085, 3087, providing for the execution of such bonds, and giving them the effect of a judgment, on which execution may issue, is voidable on the ground of the obligor's coverture, at her election only.

Appeal from circuit court, Chicot county; C. D. Wood, Judge.

Ejectment by Benjamin H. Smith against Isaac B. Hudson and others, to recover a tract of land formerly owned by W. H. Todd, under whom both plaintiff and defendants claim title. Defendant Halliday, on May 14, 1878, recovered judgment against Todd, on which he caused an execution to be issued. The sheriff, under such execution, levied on the land in question, and it was sold. Eveline Bolivar, then a married woman, became the purchaser, on a credit of three months, and executed her statutory bond, with said Todd as surety. The bond not being paid at maturity, an execution was issued on the statutory judgment arising from the forfeiture of the bond, and levied on the land. At the sale under such execution defendant Halliday became the purchaser, and the sheriff executed a deed to him. Plaintiff claims the land by virtue of a subsequent sale under execution issued on another judgment against Todd, and contends that the sale to defendant Halliday, under execution on the statutory judgment against Mrs. Bolivar, was void, on the ground that a married woman could not execute a statutory bond on the purchase of land. Defendants' demurrer to the complaint was sustained, and plaintiff appeals. *Manuf. Dig.* § 3085, provides that every bond taken on the sale of property under execution shall be signed by the principal and sureties. Section 3087 provides that "all such bonds shall have the force and effect of a judgment, and on which an execution may issue."

M. M. & G. B. Rose and J. F. Robinson, for appellant. D. H. Reynolds, for appellees.

COCKRILL, C. J. In *Gardner v. Barnett*, 36 Ark. 479, it was ruled that the defense of coverture was personal to the *feme covert*, and could not be pleaded by another; and in that case, as well as in *Chollar v. Temple*, 39 Ark. 238, it was held that the defense must be made by the woman before judgment, in order to be availing to her. Both questions were practically decided in the previous case of *Norris v. State*, 22 Ark. 526, 527, when the court, through Judge FAIRCHILD, ruled that an execution which issued upon the statutory judgment arising by operation of law upon a forfeited delivery bond was not void by reason of the fact that the only surety on the bond was a married woman. While the statutory judgment is not *res adjudicata* like the judgment of a court, the effect of the ruling in the case last mentioned is that, when a married woman is a party to it, it is voidable at her election only. That case rules this. A surety is as essential to a statutory bond and judgment as a principal. If a married woman may give color of validity to a statutory bond as surety for another, she can do so by signing for her own benefit with another as her surety. Compare *Fowler v. Jacob*, 62 Md. 326, and *Walker v. Jessup*, 43 Ark. 163. It follows that the sale of Todd's interest in the lands in suit was divested by the sheriff's sale, and conveyance made under the execution upon the forfeited purchase

bond in which he was surety for Mrs. Bolivar, and that he had no interest to be acquired by the plaintiffs at their sale had under a subsequent judgment. The plaintiff must therefore fail in this action of ejectment. Affirm.

MANSFIELD et al. v. WILSON et al.

(Supreme Court of Arkansas. April 26, 1890.)

SALES—FALSE REPRESENTATIONS—CONFIRMATION.

Where a person buys goods under false representations as to his credit, a suit for the price and attachment levied on the goods by the seller, with knowledge of such false representations, is a confirmation of the sale.

Appeal from chancery court, Pulaski county; D. W. CARROLL, Chancellor.

Defendant G. W. Wilson, with a view, as he represented, of engaging in the drug business, for which purpose he claimed that he had abundant means, ordered of plaintiffs a bill of merchandise. The goods were shipped, but before he opened his doors to the public a number of creditors sued out attachments against him. Plaintiffs, learning of this, sued out an attachment. Afterwards, plaintiffs filed a bill in chancery asking a restoration of the property shipped by them on the ground that defendant Wilson had procured it through fraud. The other defendants, defendant Wilson's creditors, claimed that plaintiffs, in suing out the attachment, had confirmed their sale to Wilson, and could not recover the goods. The court sustained this defense, and plaintiffs appeal.

Caruth & Erb, for appellants. *T. J. Oliphant*, for appellees.

PER CURIAM. Bringing suit for the purchase price of the goods, and causing attachment to be levied thereon, with full knowledge of all the facts and circumstances now relied on as ground to rescind the contract, was an affirmation of the sale. *Shoe Co. v. Block*, 12 S. W. Rep. 1073. Affirm.

KNIGHT v. STATE.

(Court of Appeals of Texas. Feb. 8, 1890.)

UNLAWFUL CONVERSION OF MONEY—MISDEMEANOR—INSTRUCTIONS.

On indictment for conversion of \$150, defendant, who had, as constable, collected the money alleged to have been converted, testified that he had been robbed, and the evidence showed that he was found insensible on the road. He further testified that when he recovered consciousness all the money was gone, except \$7.15. It was shown that he converted this amount. *Held*, that the evidence justified an instruction as to a conversion of less than \$20, which is a misdemeanor.

Appeal from district court, Red River county; E. D. McCLELLAN, Judge.

Motion for rehearing.

This conviction was had under an indictment for unlawfully converting \$150. On appeal the judgment was affirmed without a written opinion. The proof for the state shows that the appellant was the constable of one of the justice precincts in Red River

county; that one S. E. Watson sued out a distress warrant against one Christian in the justice's court of that precinct, and obtained judgment and execution thereon; that the execution was levied by the defendant as constable; that defendant sold the property levied on, and received in payment therefor \$248.85; that he reported expenses against the money received by him of \$198.70, leaving in his hands the sum of \$50.15, of which sum he never paid any part to Watson. It was also shown that after he collected the proceeds of the sale he purchased watches to the amount of \$13.50. It was further shown that shortly after collecting some of the proceeds of the sale he was found in the road insensible, and that when he recovered consciousness he claimed to have been robbed.

Stims & Wright, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. The only point made and insisted upon in the motion for rehearing in this case is that fundamental error was committed by the court in that part of the charge to the jury which submitted as an issue in the case the misdemeanor phase; that is, the conversion by the defendant of money of the value of less than \$20. This part of the charge was specially excepted to at the trial, and it is insisted that, whether injurious or not to the defendant, yet, if it be erroneous, it will nevertheless require a reversal of the judgment. It is insisted that, "if the evidence shows any case against the appellant, it is for the conversion of money of the value of \$20 or over, and that nowhere in the entire record does anything else appear." The theory of the defendant was that he was robbed of all of Watson's money on hand after the payment of the expenses incident to the property and its sale. The state's effort was to show that defendant did not lose the money in that way. It was proved that after defendant had gotten possession of the money he bought two watches, one for \$10.25, and the other for \$3.25, making \$13.50. If this was Watson's money, and all of Watson's money which defendant used, then the misdemeanor phase of the case was called for by this testimony. But, again, defendant testified himself. He says, speaking of the robbery: "When I came to myself it [the money] was all gone except the silver, which was loose in my pocket, and \$7.15 of this money belonged to S. E. Watson." So, then, according to his own testimony, he still had after the robbery \$7.15 of Watson's money, which he converted, and never accounted for; and, if his testimony be true, then he converted less than \$20; and the charge of the court presenting the misdemeanor phase of the case was called for by the case as made by his own evidence, and, had the court failed to charge the law applicable to the case as made by defendant's evidence, the charge would, indeed, have been liable to objection by the defendant. We see no error in the matter complained of. On the contrary, it would have omitted to sub-

mit a legitimate, if not a material, issue, had the court failed to instruct in this particular. Motion for rehearing overruled.

SHANNON v. STATE.

(Court of Appeals of Texas. Jan. 11, 1890.)

WITNESS—CRIMINAL LAW—DEFENDANT.

A defendant who has been convicted of a felony is not incompetent to testify as a witness in his own behalf, under Code Crim. Proc. Tex. art. 730, subd. 5, which declares incompetent as witnesses all persons who have been convicted of a felony, unless the convict has been pardoned, as Laws 1889, p. 37, declares that "any defendant in a criminal action shall be entitled to testify in his own behalf therein." Following *Williams v. State*, 12 S. W. Rep. 1103.

Appeal from district court, Hill county; J. M. HALL, Judge.

Code Crim. Proc. Tex. art. 730, subd. 5, declares incompetent as witnesses all persons who have been convicted of a felony, unless the convict has been pardoned.

J. M. Johnson, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. On the trial below the appellant proposed to testify as a witness in his own behalf. Objection was made by the prosecution upon the ground that he was an ex-convict who had served a term in the penitentiary for crime, and had never been pardoned. This objection was sustained, and the ruling is the error mainly complained of on this appeal. The assistant attorney general confesses that the ruling is erroneous. By the provisions of the act of April 4, 1889, "any defendant in a criminal action shall be permitted to testify in his own behalf therein." Gen. Laws, 21st Leg. 37. This identical question came before us at the last Tyler term in the case of *Williams v. State*, 12 S. W. Rep. 1103, and we held, and still hold, that under that statute an unpardoned convict can testify in his own behalf in any criminal action against him. Judgment is reversed, and the cause remanded.

POWELL v. STATE.

(Court of Appeals of Texas. March 3, 1890.)

MURDER—INSTRUCTIONS—EVIDENCE.

1. On trial for murder, malice is correctly charged to be the "intentional doing of a wrongful act towards another, without legal excuse or justification."

2. Under the rule that in a prosecution for homicide the charge of the court should apply the doctrine of reasonable doubt, as between the different degrees involved in the case, an instruction that, in order to warrant a verdict of murder in the second degree, the jury must believe from the evidence, beyond a reasonable doubt, that defendant committed the homicide with implied malice, etc., sufficiently applies the doctrine as between murder in the second degree and manslaughter, in the absence of a request for a special instruction.

3. Where the court charges the doctrine of reasonable doubt generally, making it applicable to the whole case, an objection that it was not applied in the instructions on threats and self-defense is untenable.

4. The evidence showed that, preparatory to keeping house, the wife of deceased was staying at her mother's house, and that, as deceased came to get her, defendant, her brother, who was living with his mother, forbade deceased to enter the house, and on his repeating the warning, when deceased came out with his wife's trunk, the latter replied that it would take a better man than defendant to keep him out, whereupon defendant shot him twice in rapid succession, and immediately thereafter, in reply to a question, said he had shot deceased because the latter had previously threatened to kill him. The wife's testimony that deceased entertained ill feelings towards defendant, and had threatened to kill him, was corroborated by other witnesses, two of whom testified that deceased put his right hand to his hip pocket just before defendant shot, and that after his death an open pocket-knife was found in that pocket. Held, that a verdict of murder in the second degree was warranted.

Appeal from district court, Johnson county; J. M. HALL, Judge.

Indictment of W. E. Powell for the murder of John Howard.

Mrs. Bettie Howard, wife of deceased, testified for the state, in substance, that she was the sister of the defendant. The witness, with her infant child, went to her mother's house, where the defendant lived, about a week before the homicide. During that week she was visited three times by her husband, on neither of which occasions was the defendant at home. On the Friday preceding the fatal Sunday morning it was agreed between witness and her husband, in the presence of witness' mother, that deceased should go to Alvarado on Saturday, purchase supplies and furniture for housekeeping, and come for witness and the baby on Sunday. Witness did not know whether or not the defendant was aware of that arrangement, but he saw her packing her trunk on Saturday night. On Sunday morning deceased drove up to the front fence in a wagon, got out, and came into the house. Just before he entered the house the witness heard the defendant say to the deceased: "Howard, don't go in that house." Witness seized a bundle, which she took to the wagon, passing her husband going into the room as she went out. She immediately returned from the wagon, and on her way into the house passed her two brothers, the defendant and Walter Powell, and the deceased, who had her trunk in his hands. Deceased and defendant were quarreling. After passing the parties she heard defendant say: "Howard, didn't I tell you not to go into the house?" Deceased replied: "Yes; but it will take a better man than you to keep me out of it." Two shots were then fired in quick succession, and deceased fell. Witness ran to him, raised up his head, and asked defendant: "Willie, why did you do this?" He replied: "He threatened yesterday in Alvarado to kill me." Witness' back was to the parties when the shots were fired, and she could not say what, if anything, the deceased was doing when shot. On her cross-examination, the witness stated that she knew that her husband entertained hard feeling towards the defendant, and that on the Friday preceding his death he told her that

he intended to kill defendant. Mrs. Powell, witness' mother, witness' sister Mamie, and a Miss Anthony were in the sitting-room at the time of the killing. Miss Anthony, testifying for the state, corroborated Mrs. Howard as to the conversation between defendant and deceased which immediately preceded the shooting, but stated that she was in the room with her back to the door, and did not see the shots fired. Walter Powell testified for the state, substantially, that when deceased started into the house defendant said to him: "Howard, don't go in that house." Deceased, however, went in, and soon came out, bearing a trunk, when defendant said to him: "Howard, didn't I tell you not to go into that house?" Defendant replied: "Yes; but it will take a d—d sight better man than you to keep me out of it." Deceased then put the trunk down, and threw his right hand to his hip pocket, and defendant fired the fatal shots. Miss Mamie Powell, testifying for the defense, located herself in the room in a position to see the deceased, but not the defendant, at the moment of the fatal shooting. She stated the conversation between defendant and deceased as Walter Powell did, and corroborated Walter Powell in his statement that deceased threw his right hand to his hip pocket immediately before the fatal shots were fired. Other witnesses for the state testified to threats uttered against the life of defendant by the deceased, and it was proved by two witnesses that, after death, an open pocket-knife was found in the deceased's right hip pocket.

The charges of the court referred to in the opinion read as follows: "Manslaughter is voluntary homicide committed under the immediate influence of sudden passion arising from an adequate cause, but neither justified nor excused by law. By the expression, 'under the immediate influence of sudden passion,' is meant that the passion must arise at the time of the commission of the offense, and that the passion is not the result of a former provocation. The act must be directly caused by the passion arising out of the provocation. It is not enough that the mind is merely agitated by passion arising from some other provocation. The passion intended is either of the emotions of the mind known as anger, rage, sudden resentment, or terror sufficient to render the mind incapable of cool reflection. By the expression 'adequate cause,' as used herein, is meant such as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection. Insulting words or gestures are not of themselves sufficient to reduce an unlawful killing from the degree of murder to the grade of manslaughter. * * * That you may understand the difference between murder of the second degree and manslaughter, you are further instructed that when an unlawful killing takes place under the immediate influence of sudden passion, and there is no evidence which

tends to excuse or justify the killing, then, to determine whether the offense is murder of the second degree or manslaughter, the true test is, was there adequate cause to produce such sudden passion? And if there was adequate cause for such sudden passion the homicide, if unjustifiable, would be manslaughter; but if there was not such adequate cause, and if the killing be unjustifiable, the offense will be murder of the second degree. And in this connection you are instructed that while insulting words or gestures are not sufficient of themselves to produce an adequate cause, and reduce an unlawful killing to manslaughter, yet, when taken together, they may be sufficient; where either or both is taken in connection with any other exciting cause or condition, it may be sufficient to produce such adequate cause, and may be sufficient to reduce an unlawful killing from murder of the second degree to manslaughter; but in passing upon the question of whether the defendant is guilty of manslaughter you will consider this paragraph of the charge in connection with the entire charge, so as to decide the case before you. The court further instructs you that if you believe from the evidence beyond a reasonable doubt that the defendant, in the county of Johnson, state of Texas, about the time alleged in the indictment, with a pistol, shot and killed John Howard, and that such killing was not justifiable under the law of self-defense as hereafter explained, and shall believe from the evidence that, at the time the defendant shot and killed John Howard, said Howard was quarreling with and abusing the defendant, or that the deceased had, over the protest of defendant, entered the house of defendant's mother, and that deceased had previously threatened the life of the defendant, and that the defendant knew of such threats, or that the deceased was a larger and stronger man than the defendant; and if you further believe from the evidence that the language of said Howard at the time of the shooting, if any, taken in connection with all the facts in evidence, was of such nature and character as to produce an adequate cause sufficient to render the mind of the defendant incapable of cool reflection, and that acting under the immediate influence of such sudden passion, if any, the defendant shot and killed said John Howard, —then you will find the defendant guilty of manslaughter, and you will assess his punishment at confinement in the penitentiary for any time not less than two years, and not more than five years, and so say by your verdict. But, on the other hand, if you believe from the evidence that the defendant shot and killed said Howard, but that prior to said killing the said Howard had threatened to take the life of the defendant, or to do the defendant serious bodily harm, and that the defendant knew of such threats, if any, and that, at the time said Howard was shot, he, by some act then done or words spoken, coupled with his acts, if any, showed

an immediate intention to carry such threats, if any, into execution; and if from all the facts known to the defendant he had reason to believe, and did believe, that he was about to suffer death or serious bodily harm at the hands of the deceased, and acting under such apprehension, if any, of danger, as the same 'reasonably' appeared to him, defendant at the time he fired the fatal shot that took the life of said Howard, to protect himself from such apprehension, if any, of danger,—then he would have the right to continue to shoot until he found himself out of danger as it appeared to him; and if you believe from the evidence that the defendant acted upon such reasonable apprehension of danger at the time he fired said shots, then you will find him not guilty, and so say by your verdict. You are further instructed that if you believe from the evidence that defendant shot and killed said Howard as alleged in the indictment, but that at the time he did so it reasonably appeared to the defendant from all the facts and circumstances known to and surrounding him at the time, and, viewed from his stand-point, he believed that it was then and there the purpose of said Howard to take the life of him, the defendant, or to do him serious bodily harm, then the defendant was not bound to retreat, but he could stand his ground and defend himself; and, if you believe from the evidence that he so acted, you should acquit him, and so say by your verdict. If the defendant was in charge of his mother's premises as the head of the family, and if he forbade the deceased from entering said house, then he would have the right to use such force as would be necessary to keep the deceased out of said house; but if the deceased did enter said house over the protest or command of the defendant, then the defendant would not be justifiable in killing the said Howard because he did enter said house over the protests and commands of him, defendant; and if he did kill the deceased because he entered said house, and said killing was upon express malice as herein explained, then he would be guilty of murder of the first degree; if done with implied malice, as hereinbefore explained, then he would be guilty of murder of the second degree; and if done with sudden passion arising from an adequate cause, as hereinbefore explained, then he would be guilty of manslaughter; and if done in self-defense, as before explained, then he would be in law justifiable, and you should, if you so believe from the evidence, acquit him. If under the evidence and the instructions given in this charge you have a reasonable doubt of the guilt of the defendant, then you will acquit him." "Malice" is the "intentional doing of a wrongful act towards another without legal excuse or justification." Defendant was convicted for murder in the second degree, and sentenced to eight years' confinement in the penitentiary, and now appeals from the judgment.

Crane & Ramsey, for appellant. *W. L. Davidson*, Asst. Atty. Gen., for the State.

WILLSON, J. Several objections to the charge of the court are presented and insisted upon by counsel for defendant. As the conviction is for murder in the second degree, the charge upon murder in the first degree will not be considered.

It is objected that the definition given in the charge of "malice" is insufficient and erroneous. This court has repeatedly held to the contrary. *Gallaher v. State*, 25 Tex. App. 247, 12 S. W. Rep. 1087.

An exception to the charge upon murder in the second degree was reserved because the rule of reasonable doubt was not applied therein. It is true that in prosecutions for murder it is proper that said rule should be applied as between the different degrees of homicide involved in the case. *McCall v. State*, 14 Tex. App. 353; *Murray v. State*, 1 Tex. App. 417. But if such an instruction be substantially given, though not in the precise language of the statute, and no special instruction upon the point be requested, the charge will be held sufficient. *Hodges v. State*, 6 Tex. App. 615. In this case the jury was instructed that, in order to warrant a verdict finding defendant guilty of murder in the second degree, they must believe from the evidence, beyond a reasonable doubt, that defendant committed the homicide with malice implied, etc. We think this was substantially instructing as to the rule of reasonable doubt between murder in the second degree and manslaughter, and no additional instruction relating to this point was requested by the defendant.

With respect to the charge on threats and self-defense, the objection is urged that it requires the jury to believe that the facts existed which constituted self-defense before they could acquit defendant, whereas the law is that if they entertained a reasonable doubt of the existence of such facts they should acquit him. In this case the court charged the rule of reasonable doubt generally, making it applicable to the whole case; and under repeated decisions of this court this was sufficient. *McCullough v. State*, 23 Tex. App. 620, 5 S. W. Rep. 175; *Ashlock v. State*, 16 Tex. App. 13; *Barr v. State*, 10 Tex. App. 507. The cases cited upon this point by counsel for defendant are not in point, and do not sustain the objection urged by them. We are of the opinion that the charge on the issues of manslaughter, threats, and self-defense are applicable to the facts in the case, and are sufficient and correct.

Several special instructions were requested by counsel for defendant, and were refused. We have given our attention to said instructions, and, without discussing them, will say that in our judgment most of them are substantially embraced in the charge given by the court, and those not so embraced were properly refused, because incorrect.

We find no error in the record for which, in our opinion, the conviction should be set aside. We think the evidence supports the conviction. We therefore affirm the judgment. Affirmed.

SELF v. STATE.

(Court of Appeals of Texas. March 8, 1890.)

MURDER — WITNESS — INSTRUCTIONS — NEW TRIAL.

1. Under Code Crim. Proc. Tex. art. 755, allowing any party, when facts stated by his own witness are injurious to his cause, to attack his testimony in any manner except by proving his bad character, the state, in a prosecution for murder, may, where a witness introduced by it testifies that he heard deceased make threats against defendant, prove by other witnesses that he made contradictory statements as to such threats.

2. On a trial for murder, testimony explaining defendant's absence from the neighborhood directly after commission of the act is admissible, but its exclusion is no ground for reversal of a judgment of conviction, if it appears, in view of the other evidence, that its character was not such as could reasonably have benefited defendant.

3. Where the evidence shows that the homicide was either murder or justifiable, a charge on manslaughter should not be given.

4. Where defendant admits that he killed deceased, an instruction on circumstantial evidence is not required.

5. Where defendant claims that he killed deceased in self-defense, and the prosecution contends that deceased was friendly to defendant, and a continuance was refused, which defendant asked because of the absence of a witness by whom he expected to prove that deceased made threats against his life, and that such absent witness told defendant of them, and it appears that such testimony is probably true, a judgment of conviction will be set aside and a new trial granted.

Appeal from district court, Johnson county; J. M. HULL, Judge.

Thomas Self was indicted and tried for the murder of J. T. Yarbrough, and on the trial the following evidence was introduced:

A. S. Turner, for the state, testified that he lived within a mile of the house occupied by deceased and his family. Deceased was killed after night on September 16, 1887. Between sunset and dark on that evening witness and his wife went to the house of deceased. When they arrived they found him lying on a pallet spread on the front gallery. He complained of feeling unwell, and had on no outer clothing other than his shirt, pants, and socks. Witness took a seat on the gallery, and his wife went into the back room. Soon afterwards defendant rode up on horseback. He dismounted, unsaddled his horse, put the saddle on the fence, led his horse to the stable, and then came to the house, took a seat on the gallery, and entered into conversation with witness. The witness could not say whether or not he and deceased spoke to each other. A few minutes after defendant arrived Dr. Simms rode up to the place, and went into the house. Witness and his wife remained at the house about two hours. They left deceased on the porch, and Mrs. Yarbrough, and her daughter, defendant, and Dr. Simms somewhere in the house. About ten minutes after witness left de-

ceased's house he heard three pistol shots fired in rapid succession, at or near the house. There was a straight chair, but no rocking chair, on the gallery while witness was at the house. Mrs. Turner testified substantially as did her husband.

Justice of the Peace Bowman testified for the state that he held the inquest upon the body of deceased on the night of the homicide. He and the parties with him found the body in the cotton patch, about 30 yards from the house. Three 45-caliber pistol balls had penetrated the body. One ball entered the left breast just below the collar-bone, another, one side, and lodged under the skin on the other side; and the third entered at the back. The wound in the back was powder burned, and a hole as large as a man's hand was burned in the shirt on the back. No blood was found on the pallet or on the porch. The first blood found by witness was on the ground, three or four feet from the porch steps. There was a straight chair on the porch, but witness saw no rocking chair.

The material facts testified to by the state's witness Veatch were that about dark on the fatal evening the defendant came to his house and borrowed his pistol for the purpose, as stated by him, of killing some dogs that had been annoying him. He left a pistol at witness' house, which he said belonged to Hill Cummings, but which would not revolve. The wife of the deceased was the sister of defendant, and it was the understanding of witness that defendant owned the place occupied by the deceased at the time of the killing.

S. H. Birdwell testified for the state, in effect, that about a week before the homicide he and the defendant helped deceased drive some cattle through Hood county *en route* to Erath county. At that time deceased and defendant were friendly, and the feeling of deceased for defendant was good.

Dr. Simms testified for the state that he was at the deceased's house on the 16th day of September, 1887, and again that night, when deceased was killed. He did not know where the defendant was at the time of the killing, but he was not in the room in which the witness, Mrs. Yarbrough, and her daughter then were. The fatal shots were fired near the gallery on which the witness last saw deceased alive. On cross-examination, the witness stated that he met deceased on September 16, 1887, when deceased invited him to call at his house for the purpose of holding a conversation about a serious matter. About 4 o'clock on that evening the witness stopped at deceased's fence, and called him out. In the conversation that ensued deceased told defendant that he had moved his cattle to Erath county, and was going to take up his residence in that county, but was not going to take his family, as he could not get along with his wife, whom he abused, and denounced as a liar. Witness asked deceased's permission to talk to Mrs.

Yarbrough for the purpose of bringing about a reconciliation. Deceased consented, whereupon witness went into the house, and deceased to the cotton patch south of the house. While witness was talking to Mrs. Yarbrough defendant came to the house. Witness asked him to go home with him. Defendant consented, and on the way the witness told him what deceased had that evening said about his wife, and, further, which was true, that deceased also said that he (defendant) upheld Mrs. Yarbrough in her meanness, and that he intended to kill him (defendant) if it was the last thing he ever did. Witness then advised defendant, as a means of avoiding trouble, to leave the neighborhood until deceased had gone to Erath county. Defendant shed tears, and replied that in his opinion his sister was a good woman, and that he disliked to see her treated like a d—d dog. Witness again advised him to leave home in order to avoid trouble. Defendant agreed to do so. About that time they met Hill Cummings, who asked witness to go to Claridge's to see a sick child. Witness told defendant to go on to his (witness') house, and went himself to Claridge's. When he finished treating Claridge's child he went back to Yarbrough's to see if defendant was there. To his inquiry from the gate several voices replied that defendant was there, and Mrs. Yarbrough called to witness that Hosea was sick, and wanted to see him. Witness went in and found Turner and his family there, and deceased lying on a pallet on the porch. From Hosea's room witness went to his horse to get his medicine bags, and back into Hosea's room. Some time afterwards the Turners left, and a few minutes later witness heard three shots fired at the gallery. A few minutes before those shots, which was the last time witness observed the defendant before the shooting, he was sitting in Hosea's room, in which the witness and Mrs. Yarbrough were. A few moments after the shooting he came to the outer door of Hosea's room, got a knife from the witness, with which he cut the rope by which his horse was tied, saddled his horse, and rode off. On redirect examination the witness stated that defendant had recently bought the premises from deceased, and had an ungathered crop of cotton, corn, and potatoes on it. He also owned some horses and cows, but witness did not know how many. He rode off with no other clothing than he had on his person. On recross-examination the witness denied that he told deceased's brother, J. C. Yarbrough, on the day after the homicide, that he never heard the deceased utter a threat against the defendant. Upon this statement he was contradicted directly by the state's witness J. C. Yarbrough. The state closed.

J. H. Claridge testified for the defense, in substance, that he had contracted to buy the ungathered crop of the defendant, and, at the time of the homicide, was negotiating with deceased for the purchase of his crop. He met the deceased on the evening of the fatal

day, and asked him if it was true, as he had heard, that defendant owned an interest in the crop he (deceased) was trying to sell him. After some hesitation, deceased replied that it was true, but that such fact need not stand in the way of the trade, as defendant's interest would never do him (defendant) any good. On the morning after the homicide the witness found an open pocket-knife of large dimensions in the front yard near the porch steps, and on a line with the place where the body of deceased was found. He identified that knife as the property of the deceased. Lear corroborated Claridge as to the finding of the pocket knife, and two other witnesses testified that they heard of the knife being found by Claridge, but did not see it.

J. L. Orrick, whose wife was the defendant's aunt, testified, in substance, that about two months before the homicide the deceased told him that defendant still owed him part of the purchase money for the place, and that he intended to close defendant out, take the place, and keep what money defendant had paid on the purchase. Witness knew as a fact that deceased had treated defendant with great severity and unkindness for years.

W. D. Orrick, the cousin of defendant, testified that defendant reached his house in Tarrant county about 4 o'clock on the morning after the homicide. He told witness that he had killed deceased, but that as he had no more than about five dollars in money, he thought it best to return and stand trial. The witness advised him not to do so until the excitement had died out, and lent him money. He left, saying he would return and surrender in four months.

Mrs. Mary Lear, formerly Mrs. Yarbrough, the wife of deceased and sister of defendant, testified substantially as did Dr. Simms as to what transpired at the house immediately before and at the time of the killing, except that she stated that defendant was not at the house when Dr. Simms arrived the last time, but came up soon afterwards. She testified, further, that when he came to the house the defendant hung up his saddle on the gallery, — a direct contradiction of the testimony of the other witnesses, who stated that he hung his saddle on the fence. The record recites: "This witness was contradicted in the details of her statements upon many things." She declared that for years the deceased had treated her with inhuman cruelty, whipping her, and on one occasion pulling her off of a horse. She stated, further, that after defendant left with Dr. Simms on the fatal evening deceased told her that he intended to kill defendant before morning.

Testifying in his own behalf, the defendant corroborated the testimony of Dr. Simms as to the time, a few minutes before the shooting, when he left Hosea's sick room. Continuing, he stated that on leaving Hosea's room, in which he left Dr. Simms and Mrs. Yarbrough attending upon Hosea, he stepped upon the gallery, where he found the deceased sitting in a rocking chair. Thence he pro-

ceeded to the lot and fed his horse. Returning, he stepped upon the gallery, when deceased got up from the chair, and said to him: "Tom, I am going to kill you!" Witness extended his left hand, and replied: "Frank, don't!" Deceased advanced with something in his right hand which witness took to be a knife. Witness opened fire at once. He fired the first two shots facing the deceased, and the last as the deceased went down the steps, deceased's back being then towards him. The witness did not know at the time that his first two shots took effect, but knew that the last one did. The witness knew that deceased was unkind to his sister, but shot him because he thought deceased would kill him. Deceased was always unkind to witness. Witness used Veatch's pistol, which he borrowed on that evening after Dr. Simms had told him of deceased's threat.

Crane & Ramsby, for appellant. *Asst. Atty. Gen. Davidson* and *Poindester & Padelford*, for the State.

WILLSON, J. It was not error to permit the state to prove that its witness Simms had made a contradictory statement in relation to the threat about which he testified. His testimony as to the threat was injurious to the prosecution, and it was permissible for the state to attack it in any manner except by proving his bad character. Code Crim. Proc. art. 755.¹

In view of the evidence adduced on the trial the rejection of the proposed testimony of the witness Alford, offered by defendant, for the purpose of explaining his continued absence after the homicide, in Arkansas, was not such error as requires a reversal of the judgment. Said proposed testimony is not of a character which could reasonably have influenced the result favorably to the defendant. Willson Crim. St. § 2540. The testimony, however, was, we think, admissible. Objections to the charge of the court upon malice, threats, and self-defense are insisted upon by counsel for defendant. The charge and the objections thereto are substantially the same as in the case of *Powell v. State*, ante, 599, (this day decided,) and we refer to our opinion in that case for a statement of our views and conclusions upon the questions here presented.

There is no evidence which, in our judgment, required a charge upon manslaughter. Under the facts of the case, the homicide was either murder or it was justifiable. Defendant claimed that it was justifiable, and the evidence excludes the theory of manslaughter.

It is strenuously and plausibly argued by counsel for defendant that an instruction upon circumstantial evidence should have

been given. We do not think such an instruction was required. Defendant admitted that he killed the deceased. This was direct, positive evidence of the *corpus delicti*. In homicide the *factum probandum* is the destruction of the life of the deceased by the act, agency, or procurement of the accused. The killing of the deceased by the defendant is the main fact in the issue. This fact in this case is not wholly proved by circumstances, but is also directly attested by an eye-witness; that is, by the defendant himself. It is not required, in order to dispense with a charge on circumstantial evidence, that the defendant's guilt should be established by direct evidence. It is only when the inculpatory evidence is wholly circumstantial, and where the defendant's guilt is dependent wholly upon that character of evidence, that an instruction as to circumstantial evidence is required. *Clore v. State*, 26 Tex. App. 624, 10 S. W. Rep. 242; *Willson, Crim. St. § 2342*. That the defendant killed the deceased was an inculpatory fact, and this fact, having been proved by direct evidence, dispensed with the necessity of a charge upon circumstantial evidence.

A question which is to our minds more serious than any other presented in the record is, should not a new trial have been granted the defendant to enable him to obtain the absent testimony set forth in his application for a continuance? It was contended by the prosecution that the deceased was friendly with the defendant, and bore no ill will against him; and testimony was adduced by the state tending to show such state of feeling on the part of the deceased towards the defendant. By the absent testimony the defendant proposed to prove that the deceased was unfriendly to him; had for a series of years treated him unkindly and inhumanly; and that deceased, some two months before the homicide, had stated that he intended to drive defendant away from the home which he (defendant) had purchased from him, (deceased,) and appropriate said home to himself, and that said home should never do the defendant any good, and that these declarations of deceased were communicated to the defendant before the homicide. In view of the testimony adduced on the trial, it must be conceded that said absent testimony is probably true. Is it material? Defendant claims that the homicide was justifiable; that he committed it in self-defense. There was no eye-witness to the tragedy except the defendant. He testified that the deceased was sitting upon the porch; that as he (defendant) stepped upon the porch the deceased said to him, "Tom, I am going to kill you;" and arose and started towards him with something in his right hand, which (defendant) took to be a knife, and that he (defendant) then shot deceased. What bearing would the absent testimony have upon the defendant's theory of self-defense? Would it not tend to support that theory and corroborate the testimony of the defendant given in his own behalf? If, as

¹ Code Crim. Proc. Tex. Art. 755. "The rule that a party introducing a witness shall not attack his testimony is so far modified as that any party, when facts stated by the witness are injurious to his cause, may attack his testimony in any other manner, except by proving the bad character of the witness."

claimed by the prosecution, the deceased bore no ill will to the defendant, was friendly to him, and had no motive to attack him, it is improbable that he would have attacked him in the manner stated by the defendant. If, on the other hand, the deceased was unfriendly to the defendant, and had a motive for attacking him, these facts would render the attack testified to by the defendant probable, and would tend to support the theory of self-defense. We are constrained to conclude and hold that the absent testimony is not only probably true, but that it is relevant and material, and entitles the defendant to a new trial. It may be that if said absent testimony had been before the jury it would not have changed the verdict. We are not prepared to say that it would not reasonably have inured to the advantage of the defendant. *Hammond v. State*, infra, (this day decided.) Believing that the defendant is entitled to the absent testimony, and that justice and law demand that he should have it, we reverse the judgment, and remand the cause for a new trial.

HAMMOND v. STATE.

(Court of Appeals of Texas. March 8, 1890.)

HOMICIDE—ABSENT WITNESS—NEW TRIAL.

When, on indictment for murder, defendant's motion for a continuance, on the ground of absent witnesses, is overruled, and a verdict of guilty of murder in the first degree rendered, and it appears that there is some probability of the truth of defendant's theory that he killed deceased because he slandered his sister, and that the slander may be proved on a new trial by such absent witnesses, the new trial should be granted; as under Pen. Code Tex. art. 597, a homicide committed because of insulting words concerning a female relative is reduced from murder to manslaughter.

Appeal from district court, Webb county;
J. C. RUSSELL, Judge.

Allee & Earnest, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. A contest was had over the diligence used by defendant to secure the attendance of the absent witnesses named in his application for continuance, and the application was overruled because the diligence was insufficient. This ruling was doubtless correct. But the fact that a continuance was refused in the first instance because of a want of diligence does not absolve the trial court, on the motion for a new trial, from the duty of considering the materiality and probable truth of the testimony expected from the absent witnesses in connection with the evidence adduced on the trial. Though an application for continuance fails to comply with the statutory requirements, if in view of the evidence adduced on the trial the absent testimony appears to be material and probably true, the trial court should award a new trial. *Willson*, Crim. St. § 2186; *Simmons v. State*, 26 Tex. App. 514, 10 S. W. Rep. 116; *Black v. State*, 27 Tex. App. 495, 11 S. W. Rep. 485. "It is not in every case,

however, even when the absent testimony is material and probably true, that this court will reverse the ruling of the trial judge in refusing a new trial, considered with reference to the application for continuance. It is only in a case when, from the evidence adduced on the trial, we would be impressed with the conviction not merely that the defendant might probably have been prejudiced in his rights by such ruling, but that it was reasonably probable that if the absent testimony had been before the jury a verdict more favorable to the defendant would have resulted." *Browning v. State*, 26 Tex. App. 432, 9 S. W. Rep. 770; *Boyett v. State*, 26 Tex. App. 689, 9 S. W. Rep. 275; *Peace v. State*, 27 Tex. App. 83, 10 S. W. Rep. 761; *Covey v. State*, 28 Tex. App. 388, 5 S. W. Rep. 283; *Self v. State*, ante, 602, (just decided.) Now to apply these rules to the case in hand. Defendant was found guilty of murder of the first degree, with the penalty assessed at imprisonment for life in the penitentiary. Two theories were presented by the evidence. For the state the theory was that appellant killed the deceased because the deceased had stated to his (defendant's) employer that he (defendant) was a desperate character, who had been driven out of Wharton county by the sheriff of said county on account of his character and misdoings in said county; that this statement of the deceased caused defendant's discharge by his employer; that deceased was employed in his stead; that defendant threatened just before the killing to kill deceased on account of it; and that this, and this alone, was the cause of the killing. This theory was supported by the dying declaration of deceased, to the effect that "Peter Hammond shot me because I had told O'Brien how the sheriff of Wharton county took him in;" by the statements of defendant to Jenks made on the morning of and a short time before the killing; and by defendant's remark to deceased just as he was about to shoot: "Stand, Muldooney! What have you been saying to O'Brien about me?" and his threats to the same effect made just before to the witness Lane. Evidently the verdict and judgment are based upon the correctness and truth of this theory of the state.

On the other hand, the theory and contention of the defendant was that he killed deceased on account of insulting and slanderous language used by deceased concerning his (the defendant's) sister; and that in this view of the case his crime, at most, would be of no higher grade than manslaughter. As shown by the testimony adduced on the trial, it is made to appear, in relation to this matter, that a day or two before the killing deceased told one Payne, a witness, that defendant's sister had been "laying up with a man in Wharton county;" that he told the witness Barnhard that defendant's sister "was a prostitute, and that he knew her to be such; that she had been a prostitute in Hempstead, and was in a house of prostitution

of the lowest order in Dallas." But neither Payne nor Barnhard had communicated to defendant these statements of deceased about his sister. The witness Jenks says that about daylight on the morning of the killing he had a conversation with defendant, and that defendant then said to him: "Muldooney has been back-capping me to O'Brien. Muldooney has told O'Brien that I am a desperate man, and to look out for me; and, furthermore, he has been slandering my sister.' He seemed to be affected when he referred to his sister. He almost cried." Defendant himself testified that as he started to breakfast he was called by Dave Ray and Jack Dempsey, "and Dave Ray told me that Muldooney had told him that I had a sister who was a prostitute, and that she was in Dallas, in a house of prostitution of the lowest character. Dempsey said that it was true that Muldooney had said this, as he had heard it." Just after eating his breakfast defendant met Muldooney, and, he says, "I became so enraged at what I had heard—at what Ray had told me—that I could not help but do what was done. * * * I killed Muldooney because of what Dave Ray and Dempsey told me he had said about my sister."

Defendant's application for continuance was on account of the absence of his witnesses Ray and Dempsey, by whom he expected to prove these facts. That said testimony was material on the issue of manslaughter, based upon insulting words and conduct concerning a female relative, which, under our Penal Code, (article 597,) is one of the enumerated adequate causes which will reduce a homicide from murder to manslaughter, is, we think, manifest. Was the proposed testimony probably true, and such as would likely affect the result upon another trial of the case? In view of what the deceased had told the witnesses Barnard and Payne about defendant's sister, it is most highly probable, we think, that he should have told Ray the same thing, and that Ray's and Dempsey's testimony to the effect that Ray communicated the matter to defendant just a short time before the shooting was true. That defendant had been informed of deceased's slanderous statements is furthermore borne out by defendant's statements to Jenks as aforesaid. The evidence upon this point, as it stood before the jury on the trial, amounted simply to defendant's unsupported declaration that he killed the deceased because he had slandered his sister. He could not have acted upon what Barnhard and Payne had heard, for they had not communicated it to him. He does not tell Jenks from whom he received his information, but he states in his own testimony that he obtained it from Ray and Dempsey. Now, if Ray's and Dempsey's evidence could have been had in addition to this other testimony, is it not altogether probable that it would add strength to this defense, and upon another trial tend to change the result from murder of the first degree to manslaughter? Under

the circumstances developed, we think it probable that such result might be effected. There was no effort made by the state to prove the general character of defendant's sister in order to ascertain the extent of the provocation. Pen. Code, art. 599. In the absence of proof that her general character for chastity was bad, the reasonable presumption which attaches to all females would be that it was good, and that language derogatory to it was insulting, slanderous, and defamatory, and such as would produce in the mind of the brother of a virtuous sister a degree of anger, rage, and resentment calculated to render his mind incapable of cool reflection. We are of opinion the court erred in overruling defendant's motion for a new trial based upon the absence of this testimony. The other questions presented on the record and discussed in the brief of counsel will not be passed upon, as they are of a character not likely to arise on another trial of the case. Because the court erred in refusing the defendant a new trial, the judgment is reversed and cause remanded.

WASHINGTON v. STATE.

(Court of Appeals of Texas. March 8, 1890.)

THEFT—DEFENDANT UNDER SIXTEEN YEARS—
SENTENCE—CONSTITUTIONAL LAW.

1. On trial of a defendant under 16 years of age for theft, the court charged the jury that, if they found defendant guilty of the theft of property of the value of \$20, they should assess his punishment at confinement in the penitentiary. The jury found him guilty, and assessed his punishment at 4 years in the penitentiary. The court gave judgment that he be confined in the house of correction and reformatory for said term. *Held*, that the charge was reversible error, since Act Tex. April 2, 1889, provides that "the jury convicting shall say in their verdict whether the convict shall be sent to the reformatory or the penitentiary," and limits the punishment of a convict under 16 years of age, whose term of imprisonment is assessed at not more than 5 years, to confinement in the reformatory.

2. This act is mandatory, and it is the duty of the court, on trial of defendants under 16 years of age, to give it in his charge to the jury.

3. Said provision is subsidiary to the main subject as expressed in the title, "An act to provide for the more efficient government and maintenance of the House of Correction and Reformatory at Gatesville," and does not violate Const. Tex. art. 3, § 85, which provides that no bill shall contain more than one subject, which shall be expressed in its title.

4. The constitution of Texas does not limit the power of the legislature, in enacting laws, to enactments by amendment of the Code, under Const. Tex. art. 3, § 86, which provides that "no law shall be revived or amended by reference to its title, but in such case the act revived or the section or sections amended shall be re-enacted and published at length."

Appeal from criminal district court, Galveston county; C. L. CLEVELAND, Judge.

W. L. Wilson, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. It was shown by the evidence, and so found by the verdict of the jury, that the defendant at the time of the trial was 13 years of age. By the charge of the court the

jury were instructed that if they found the defendant guilty of theft of property of value of \$20, or over that amount, they would assess his punishment at confinement in the penitentiary, and the jury, having found the defendant guilty, assessed his punishment at confinement in the penitentiary for the term of four years. Upon this verdict the court rendered judgment that the defendant be confined in the house of correction and reformatory for said term, and the sentence is in accordance with the judgment. By section 12 of the act of April 2, 1889, entitled "An act to provide for the more efficient government and maintenance of the House of Correction and Reformatory at Gatesville," (Acts 21st Leg. p. 97,) it is provided that "the jury convicting shall say in their verdict whether the convict shall be sent to the reformatory or the penitentiary." This provision of the statute was doubtless overlooked by the learned trial judge, and he did not in his charge inform the jury that they should determine and say in their verdict whether the defendant should be sent to the reformatory or the penitentiary. But he instructed the jury that the place of punishment was the penitentiary, and the jury found in accordance with such instruction. We are of the opinion, and so hold, that the charge of the court in the particular above mentioned is erroneous and insufficient. It should have told the jury that if they found the defendant guilty, and found that he was not more than 16 years of age, they should further find, and state in their verdict, whether he should be sent to the reformatory or the penitentiary, and that the place of his punishment would be determined by the period of confinement assessed by them; that is, if the period of confinement should be assessed at five years or less, he would be sent to the reformatory, but if at more than five years, he would be sent to the penitentiary. We think the provision of the statute we have quoted is mandatory, and, though to our minds it is an unnecessary provision, still it is the law, and a part of the law of this case, and should have been contained in the charge. *Doran v. State*, 7 Tex. App. 885.

It is claimed, however, by the assistant attorney general, that said provision of the statute is unconstitutional, because it is not embraced within the subject of the act as expressed in the title of said act. Const. art. 3, § 35.¹ We are of the opinion that said section is germane and subsidiary to the main subject of the act as expressed in the title of said act, and is not, therefore, in violation of the constitution. *Fahey v. State*, 27 Tex. App. 146, 11 S. W. Rep. 108.

It is further claimed by the assistant attorney general that said section of the statute is not an amendment to any provision of our

Code, and that it was not within the power of the legislature to alter or in any way change the provisions of the Code, except by amendment enacted in accordance with section 36 of article 3 of the constitution.² It would, perhaps, have been the better way to have enacted said section 12 as an amendment to the Code; but we are not aware of any constitutional requirement to that effect, or of any constitutional limitation upon the power of the legislature that would render the section in question invalid. Because of the fundamental defect in the charge of the court the judgment is reversed, and the cause is remanded.

GALBRAITH v. STATE.

(Court of Appeals of Texas. Feb. 8, 1900.)

AGGRAVATED ASSAULT.

A boy of 17 years is not an "adult male," within the meaning of Pen. Code Tex. § 496, providing that an assault and battery becomes aggravated when committed "by an adult male upon the person of a female."

Appeal from criminal district court, Galveston county; C. L. CLEVELAND, Judge.

Stubbs & Stubbs, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. The appellant was indicted for assault with intent to rape, and was convicted of aggravated assault and battery. The question is whether the verdict and judgment are supported by the evidence. "An assault becomes aggravated when committed by an adult male upon a female." Pen. Code, art. 496. An "adult male," as the term is used in this statute, means a male person who has attained the age of 21 years. Willson, *Crim. St.* § 841. In this case the only evidence as to defendant's age was that at the time of the alleged offense he was not over 17 years of age. Not being an adult male, the issue of aggravated assault did not arise from the circumstance alone that the assault was committed by a male upon a female. None of the other statutory circumstances of aggravation are shown by the evidence. The charge of the court submitted the issue of aggravated assault by an adult male, and the charge was specially excepted to, upon the ground that there was no evidence to support such charge, or, in fact, any charge upon aggravated assault. We are of opinion that the exception is well taken. As presented in the evidence before us, there is no aggravated assault in the case. Again, the court erred in refusing to give the defendant's special requested instructions upon simple assault. Simple assault was perhaps an issue made by the evidence in the case. Reversed and remanded.

¹ Const. Tex. art. 3, § 35, provides that no bill passed by the legislature shall contain more than one subject, which shall be expressed in its title.

² Const. Tex. art. 3, § 36, declares that "no law shall be revived or amended by reference to its title; but in such case the act revived, or the section or sections amended, shall be re-enacted, and published at length."

HARRIS v. STATE.

(Court of Appeals of Texas. Feb. 8, 1890.)

DISORDERLY HOUSE—EVIDENCE.

On indictment for keeping a house of ill fame, the time embraced in the prosecution being limited to the period between June 1st and July 16th, two of the state's witnesses, one of them a policeman, testified that the house was closed during June and July, and defendant was absent. The owner of the house testified that he thought it was closed for repairs during June and July, and defendant's witnesses testified to the same. One witness for the state testified that he thought it was closed during the latter part of June and July. *Held*, that the evidence did not support the allegation as to the time of the commission of the offense.

Appeal from criminal district court, Galveston county; C. L. CLEVELAND, Judge.

F. M. Spencer, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. The indictment charged the appellant with keeping a disorderly house on June 1, 1888, and on divers days and times between said day and the presentment of the indictment, on July 16, 1888. On account of a former acquittal on a similar charge, which was pleaded by defendant, and which was embraced in the time up to and including May 31, 1888, the time of this prosecution was limited to the period between June 1st and July 16th; and the question was, did defendant keep a disorderly house on any day or at any time between those dates? Sherwood, the first state's witness, says: "His [defendant's] house was closed during the months of June and July, 1888, and he [defendant] was absent in the country." Another witness for the state, Smith, a police officer, makes the same statement; and Martin, the owner of the house, thinks the house was closed for repairs in June, July, and August, 1888. Defendant's witnesses testify that the portion of the house occupied by defendant was closed during the months of June and July. There is a state's witness who testified that he thought the house was closed during the latter part of June and July. We are of opinion that the evidence wholly fails to support the allegation as to time of the commission of the offense. The judgment is reversed, and the cause remanded.

WEGNER v. STATE, (two cases.)

(Court of Appeals of Texas. March 5, 1890.)

BAIL-BOND—MATERIAL ALTERATION.

1. A bail-bond which obligates the principal to appear at the next term of court, "A. D. 188," being on an impossible date, is fatally defective.

2. Its unauthorized alteration by the sheriff, so as to make it read "1889," being material, discharges the obligor.

3. Code Crim. Proc. Tex. art. 288, requires the bail-bond to state the time and place when and where the accused binds himself to appear, and provides that in stating the time it shall be sufficient to specify the term of court. The prior statute (Hart. Dig. art. 2889) merely required the bond to state that the obligor would "appear at the district court of the proper county at the next term thereof." *Held*, that the Code abrogated the rule which prevailed under the prior statute, and that

an impossible date, designated in a bail-bond as the time of holding the next term of court, could not be stricken out as surplusage.

Appeal from criminal district court, Galveston county; C. L. CLEVELAND, Judge.

A. Sampson, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. These two appeals are from judgments final upon forfeited bail-bonds, and the records in both cases present the same question. The bail-bonds were for the appearance of one Joe Browning before the criminal district court of the county of Galveston. With regard to the time when he was obligated to appear, it is agreed that the original recitations in each of said bonds was as follows, viz.: "Now, if the said Joe Browning shall appear before the criminal district court at the next term thereof, to be holden in and for the county last aforesaid on the first Monday in November, A. D. 188." After said bonds were executed, the sheriff, without the knowledge or consent of the sureties, added the figure "9" after the letters and figures "A. D. 188," making the year of the appearance "A. D. 1889," instead of "188," as originally written. In answer to the *scire facias*, the sureties, these appellants, pleaded the alteration in said bonds, and that said alteration was material, and invalidated the said bonds. They furthermore pleaded that the said bonds as originally entered into were invalid and void, because they obligated the principal to appear at an impossible time or date. Both of these positions are well taken, under the agreed statement of facts sent up in the record. A bail-bond is fatally defective when its conditions require the appearance of the principal obligor at a time when there can legally be no term of court in which he is required to appear. *Burnett v. State*, 18 Tex. App. 283; *Thomas v. State*, 13 Tex. App. 496. Again, a material alteration in an obligation of record, as a bail-bond, made without the consent of the obligors at the instance of the officers of the state, will discharge the obligors. *Gragg v. State*, 18 Tex. App. 295; *Heath v. State*, 14 Tex. App. 213; *Grant v. State*, 8 Tex. App. 432; *Collins v. State*, 16 Tex. App. 275. The bail-bonds being void, because the time stated in them is an impossible time, no legal proceedings could be taken to forfeit them as originally executed; and the alteration, being material and without authority, discharged the obligors from all further liability upon said bonds, had they been valid at the time of the execution of said obligations. Judgments in each case reversed, and prosecutions dismissed.

ON MOTION FOR REHEARING.

(March 21, 1890.)

WHITE, P. J. The state has filed a motion for a rehearing in this case, and insists that those portions of the bail-bond which we have held fatally defective, and upon which our opinion reversing and dismissing the

case was based, can and should be treated as surplusage, and that, eliminating them, there is enough left in said bond to make it valid and sufficient under our statutes prescribing the requisites for bail-bonds. In support of this position, we are cited to *Brite v. State*, 24 Tex. 219, (which was a case on recognizance, and not on bail-bond,) and where in it was held that "where a recognizance binds the party to appear at the next term of the court it is valid, although the court cannot lawfully be in session at the time stated in the recognizance." That decision was made upon a recognizance entered into in 1853, before the adoption of our Penal and Criminal Codes, as was also the case of *Wilcox v. State*, Id. 544. But such is not the rule as now construed with reference to the provisions of the Codes. *Barnes v. State*, 36 Tex. 332; *Williamson v. State*, 12 Tex. App. 169. With regard to bail-bonds, the condition required by the old law was that the obligor would "appear at the district court of the proper county at the next term thereof." *Hart. Dig. art. 2889*. One of the requisites of a bail-bond now is "that the bond state the time and place when and where the accused binds himself to appear, and the court or magistrate before whom he is to appear. In stating the time it is sufficient to specify the term of the court, and in stating the place it is sufficient to specify the name of the court or magistrate and of the county." *Code Crim. Proc. art. 288*. "A bail-bond, being a statutory bond, to be valid as such must in every essential particular conform to the statute, and this court cannot treat an objectionable condition as mere surplusage." *Turner v. State*, 14 Tex. App. 168; *Wallen v. State*, 18 Tex. App. 414. In this case the bond was conditioned that the obligors were to appear not only at "the next term," but said next term was expressly stated to be on the first Monday in November, "A. D. 188,"—an impossible time. A bail-bond that obligates the defendant to appear at a term of the court not authorized by law is void. *Thomas v. State*, 12 Tex. App. 417; *Thomas v. State*, 13 Tex. App. 496; *Douglass v. State*, 26 Tex. App. 248, 9 S. W. Rep. 733. The authorities which we cited in our original opinion not only sustain the opinion, but are directly in point, and applicable to the questions in the case. *Burnett v. State*, 18 Tex. App. 283; *Gragg v. State*, Id. 295; *Heath v. State*, 14 Tex. App. 218. Under these authorities the opinion is correct, and the motion for rehearing is accordingly overruled.

WILLIAMS v. STATE.

(Court of Appeals of Texas. Jan. 11, 1890.)

BURGLARY—EVIDENCE—INTENT TO COMMIT RAPE.

1. The front door of a house was locked, with the key on the inside, but the back doors were left open, when the occupants retired. Defendant, accused of burglary, was discovered in the house with no shoes on, and immediately ran out of a back door, near which, next morning, his shoes were found. Held insufficient evidence to support a finding of forcible entry.

found. Held insufficient evidence to support a finding of forcible entry.

2. One who, with criminal intent, enters a house in the night-time by an open door does not enter burglariously.

3. On a trial for burglary with intent to commit rape, where the court fails to instruct as to the character and degree of force necessary to constitute rape, a finding of intent to commit rape cannot be sustained.

Appeal from district court, Bexar county; G. H. HOONAN, Judge.

Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. This appeal is from a conviction for a night-time burglary, with intent to commit rape. We are of opinion that the evidence does not show a burglarious entry. The front door of the house was locked, with the key in the lock on the inside. Thus situated, it is not shown how a person could possibly, from the outside, have unlocked said door. On the other hand, the doors in the back part of the house were all left open by the occupants when they retired for the night. When defendant was found in the room, after he had entered it, he was in his stocking feet, or bare-footed—that is, without his shoes. After the alarm was raised, he ran out of a back door, and escaped. Next morning his shoes were seen near the back door of the house. If he pulled off his shoes, and left them at this place, and then entered the house through the open doors, then the entry was without force, and consequently was not burglarious; there being no evidence of a burglary by threats or fraud, the other statutory modes of committing said crime. "The entry, to constitute burglary, if at night, must be by force,—threats or fraud not being in the case." *Carr v. State*, 19 Tex. App. 686; *Buchanan's Case*, 24 Tex. App. 195, 5 S. W. Rep. 847; *Melton's Case*, 24 Tex. App. 287, 6 S. W. Rep. 303; *Painter's Case*, 26 Tex. App. 454, 9 S. W. Rep. 774.

Again, we do not think the evidence shows with sufficient certainty that defendant's intent was to commit rape.

And again, the charge of the court failed to instruct the jury as to the character and degree of force necessary to be used in order to constitute rape; that is, that, before they could convict defendant of the intent or attempt to rape, they must believe that he intended to use such force as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case. *Penal Code, art. 529*; *Jones v. State*, 10 Tex. App. 552; *Favors v. State*, 20 Tex. App. 156; *Brown's Case*, 27 Tex. App. 330, 11 S. W. Rep. 412. Reversed and remanded.

In re WILSON et al.

(Court of Appeals of Texas. Jan. 15, 1890.)

BAIL—MURDER IN THE FIRST DEGREE.

Persons accused of murder in the first degree are entitled, on *habeas corpus*, to be released on bail, when it is not evident from the proof that they are guilty. *Code Crim. Proc. Tex. art. 2*

Appeal from district court, Bastrop county; H. TEICHMUELLER, Judge.

On the hearing below, Moore and Johnson were awarded bail in the sum of \$2,000 each, and Wilson, Thompson, and Williams were remanded without bail. The offense charged against the parties was the murder of George Schoeff and Alexander Nolen. The killing occurred in the progress of an affray between whites and negroes,—the applicants being negroes,—during the progress of a trial in a justice's court. The contention of the state was that, in pursuance of a conspiracy to kill white men, the negroes provoked and brought on the affray, fired the first shots, and killed the deceased. The contention of the applicants was that, unwilling that a white man on trial should submit to the jurisdiction of negro officers, the whites, in pursuance of a conspiracy to break up the negro court, rescue the white prisoner, and kill negroes if necessary, in the attempt brought on the affray, and fired the first shots. Both theories were supported by the evidence. Code Crim. Proc. Tex. art. 6, provides that all prisoners shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident.

WILLSON, J. After a careful examination and consideration of the voluminous evidence presented in the record in this case, we conclude that the proof is not evident that the applicants, or either of them, are guilty of murder in the first degree, and that, therefore, each of said applicants is entitled to bail. Code Crim. Proc. Tex. art. 6. As to the applicants Fountain Moore and Jesse Johnson, the judgment of the court below, granting them bail in the sum of \$2,000 each, is affirmed. As to the other applicants, the judgment refusing them bail is reversed, and it is here adjudged that they are each of them entitled to bail, and the amount of bail for Ike Wilson is fixed at \$5,000, and for the other applicants, Robert Thompson and Runnels Williams, at \$3,000 each. Upon giving such bail, in the manner prescribed by law, said applicants will be released from custody. Ordered accordingly.

In re TIPTON.

(Court of Appeals of Texas. Feb. 15, 1890.)

STATUTES—AUTHENTICATION—CONSTITUTIONAL LAW.

After an act has been passed by the legislature, signed by the proper officers of each house and by the governor, and filed in the office of the secretary of state, and published as a law, the presumption is conclusive that the act is the same as was enacted by the legislature, and neither the legislative journals, nor any other evidence, can be received to show the contrary.

Original application for writ of *habeas corpus*.

Finlay, Marsh & Butler and *McLemore & Campbell*, for relator. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. Applicant, T. W. Tipton, being in custody of the sheriff of Smith county by virtue of a *capias* issued from the county court of said county upon an information based upon a complaint charging said applicant with unlawfully selling refined kerosene illuminating fluid without first having the same inspected and branded according to law, applied to the county judge of said Smith county for the writ of *habeas corpus*, and said judge declined to grant said writ, but, as the question involved in the case was the validity of a statute, referred the application to this court, requesting action thereon. At Tyler this court granted the writ, and upon a hearing thereof took the cause under advisement, and transferred the same to this branch; and, after a thorough investigation of the question presented, we now declare our conclusions.

It is claimed by applicant that the statute for a violation of which he is being prosecuted and is in custody as aforesaid, to-wit, the act approved April 5, 1889, entitled "An act to provide for the inspection of refined oils which are the product of petroleum, and which may be used for illuminating purposes within this state, and to regulate the sale and use thereof, and to provide penalties for violation of the same," is not a valid law, because it is not the statute which was in fact enacted by the legislature. It is claimed by applicant, and is conceded by the assistant attorney general, and is shown by the journals of the senate and house of representatives, that said act originated in the house of representatives, and was designated and known as "House Bill No. 167." It passed the house, and was sent to the senate. In the senate, section 3 of the bill was amended, and the bill was returned to the house with the senate amendment thereto. The house concurred in the senate amendment. The bill, as amended, was enrolled. The committee on enrolled bills reported to the house that the bill had been correctly enrolled, and the bill was then signed and presented to the governor, who approved it, and it was deposited in the secretary of state's office. As appears from the senate journals, the amendment to section 3 of said bill, which was adopted by the senate, was as follows: "Provided, it shall not be necessary to inspect oil which has been inspected under a law of another state, and its quality determined and evidenced by the authentic stamp or mark of the inspector of such state." In the enrolled bill, which is now the statute we are considering, the proviso in section 3, corresponding to the amendment above quoted, reads: "Provided, it shall not be necessary to inspect one which has been inspected under a law of another state." It is manifest that the proviso in the statute and the proviso which is recited in the senate journals are not the same, but are essentially different.

But how far will the courts of this state go in inquiring into the acts of the legislative department of the government? When a bill

has been authenticated by the signatures of the president of the senate, and the speaker of the house of representatives, and the governor of the state, and has been deposited in the office of the secretary of state, and published as a law of the state, will the courts of this state, from the journals of the legislature or other evidence, determine that the statute is not a valid law because not enacted in accordance with the formalities required by the constitution, or because the statute so authenticated is not the one enacted by the legislature? In several of the American states, it is the established doctrine that the courts will inquire behind the authenticated statute into the manner of its enactment, and will from the journals determine whether or not it is a valid law. Counsel for applicant have referred us to numerous decisions which so hold, and which unquestionably support the propositions contended for in behalf of applicant. But there is much conflict of authority upon the questions above propounded. We shall not take the time to cite and review the vast number of decisions bearing upon the subject, believing, as we do, that the courts of this state have announced the rules by which we should be governed. In *Blessing v. City of Galveston*, 42 Tex. 641, it is held that the judicial department, on the bare fact that the journals of one or both houses of the legislature fail to show the passage of the bill in full and strict conformity to all the directions contained in the constitution, should not disregard and treat as naught an act in all other respects unobjectionable. It is further clearly intimated, we think, in that decision that the authenticated statute should be regarded as the best, if not conclusive, evidence that the required formalities were observed in its passage, and that for the courts to exercise the power of going behind such statute, and inquiring into the manner of its enactment, would lead to most disastrous consequences. In *Railway Co. v. Hearne*, 32 Tex. 547, it is held that the best evidence of the terms of an act of the legislature is a duly-certified copy of the enrolled bill. In *Cattle Co. v. State*, 68 Tex. 526, 4 S. W. Rep. 865, it is held that it will be conclusively presumed that a bill had been referred to a committee and reported on before its passage, as required by the constitution. In *Usener v. State*, 8 Tex. App. 177, this court quotes approvingly from *State v. Swift*, 10 Nev. 176, as follows: "Where an act has been passed by the legislature, signed by the proper officers of each house, approved by the governor, and filed in the office of the secretary of state, it constitutes a record which is conclusive evidence of the passage of the act as enrolled. Neither the journals kept by the legislature, nor the bill as originally introduced, nor the amendments attached to it, nor parol evidence, can be received in order to show that an act of the legislature, properly enrolled, authenticated, and deposited with the secretary of state, did not become a

law. This court, for the purpose of informing itself of the existence or terms of a law, cannot look beyond the enrolled act, certified to by those officers who are charged by the constitution with the duty of certifying, and with the duty of deciding what laws have been enacted." In *Hunt v. State*, 22 Tex. App. 396, 8 S. W. Rep. 233, this court held that where the constitution expressly requires that the journals shall show a particular fact or action of the legislature in the enactment of a statute, as that the bill was signed by the presiding officer of each house, such fact or action must affirmatively appear in the journals, or the statute will be invalid. But, where there is no express constitutional requirement that the journals shall show affirmatively that a constitutional requirement has been observed, it will be conclusively presumed that such requirement was observed; and neither the journals, nor any other evidence, will in such case be allowed to impeach the validity of the statute.

We conclude, therefore, that we are not at liberty to go behind the authenticated statute in this instance. Upon its face, it is a valid law, and it is not claimed that the journals fail to show any fact expressly required to be shown in order to make it valid. It must be conclusively presumed that the statute, as authenticated and deposited in the secretary of state's office, is precisely the same as was enacted by the legislature. But, were we at liberty to go behind the statute, and consult the journals, we would be confronted with conflicting evidence as to the amendment. The senate journals show that an amendment to section 3 was adopted in that house, and show what that amendment was, and that the bill and amendment were returned to the house of representatives. The journals of the house of representatives show that the amendment adopted by the senate was concurred in, but does not set forth the amendment. The journals of the house further show that the bill as amended by the senate was correctly enrolled, and this enrolled bill is the statute authenticated and published as a law, but it does not contain the amendment as set forth in the senate journals. Which of the journals, those of the senate or of the house, are correct? They are of equal credit. It may be that the amendment was incorrectly copied into the senate journals, and that the amendment in fact adopted by the senate and concurred in by the house is that which appears in the enrolled bill. If, then, we were to look to the journals to determine the question, we should hold that the weight of evidence supports the validity of the statute, because, the journals of the two houses being of equal credit and weight, the authentication of the bill as enrolled by the presiding officers of the two houses and by the executive corroborates and confirms the correctness of the house journals as to the amendment in fact adopted. It is ordered that the applicant be remanded to the custody of the

sheriff of Smith county, and that he pay the costs of this proceeding. Ordered accordingly.

HALL *et al.* v. HAYWOOD *et al.*

(*Supreme Court of Texas.* April 11, 1890.)

TRESPASS TO TRY TITLE—EVIDENCE.

1. Where persons in possession of land as tenants disown the relation, and claim adversely, trespass to try title will lie against them.

2. Where an agreement is executed, to be used in evidence at a trial, to which is attached a certified copy of a duly-recorded will, the detachment therefrom and loss of such copy does not render the agreement inadmissible in evidence, where another certified copy of the will, with proof of probate, is introduced in evidence, and its correctness is not questioned.

3. Testator devised land to his children, and provided that, as each became of age, his executors should partition and deliver to him or her one-half of his or her ultimate distributive share. Two, only, of the executors joined in the conveyance to plaintiff, a daughter of testator. Held that, irrespective of the deed, plaintiff's interest as joint tenant entitled her to bring action for possession against one claiming the same by adverse possession.

4. The delivery of land by executors to the heirs is sufficient evidence that it was not needed for the purposes of administration.

Appeal from district court, Denton county.

W. J. Austin, for appellants. *H. C. Ferguson*, for appellees.

STAYTON, C. J. This action was brought by Mrs. Haywood to recover a tract of land granted to S. F. Mosely, who was her father. S. F. Mosely died in the year 1877, and left a will, which was duly probated in the probate court of Marion county, Tex., on the 20th day of March, 1878, by which he appointed M. D. K. Taylor, and such of his sons, as they arrived at full age, as would accept and qualify, executors. M. D. K. Taylor, S. W. Mosely, and S. F. Mosely, Jr., qualified as executors, March 20, 1878. The will provided, among other things, that, as each of his children arrived at majority, the executors under the will should partition and deliver to them one-half of what they would respectively be entitled to at the final settlement of his estate, and to partition his estate among his heirs, and that no action be had in the probate court concerning his estate, except to probate the will, and to return and record an inventory of the property. On the 11th of February, 1885, M. D. K. Taylor and S. W. Mosely executed a deed of conveyance to appellee for the land in controversy, as a part of her distributive share of her father's estate, for which she executed her receipt, with her husband. Appellants, James Hall and Giles Lawson, entered into a written contract with Thomas E. Hogg, as the agent of S. F. Mosely, in which they agreed to pay a certain sum per annum as rents for the use of the land. None of the defendants set up any claim of title in themselves, except adverse possession for 10 years prior to the institution of this suit, and

purchase (by parol) of improvements on the land from parties not shown to have had any interest in the land. The lease contract executed between Hogg, assuming to act as the agent of S. F. Mosely, and Hall and Lawson was executed after the death of S. F. Mosely. Appellants, to be used in evidence, made a written agreement to the effect that S. F. Mosely died in 1877; that Mrs. Haywood was his daughter; that she married her present husband in 1888; and that a certified copy of the will of Mosely, which seems to have been attached to the agreement, was duly recorded in the county in which the land was situated, on July 9, 1884,—all of which it was agreed might be used in evidence; the copy of will, however, to be subject to all legal objections other than that of its record. The agreement and certified copy of the will seem to have become detached, in some way not explained. On this account, appellants objected to the introduction of the agreement; a certified copy of the will, with all the proceedings showing its probate, being in evidence. There is no pretense that the copy of the will offered in evidence was not a true copy, nor that the copy attached to the agreement, when executed, in any respect differed from the copy offered in evidence. In fact, it is not clear that the identical paper was not offered. The court did not err in admitting the agreement. The agreement showed that Mrs. Haywood was entitled to take under the will; and the court did not err in admitting a certified copy of the will in evidence.

Appellants question the power of two of the executors to make the conveyance to Mrs. Haywood; but the will did not provide how the executors were to set apart to each child of the testator the part of the estate to which such child was entitled; and we are of opinion that, without reference to the deed executed by the two executors, Mrs. Haywood shows such interest as entitled her to recover. Under the will of her father, she was a joint tenant with the other children of her father, and therefore had such interest in the land as would enable her to maintain this action. The action of the executors in delivering the property to her, as a part of her share of her father's estate, must be received as sufficient evidence, in this case, that the property was not needed for the ordinary purposes of administration.

It seems to be claimed that an action of trespass to try title would not lie against Hall and Lawson, but that an action for forcible entry and detainer was the proper remedy. This is a strange proposition to come from persons who disown any holding as tenants, and set up adverse claim through the statutes of limitations. If, however, the relation of landlord and tenant had existed, on the disavowal of that relation the owner of the land would be entitled to maintain an action of trespass to try title. There is no error in the judgment, and it will be affirmed.

LEACH v. WILSON COUNTY.*(Supreme Court of Texas. April 11, 1890.)***APPEAL—ASSIGNMENTS OF ERROR.**

Assignments of error that the court erred in overruling plaintiff's motion for a new trial, that the verdict is not supported by the evidence, and that the verdict and judgment are contrary to law and the evidence, are too general for consideration.

Appeal from district court, Wilson county.

Action by T. T. Leach to recover of Wilson county the sum of \$730, evidenced by a warrant drawn on its county treasurer. Verdict and judgment for defendant, and plaintiff appeals.

L. S. Lawhon and Brown & Beasley, for appellant. *J. B. Polly, W. H. Burges*, and *B. F. Ballard*, for appellee.

GAINES, J. In 68 Tex. 353, 4 S. W. Rep. 613, will be found a report of this case upon a former appeal. The facts adduced in evidence upon the first trial are stated in the opinion there reported. Upon the second trial, by agreement of parties, the statement of facts made up and filed for the purpose of the former appeal was read in evidence. There was some additional evidence introduced, which, however, did not materially change the case in any particular, and which need not be further noticed. Upon the second trial, defendant county again obtained a verdict and judgment in its favor; and the plaintiff again appeals, presenting the following assignments only: "(1) The court erred in overruling plaintiff's motion for a new trial; (2) the verdict was not supported by the evidence; (3) the verdict and judgment are contrary to law and the evidence." That such assignments are too general to entitle them to be considered is too well settled to require the citation of any authority. The record discloses no "error of law apparent upon the face of the record," nor any error fundamental in its character. The judgment must therefore be affirmed.

SHINER v. ABBIE.*(Supreme Court of Texas. April 11, 1890.)***CONTRACT—PLEADING—EVIDENCE.**

1. A petition alleging that defendant inclosed part of plaintiff's land, and has since, by plaintiff's permission, occupied and used it, having promised to pay the reasonable value thereof, states a cause of action on an implied contract, and evidence of an express contract is incompetent.

2. Declarations of plaintiff's agent, made to a third party when defendant was not present, are inadmissible in evidence against defendant.

Appeal from district court, Frio county.

J. M. Eckford, for appellant.

HENRY, J. Appellee instituted this suit, charging that about the 20th day of August, 1884, the defendant inclosed six sections of land belonging to plaintiff, and that by the permission of plaintiff he has since that date occupied and enjoyed the use of said land, having promised to pay plaintiff the reason-

able value thereof, which has been six cents per acre per annum. Defendant excepted to the petition, on the ground that, by it, it was sought to recover both upon an express and an implied contract, without stating facts sufficient to constitute either. We think the petition states a good cause of action upon an implied contract, and contains no allegations of an express contract. The exception was properly overruled.

A witness for plaintiff testified, over the objection of defendant, that some time in 1886 he was informed by one Johnson, who was plaintiff's agent, that "they could not lease the land to him because the defendant had it leased." We think this evidence should have been excluded. The fact that other evidence of the same character had been introduced without objection did not furnish a satisfactory reason for allowing plaintiff to introduce the declarations of his own agent, made out of the presence of the defendant, when they were objected to.

As the case will be reversed, it is proper for us to say, in view of another trial, that, as the case stated by the amended petition of plaintiff is founded upon an implied, and not upon an express, contract, evidence of an express contract should not have been permitted. The record contains some such testimony, delivered by plaintiff, and its admission is assigned as error; but the record falls to show that it was objected to in the court below. *McGreal v. Wilson*, 9 Tex. 426. If the plaintiff's pleadings remain as they now are, the charge of the court should present the case to the jury as founded upon an implied, and not upon an express, contract, and the evidence as to the amount of the recovery should be confined to the issue of the reasonable value of the use and occupation of the land, and plaintiff should not be permitted to prove both that and a contract price. The judgment is reversed, and the cause is remanded.

DAVIS, Tax Collector, v. BURNETT.*(Supreme Court of Texas. April 11, 1890.)***TAXATION—COUNTY SCHOOL LANDS—INJUNCTION.**

1. Const. Tex. art. 11, § 9, exempting from taxation the "property of counties, cities, and towns owned and held only for public purposes," applies to county school lands; and, where such lands are held under a lease from the county, they cannot be taxed as the property of the lessee. *Following Daugherty v. Thompson*, 9 S. W. Rep. 99.

2. It is not necessary, before seeking to enjoin the collection of an illegal tax on county school lands, for plaintiff to show that he first applied for relief to the board of equalization, as the jurisdiction of the board extends only to questions of valuation.

3. Injunction is the proper remedy to prevent the collection of an illegal tax. *Following Court v. O'Connor*, 65 Tex. 334.

Appeal from district court, Wichita county.

Petition for an injunction by *S. B. Burnett* against *F. M. Davis*, tax collector, to enjoin the sale for taxes of 640 acres of land

situate in Wichita county, Tex. The land levied on belonged to plaintiff, but the levy was made to satisfy the sum of \$428.25 taxes due upon 17,500 acres of the Tarrant county school lands, which had been leased by plaintiff. Const. Tex. art. 11, § 9, provides that the property of counties, cities, and towns owned and held only for public purposes shall be exempt from taxation.

J. P. Boyd, for appellant. *W. W. Flood*, for appellee.

GAINES, J. The school lands which belong to Tarrant county lie in Wichita county, and, before the bringing of this suit, had been leased to appellee. During the year 1886 the tax assessor of Wichita county assessed these lands against him as such lessee. The valuation placed thereon was not of the leasehold interest, but of the entire property, in the lands. In order to enforce the collection of the tax so assessed, appellant, as the tax collector, levied upon and advertised for sale a tract of land belonging to appellee. This suit was brought to enjoin the sale of the land so levied upon. In *Daugherty v. Thompson*, 71 Tex. 192, 9 S. W. Rep. 99, this court held that the school lands belonging to the several counties of the state were not subject to taxation so long as they remained the property of the county, and that the leasehold estate could not be taxed as the property of the lessee when they were held under a lease from the county.

It is urged in the brief of appellant that the appellee had a remedy by application to the board of equalization, and that therefore he was not entitled to a writ of injunction. The function of the board of equalization is to correct errors in the valuation of property that has been properly assessed. It has no power to add to the rolls property not previously assessed, or to take from them property which they embrace. *Galveston Co. v. Gas Co.*, 72 Tex. 509, 10 S. W. Rep. 583. In *Court v. O'Connor*, 65 Tex. 334, it was held that it was not necessary for one who seeks to enjoin the collection of a tax, wholly illegal, to show that he had first applied for relief to the board of equalization.

The case last cited is also authority for the proposition that a writ of injunction is proper to restrain a sale of land which is attempted to be made for the payment of a tax assessed without authority of law. We find no error in the judgment, and it is affirmed.

GENTRY v. SCHNEIDER.

(*Supreme Court of Texas. April 11, 1890.*)

RECORD ON APPEAL.

Where the record contains no statement of facts, and there is no bill of exceptions, it must be presumed that all proof necessary to sustain the judgment was produced.

Error from district court, Hamilton county.

G. H. Goodson, for plaintiff in error. *C. K. Bell*, for defendant in error.

HENRY, J. This suit was brought by defendant in error to recover the amount of two promissory notes, and to foreclose a vendor's lien. The defendant answered, but subsequently withdrew his pleadings, whereupon judgment was rendered in favor of plaintiff for the amount of the notes, and foreclosing the lien.

The record contains no statement of facts. It is complained that the court erred in rendering judgment in favor of plaintiff below as upon a liquidated and proven instrument, when no such instrument was filed with the papers of the case, or produced in evidence. There being no statement of facts or bill of exceptions showing the contrary, we are bound to presume that all proof necessary to sustain the judgment was produced. *Bond v. Mallow*, 17 Tex. 636. We find no error in the proceedings, and the judgment is affirmed.

LANIUS et al. v. SHULER.

(*Supreme Court of Texas. April 15, 1890.*)

PROMISSORY NOTES — PAROL EVIDENCE — NEW TRIAL.

1. In an action on a note, answers alleging that defendants were induced to sign it as sureties by false representations, made by the payee's agent, that the note was given for money to be borrowed by the maker to purchase cattle, and that the money should not be delivered to him until he had purchased the cattle, and executed a mortgage thereon to defendants, are not allowable, as they would destroy the written contract by parol evidence.

2. Plaintiff demanded a jury trial, but failed to pay the jury fee, and the case, though not stricken from the non-jury docket, was placed on the jury docket, which showed that the fee had not been paid. Defendants averred that they attended court until the judge announced that there was no jury for the following week; that they, having been informed by plaintiff and the clerk that the case was on the jury docket, and having found this true by inspection of the record, did not attend during that week, during which time judgment was rendered for plaintiff; and that they were able to produce material testimony. Held, that defendants were entitled to a new trial, though the case should not have been placed on the jury docket until the fee had been paid.

Appeal from district court, Clay county.

Action by *H. B. Shuler* against *Phil Lanus, A. E. Ray, Frank Houston, and B. F. Denson*. Judgment for plaintiff, defendants' motion for new trial overruled, and they appeal.

A. K. Swan and *J. C. Chestnutt*, for appellants. *Hazlewood & Templeton*, for appellee.

HENRY, J. This suit was instituted by appellee to recover upon a promissory note. The defendant Lanus pleaded under oath that the only consideration for the note was an offer made by plaintiff, through an agent, to lend him the amount of money recited in the note; that the note was signed and delivered to the agent of plaintiff for the purpose of being submitted to plaintiff for his approval before it was delivered, but the money was never furnished, and defendant

was notified through said agent that the note was not accepted. Defendant Houston answered that the note was given by Lanius, as principal, for borrowed money, and that he signed the note as a surety; that he was induced to sign it by false and fraudulent representations made to him by the agent of the lender, "that the said Phil Lanius was borrowing the money for which the note was given for the purpose of buying cattle therewith; that said money was then in C. W. Israel & Co.'s bank, of which said G. A. Archibald was then cashier, and that the same would not be paid or delivered to the said Lanius for any other purpose than to buy said cattle, and that plaintiff's said agent (Archibald) would not let said Lanius have said money until he should have bought the cattle to be paid for with same, and that when said cattle were so bought, and before said money should be paid or delivered to said Lanius, or by him taken out of said bank, he, the said Archibald, would require the said Lanius to make and execute to this defendant a good and sufficient chattel mortgage on said cattle so bought with said money, and deliver the same to the said Archibald, to be by him kept and delivered to the defendant, to save him harmless from loss or liability on account of said note;" "that the plaintiff, by his agent, Archibald, agreed with this defendant and promised him, at and before the signing of said note, that he would not deliver to said Lanius said money, or permit him to withdraw the same from the said bank, until he, the said Lanius, should make and execute said mortgage on said cattle so bought and to be paid for with said money, so that the defendant Houston should be fully indemnified from loss or liability on account of said note." "Defendant further says that said representations, promises, and agreements so made by plaintiff and through his said agent, Archibald, were false, and were fraudulently made for the purpose of defrauding and deceiving this defendant, and did deceive this defendant; that he believed said representations and relied upon the said promises and agreements so made by plaintiff's said agent, and was induced thereby to sign said note; that said Lanius never bought cattle with said money, but, upon the contrary, used the same for other and different purposes, if, indeed, he ever used it at all." The defendant Ray pleaded substantially the same facts. The court sustained exceptions to the answers of defendants Ray and Houston.

The note furnished evidence of a complete and valid contract between the parties. The facts set up in the answers excepted to go to show that the note failed to embody the entire contract between the parties, and add to it other material conditions. The answers, if allowed, would have had the operation of varying and destroying the force of the written contract by parol evidence, and the exceptions were properly sustained.

Judgment was rendered for plaintiff. The

defendants moved for a new trial upon, substantially, the following grounds: That plaintiff, at a previous term of the court, had demanded a jury, but never paid the jury fee. The cause was not stricken from the non-jury docket, but was placed by the clerk upon the jury docket; and, at the term when judgment was rendered, it was on both dockets. The entry on the jury docket showed that the jury fee had not been paid. In support of the motion the defendant Lanius filed an affidavit stating that he had attended the court "from time to time until the last day of the fourth week of the term, and would not have left then but for the reason that the court announced that there was no jury for the fifth week, and, having always believed and been informed by both plaintiff and defendant that this cause was a jury case, and was upon the jury docket at the instance and wish of plaintiff, and having been informed by the clerk of the court that the cause was upon the jury docket, and finding the same to be true from an inspection of the record, and being thereby confirmed in the belief that it was a jury case, he, under the announcement made by the court, went home; that affiant understood from the court that there would be a jury for the sixth week, and he returned to the court upon the first day of said week for the purpose of being at the trial of the cause, when he first learned that the cause had been tried during the fifth week. Affiant also stated that the matters stated in his motion for a new trial were true;" one of said matters being "that the defendant can prove each and every allegation contained in the said amended answer of Lanius by said Lanius and Ray." Substantially the same statements are made with regard to the absence of the defendant Ray. While it is true that an application for a jury, within the meaning of the law, is not complete until the jury fee has been paid, and the case ought not to be placed on the jury docket until then, we think that, under the circumstances of this case, there was such evidence of diligence shown by the defendants, and such probability that they had been misled by the action of the plaintiff in connection with the condition of the dockets, that a new trial should have been awarded, so as to furnish defendants an opportunity to make the material testimony which they alleged their readiness and ability to do. The judgment is reversed, and the cause is remanded.

PUNCHARD *et al.* v. DELK *et al.*

(Supreme Court of Texas. April 15, 1890.)

JOINDER OF ACTIONS—SEVERANCE—ABANDONMENT.

Where, after an order permitting one of several plaintiffs, who have voluntarily joined in an action to try title, to sever, the cause is several times tried without regard to the land claimed by him, and without his participating in the proceedings, and he fails for more than 25 years to have his branch of the action separately docketed, or in

any manner to continue its prosecution, and his evidence that this was the result of an agreement with defendants is denied, his suit is properly held to have been abandoned.

Appeal from district court, Hill county.

Thos. Harrison, for appellants. *Anderson, Flint & Anderson*, for appellees.

HENRY, J. In the year 1858, Samuel W. Punchard, C. Ennis, Hardy Hendy and wife, Benjamin Allen, and Robert B. McNutt jointly instituted an action of trespass to try title against William Delk and others for the recovery of the Joseph Punchard league of land. The plaintiffs were not tenants in common, but each owned separate and distinct portions of the survey. On the 17th day of April, 1860, the parties to the suit entered into an agreement "that the plaintiffs are properly joined in the original petition, and that the cause may proceed and the rights of all the parties be determined in the one suit; thus preventing multiplicity of litigation." On the same date, plaintiff McNutt filed a motion for "a severance of plaintiffs so far as that this plaintiff may prosecute his suit alone, because he holds title to and claims a part of the land in controversy which is distinct and separate from that part claimed by the other plaintiffs by metes and bounds, and that he holds the same by a different title from that by which they hold theirs." Upon this motion the court entered an order "that the plaintiff McNutt have a severance from the rest of the plaintiffs in the original case without prejudice to the defendants, and that the evidence in the original cause be used in the trial of the said McNutt without the expense of taking new evidence." On the 18th day of April, 1860, under the original style of the cause, plaintiffs amended their petition, by which the plaintiff Benjamin Allen withdrew from the further prosecution of the suit, and the remaining plaintiffs were mentioned, including Robert McNutt as one of them. This pleading, among other matters, alleged that "plaintiffs own the whole league of land described in their original petition, but in separate parcels;" and it then proceeded to designate the particular tract or parcel separately claimed by each of the several plaintiffs, charging that "Robert McNutt owns one thousand acres of said league, on the lower side of the same," and otherwise sufficiently describing and identifying the same. At the fall term of the court, 1865, E. B. McCown, J. W. McCown, T. P. McCown, and Ambrose Key, who had purchased the interests of the original defendants pending the litigation, were permitted to become defendants in their stead. The severed case of McNutt was never separately docketed, and the subsequent proceedings in the cause are stated in appellants' brief in the following language: "The main case of Punchard v. Delk and wife, but not including the McNutt branch of it, in which the above-named parties were made defendants, was several times tried.

There were mistrials and new trials, and it was appealed to the supreme court three times,—first by the defendants, second by the plaintiffs, and third by the defendants,—and, being affirmed on this appeal, after motion for rehearing was refused, writs of possession were awarded to the plaintiffs separately, according to their amended pleadings and respective titles. The plaintiffs are in possession of all land claimed, except one thousand acres claimed by McNutt, and that now is the only subject of contention." The case was finally disposed of in this court in the year 1885. 65 Tex. 360. In the year 1881 a motion was made in the district court, in behalf of McNutt, to separately docket his case; but, on its being opposed in behalf of the defendants, it was abandoned without being acted on by the court. At the March term, 1886, of the district court an order was made in the cause as originally styled and numbered, as follows: "S. W. Punchard et al. v. Wm. Delk et als. No. 102. Munger and wife have leave to intervene. Death of R. B. McNutt suggested, and his heirs ordered to be made parties, and cause continued by consent." No action appears to have been taken between the date of the pleading, on the 18th day of April, 1860, and the final judgment, in 1885, with regard to the prosecution of McNutt's claim, either as a separate suit or as a part of the original suit.

The case comes to this court by an appeal taken by the plaintiff McNutt from a judgment of the district court dismissing the cause from the docket, made, on a motion filed by the defendants, in October, 1886. Upon the trial of this motion, McNutt claimed, and introduced some evidence tending to prove, that an agreement had existed to delay the trial of McNutt's part of the case until after the controversy between the other parties had been determined, but not for it to abide the result of the litigation between the other parties, and that in various ways, and at different periods, the existence of such an agreement had been recognized or acquiesced in by defendants. The defendants denied, and introduced evidence tending to disprove the existence of, or their acquiescence in, such an arrangement. So far as the issues of fact are concerned, the ruling of the court is sufficiently sustained by the evidence to make it proper for us to let it stand. If it be admitted that plaintiffs, who have voluntarily joined in actions to try title, may be permitted to sever, it still cannot be held that an order to that effect will relieve plaintiffs from their obligation to continue the prosecution of their suits. When a severance, in such cases, is permitted, the proper practice is to separately docket, and proceed with the trial of the case, at least to an adjudication of the title in controversy. No doubt such an order, when properly made, may be abandoned or set aside. The uncertain and confused condition of the record in this case does not leave entirely clear the question as to what was finally intended to

be done. But, in either view, we think it must be held that plaintiff McNutt abandoned the prosecution of his cause. The numerous trials of the original cause as to the other portions of the land in controversy, without regard to the 1,000 acres claimed by him, and without his participating in, or being mentioned in, the proceedings, forbid the conclusion that his connection with that suit as a party continued. On the other hand, his failure to cause his branch of the suit to be separately docketed, or to prepare it for trial, or in any manner to continue its prosecution, for so long a period of time, are not sufficiently explained, and must be held to show an abandonment of its further prosecution. A much shorter delay would have warranted the same conclusion. The judgment is affirmed.

BAKER v. DUNNING.

(Supreme Court of Texas. April 15, 1890.)

COUNTY SCHOOL LANDS—PRE-EMPTION—CONSTITUTIONAL LAW.

1. The right of pre-emption given to actual settlers on county school lands by Const. Tex. art. 7, § 6, which provides that they "shall be protected in the prior right of purchasing the same to the extent of their settlement, not to exceed one hundred and sixty acres," extends to future settlers as well as to those residing on the land at the time the constitution was adopted, and is not affected by a sale of the land by the county to another before the settler offered to buy it.

2. Const. Tex. art. 7, § 6, giving to actual settlers on school lands the right of pre-emption, is not repugnant to the constitution of the United States, as being an infringement of the vested right of the counties.

Appeal from district court, Taylor county.

Action of trespass to try title by Cordella H. A. Baker against G. W. Dunning. Plaintiff appeals. Const. Tex. art. 7, § 6, provides that actual settlers residing on county school lands "shall be protected in the prior right of purchasing the same to the extent of their settlement, not to exceed one hundred and sixty acres, at the price fixed" by the commissioners' court.

Sayles & Sayles, for appellant. *Bentley & Boyer*, *H. A. Porter*, and *Mr. Cookrell*, for appellee.

GAINES, J. The appellee, Dunning, settled upon the school lands belonging to Grimes county in 1884, and continued to reside there until the bringing of this suit. In 1886 the commissioners' court of that county caused these lands to be advertised for sale, and to be sold. Buffington, McDaniel, and Baker became the purchasers of the entire tract at \$2.45 per acre, and the lands were conveyed to them. They subsequently conveyed to appellant, who brought this suit to dispossess the appellee of so much of the premises as were occupied and claimed by him. Appellee, in his answer, claimed a right to possess, and a prior right to purchase, 160 acres of the land, including his improvements, by virtue of section 6 of article 7 of the constitution. After the sale to

Buffington, McDaniel, and Baker, appellee tendered, both to them and to the commissioners' court of Grimes county, money and his promissory notes in amount sufficient to pay for 160 acres of land at \$2.45 per acre. His offer was based upon the same terms for the 160 acres claimed by him as those upon which the county had sold the land to Buffington, McDaniel, and Baker. There was a judgment in favor of the settler, and the plaintiff appeals.

The case presents questions which have heretofore been suggested in this court, but have never been determined. In *Cattle Co. v. Wood*, 71 Tex. 463, 9 S. W. Rep. 340, this court recognized the right of a settler who was residing upon county school land at the time of the adoption of the present constitution to a pre-emption of as much as 160 acres of land, including his improvements. In that case the settler had offered to buy of the county before the land was sold by it to his adversary in the suit. In *Falls Co. v. De Laney*, 78 Tex. 463, 11 S. W. Rep. 492, it was held that the county had the right to lease lands, and that a settler could not lawfully interfere with that right. In that case there was a suggestion that there was a question whether section 6 of article 7 of the constitution was intended to apply to those who might thereafter settle upon lands held by the counties for school purposes; and, also, there was doubt expressed as to the extent to which the state could regulate the control of the counties over the school lands. The appellant does not insist that the section was not intended to apply to future settlers, but we have had some difficulty in determining that question. We have considered, however, that there was probably a predominant sentiment in the convention that framed the constitution to give a right of pre-emption of the public lands to actual settlers, in so far as it could be done without interfering with other objects, and without prejudice to vested rights. It was probably intended not only to favor the class of persons who were likely to avail themselves of the privilege, but also to encourage the settlement of the vacant lands of the state. Besides, the language of the section is sufficiently comprehensive to embrace not only settlers residing upon the lands at the time the constitution took effect, but also such as might thereafter settle upon them. If it had been the purpose to limit the operations of the provision to the former class, that intention could have been made clear by simply saying: "Settlers now residing on said lands shall be protected," etc. We conclude that the section was intended to apply to future settlers as well as to those residing upon the lands at the time the constitution was adopted.

It is insisted, however, that the counties have a vested right in their school lands which the state has no power to impair even by a constitutional enactment, and that the provision in question is an infringement of that right. In *Milam Co. v. Bateman*, 54

Tex. 153, it was held the state could not take from the counties the lands which had been donated to them for educational purposes. We are of the opinion that that decision should be adhered to. If it were an open question, we might have difficulty in coming to that conclusion. The counties being but political subdivisions of the state, and *quasi* corporations created by the state for the more convenient administration of its laws, I incline to the opinion that they hold their property, as they hold their existence, at the will of the state, or that, at least, what has been given to them by the state for the purposes of government they hold in trust, and that it is subject to be resumed by the state at its pleasure. But, considering the proposition that the state cannot take from the counties their school lands as settled by the case last cited, the question recurs whether the right of pre-emption conferred by the section of our constitution under consideration is such an interference with the grant of the state to the counties as to render it repugnant to the constitution of the United States. We think this question must be answered in the negative. The grant was by no means absolute. It was for the purpose of assisting in maintaining a system of public schools; and it is to be presumed, we think, that in the grant the state impliedly reserved, or at all events did not part with, the power to regulate the mode in which the trust was to be administered. Let it be conceded that the state cannot revoke the grant either in whole or in part, and that it can make no law which impairs its value. Still it should be held that the provision in question is valid. That it does not compel a sale we held in *Falls Co. v. De Laney*, supra. We there held, also, that the settler could not even obstruct the right of the counties to derive a revenue from its lands by a lease. The provision does not require the county to sell to the settler at any fixed price, or at a less price than to any other purchaser, but merely that when it determines to sell, everything else being equal, the purchaser shall have the prior right of purchase. The county may fix its price and terms, and tender the land to the settler at the price and upon the terms so fixed. If he reject the offer, it is free to sell to another. It loses nothing by the operation of the law.

It is also urged, in effect, that the court should have held that the appellee had forfeited his right of pre-emption because he failed to take any steps to secure the land until it was sold to appellant's vendor. The respective rights of the settler and of the county, in cases like this, are not clearly defined in the constitution. The language of section 6 of article 7 is, however, emphatic, that settlers "shall be protected in the prior right of purchasing." If the counties can, without an offer to the settlers, and without actual notice brought home to them, sell the lands to others, the provision would be of no value whenever a commissioners' court

should desire to thwart its purpose. The settler would not be protected. But it may be argued that the settler should at least file a notice of his desire to purchase with the commissioners' court of the county to which the land belongs. It would hardly be reasonable to require this until he has notice that the county has determined to put the lands upon the market. On the other hand, it would seem but reasonable that when a county had decided to sell its lands the commissioners' court should fix, in good faith, a price upon each parcel that is occupied by a settler, as well as the terms of the sale, and should then afford him a reasonable opportunity to buy the land at the price and upon the terms so fixed. Governed by this rule, the county need not lose anything, and the settler will receive the protection the constitution was intended to afford.

It follows that, in our opinion, the court below did not err in holding that the purchasers from Grimes county did not acquire through their purchase a right to the land in controversy as against the appellee, and in giving judgment in his favor. So much of the judgment as permits the appellee to perfect his title by paying to appellant the same price per acre that her vendors agreed to pay the county is not complained of, and we do not pass upon the question of its correctness.

The judgment is affirmed.

BAKER v. MILLMAN.

(Supreme Court of Texas. April 22, 1890.)

SCHOOL LANDS—PRE-EMPTION—ADVERSE POSSESSION.

1. Const. Tex. art. 7, § 6, in regard to school lands, provides that "actual settlers residing on said lands shall be protected in the prior right of purchasing the same," etc. *Held*, that one who does not reside upon the land claimed is not an "actual settler," although he has fenced the entire tract, and cultivated several acres of it.

2. Rev. St. Tex. art. 4818, allows compensation for improvements to land to those who "have had adverse possession, in good faith, of the premises in controversy for at least one year before the commencement of this suit." *Held*, that one who has fenced and cultivated school lands for more than one year, but has not actually resided thereon, is not entitled to compensation for improvements from a purchaser of such lands.

Appeal from district court, Taylor county. *Sayles & Sayles*, for appellant. *Bentley & Boyer, H. A. Porter, and Cockrell & Cockrell*, for appellee.

GAINES, J. This case, like that of the same appellant against G. W. Dunning, ante, 617, (decided at a former day of this term,) is a controversy between one claiming under a purchase of the Grimes county school lands and a claimant of the right of pre-emption as an actual settler. With two exceptions, the questions presented upon this appeal are the same which in the former case were decided adversely to appellant. One of the additional questions submitted in this case is whether or not the appellee was a "settler," within the meaning of that term as used in section

6 of article 7 of the constitution. The facts in reference to this matter, as agreed upon by the parties, are as follows: "That Jasper Millman fenced the entire tract, 160 acres, [meaning the land in controversy,] in 1885; that he is a single man, but of age; that, at the date of the purchase by Buffington, McDaniel, and Baker said Jasper Millman was sleeping at his father's (George Millman's) on a survey of 160 acres out of the same league adjoining that in controversy; that all the improvements on the land were put on it by Jasper Millman, and that he himself worked 7 or 8 acres of the land in 1887; that he claimed the land prior to the purchase by Baker, Buffington, and others; and that he owned no other homestead." The entire league was sold to McDaniel, Buffington, and Baker, under whom appellant claims, by the commissioners' court of Grimes county, and was conveyed to them August 2, 1886.

It may be, as claimed by counsel for appellee, that it was not necessary that he should be the head of a family in order to acquire a right of pre-emption in the land claimed by him. The provision of the constitution in question, in designating the persons to be protected, does not say "heads of families," nor does it use any other words which evince an intention that the right should be restricted to that class; but the language is: "Actual settlers residing on said lands shall be protected in the prior right of purchasing the same to the extent," etc. Const. art. 7, § 6. While this language does not exclude single men, it includes only such persons as have actually settled upon the land, and are residing upon it at the time the county determines to sell. An actual settler upon land is one who has actually established his residence upon it, and not one who has inclosed it and cultivated it, intending at some future time to live upon it. The use of the word "actual" would seem to have been intended to prohibit the courts from extending the meaning of the word "settlers" by construction, and to confine the benefits of the provisions to those only who come within the literal meaning of the term. The purpose was to secure to those who had made or should make homes upon the school lands an opportunity to make them permanent by purchase of the lands upon which their residences were established. It was not the object to confer any privilege upon those who should inclose and use the lands while they resided elsewhere. The defendant was not residing upon the lands at the time they were sold, and cannot be deemed an "actual settler," within the meaning of the constitution. It follows that, in our opinion, the judgment of the court below should have been for the appellant.

The appellee, however, claims that he was a possessor in good faith, and prays that, in the event the plaintiff shall recover the land, he shall be allowed compensation for his improvements. The statute allows compensation for improvements to those who "have had ad-

verse possession, in good faith, of the premises in controversy, for at least one year next before the commencement of the suit." Rev. St. art. 4813. The defendant did not have adverse possession of the land now claimed by him. He entered upon and improved it with the expectation of buying it from the county of Grimes. He may have honestly believed that he acquired a right of pre-emption without making his residence upon the land. But, in our opinion, it was not intended that persons who were not actual settlers should incumber the school lands of the counties with claims for improvements, when their sole excuse for making such improvements was their ignorance of the law. We are of opinion that the judgment should be reversed, and here rendered for appellant; and it is so ordered.

GALVESTON, H. & S. A. RY. CO. v. STATE.

(Supreme Court of Texas. April 18, 1890.)

Dissenting opinion. For majority opinion, see 12 S. W. Rep. 988.

STAYTON, C. J., (*dissenting*.) Magnitude of the interests involved in the question decisive of this case, and the broad divergence of opinion entertained by members of this court, must furnish my reason for stating what is believed to be the true construction of those parts of the constitution on which the decision must rest. In construing a constitution, or any other law, the object sought is the true intent of the law-maker, which must be ascertained from the language in which the law is written; and in considering this it is always important to keep in view the object which the law-maker intended to accomplish through its enactment. The more intensely the law-maker may be seen to have desired to accomplish the given purpose, the more weight should be given to the language used in a law looking to that end. When it is seen that the people of a great state have persisted throughout the entire period of their statehood, in prosperity and in adversity, in peace and in war, in the accomplishment of a purpose which they have declared again and again of the utmost importance to their welfare, if not to their existence; when from time to time, as occasion offered, they have manifested their deep concern to accomplish it by increasing the fund with which this may be done,—their language used in laws looking to that end ought not to be lightly weighed.

The first section of the article (7) of the constitution on which the decision of this case rests declares that "a general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the legislature of the state to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." This utterance is not new to the people of Texas. Before it became a separate nationality, in

the face of an hostile army bent on subjugation, when the future was dark, the fathers of the republic, in summing up the wrongs which drove them to seek refuge from oppression through revolution, declared that the Mexican nation had "failed to establish any public system of education, although possessed of almost boundless resources, [the public domain,] and although it is an axiom in political science that unless a people are educated and enlightened it is idle to expect the continuance of civil liberty, or the capacity for self-government." 4 Sayles' Tex. St. 152. The same men, in the constitution then made, declared that "it shall be the duty of congress, as soon as circumstances will permit, to provide by law a general system of education." Const. Republic, General Provisions, § 5. When it surrendered its nationality and entered the Union it preserved the fund now in question, and in the constitution of 1845 first used the language found in the present constitution, before quoted. That constitution preserved to the school fund all that had been donated by the congress of the republic, imposed upon the legislature the duty "as early as practicable to establish free schools throughout the state," and "to set apart not less than one-tenth of the annual revenue of the state derivable from taxation as a perpetual fund." Article 10, §§ 2-4. It made other provisions in lands. The accumulation of that fund, and the sources from which it came, may be traced through the legislation of the period. Again came devastating war, but the purpose was never abandoned; the fund, though for a time partially diverted, was restored. In 1854 the system of granting aid, through alternate sections of land, to railway companies began, through which the state required 16 sections of land for every mile of railway built to be surveyed for the state. This land was reserved from location, entry, or pre-emption privileges, and when the people again met in convention to remodel their organic law, they repeated the declaration before quoted; secured to the perpetual school fund all funds which had theretofore belonged to it; provided for taxation for school purposes; and, in addition to this, declared that "all the alternate sections of land reserved by the state out of grants heretofore made, or that may hereafter be made, to railroad companies, or other corporations of any nature whatever, for internal improvements or for the development of the wealth and resources of the state, shall be set apart as a part of the perpetual school fund of the state: provided, that if at any time hereafter any portion of the public domain of this state shall be sold, and by virtue of said sale the jurisdiction over said land shall be vested in the United States government, in such event one-half of the proceeds derived from said sale shall become a part of the perpetual school fund of the state; and the legislature shall hereafter appropriate one-half of the proceeds resulting from all sales of the public lands to the perpetual

public school fund." Const. 1866, art. 10, §§ 1-7. It secured to counties the school lands theretofore granted to them, as did it secure the grants of money and lands theretofore made to found and support one or more universities. The period of "reconstruction" came, and the constitution of 1869 was adopted. That took from the legislature the power to grant land to aid in the construction of railways, or other like improvements, but provided that lands might be sold only to actual settlers in small quantities. In reference to education it contained the following provision: Article 9, § 1. "It shall be the duty of the legislature of this state to make suitable provisions for the support and maintenance of a system of public free schools for the gratuitous instruction of all the inhabitants of this state between the ages of six and eighteen years." "Sec. 4. The legislature shall establish a uniform system of public free schools throughout the state." "Sec. 6. As a basis for the establishment and endowment of said public free schools all the funds, lands, and other property heretofore set apart and appropriated, or that may hereafter be set apart and appropriated, for the support and maintenance of public schools, shall constitute the public school fund. And all sums of money that may come to this state hereafter from the sale of any portion of the public domain of the state of Texas shall also constitute a part of the public school fund. And the legislature shall appropriate all the proceeds resulting from sales of public lands of this state to such public school fund. And the legislature shall set apart for the benefit of public schools one-fourth of the annual revenue derivable from general taxation, and shall also cause to be levied and collected an annual poll-tax of \$1 on all male persons in this state between the ages of twenty-one and sixty years, for the benefit of public schools. And said fund and the income derived therefrom, and the taxes herein provided for school purposes, shall be a perpetual fund, to be applied as needed exclusively for the education of all the scholastic inhabitants of this state; and no law shall ever be made appropriating such fund for any other use or purpose whatever." It attempted to place the lands theretofore given to counties for school purposes under the control of the legislature, the proceeds to be added to the public school fund, and further provided for local taxation for support of schools if found necessary. By amendment to that constitution the policy in reference to grants of land in aid of internal improvements was changed on March 19, 1873; but, the day before the amendment took effect, the legislature set apart one-half of the public domain for the support of public schools. The act by which this was done evidently was prompted by the anticipation that lands would be appropriated to works of internal improvements, and secured to the school funds alternate surveys to be made under certificates theretofore or thereafter to be issued, and seems to have

looked to that method for securing the one-half then appropriated. Gen. Laws, 1873, p. 15. After the amendment of the constitution, last referred to, no general law was passed granting land to aid in the construction of railways until the act of August 16, 1876, (Gen. Laws, 153,) though after that amendment such aid was given in special laws contained in charters, before the passage of the act last referred to; but grants were made in alternate sections as required by the act of March 18, 1873, as well as by the act of August 16, 1876. Legislation from January 26, 1839, to the adoption of the present constitution manifested the same deep interest in the cause of free public education shown in the organic laws to which reference has been made; and in view of this persistent and unfaltering purpose, not manifested for any other objects, must be read the language found in the present constitution. Section 2, art. 7, and so much of sections 4 and 5 of the constitution as have bearing on the question involved in this case, are as follows: "Sec. 2. All funds, lands, and other property heretofore set apart and appropriated for the support of public schools; all the alternate sections of land reserved by the state out of grants heretofore made, or that may hereafter be made, to railroads, or other corporations, of any nature whatsoever; one-half of the public domain of the state, and all sums of money that may come to the state from the sale of any portion of the same,—shall constitute a perpetual school fund." "Sec. 4. The lands herein set apart to the public free school fund shall be sold under such regulations, at such times, and on such terms, as may be prescribed by law; and the legislature shall not have power to grant any relief to purchasers thereof. Sec. 5. The principal of all bonds and other funds, and the principal arising from the sale of the lands hereinbefore set apart for said school fund, shall be the permanent school fund; and all the interest derivable therefrom, and the taxes herein authorized and levied, shall be the available school fund, which shall be applied annually to the support of the public free schools, and no law shall ever be enacted appropriating any part of the permanent or available school fund to any other purpose whatever; nor shall the same or any part thereof ever be appropriated to, or used for the support of, any sectarian school; and the available school fund herein provided shall be distributed to the several counties according to their scholastic population, and applied in manner as may be provided by law."

On the interpretation of section 2 rests the right of the parties, and, in seeking for that, we must look to the language used, remembering that the intent to be ascertained is that of the people who ratified the constitution. As has been truly said: "It is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the com-

mon understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed." Cooley, Const. Lim. 80. Courts are not at liberty to speculate as to what the people would have done, under any given state of facts, when called upon to construe a constitution, but are bound to ascertain what they did,—what they intended to do,—and this from the language used in making known their intention. That ascertained, the only remaining duty is to give effect to that intention. It is not claimed that there is a conflict, real or seeming, between the section of the constitution in question and any other; and the sole inquiry is, what lands did the language used appropriate to and make a part of the perpetual or permanent school fund? The first inquiry arising is, does this section make an appropriation of the several sources of revenue named in it? A fund or property is said to be appropriated when it is reserved or destined by law for a particular named use or purpose. The declaration that the specified funds together "shall constitute a perpetual school fund" of itself leaves no doubt upon this question; for the word "constitute," as here used, is the equivalent of the words "compose," "make up," "be,"—the unit composed of the several constituents, which it is declared shall be perpetual, continuing indefinitely, without cessation or interruption by any department of the government, and subject to diversion only by the will of the people, which may be expressed in some future organic law. All the lands referred to in the several clauses of section 2 are the same in their entirety as the lands referred to in sections 4 and 5,—nothing left out or added. These last sections speak of these lands as "the lands herein set apart to the public school fund;" and declare that "the principal of all bonds and other funds, and the principal arising from the sale of the lands hereinbefore set apart to said school fund, shall be the permanent school fund." As if to place this question beyond controversy, then follows the declaration that "no law shall ever be enacted appropriating any part of the permanent or available school fund to any other purpose whatever." Property thus set apart as a permanent or perpetual fund for a named use, with power denied to the legislature ever to divert it from that use, is appropriated as absolutely as the people had power to appropriate. No more apt words could have been used to declare an appropriation than are used in sections 2, 4, and 5 of article 7, and it ought not to be assumed that the people did not understand the meaning of the vernacular, in no manner technical, used by themselves. The question of appropriation will be more closely considered in other connections.

If the constitution appropriates to the school fund each of the items which make up the aggregate denominated in section 2 the "perpetual school fund," when did that appropriation take effect? To this inquiry there can be but one answer. The people de-

clared that the constitution should become the law of the land on April 18, 1876, and from the moment it so became its provisions were binding on the people, and upon every department of the government alike, and must so continue until changed by the people themselves. The opinion of the majority is understood to hold that sections 2, 4, and 5 of article 7 are not self-executing. Section 1 of that article makes it the duty of the legislature to establish and make suitable provision for the support of an efficient system of public free schools, and while this is mandatory it is not self-executing. It rests with the legislature to determine what the system shall be, and to provide for realizing from what is termed the perpetual fund an available fund, and for the manner of its use. As to the system and best means for the conduct and support of the schools contemplated by the constitution, much is left to the discretion of the legislature. Without legislation on these subjects no system could exist, the constitution having established none; nor could an available fund arise from the fund termed "perpetual" for the support and maintenance of any system of public free schools. In so far the constitution is not self-executing. It may be further conceded that, in a limited sense, so much of section 2 of article 7 as made alternate sections out of grants made to railroads or other corporations, after the adoption of the constitution, a part of the perpetual fund was dependent on the action of the legislature. No general law existed when the constitution was adopted, giving land to aid in the construction of railroads or other corporate enterprises. Whether such laws should be enacted depended upon the will of succeeding legislatures, the constitution not commanding the passage of such laws. In so far the appropriation made by the constitution depended on a contingency, in that it rested on the will of the legislature. If, after the constitution was adopted, no lands had been granted to railroads or other corporations, there would have been no "alternate sections of land * * * out of grants * * * that may be hereafter made" to become a part of the perpetual school fund. In this respect the constitution did not absolutely secure to the perpetual school fund, by force of its own provisions alone, a single acre of land; but it does not follow from this that even as to such lands it is not self-executing. Both parties to this appeal concede that the alternates of the sections of land in controversy belong to the school fund, and so, simply because the constitution declares they shall so belong. This is not by force of any act of the legislature, but solely by reason of the self-executing provision of the constitution which attaches whenever such grants are made. This being concededly true of the only item of the appropriation which had in it any element of uncertainty, where is to be found a secure resting place for the proposition that any part of section 2 of article 7 of the constitution is not

self-executing, in so far that it binds every item that makes up the aggregate fund to it with chains so strong that neither one nor all the co-ordinate departments of the government can rend them? All other clauses of that section are absolutely self-executing in every sense having relation to the fact of appropriation, unless the power of the people to appropriate can be successfully denied. If the legislature had not established a system of public free schools, or should now repeal all laws in force providing for their establishment and management, or for realizing from the perpetual fund an available fund for annual use, the perpetual or permanent fund appropriated and put beyond the reach of the legislature for purposes of destruction or diversion would continue to exist; and this would result solely from the fact that every one of the clauses of the appropriating sections is self-executing. The act of appropriating this fund and placing it beyond the power of the legislature to divert or destroy it is an instance of the exercise of a power by the people directly, completely, and absolutely, in regard to a matter which might have been left to the legislature; and the fact that they did this ought to be deemed of itself the strongest evidence of the intent of the people to make the law self-executing, if the language in which the intent to appropriate is found left the question not free from doubt. The language used, however, bears no uncertain meaning, unless we deny to the words used their ordinary and most obvious signification. The instance before us is one in which the people exercised their own power, in so far as it was deemed expedient, to firmly and broadly lay the foundation and furnish the means to erect, through detail to be provided by the legislature, a structure to last for ages. Such provisions in a constitution are self-executing, necessarily, in so far as they determine and fix the fund with which public schools are to be maintained, for they deprive every department of the government of all power to diminish or to divert it. The sections of the constitution having direct bearing on the question involved in this case do not merely indicate a policy or announce a principle, nor are they advisory in character. They declare a right, give its measure, the subject-matter to which it attaches, and assert it to be perpetual, and where this state of facts is found to exist the law which brings it into being is necessarily self-executing. Several sections of the constitution not bearing directly on the question involved in this case, but affecting the lands of the state, have been appealed to for the purpose of giving strength to the propositions that these in question do not make an absolute appropriation, and are not self-executing; and these will be briefly noticed, for every provision of the constitution having even a remote bearing is entitled to a candid consideration, and to be given full weight in the search for truth and right. It has been suggested that, if the people had intended to

make the sections of the constitution in question self-executing, and through them to make an absolute appropriation of all the lands specified in section 2, some such language would have been used as is found in section 6 of the same article. That section has application to county school lands, and declares that lands theretofore or thereafter to be granted to the several counties for educational purposes "are of right the property of said counties, respectively, to which they were granted, and title thereto is vested in said county." This language was not necessary to appropriation, and could not, with propriety, have been used in relation to lands which were to continue the property of the state until sold to individuals.

The earliest grants of land for educational purposes were made to counties, in pursuance of the policy foreshadowed by the constitution of the republic. Act January 26, 1839, and of January 16, 1850, (Pasch. Dig. arts. 3464-3476.) The location and survey of these lands were paid for by the several counties, in whose ownership they remained, without question, until the adoption of the constitution of 1869, whereby an effort was made to destroy the counties' ownership, and to make the proceeds of such lands a part of the public school fund. Const. 1869, § 8, art. 9. In *Milam Co. v. Bateman*, 54 Tex. 153, that section of the constitution was held inoperative, because to give it effect would destroy vested rights. That decision, however, had not been made when the present constitution was adopted; and the language quoted from section 6, art. 7, was doubtless inserted for the purpose of restoring to the several counties the lands which it was thought were taken from them by the former constitution, or for the purpose of removing any doubt cast upon the titles of the counties by that instrument. This was its purpose; and that language used to manifest that intent is not found in the section in question, where it was not needed, and would have been inappropriate, cannot diminish the force of the words found. The language of section 15, art. 7, which makes, as all concede, an absolute appropriation of land for the university, is not more imperative, and does not more clearly evidence an intent that it shall be self-executing, than do sections 2, 4, and 5 of the same article, in so far as they make or recognize an appropriation. In the one case, as in the other, the lands are declared to be "set apart." In respect to the university lands, however, it was declared that these should in part consist of lands "to be designated and surveyed as may be provided by law." The appropriation was absolute, without the words quoted,—for no one would seriously contend that the constitution did not secure to the university the number of acres named, and thus withdrew from the legislature the power to defeat its right to them, or to grant to others so much of the public lands as would defeat the university's right. The appropriation for the university, even

with an express declaration that the land appropriated should be designated, was less certain than was the appropriation of "one-half of the public domain of the state;" and the language found in section 15, art. 7, cannot, with propriety, be invoked to sustain the proposition that the appropriation for the university was absolute, but that for public schools, embraced within the words "one-half of the public domain," was not intended to be so, nor to support the proposition that the one provision was self-executing, and the other not. This is especially true in view of the fact that the constitution commanded the legislature to "pass such laws as may be necessary to carry into effect the provisions of this constitution." Article 8, § 42. In the one case, as in the other, segregation was necessary to designate the particular lands appropriated, before they could be sold, but the appropriation in neither case depended on that. Section 57, art. 16, of the constitution provided that "three millions acres of the public domain are hereby appropriated and set apart for the purpose of erecting a new state capitol and other necessary public buildings at the seat of government; said lands to be sold under the direction of the legislature; and the legislature shall pass suitable laws to carry this section into effect." This language is no more emphatic than that found in the sections bearing on the question before us. Each, in terms, proposes to set apart lands for a particular purpose, and requires legislation to carry out the purposes for which appropriations were made. They all relate to lands set apart for named purposes, which, it was known, must be sold to realize means for carrying out the purposes contemplated. With a view to sales, it was necessary that the appropriated lands should be segregated; but this was not necessary to the appropriation, unless it be true that the people had not power to appropriate an undivided part of the public domain. To that point must those go who deny that the sections of the constitution in question are not self-executing, and do not absolutely appropriate a part of the public domain.

That the people, through section 2, art. 7, of the constitution, made some appropriation absolutely to the public free-school fund, neither party denies; and the vital question in the case is, what did the people thus appropriate? That section enumerates, in a general way, the several items which make up what is therein termed the "perpetual school fund." Section 5 of same article terms the interest-bearing securities on hand, and to be acquired with the proceeds of the sales of lands appropriated by section 2, the "permanent school fund." The words "perpetual" and "permanent" have practically the same signification, and the basis for the entire fund is found in section 2, for none other makes appropriation to that fund. The word "fund," as here used, means the entire property from which money is to be derived for the maintenance of public free schools,—the

foundation on which rests the support of the system of schools which it is made the duty of the legislature to establish and maintain. Each clause of section 2 makes an appropriation complete within itself, when considered with its necessary connections,—the one not dependent upon the other, and together constituting an aggregate which the people have declared shall constitute a perpetual, permanent fund. Looked to as an entirety, the section seems to be too clear to justify construction. If separated into its parts, the same conclusion must be reached, unless we deny to words their most obvious and usual meaning. The first clause of the section, with its necessary connection, will read as follows: "All funds, lands, and other property heretofore set apart and appropriated for the support of public schools shall constitute [part of] a perpetual school fund." Looking to laws in force when the constitution was adopted, we readily perceive what funds passed by this clause of the section, the purpose of which was to preserve existing appropriations. Neither party denies that the fund covered by this clause was absolutely appropriated; nor is it claimed that legislation was necessary to give effect to it. The second clause of the section, with its necessary connections, will read: "All the alternate sections of land reserved by the state out of grants heretofore made, or that may be hereafter made, to railroads or other corporations, of any nature whatsoever, shall constitute [part of] a perpetual school fund." It is not denied that this clause made an absolute appropriation of the lands embraced in it; nor can there be ground for claim that legislation was necessary to the appropriation, even though the extent of the appropriation made by the last division of the clause was dependent on legislation, and the acts of corporations thereunder, to some extent. The application of the first division of the clause is clear, and thereby it was intended to preserve and continue appropriations made by section 3, art. 10, of the constitution of 1866, continued by section 6, art. 9, of the constitution of 1869, as well as to preserve appropriations made by the act of March 18, 1873. The second division of this clause has application to alternate sections to be located, after the constitution took effect, by railway companies or other corporations, on certificates issued before or after that date; and if dissevered from its immediate associate, with its necessary connections, will read: "All the alternate sections of land reserved by the state out of grants * * * that may hereafter be made to railroads or other corporations, of any nature whatever, * * * shall constitute [part of] a perpetual school fund." The third clause of the section, with its necessary connections, will read: "One-half of the public domain of the state * * * shall constitute [part of] a perpetual school fund."

My brother who wrote the opinion of the majority, in construing the fourth clause of

the section, asserts a proposition calculated to cast doubt on the unity of purpose of every clause contained in it, which, in this connection, it is proper to notice. That clause provides that "all sums of money that may come to the state from the sale of any portion of the same shall constitute [part of] a perpetual school fund." It is suggested that this appropriated all proceeds of sales of public domain to the school fund, and that it did not merely appropriate the proceeds of land appropriated to that fund. This clause, manifestly, has reference only to lands or other property which had been appropriated by preceding clauses of the same section, and the purpose of its insertion evidently was to leave no doubt that money to be realized from the sale of appropriated property should be considered as fully appropriated to the perpetual school fund as was the property from which it was to be derived. The word "same," used in the clause, doubtless refers only to property by that section appropriated to the perpetual school fund. This is its obvious construction, without reference to any other section of the constitution; but, if there could be doubt as to this, it is removed by a consideration of the fifth section of the same article, which, with the fourth, may not have been given, in the disposition of this case, that weight that should have been in construing the second section.

The fifth section declares that "the principal of all bonds and other funds, and the principal arising from the sale of the lands hereinbefore set apart for said school fund, shall be the permanent school fund; and all the interest derivable therefrom, and the taxes herein authorized and levied, shall be the available fund, which shall be applied annually to the support of the public free schools." There are but two classes of school funds recognized by the constitution, and it declares of what these shall consist. One is the available fund, and the sources from which it is to be derived are declared by the constitution. The principal of moneys derived from the sale of lands is not one of these sources. The other is the fund termed "perpetual" and "permanent;" and, in so far as it consists of proceeds of sale of lands, is restricted to the "principal arising from the sales of lands hereinbefore set apart for said school fund." The lands referred to as lands hereinbefore set apart are the lands appropriated by section 2; for no other part to the constitution undertakes to appropriate lands to the perpetual public free-school fund. Whether the legislature might make other appropriations it is not now necessary to consider, there being no prohibition of such legislation; for the question now is, what did the constitution appropriate?

Appropriations made by the first, second, and third clauses of section 2 are clearly cumulative, whether the construction of the one or the other party be placed upon them. Appropriation made by one clause is in no manner made dependent on another; and, at the

time the constitution was adopted, the first and third clauses, and the first divisions of the second clause had application to things certain, then existing, and easily identified. As to them, the appropriation was as absolute as words most apt could make it; and the fact that no specific half of the public domain was appropriated ought not to defeat the intent of the people, so clearly expressed. They knew that there had been no division of lands subject to the third clause into two parts when the constitution was adopted, and, with reference to the state of fact then existing, made the appropriation, which then necessarily vested an undivided interest. It must be conceded that this was done with expectation that the legislature would in some proper method segregate that part of the public domain appropriated to the school fund from that which should remain subject to appropriation by outstanding certificates, other valid claims thereafter to arise, or to such disposition as the legislature might lawfully make of it. The power of the people to make such an appropriation cannot be denied. The language used by them in doing this in a contract between individuals would receive but one construction. A distinguished author truly said that "every word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them; the people adopt them; the people must be supposed to read them with the help of common sense, and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss." Story, Const. § 451. Apply these rules to the declaration "that one-half of the public domain of the state shall constitute [part of] a perpetual school fund," and what intent or meaning can be drawn from them other than that the people intended absolutely to appropriate one-half of the unappropriated public domain to the school fund? Where can be found in the context anything to require or justify a different meaning to be attributed to them than that which the words in their ordinary use convey? The immediate context and the entire constitution may be searched in vain for anything to justify varying their import. If we are to indulge in speculation and conjecture to find reasons why the people did not intend what their words import, then constitutions will cease to be safeguards to rights of persons or property. As before said, the constitution took effect in all its parts the very moment the people declared it should, and the appropriation of the then one-half of the otherwise un-

appropriated public domain became as absolute as it ever could. Any other proposition must be based on the theory that the people had not the power to appropriate one-half of an undivided whole, or that the failure of the legislature to make the segregation would defeat the clearly expressed will of the people. What the legislature could not do by the affirmative act could not be accomplished by its mere failure to act at all.

It is contended by appellant that the words "one-half of the public domain of the state," used in the third clause, were intended only to embrace lands remaining, if any, after railroads and other corporations had received in alternate surveys what lands they might take; "that the expression, 'public domain of the state,' was not meant to embrace lands thereafter taken up under the law granting lands to railroads;" and the further proposition is made that "it was only through the operation of the law concerning grants to railroads, and its practical application to the public domain, that the school fund could receive any land under it. If the railroad got no land, the school fund could get none." It is certainly true that it was not intended that the appropriation made by the third clause of section 2 should embrace lands to be thereafter taken up under laws granting lands to railroads and other corporations in alternate surveys; but it does not follow from this that such corporations could thus appropriate any lands appropriated by that clause to the school fund. The proposition that it was only some remainder which might be found to exist at some future time, after railroads and other corporations had acquired, through alternate surveys, all the lands they desired or were permitted by the legislature to take, to which that clause of the constitution could have application, finds recognition in the opinion of the majority, as does the further proposition that it was intended partition should be made only through the grant of lands to corporations through alternate surveys. The fallacy of both these propositions is evident from several considerations. The proposition that the appropriation only applies to an uncertain remainder, to be ascertained at some future time, after corporations had acquired all the lands they desired or that the legislature would permit them to take, assumes that the constitution does not deal with the public domain at the moment it became the law of the land, when there is nothing in the language of that instrument to justify such an assumption. It must be admitted that the people intended to place something denominated "one-half of the public domain" in the school fund, and to deprive the legislature of the power to appropriate this something to any other use. If by the words is not meant one of two equal parts of the whole public domain not otherwise appropriated by the constitution, it must mean something termed the "residue" or "remainder," which simply means that left after a part is taken away. The

remainder of one-half, in the nature of things, cannot be equal to it. The word involves the idea of diminution, which cannot exist unless some larger standard is once fixed, nor can diminution be made without a power to make it. The words of the constitution leave no doubt of the intent of the people to fix the measure of the appropriation made by the third clause at one-half of the public domain; and we must concede that they did so fix it with reference to the area of public domain existing unappropriated until this was done by the constitution, or that they left its area to be determined by the legislature at some future time, after a part of it had been appropriated by that body, or with its consent, to some use to which the people did not appropriate it through the constitution. If the first proposition be granted, all controversy must cease; for the constitution declares that the legislature shall not appropriate to other use that which the people, through it, appropriated to the school fund. If the last proposition be correct, then we are forced to the conclusion that the people made no appropriation at all when they declared that one-half of the public domain should constitute a part of the school fund. But this conclusion is not contended for, and it is admitted that the people did thus appropriate something that the legislature could not take away.

This brings us to the question whether power was left in the legislature to determine what this remainder—this something, called in the constitution “one-half of the public domain”—should be; for, if it be conceded that the legislature had such power, then it is too clear that it was clothed with power to declare that no part of the public domain should pass to the school fund by the third clause of the section, under the words “one-half of the public domain.” It must be remembered that no part of the constitution required the legislature to permit corporations or individuals to acquire lands through the alternate system, except as this may have been done by the recognition of such claims then existing. In fact, it was left wholly to the discretion of the legislature whether any lands should be granted to corporations, except under claims existing when the constitution was adopted and recognized by it; and it is evident that, with reluctance, the people left this power in the hands of the legislature, to be exercised, in some cases, only under prescribed restrictions. From this it necessarily follows that the legislature had power to refuse to grant lands in alternate sections; whereby, in so far, one-half of the public domain would inure to the school fund, as it is claimed was intended under the second branch of the second clause. In so far, then, the legislature had power to refuse to secure to the school fund, through alternate surveys under grants to corporations, any lands whatever, and could thus defeat, not only the method of partition claimed to have been intended, but also the acquisition

of one-half of the public domain through such survey. If the legislature pursued that course,—and, in considering its power, it is not necessary to inquire what it did, but what it had power to do,—it may be said that the state would still own the land, and therefore one-half of the public domain could be set apart to the school fund without reference to alternate surveys. That is all true; but it must again be remembered that the constitution entitles actual settlers to land, and leaves it in the power of the legislature to make other uses of public domain without limit, subject, only, to the specific appropriations made or rights recognized in the constitution. It must further be remembered that no period is fixed when grants to settlers shall cease, but, on the contrary, the rights of such persons are recognized to exist so long as unappropriated land exists; and the constitution imposes no limit or point of time within which the legislature may make appropriation of land to any purpose not forbidden, nor does it limit the extent of such appropriations, except as this is done through appropriations made by the people themselves.

Thus it will be seen, if the contention of appellant, that the constitution does not appropriate one-half of the public domain as it was at the time the constitution was adopted, is correct, that there is nothing to withdraw from the legislature the power to hold open to actual settlers, or other use, every foot of public land, for all time to come, which is not taken up by lawful claim, and the school fund thus be denied any part of the public domain under the third clause of the section in question, unless, perchance, some lands might be received through the second branch of the second clause, and thus become chargeable to the one-half of the public domain, as is contended would be the case. The existence of such a power in the legislature, with any vested right of the school fund to anything under the grant of one-half of the public domain, whatever the extent of that may be, is impossible; for it would be a power to destroy the grant, which is expressly denied to the legislature, or, what is the same thing, to deny that the time had come when the residue to be held beyond legislative control was ascertained, or should be. The proposition that the words “one-half of the public domain” are not to be given their ordinary meaning does violence to every recognized canon of construction applicable; for there is no word in the entire section which shows the slightest intention to limit the meaning of these words to less than one of two equal parts of the whole unappropriated otherwise than by the constitution. To make these words mean some residue of the public domain existing at some time after the adoption of the constitution, when part had been granted away, is to make them mean something not expressed by any word used in the appropriating section. The rule applicable here is that “effect is to be given, if possible,

to the whole instrument, and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory." Cooley, Const. Lim. 70.

That there is even a seeming conflict between any of the clauses of the constitution on which the decision of this case must rest cannot be successfully asserted; nor is it understood to be. But the proposition, in effect, is made that the second branch of the second clause of the section in question does not appropriate any land not embraced in the third clause; that the two together only appropriate one-half of the public domain not otherwise appropriated by the constitution. If this was the intention, why the declaration that "all the alternate sections of land reserved to the state out of grants * * * that may hereafter be made * * * shall constitute [part of] a perpetual school fund," when the declaration that "one-half of the public domain of the state * * * shall constitute [part of] a perpetual school fund" would accomplish all that was intended by both? No good reason can be given for the insertion of the two, other than that the people intended to appropriate all the lands that would be embraced in both,—that the appropriation should be cumulative; and in the absence of an insufficient public domain to satisfy both, and all other appropriations, there is no reason for placing on the words used by the people a meaning which neither their ordinary import nor the context justifies. If it had been intended that, through alternate grants thereafter to be made to corporations, one-half of the public domain should be secured to the school fund, it is incomprehensible why the people did not at least provide that such grants should be made, instead of simply not denying the power to grant lands to corporations. One-half of the public domain, however, could not have been segregated for the school fund, through alternate grants to corporations, unless there had been no other recognized claims for land; for under such grants the school fund would receive no more land than the corporations, which demonstrates the fact that it was not intended, through such grants, to secure to the school fund lands other than those it was entitled to receive under the claim appropriating alternate surveys to be made, and tends strongly, further, to establish that the appropriations were intended to be cumulative.

The proposition that it was intended to appropriate a part of the public domain to the school fund, only in event lands were subsequently granted to corporations in alternate surveys, does not require consideration. The constitution revived land certificates barred by the former constitution, and provides that "all unsatisfied genuine land certificates now in existence shall be surveyed and returned

to the general land-office within five years after the adoption of this constitution, or be forever barred; and all genuine land certificates hereafter issued by the state shall be surveyed and returned to the general land-office within five years after issuance, or be forever barred: provided, that all genuine land certificates heretofore or hereafter issued shall be located, surveyed, or patented only upon vacant and unappropriated public domain, and not upon any land titled or equitably owned," etc. Const. art. 14, § 2. Section 6 of same article provides for homestead donations both to families and single men. An argument is based on these provisions of the constitution against the proposition that by the terms of the constitution one-half of the public domain not otherwise appropriated by it was appropriated to the school fund, in addition to alternate sections thereafter to be granted. The argument is that, if such a proposition was made, until the school lands were segregated it was unlawful for the holder of a valid land claim, or an actual settler, to locate lands, because his act would be in violation of so much of the constitution as forbids the location of appropriated lands; and that, while he was thus prevented from exercising his right, time would destroy it altogether, without his fault. It is said that the people never intended that such a state of affairs should exist, and that therefore they did not intend to appropriate absolutely one-half of the public domain to the school fund by the clause in question. It must be conceded that the people never contemplated that there should be any unreasonable delay in the segregation of the school lands, nor that persons or corporations having valid claims for land should for an unreasonable time be delayed in realizing on them, or have them destroyed by lapse of time, without their fault. The legislature, however, had ample power, which it was commanded to exercise, to prevent the occurrence of any such state of affairs; and when we come to inquire as to the intent of the people, as expressed in language found in a constitution, we ought not to look for that from the stand-point of after-events which the people had no reason to expect would occur.

It does not necessarily follow, because the constitution requires land certificates to be located only on unappropriated lands, that locations made on lands in which the school fund has an undivided interest would be void, except, as to that interest; but if, for the purposes of this case, it be conceded that all locations made on lands so situated are absolutely void, it is not seen that this would better the position of appellant in the matter of construction. The power of the people to appropriate one-half of the public domain to the school fund, and to withhold the balance from location until that should be segregated, cannot be questioned. Certificates revived by the constitution, or issued after its adoption, certainly took their existence and

their owners' rights in subordination to all the provisions of that instrument. Those holding valid claims when the constitution was adopted, even if they had vested rights which the people could not destroy, would have had no ground for complaint because of the appropriations made by the constitution; for there was more land than was necessary to satisfy all such claims, as well as all the appropriation. If such delay in segregation continued that certificates would be barred, under the terms of the constitution, before they could be located and returned to the general land-office, this would not annul the constitution. Segregation would not have been difficult, though it might have involved some expense. If the legislature had segregated the school lands in solid bodies, it is not seen that there could have been any constitutional objection to that course; for the remaining lands, left subject to the claims of all having valid claims for land, could not be deemed a "reservation of any part of the public domain for the purpose of satisfying" grants to railway companies, which the constitution forbade. Const. art. 14, § 3. The legislature might have required all certificates or claims for land, entitled, under the general law, to be located as headrights were, to be located with alternate surveys for the school fund, as it will be hereafter seen was done in reference to homestead donations, in one instance, by the first legislature that met after the adoption of the constitution. Thus in so far would the school fund have received one-half of the public domain. When certificates, required to be surveyed with alternate sections, were surveyed, the legislature might have required four sections to be surveyed under each certificate, instead of two, one of them to belong to the corporation or person owning the certificate, and three to the school fund. This would have secured to the school fund, in so far, all the state claims under both claims of the section in question, and segregation could have gone on without interruption or hurtful delay. If necessary, the increased expense of this surveying could have been provided for by the state. When the legislature had ample power to have thus or otherwise made the segregation, and when the people must be supposed to have intended this to be done, and even went further, and declared that "the legislature shall pass such laws as may be necessary to carry into effect the provisions of this constitution," what is the argument last noted worth on the matter of construction? That the legislature may not have done all that ought to have been done, and what the people expected and commanded to be done, can have no bearing on the question of their intent to make, or not to make, the appropriations claimed by the state to have been made. To ascertain the intention of the people, we must look to the language used by them to make their intent known, must look to the subject-matter to which the intention relates, and may look to all contemporaneous facts;

but the future action of the people's representatives, or their failure to act, is entitled to but little weight on the question of the people's intention.

If it be conceded that appropriations to the school fund were made as claimed by the state, and if it be further conceded that, for want of segregation of the school lands, no land in the state, since the adoption of the constitution, has been in such condition that valid locations and surveys could be made by persons or corporations holding valid land claims, even then it could not be held that the appropriations made by the people were not valid, and entitled to full recognition by every department of the government. To hold otherwise would be to assert that by failure to enact necessary laws to enable persons fully to enjoy their rights the legislature could annul a provision of the constitution. If injuries to legal rights have resulted to individuals or corporations from failures of such character, then it may be that those so injured have claims on the people that in honor and conscience they are bound to recognize; but neither the constitution, nor appropriations legally made through it, can be thus annulled. Whether any such rights may possibly exist, it is neither necessary nor proper now to consider.

If, under the plain language of the constitution, there could be reasonable doubt as to its true interpretation, it would be proper to look to the contemporaneous construction placed on it by the different departments of the government; and while believing that there is no reasonable room for doubt in this respect, as an appeal has been made to this source for light, for confirmation of the intent of the people, expressed in clear language used in the instrument, a brief examination of the utterances and acts of the several departments, since the constitution was adopted, will be made. This will assist us in the further inquiry whether the legislature has made, or attempted to make, a complete segregation of the lands appropriated to the school fund by the people; for, if that department has made such a segregation, the division ought to be deemed final, however unequal it may be. The first legislature that met after the adoption of the constitution passed two acts which have some bearing on the question. Reciting that there was no law in force giving aid in construction of railroads, the legislature, on August 16, 1876, provided that such companies should receive aid through donations of land out of any of the unappropriated lands of the state; but the law required that "surveys shall be made in alternate sections or half sections, as nearly square as practicable, one section for the company, and one for the state, for the benefit of the public school fund." Gen. Laws, 1876, p. 153. By an act approved on the next day, all reservations of public domain for the benefit of railroad companies which had lapsed, or should thereafter lapse, were declared to be severed from the mass

of the public domain, and to be reserved from location, "except the three millions of acres of land reserved for constructing a new state capitol and other public buildings, and to actual settlers under the pre-emption laws of this state; and wherever a pre-emption survey of one hundred and sixty acres, or of eighty acres, shall be made for any settler, a like quantity shall be made, adjoining said pre-emption survey for the public free-school fund of Texas. The settler having the pre-emption survey made shall pay to the surveyor the fees for both the pre-emption survey and the one for the school fund, and also the fees for recording the field-notes of both surveys, and said field-notes shall be returned to the general land-office together." Gen. Laws 1876, p. 168. The last act cannot be read without recognition of the fact that the legislature had in mind, when it passed, the provision of the constitution which in terms appropriated one-half of the public domain to the school fund, recognized its binding force, and, in so far, intended to comply with it in the enactment of this law, wherein the burden of segregation, even, was placed on a class usually favored above all others in the grant of lands. It evidences, further, that the legislature did not understand that the "one-half of the public domain" appropriated was some indefinite remainder that might exist at some future time, after parts not appropriated by the constitution had been applied to other uses, but that the appropriation was of one-half of the public domain not otherwise appropriated by the constitution, which it was the duty of the legislature to segregate and to protect in its entirety. This was the work of a legislature that began its session on the day the constitution took effect, and with the will of the people freshly impressed on the minds of its members, who then understood the time had arrived when the appropriation was complete, and the duty to segregate a present duty. The one act evidences an intention to give immediate obedience to the clause of the section in question which appropriated one-half of the public domain to the school fund, and to the other provision which commended all necessary legislation; while the other manifests an intent to exercise the power left in the hands of the legislature, under the limitations therein placed; and together they negative any understanding on the part of the legislature that the one clause was but the means for carrying out the other. The act of August 16, 1876, is the sole act under which railway companies became entitled to receive lands; and, if it be conceded that the legislature may have been of opinion that locations made under it would entitle such companies to one of the sections thus located, then we have the inquiry whether this conclusion could override the constitution, and enable them to acquire lands appropriated to another purpose. That inquiry can be answered in but one way, unless we are prepared to admit that the legislature has power

indirectly to annul the constitution. Lands appropriated to the school fund not having been segregated when that act was passed, it ought to be conceded that the legislature was of opinion that, without that, valid surveys might be made in alternate sections under the act; but this neither affects the question of extent of appropriation understood by the legislature to have been made by the people to the school fund, nor impairs the appropriation.

The constitution appropriated 3,000,000 acres of land for the building of a new state capitol. Const. art. 16, § 57. By an act approved February 20, 1879, lands within certain counties were reserved for this purpose, and a survey of 3,050,000 acres within the reservation was directed as a preliminary step looking to its use. It will be seen that this survey embraced 50,000 acres in excess of the appropriation for building the capitol; and, as to this, the legislature declared that "one-half of the amount realized from the sale of the first fifty thousand acres of land sold under this act shall be deposited in the treasury of the state to the credit of the common-school fund." Why this scrupulous care on the part of the legislature to preserve to the school fund one-half of the proceeds of the land in excess of the appropriation for building the capitol? The only answer that can be given is that the legislature recognized the fact that it was directing the sale of 50,000 acres of land, of which one-half then belonged to the school fund, to which it was then entitled; and so, without reference to how much land might find its way to that fund through alternate sections to be granted under the act of August 16, 1876. The same legislature, five days later, passed a law declaring "that all the vacant and unappropriated public domain embraced in the territorial limits of the county of Greer be, and the same is hereby, appropriated, one-half thereof for public free schools for the education of the children of Texas, without reference to race or color, and the other half for the payment of the state debt." Why one-half to the school fund? Why not wait until one-half had been acquired through alternate surveys made by railway companies? Why not wait until there was a remainder to which the appropriation of "one-half of the public domain" would attach? The only answer is that the legislature was of opinion that the appropriation was absolute the moment the constitution took effect, and extended to one-half of the public domain as it then was, without reference to the appropriation of alternate surveys to be made under grants to corporations. The same legislature, by act approved July 14, 1879, which in some respects not now important was subsequently amended, directed the lands in 53 counties, as well as the unappropriated lands within the Pacific reservation, and separate tracts of unappropriated lands situated in organized counties not containing more than 640 acres, to be

withdrawn from location, and sold; reserving, however, the lands to be surveyed, as before directed, for building the state capitol. The lands thus withdrawn were directed to be sold, and the act declares that "one-half of the net proceeds of sales under the provisions of this act shall be, and are hereby, set apart for the benefit of the public free schools of this state. * * * The balance of the net proceeds of sales under the provisions of this act shall be applied * * * to the payment and extinguishment of the bonded debt of the state of Texas as the same becomes due and payable." Gen. Laws, Sp. Sess., 1879, p. 48. This act was repealed by an act approved January 22, 1883, in so far as sales were authorized, but the lands unsold were held in reservation for the purposes named in the former act. Why so persistently secure one-half of the lands within these reservations, or their proceeds, to the school fund, and at the same time forbid the acquisition of lands within that territory for that fund, or for corporations, through alternate surveys? The answer is evident. The legislature understood that the constitution appropriated one-half of the public domain to the school fund without reference to what it might receive in addition through alternate surveys, and in good faith intended to carry out the will of the people, through these laws, within the reserved territory.

By an act approved April 9, 1881, the legislature donated to persons permanently disabled by wounds received while in the service of this state, or the Confederate States, 1,280 acres of land each; but it provided that "the locator shall also locate a like amount of land for the benefit of the permanent school fund before either shall be patented." Gen. Laws, 122. This is in harmony with the laws before referred to, and manifests the same purpose and understanding of the meaning of the constitution by the legislature. By an act approved February 28, 1883, (Gen. Laws, 15,) the legislature, recognizing the right of the school fund to one-half of the proceeds of the sales of land made under the act of July 14, 1879, and amendment thereto, and further recognizing the debt of the state to the school fund under the act of November 12, 1866, directed the latter, as well as other recognized indebtedness of the state to the school fund, to be returned to that fund from the half of the proceeds of sale that did not belong to the school fund under the terms of the law directing the lands to be sold. By an act approved April 10, 1883, (Gen. Laws, 71,) the legislature, after again recognizing the right of the school fund to one-half of the proceeds of sale made under the act of July 14, 1879, and the payment of the indebtedness of the state to the school fund and to the university out of the other half, declared that "the remainder of said land, not to exceed two million of acres, contained in the counties and territory specially mentioned in said acts, or the proceeds thereof, set aside by said acts for the

payment of the public debt, heretofore or hereafter to be received by the state, shall, one-half thereof, constitute a permanent endowment fund for the University of Texas and its branches, including the branch for the instruction of colored youths, and one-half thereof shall constitute a permanent endowment fund for the common free schools of this state."

Thus we see the state kept up this equal division between itself and the school fund; and, when it donated to the university 1,000,000 acres of land, it recognized the right of the school fund to a like quantity. Is not the reason for this too obvious? Under these acts the absolute right of the school fund to one-half of the public domain as it existed when or until the constitution took effect, without reference to alternate surveys, is recognized; and as, in all these cases, a like quantity of land secured to that fund was applied to some other purpose, there can be no pretense that in this distribution the fund received, either in quantity or value, more than one-half of that part of the public domain to which the acts have application. Their application is not to the entire public domain subject to the clauses of the constitution in question, of which it declares the fund shall have one-half, and also alternate sections through grants made to corporations. The only other lands received by the funds under the clauses in question came through alternate surveys; and there can be no claim that in this manner the fund has received, either in quantity or value, more than have the corporations. That a segregation of lands for the school fund according to value, except as this may be supposed to be reached through contiguous grants which may be presumed to be of equal value, was ever contemplated, all legislation bearing on the question refutes, and no single act can be found indicating the intention of the legislature otherwise to do this, or a belief that it had been done. This strips the case of any pretense that the legislature has, by values or quantities, attempted to segregate all the land to which the school fund is entitled under the third clause of the section in question. Throughout all the legislation since the adoption of the present constitution, there is but one act in which the rule recognized in the acts referred to has not been observed. An act approved April 26, 1879, (Gen. Laws, 175,) granted 640 acres of land to indigent veterans engaged in the struggle for Texas independence, and this was increased to 1,280 acres by an amendment approved March 15, 1881. These acts authorized the certificates to be issued under them to be located as were headright certificates, and did not require each person to locate and have surveyed a like quantity for the school fund? These acts may not be in harmony with the others referred to in this respect; but, if the question had to be decided on the preponderance of evidence furnished by acts of the legislature, can there

be any question where the great weight of that is to be found. Contemporaneous construction, evidenced by acts of the legislature, is practically, with this single exception, if it may be so termed, in favor of giving effect to the clear and unambiguous words found in the constitution. In fact, it cannot be claimed that facts exist which entitle appellant to invoke the maxim *communis error facit jus*.

It is insisted that the several executives of the state who have served the people since the adoption of the present constitution have united in construing the constitution as appellant claims it should be. These distinguished men ought not to be subjected to such a charge, unless those making it come prepared to sustain it. During the first two years after the constitution was adopted the state had two governors, one of whom, soon after his inauguration, was elected to the United States senate. No legislation during his term of service as governor has any bearing on the question involved in this case, and every communication made by him to the legislature may be searched in vain for a single utterance to give color to the charge made against him. During the term of his successor the acts of August 16, 1876, and of August 17, 1876, before referred to, were passed, and further comment on them is unnecessary. Besides these, none others were passed which could have the remotest bearing on the question; but that he approved them is evidenced by his official acts. With the vast amount of legislation necessary to adjust the laws to the requirements of the constitution then first put in operation, it was not to be expected that all proper laws would at once pass, nor that the executive would recommend all such laws; and failure in these respects ought not to be made a ground for claim that he placed on the constitution a construction not evidenced by some affirmative fact. Silence or non-action cannot be deemed evidence of construction, unless a state of facts be shown in which this amounts to acquiescence when action was necessary to preserve right.

Before the sixteenth legislature met, the people had called to the executive office a citizen thoroughly familiar from long residence and public service with the affairs of the state, with its laws and institutions, devoted to the interests of the people, and peculiarly well fitted, by learning as well as a long, most honorable, and efficient judicial career, to construe the constitution. The acts passed during his term of office have more bearing on the question before us than have all others passed since the constitution was adopted. These acts, before noticed, received his approval; and, with the single exception of the acts known as the "Veteran Acts," not one of them, in whole or in part, is susceptible of any other construction than one in entire harmony with the plain import of the language used in the constitution, and with the construction placed on that instrument by

the very able judge who tried this cause. It is most probably true that it was expected to supplement the "Veteran Acts," in due time, by such legislation as was necessary to give full effect to them, without prejudice to any right secured by the constitution; but that, in the hurried grasping for lands, before that was accomplished, that state of affairs was found to exist which required the passage of the act of April 22, 1882, withdrawing from corporations the further right to donations in aid of internal improvements; and that even then it was not known to what extent they had assumed the right to appropriate lands. On the immediate question before us, that officer, in his inaugural address, used the following language: "There are other obligations imposed upon the government of the state, by the constitution, of equally as high a nature, which are to devote one-half of all the public lands to the public-school fund, and one million of acres to the university fund, and three millions of acres to the building of a capitol of the state. Under the present policy of procrastination these obligations will not be met, and the people will have to be taxed to perform them." Inaugural address of Gov. O. M. Roberts, Jan. 21, 1879, (House Journal 1879, p. 112.) Here the appropriation of one-half of all public lands to the school fund is placed on the same footing as the appropriations made for the university and for building the new capitol, all of which are recognized as resting on the constitution. While the alternate sections out of grants to be made to railroads or other corporations after the adoption of the constitution were appropriated to the school fund by the constitution, they were dependent on a contingency, with the very happening of which the land thus to be acquired would be segregated. That appropriation would take care of itself. It could not be expected that in an inaugural address more than an outline would be given; and that here given is in strict conformity to the constitution. In a message to the legislature soon afterwards, the following language was used: "The free common schools have their foundation in the constitution of the state. The mode and means of creating a permanent fund therefor, and of an available fund, with the manner of its distribution annually, are prescribed in the same instrument. It results in fixing it as a duty upon the government of the state, and not as a charity, to educate the rising generation. Its permanent fund consists of surveyed land of about 21,000,000 acres, and half of all the vacant domain, making 15,000,000 acres more, set apart by the constitution." Message of Gov. Roberts, Feb. 10, 1879, (House Journal, p. 342.)

While, if the record before us is correct, the estimate of school lands at that time was too small, we have here an unequivocal declaration that the constitution appropriated one-half of the public domain for the permanent school fund. There is nothing in these official utterances of this executive, neces-

sarily general in their nature, from which it can be fairly claimed that he construed the constitution as appellant would have it. We find no act of either of the distinguished men who have succeeded him which evidences that they have construed the constitution as appellant contends it should be, unless we are to presume that they have continuously issued patents on surveys made since the constitution was adopted which amounts to a recognition of such a construction. How far this has been done we are not advised, nor does it appear that a single patent has been so issued which showed on its face that it was not under a location made before the adoption of the constitution. In the judicial department, not a single utterance was heard in any court, prior to the decision of this in this court, which countenances the construction now put upon the constitution. In *Fannin Co. v. Riddle*, 51 Tex. 368, and in *Cattle Co. v. State*, 68 Tex. 526, 4 S. W. Rep. 865, it was in effect held, without dissent, that the language of the constitution was to be given its ordinary meaning. While, in these cases, the question now before us was not directly involved, in the case last named it was indirectly involved, and a consideration of the several clauses of the section of the constitution in question became necessary. It has been held that courts, in construing a constitution, may look, in doubtful cases, to the proceedings of the convention that framed it, and so upon the theory that the people may be supposed to have adopted it with the same construction placed on it by their delegates. This, at most, is a class of contemporaneous construction, and some reference will be made to the proceedings of the convention that framed the present constitution.

The second section of article 7, now found in the constitution, is literally as reported to the convention by the committee appointed to draft that article. The fourth and fifth sections are the same, in all material respects. *Journal of Convention*, 517. An amendment to the third clause of the section was offered, which was to strike out the word "half," and insert the word "all" in its place; which would have made that clause read, "all of the public domain of the state." A substitute for that amendment was offered, which consisted of a proposition to strike out the words, "one-half of the public domain of the state." *Journal*, 612, 616. Both of these amendments were defeated, but they show that the mind of the convention was called sharply to this clause; and, in fact, the journals show that the only serious contest over any part of the article that has any possible bearing on the question involved in this case was over the third clause of section 2. Had the amendment passed without any change being made in the preceding clause, there would have been a conflict between the two which it would have been necessary to reconcile. Had the substitute to the amendment offered been adopted, the third clause

would have been entirely stricken out, and there would have been no provision for the addition of lands to the school fund otherwise than through grants thereafter to be made in alternate sections, as provided by the last branch of the second clause. The constitution would then have meant what appellant contends it now does, with the second and third clauses remaining entire. After attention was thus sharply drawn to the third clause and its wording, it is not to be understood that the words were not intended to have their ordinary meaning; and there can be no reasonable doubt as to the interpretation put upon the clause by the convention, nor belief that the words were used with any hidden sense. The journal teems with evidence that the real contest was not whether the school fund should have one-half of the public domain not otherwise appropriated by the constitution, and, in addition to this alternates from grants which were thereafter to be made to corporations, but was whether the legislature should not be prohibited to make any grants to corporations to aid in improvements. *Journal*, 342, 616, 621, 628. These citations and others show that all propositions to place in the constitution a provision granting lands to railway companies, or directing the legislature to do so, although repeatedly offered, were defeated; and the compromise was that no clause requiring such grants to be made, or denying the legislature the power to make them, was inserted. That matter was left to the discretion of future legislatures. No such discretion was left to the legislature in regard to the school fund. For that the people unhesitatingly made the appropriation, as appears in the constitution itself, for the express purpose of placing the fund beyond legislative interference. As a compromise, with evident reluctance power was left in the legislature to make grants to railway companies out of the unappropriated land; but even this power was placed under more than one restriction. Aid to immigration was expressly prohibited, except as this might be extended by homestead donations.

In the light of these facts ought this court to contrast these purposes, and therefrom draw inferences contrary to the plain import of the language used. It is not proposed to consider any question of partition, or what has been termed the "adjustment of equities," further than to say: (1) If the constitution means what appellant claims, the state has no right on which to base partition, and neither party equities to adjust. (2) If it means what the state contends, then appellant has no equity to adjust, or right to be secured, which does not attach to the land in controversy, and may be fully adjusted in this suit. (3) If the state's theory is correct, appellant certainly has not acquired any right, joint or several, in any land, except to one-half of each of the sections in controversy; and there can be no claim that it has equities to adjust or partition to make on account of

its failure to acquire right to land, other than that in controversy, by reason of the fact that it would or might have acquired more land had the school lands been segregated.

(4) No right can be acquired through partition which did not exist before; but through partition that right can be made to attach in severalty to a particular part of that, before partition, held in common. (5) Whatever right appellant has must be realized in this action, and through the lands in controversy, without reference to any other lands, simply because it has no right, in common or severalty, legal or equitable, in or to other lands. All the public domain, except 1,000,000 acres, is shown to have been appropriated; and individuals and other corporations could not be compelled to surrender land acquired by them to make up to appellant the quantity of land it might possibly have acquired had the school lands been segregated; and at last, if it received the quantity of land now claimed by it, would have to do so out of lands appropriated to the school fund under the clause appropriating one-half of the public domain, or the school fund would have to surrender some of its alternate sections.

The error of the proposition that appellant has equities to be adjusted, through partition or otherwise, is believed to result from a misapprehension as to the right it has obtained. Reference to the quantity of public domain as it existed when or until the constitution was adopted, and the disposition made of it, will show the practical operation of the rule insisted upon by appellant. The statement will be taken from the record in this case, which shows that, at date mentioned, there were 71,961,277 acres of land, all of which, except 1,000,000 acres, had been disposed of when this cause was tried. Out of that was taken 4,000,000 acres for the erection of the capitol and endowment of the university; which left 67,961,277 acres, to the one-half of which, it must be conceded, the school fund was entitled, if the appropriation of "one-half of the public domain of the state" is to be given effect in accordance with the plain import of the language. That gives 33,980,610 acres; but all the land received by the school fund, including that sold, of which the proceeds were carried to its credit, amounts to only 27,871,552 acres. Thus it will be seen that the school fund has received less than one-half of the public domain then existing, and not otherwise appropriated by the constitution; and there is no land left from which the residue can be made up, even if the fund was entitled only to one-half, if the claims of others who have assumed to appropriate lands are to be recognized in their entirety. This, however, would only leave a deficiency of 6,109,058 acres, which might be diminished 1,000,000, if that not appropriated when this cause was tried was made a part of the fund. For corporations under alternate certificates, 41,-

984,398 acres have been surveyed, and of this the school fund has received one-half, or 20,967,199 acres, which is included in the 27,871,552 acres before referred to, and corporations hold a like quantity. If it be true that, by the appropriation of "one-half of the public domain of the state," the school fund became thus entitled, then it is clear that, in the alternate surveys received, the fund has only received what it was entitled to, in so far, without reference to the appropriation made by the last part of the preceding clause; for it would have been entitled to so much had no alternate surveys been made. If land, in so far, was not subject to appropriation by corporations, it necessarily follows that the fund is entitled to one-half of each section of land that corporations holding alternate certificates have assumed to appropriate to themselves; for in no other manner can effect be given to both clauses of the constitution on which the rights of the parties in this case depend. The matter, then, would stand thus: Under the clause appropriating one-half of the public domain, the fund is entitled to 33,980,610 acres, and under the clause appropriating alternates from grants to be made to corporations—which is, in effect, but a declaration that for every grant made for a corporation a like quantity should go to the school fund—that fund would be entitled to 10,488,589 acres more; making an aggregate of 44,469,209 acres. To meet this claim, the fund has received only 27,871,552 acres, which leaves a deficiency of 16,597,657. If, as believed, this deficiency exists, it cannot be restored in a manner so equitable as by the enforcement of the spirit of the constitution, which is believed to be in strict accord with the letter. Compel every person or corporation who has received two acres of land when only entitled to receive one to restore one, and the question will be settled, without jar or confusion, in accordance with the law. It is believed that any other method of enforcement of the right would not only operate great hardship in individual cases, but be in itself illegal.

Looking to the matter solely from the stand-point of expediency, the conclusion might be reached that the public good would be subserved if the state were to surrender its right in order to quiet titles and avoid hardship in many cases; but questions of that character must be addressed to the people, who alone have power to determine what is expedient, and to pursue the course their own judgments and wills may dictate. Those charged with the enforcement of the laws have no discretion upon such a question, and courts can look to no such consideration, in the determination of causes, but must, as best they can, ascertain and declare the law applicable to the facts presented, and award such relief as these warrant. Believing that the proper disposition of this cause was made by the court below, I am unable to concur in the disposition here made of it.

JOSE SAN ROMAN SOBRINOS *et al.* v.
CHAMBERLAIN *et al.*

(Supreme Court of Texas. March 25, 1890.)

ADMINISTRATOR—FINAL SETTLEMENT.

The approval by the probate court of the final account and settlement of an administrator is a judgment, and, in the absence of appeal, *certiorari*, or bill of review, conclusive on the distributees and creditors. It cannot be reviewed or annulled by the district court in a suit by a creditor on the administrator's bond, alleging a waste of assets by the payment of claims already barred by limitation.

Commissioners' decision. Appeal from district court, Nueces county.

G. R. Scott, for appellants. *Stayton & Kleberg* and *Stanly Welch*, for appellees.

ACKER, J. Appellants were plaintiffs in the court below. A general demurrer to the petition was sustained and the suit dismissed. That ruling is assigned as error. The original petition was filed on the 9th day of September, 1881, and the amended petition, against which the general demurrer was directed, was filed on the 9th day of February, 1886, in which the cause of action was stated substantially as follows: That the defendant Bland Chamberlain qualified as administrator of the estate of Hiram Chamberlain, who died July 11, 1879, on the 8th day of October, 1879, with Richard King and John S. Greer as sureties on his bond; that on the 29th day of December, 1879, Richard King presented to the administrator for allowance a note against said estate for \$5,000, dated February 20, 1874, and due at 12 months from date, which the administrator allowed on presentation for the sum of \$7,168.88, and the county court approved it for the same amount on the 22d day of July, 1880; that the claim was barred by the statute of limitation before its allowance by the administrator; that the maker of the note, Hiram Chamberlain, resided in Texas for a period of more than four years after the note became due and payable, and no suit was instituted thereon, and there was no acknowledgment in writing of the justness of the claim signed by Hiram Chamberlain; that Richard King presented another claim to said administrator against said estate for the sum of \$4,090.45, which was allowed by the administrator on February 9, 1880, though not verified by affidavit of said King until March 8, 1880, and which was approved by the county court on July 22, 1880; that said claim was an open account, every item of which was barred by the two-years statute of limitation before it was presented to the administrator; that for more than two years after the charge of each and every item in said account Hiram Chamberlain resided in this state; that the justness of said account was never acknowledged in writing signed by said Chamberlain; that it was never contracted by said Chamberlain that the statute of limitations should not run against the items of said account, and therefore each and every item of said account was barred before it was presented to said admin-

istrator for allowance; that plaintiffs were the holders and owners of a valid claim against said estate for the sum of \$2,074.23, which was allowed by said administrator on the 15th day of November, 1879, and approved by the county court on July 22, 1880, for that amount; that besides the said claims of Richard King and plaintiffs there were several small claims in favor of other persons against said estate, which were allowed by the administrator, and approved by the county court, amounting in the aggregate to about the sum of \$1,000, believed by plaintiffs to be just; that on the 31st day of July, 1880, several of said small creditors joined in a motion in the county court to set aside the allowance and approval of the claims of Richard King, on the ground that they were barred by the statutes of limitation; that said motion was continued by consent of parties at the September term, 1880, of said county court, and was dismissed at the November term by consent of parties; that the dismissal of said motion was secured on the undertaking and promise of Richard King to purchase, at their full amounts, the claims of all parties to said motion, which he did, on the 23d day of November, 1880, on which date he purchased all of the claims against said estate, except that of plaintiffs, paying therefor the full amounts due thereon; that the purchases of said claims by said King were made to the end and with the purpose of suppressing all inquiry by the court as to the legality of the allowance and approval of his claims, which was easily accomplished, as plaintiffs, the only parties interested adversely, lived at a great distance from said court, and could not have any knowledge of the acts and doings in and about said motion, and the purchases of said claims, until after the claims of said King were paid, so far as the funds of the estate would allow, which was done on the day of the purchase of said claims by said King; that these things were all done with the knowledge and by connivance of and collusion with the said administrator; that on November 24, 1880, said administrator filed his final report of the administration of said estate, which was approved at the January term, 1881, and said administrator discharged and said administration declared closed; that by said report it appears that on November 23, 1880, the same day that King purchased and had said claims transferred to him, all claims allowed and approved against said estate were paid; that after paying preferred claims in full there remained in the hands of the administrator the sum of \$7,637.67, an ample amount to pay all legal claims against said estate, and leave a large surplus in the hands of the administrator for distribution; that, as shown by said final report, said administrator paid on the barred note of said King, out of the funds of said estate, the sum of \$3,749.32, and upon the barred open account held by said King said administrator paid the sum of \$2,139.57; that on the claim of plaintiffs, amounting to the sum of \$2,121.51, the administrator paid the

sum of \$1,109.58, and the remainder of said funds were paid on the claims purchased by said King at the same ratio; that after said payment there remained due on plaintiffs' approved claim the sum of \$1,011.99, with legal interest from the 23d day of November, 1880, which sum the administrator, by the aforesaid collusion and fraudulent acts in the interest of said King, has kept and withheld from plaintiffs, notwithstanding the order for the payment of the same, thereby defrauding them of their money; that, if said administrator had faithfully and honestly discharged his trust by refusing to pay the pretended claims of said King, there were sufficient funds of said estate to pay all legal claims, and leave more than \$4,000 for distribution among the heirs; that said administrator well knew that the said claims of Richard King were barred by the statutes of limitation, and were not valid and subsisting claims against said estate, and that he had no lawful right or authority to pay the same; that said administrator was the brother-in-law of said Richard King, and during the pendency of said administration was in the general employ of said King; that said King was one of the sureties on the bond of said administrator, and the other surety, John S. Greer, also a defendant herein, being an agent of and also in the general employ of the said King; that in the collection of said King's claims said administrator acted as the agent of said King, and also acted as his agent in buying up the claims held by the parties who made the motion to set aside the allowance and approval of said King's claims; that by his zeal in the discharge of the duties of his agency in behalf of his brother-in-law and surety, the said Richard King, and the utter disregard of his obligations and duties as administrator, he has squandered the funds of said estate, he has willfully and unlawfully diverted the funds of said estate from the payment of the legal and just claim of plaintiffs, and from a distribution of the remainder among the heirs of said estate, and misappropriated the same by paying the sum of \$5,888.69 to his brother-in-law and surety, the said King, upon claims which he well knew were not legal or valid demands against said estate; that by the aforesaid unlawful and fraudulent acts of said administrator, he and his sureties, Richard King and John S. Greer, defendants herein, have become and are liable to plaintiffs for the amount of their claim remaining unpaid on November 23, 1880, to-wit, the sum of \$1,011.99, with interest thereon at 8 per cent. per annum from said date; that by his refusal and failure to pay the same on the said date, as demanded under the order of court, and the willful use of said money in paying it to his surety and brother-in-law as aforesaid, and withholding it from plaintiffs, said administrator and his said sureties became and are liable to plaintiffs for damages at the rate of 5 per cent. per month on said sum of \$1,011.99 from and since November 23, 1880. Prayer that "the

pretended claims of Richard King be adjudged as barred by limitation, and constituting no claim against the estate of Hiram Chamberlain at the time of the approval of the same; that the approval thereof be adjudged wrongful and illegal, vacated and held for naught; that the administrator, in the payment of said claims, be adjudged to have willfully misappropriated the funds of said estate to defeat the payment in full of plaintiffs' just claims; that all of his acts in and about the allowance, approval of, collection and payment of, the said claim, the purchasing in behalf of said King of the claims of creditors contesting the approval of said claims to defeat action by the court on said contest, the purchasing of all other claims against the said estate, except that of plaintiffs, be adjudged unlawful, collusive, and fraudulent, and as done and committed to defraud plaintiffs; and that they have judgment against defendant Bland Chamberlain, administrator, and the said sureties on his administrator's bond, for the balance due plaintiffs, and interest thereon and 5 per cent. per month thereon as aforesaid, for all costs, and general relief."

It is believed that the court did not err in sustaining the demurrer, for the following reasons:

1. When King's claims were allowed and approved by the court, there being no appeal, as between him and the administrator, the judgment of approval by the probate court was conclusive.

2. That, notwithstanding this, other creditors or the heirs, on the final settlement of the administrator's account, had the right to show in the probate court that the claims were barred at the time they were allowed, and to defeat the claim of the administrator to credit therefor. *Hefflinger v. George*, 14 Tex. 569.

3. Because the district court has no power, in a suit on the administrator's bond, to annul the orders of the probate court. *Franks v. Chapman*, 60 Tex. 46. If plaintiffs were dissatisfied with the allowance and approval of the King claims, they ought to have interposed their objection to the administrator's final account, claiming credit therefor; and if their objection had been overruled, and the final account approved, they should have appealed from the order of approval, or had it reviewed by *certiorari* or bill of review. We are of opinion that the judgment of the court below should be affirmed.

GAINES, J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

STAYTON, C. J., not sitting.

HOWARD v. MASTERSON.

(*Supreme Court of Texas*. April 23, 1890.)

TRESPASS TO TRY TITLE—COMMON SOURCE—EVIDENCE.

In trespass to try title, plaintiff introduced in evidence a deed from one whom he claimed to

be the common source of title, and proved that after the delivery defendant obtained a sheriff's deed to the land on a judgment against plaintiff's grantor and another. Held not to make a *prima facie* case, since it did not appear that defendant's title was not derived from the other judgment debtor.

Appeal from district court, Nolan county.

B. L. Aycock, for appellant. *Cowan & Fisher*, for appellee.

GAINES, J. The appellant brought this suit against appellee in the ordinary form of an action of trespass to try title, alleging that he was the owner of an undivided one-third interest in the land in controversy, and that the heirs of John Clark, deceased, (who were neither named nor made parties to the suit,) were the owners of the other undivided two-thirds. Upon the trial the plaintiff sought to prove his case by showing that both he and defendant claimed title under Clarence W. McGreal as a common source, and that as between the two his was the superior title. He did not attempt to deraign title from the sovereignty of the soil. He introduced in evidence a deed from Clarence McGreal to Lucy E. Howard, his wife, for the land in controversy, dated July 26, 1878, and, in order to establish the common source, also introduced a deed from the sheriff of Nolan county to appellee purporting to convey the interest of Clarence W. McGreal and Cornelia Levin on the land in controversy. This deed was dated April 4, 1883. The sale by the sheriff was made by virtue of an execution issued upon a judgment against Clarence W. McGreal and Cornelia Levin as heirs of Peter and Mary C. McGreal. Whatever interest passed by the deed to Mrs. Howard was *prima facie* the community property of appellant and his wife. The court below held that the plaintiff had failed to show that he and defendant claimed under a common source, and gave judgment for the defendant. We are of opinion that the court did not err in so holding. When the plaintiff in an action of trespass to try title has proved that both he and the defendant claim from the same grantor, and that he has the superior title as emanating from that source, he has made out a *prima facie* case. No other facts appearing, it is to be presumed that the defendant claims no other title. The effect of his claim is to assert that, prior to the conveyance through which he derives his right, the title was in the common source, and this is deemed sufficient to relieve the plaintiff from the necessity of proving that fact. The rule is just, useful, and convenient. But "it is not broadly true to say, as is sometimes said, that when two persons trace title to the same grantor each is estopped as against the other." Bigelow, Estop. (4th Ed.) p. 335. The author just quoted also says: "The question is one of the burden of proof only." Id. p. 336, note 1. In this case the plaintiff claimed title to an undivided one-third interest in the survey described in his petition, under a deed from Clarence McGreal, and he proved that the defendant held

a sheriff's deed which purported to convey to him an undivided third interest in the land as the property both of Clarence McGreal and of Mrs. Levin. What interest the defendant claimed to have derived through the sheriff's sale from Clarence McGreal the deed does not show. The effect of the conveyance is merely to show that defendant asserted some title to be in McGreal at the time of the sale. This is not sufficient to enable plaintiff to recover. He may have established that he is entitled to McGreal's interest; he should also show what that interest is before he can have a judgment, and this he has failed to prove. But appellant insists that, for want of valid service upon Mrs. Levin, the judgment against her was void, and the sheriff's sale passed no title to defendant. Should this be true, it matters not. The deed to defendant shows that, while he asserted an interest in the land in McGreal, he also asserted an interest in Mrs. Levin, and proof of the extent of the interest to which plaintiff has shown his title is still wanting. Besides, the defendant introduced in evidence a deed from Mrs. Levin and her husband, conveying to him her interest in the land in suit, whatever that interest may have been. The plaintiff should have shown title in Clarence McGreal from the sovereignty of the soil. There is no error in the judgment, and it is affirmed.

CARNEY et al. v. MARSALIS et al.

(Supreme Court of Texas. April 23, 1890.)

EXECUTION—CLAIMS BY THIRD PARTIES.

1. Where property seized under an execution is claimed by a third person, it is immaterial whether its value is properly estimated in the return, if it is properly assessed on the claimant's bond.

2. Failure to indorse on an execution the name of the court to which a bond of a claimant was returned is harmless error, when such indorsement is made on the bond itself, and the claimant finds the proper court, and duly defends the suit there.

Appeal from district court, Hill county.

B. D. Tarlton, for appellants. *McKinnon & Carlton*, for appellees.

HENRY, J. T. L. Marsalis & Co. caused an execution, issued by a justice of Hill county, to be levied upon the interest of T. D. Carney in an engine, boiler, and machinery alleged to have been owned by said Carney and one Whitmore as partners. Appellants made an affidavit and gave bond for the trial of the right of property. The bond was indorsed by the constable as follows: "The value of the interest of the within described property levied upon by me has been by me assessed at five hundred dollars, and this bond and oath has been by me returned to the district court of Hill county, Tex." The return on the execution showed that claim had been made and that the property had been delivered to the claimant, but did not state to what court the bond was returned. Both parties appeared in the district court, and issue between them was joined. The trial re-

sulted in a judgment in favor of the plaintiffs in execution, from which the claimants prosecute this appeal. Appellants assign the following errors: "(1) The court erred in overruling defendants' motion in arrest of judgment, because the return on the execution shows that the property levied on is of less value than five hundred dollars. (2) Because there is no indorsement on the writ of execution showing to what court the bond had been returned." It becomes immaterial to consider whether the value of the property was estimated in the return made on the execution upon the interest of the defendant in execution or the entire property owned by the partnership. The assessment of value was properly made upon the bond, and, as will be seen, there is no doubt about its being there made upon the interest levied upon, and not upon the entire property. The name of the court to which the bond was returned was indorsed on the bond itself, instead of upon the execution, as the statute prescribes. But the claimant found the proper court, and defended the suit, which would have made the omission immaterial, even had there been an entire failure in that particular. The judgment must be affirmed.

FT. WORTH & D. C. RY. CO. v. WILLIAMS.

(*Supreme Court of Texas. April 22, 1890.*)

CARRIERS—LIABILITY OF CONNECTING LINES.

By a contract between plaintiff and a railroad company whose line connected with that of the defendant, it was agreed that plaintiff's cattle should be transported to a point beyond the line of such road, the liability of the contracting road to cease at its terminus. From that point the cattle were hauled over several roads, and were finally delivered to the defendant road, which delivered them at their destination, and collected all charges for carriage from plaintiff. *Rev. St. Tex. art. 4351*, provides that every railroad company shall, for a reasonable compensation, draw over its road without delay the passengers, merchandise, and cars of every other railroad company which may enter and connect with its road. *Held*, that the facts were insufficient to fix any liability upon defendant, as member of a partnership, or as joint contractor, for injuries received by the cattle on roads other than its own; its action in hauling such cattle, as it was required to do by law, not of itself amounting to a ratification of the contract. *Following Railway Co. v. Baird, (Tex.) 12 S. W. 530.*

Appeal from district court, Clay county.

J. M. O'Neill, for appellant. *John Dowell* and *Hazlewood & Templeton*, for appellee.

HENRY, J. This suit was instituted by appellee upon causes of action stated as follows in brief of his attorneys filed in this court: "Appellant was, in connection with the Texas & New Orleans Railroad Company, the Galveston, Harrisburg & San Antonio Railway Company, and the Gulf, Colorado & Santa Fe Railway Company, engaged in the shipment and transportation of freight, such as live-stock, consisting of cattle and horses, and other goods and property commonly known as 'freight,' as common carriers for hire, each and all of said companies being connecting lines of railway, and acting as

through lines, and proposing and agreeing to accept, receive, and transport freight as such upon through contracts, and through bills of lading, from one station on any of said roads to any other station on either of said roads, and agreeing and contracting and binding themselves and each of said railroads to speedily, safely, and securely convey, transport, and deliver said freight at the point of destination, in like order and condition as when received. That on the said 18th day of May, A. D. 1884, the said defendant was likewise, in connection with the International & Great Northern Railway Company and the Missouri Pacific Railway Company, engaged in the carriage and transportation of freight, such as live-stock, consisting of cattle and horses, and other goods and property commonly known as 'freight,' as common carriers for hire, each and all of said companies being connecting lines of railway, and acting as through lines, and proposing, accepting, and agreeing to receive and transport freight as such, upon through contracts and through bills of lading, from one station on any of said railroads to any other station on the same road, or to any other station on either of said railroads, and agreeing, proposing, contracting, and holding themselves and each of said railroads to speedily, safely, and securely carry and transport said freight to the point of destination, and there deliver the same in like order and condition as when received. That appellant's road extended from Fort Worth, in Tarrant county, Tex., to Henrietta, in Clay county, Tex. That at the town of Fort Worth it is connected with the Gulf, Colorado & Santa Fe Railway, and with the Missouri Pacific Railway Company, and was so connected at the time of the injuries complained of. That about the 18th day of May, 1884, appellee was the owner of 1,551 head of stock cattle of the value of twenty thousand dollars, and forty head of horses of the value of fifteen hundred and eighty dollars, and was in possession of the same at Devers, a station on the line of the Texas & New Orleans Railroad, in Liberty county, Tex., and desired to ship and transport the same by railroad from this station to the station of Henrietta, in Clay county, Tex., on a through contract and bill of lading over the said Texas & New Orleans Railway, the Galveston, Harrisburg & San Antonio Railroad, the Santa Fe Railroad, and defendant's line of railway. That also about the 18th day of May, 1884, petitioner was the owner of 510 head of stock cattle, in good order and condition, of the value of ten thousand and five hundred dollars, and in possession of them through his agent, M. E. Williams, at Kyle, in Hays county, Tex., a station on the International & Great Northern Railroad, and desired to ship the same from the said station of Kyle to the station of Henrietta, in Clay county, Tex., over that railroad, over the line of the Missouri Pacific Railway, and over the line of defendant's railway. That about the 18th day of May, 1888, appellant delivered the

cattle and horses at Devers in good order and condition to the Texas & New Orleans Railroad, to be transported as aforesaid, upon a written contract and through bill of lading, a copy of which was attached to the petition. That a delivery to the Texas & New Orleans Railroad was a delivery to the Galveston, Harrisburg & San Antonio Railway, the Gulf, Colorado & Santa Fe Railway, and to defendant, and was to each of these a delivery. That about the 18th day of May, 1884, petitioner, through his agent M. E. Williams, in good order and condition, delivered the cattle at Kyle to the Missouri Pacific Railway Company, by making the delivery to the International & Great Northern Railroad Company, which was leased, and being operated by the Missouri Pacific Railway Company, and that this delivery was a delivery to the International & Great Northern Railroad to the Missouri Pacific Railway Company and to defendant. That said cattle were to be transported as aforesaid, and on a through contract and bill of lading, from Kyle to Henrietta, the contract of shipment being attached to the petition. That the Texas & New Orleans Railroad in making the contract of shipment, and receiving said cattle thereon for transportation from Devers to Henrietta, was acting for itself, and as the agent for the other railroads over which the cattle were to pass, and especially was the agent of defendant. That the Missouri Pacific Railway Company, receiving said cattle thereon for transportation, was acting for itself, and as the agent of the other railroads over which said cattle were to pass, and was especially the agent of defendant. That said railway companies, as aforesaid, each acting for itself and for defendant herein, as connecting lines, so negligently and wrongfully conducted themselves that they did not deliver said cattle and horses to plaintiff at Henrietta, Tex., but violated their contract, and failed, neglected, and refused to deliver said cattle and horses as therein required, and that by reason of the negligence and carelessness of defendant, and of the connecting lines as aforesaid, some of said cattle were killed, and the others greatly injured and damaged. That by reason of the unsafe and insecure track of defendant's railway and that of the other connecting lines, and by reason of the defective and insecure cars in which said cattle and horses were shipped, and the insufficient and improper engines drawing said cars, as well as the negligent and careless operatives of said railways as aforesaid, the cars in which the cattle and horses were transported were wrecked, derailed, and the cars thrown from the track, many of them killed, and the balance greatly injured, and that in the transit of the cattle they were delayed the space of forty-eight hours over the time necessary to properly transport them, and the horses were delayed the space of ten days over the time necessary to transport them."

Attached, as exhibits, to the petition were two contracts, both signed by plaintiff, one by

the "Agent for Louisiana Division Galveston, Harrisburg & San Antonio Railway System," and the other by the "Agent for the Missouri Pacific Railway Company." The first-mentioned contract provides for the transportation of the cattle to Henrietta station at the rate of \$50 per car-load. It further provides "that, in case the live-stock mentioned herein is to be transported over the road or roads of any other railroad company, the party of the first part shall be released from liability of every kind after said live-stock shall have left its road; and the party of the second part hereby so expressly stipulates and agrees, the understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything beyond the line of the Galveston, Harrisburg & San Antonio Railway, Texas & New Orleans Railroad, Louisiana Western Railroad, Sabine & East Texas Railway, excepting to protect the through rate of freight named herein." The contract with the Missouri Pacific Railway Company contained substantially the same provisions. The defendant railway company was not alluded to in either contract.

The defendant excepted generally and specially to the petition, and denied its allegations generally, and denied specially that it had with any of the railroads mentioned in said contracts any connection, association, or arrangement for the transportation of freight, or that any of them were authorized to act for it as agent in making the contracts sued upon.

It was proved by defendant that its road extended from Fort Worth to Henrietta, and was the only railroad line between the two places; that no contract existed between it and the other roads for the transportation of cattle or through bills of lading; that there was no association between it and any other road; that no one was authorized to sign the contracts for it; that the cattle were tendered to it for shipment at Fort Worth by the lines that had transported them to that place, and that defendant transported them without changing cars to the point of their destination, and there collected the contract prices for their transportation; that the local rate of the defendant from Fort Worth to Henrietta was retained by defendant, and the remainder of the freight paid was remitted to the other roads. Judgment was rendered in favor of plaintiff upon the verdict of a jury.

There was no error in overruling the exceptions to plaintiff's petition. We deem it unnecessary to consider in detail the assignments of error on the charge of the court, and upon its refusal to sustain defendant's motion for a new trial. The main question is similar to the one decided by this court at the last Tyler term, in the case of *Railway Co. v. Baird*, 12 S. W. Rep. 530. In that case it was said: "If the Louisville & Nashville Railway Company had not authority by virtue of the existence of a partnership between itself and the other lines over which the cattle were to pass, or by virtue of an agency

conferred on it by the other companies, empowering it to make a contract which would bind them jointly, then the contract was simply the contract of the company that made it, by which it was bound to transport the cattle on its own line as far as that extended, and beyond that to furnish transportation through other lines. * * * In the absence of proof of express authority, facts may be shown which will be sufficient to authorize a jury to find that the power actually existed. * * * A railway company cannot be held to have ratified a contract from the fact that it performed some of the services contemplated by it, when it is not at liberty, contract or no contract, to refuse to render the service. At the time the cars in which appellee's cattle were, were received by appellant, the law provided that 'every such company shall for a reasonable compensation draw over their railroad, without delay, the passengers, merchandise, and cars of every other railroad company which may enter and connect with their railroad.' * * * In the face of such legislation, the evidence should show something more than that a through shipment was made; * * * that a price was fixed for the entire transportation, and collected by the last carrier,—before it ought to be held that this was a joint contract for transportation that would render each carrier liable for failure of duty on the part of other carriers in the connected lines." The charges given and the ruling of the court upon defendant's motion for a new trial were contrary to the rules here announced. We find nothing in the facts of this case making defendant liable for any injuries to the freight that did not occur after the property had come into its own custody, and upon another trial the question of its liability ought to be so restricted. The judgment must be reversed, and the cause remanded.

MISSOURI PAC. RY. CO. v. WHIPKER.

(Supreme Court of Texas. April 15, 1890.)

GARNISHMENT—EXEMPTION—ANSWER.

Under Rev. St. Tex. art. 218, which provides that "no current wages for personal services shall be subject to garnishment," a garnishee who is indebted to the principal defendant for current wages is bound to disclose the facts showing the exemption where the principal defendant has not voluntarily appeared, and has not been formally cited to appear, in the garnishment proceeding, though articles 188, 189, in terms, require the garnishee to answer only as to the fact of indebtedness.

Error from circuit court, Bexar county.

Carr & Leuls, for plaintiff in error. *T. G. Pray*, for defendant in error.

GAINES, J. This suit was brought by the defendant in error against plaintiff in error to recover a balance due him for services as a brakeman. The defendant company answered, among other things, that, in a certain suit in which this plaintiff was defendant, a writ of garnishment had been sued

upon it, and that upon the coming in of its answer a judgment had been rendered against it, which it had paid. A transcript of the proceedings in the garnishment suit was introduced in evidence by the defendant upon the trial. They showed that the defendant company answered that it was indebted to this plaintiff, but did not show that the answer disclosed that the indebtedness was for current wages. The court held that the judgment in the garnishment proceedings, and its payment by the defendant company, did not diminish the liability of the company to the plaintiff in this suit, and gave judgment accordingly. The ruling of the court in that particular is here assigned as error.

Our statutes provide that "no current wages for personal service shall be subject to garnishment, and, where it appears upon the trial that the garnishee is indebted to the defendant for such current wages, the garnishee shall nevertheless be discharged as to such indebtedness." Rev. St. art. 218. The question, then, is, will the garnishee, who is indebted to the defendant in the suit for current wages, be protected by a judgment against him when he fails to state in his answer the facts which show the exemption? We think this question must be answered in the negative. The garnishment proceeding is ancillary to the main suit, and to it the defendant in the principal action is not a party. He is not required to be served with notice of either the issuing or the service of the writ of garnishment. It is true that our statutes, literally construed, require the garnishee to answer only whether or not he is indebted to defendant, and whether or not he has any effects of the defendant in his possession, and does not, in terms, direct that he shall say whether such indebtedness or such effects are exempt from a forced appropriation to the payment of debts or not. *Id.* arts. 188, 189. The statutes of some of the states require him to answer only as to debts or property not exempt. We think, however, that, since the defendant is not required by the statute to have notice of the service of the writ, it was not intended that the garnishee should in his answer confine himself to the literal directions of the statute, when he knows that the debt or property is exempt. Such a rule would place it in the power of the garnishee, in many cases, to deprive the defendant of the exemption which the law affords him. The garnishment may issue after judgment; and, even when it is issued before, the defendant may remain ignorant of the fact, unless he sees proper to defend the principal suit. If, after service of citation, he determines not to defend, he may expect a judgment to be rendered against him, and execution to issue; but we know of no rule which requires him to take notice of any ancillary proceedings. If he fails to appear, and the plaintiff amends the statement of his demand so as to show a cause of action materially different, he must have notice.

For this reason, we cannot think that it was the intention of the legislature that he should be concluded by the judgment in the garnishment proceeding when the garnishee has failed to disclose the facts showing the exemption, and when he has not been formally cited to appear, and has not voluntarily appeared for the purpose of maintaining his right. This ruling we think in accordance with the great weight of authority in the courts of other states. The statute of Maine provides that "no person shall be adjudged a trustee * * * by reason of any amount due from him to the principal defendant, as wages for his personal labor, for a time not exceeding one month." Rev. St. 1841, c. 119, § 63. In construing that statute the supreme court of that state say: "The statute secures to the laborer his claim of payment for one month's labor, and places it beyond the reach of his creditors; and his debt or cannot deprive him of it by his neglect to disclose the whole matter when summoned as his trustee." *Lock v. Johnson*, 36 Me. 464. The following authorities are to the same effect: *Railroad Co. v. Ragland*, 84 Ill. 375; *Winterfield v. Railway Co.*, 29 Wis. 589; *Daniels v. Mau*, 75 Me. 397; *Jones v. Tracy*, 75 Pa. St. 417. The case before us illustrates the injustice of a contrary doctrine. The suit in which the writ of garnishment was sued out was brought June 25, 1886, in a justice's court of Williamson county. The writ of garnishment was issued, was served, and was answered by the garnishee on the same day the suit was instituted. The citation for the defendant to Williamson county was returned "Not found," when an *alias* issued to Bexar county, and was served upon him. He made default. There is nothing in the record to indicate that he ever had any reason to suspect that a garnishment had issued to subject his wages to the payment of the debt. In saying that the defendant in the principal suit is not a party to the garnishment proceeding, we do not wish to be understood as holding that he has not the right to appear in a case like this, and to make his own defense. On the contrary, our statutes expressly permit this. Rev. St. art. 212. What we do mean to say is that he is not to be held to have constructive notice of the garnishment proceeding.

We will say, in addition, that, in every case of this character, it would be a proper practice for the garnishee, after disclosing the facts which show the exemption, to have the defendant cited, to the end that he should make his own defense. See *Iglehart v. Moore*, 21 Tex. 501. The parties at interest will then have the burden of the litigation; and upon the trial the garnishee will be entitled to recover his costs, and a reasonable attorney's fee, for his answer. This certainly should be the practice when the fact of the exemption is contested by the plaintiff, or when the garnishee is in doubt as to the facts. Such a rule affords ample protection to all parties. The judgment is affirmed.

ANDREWS v. KEY *et al.*

(Supreme Court of Texas. April 23, 1890.)

VENDOR'S LIEN—PAYMENT—PRIORITIES—TRIAL.

1. Where a vendor's lien securing a non-negotiable note was foreclosed by an assignee of the note after the same had been paid, a purchaser under the foreclosure, with notice of such payment, and of the existence of a junior lien, takes no title as against a purchaser under foreclosure by the junior lienholder, who was not a party to the first suit.

2. Where issues of fact have been tried by the court, judgment will not be reversed because of the admission of testimony merely immaterial, though of a character that might prejudice a jury.

3. It is no ground of reversal that, in a trial before the court, there was a finding of immaterial facts.

4. It is not necessary that facts found by the court should be set out with the particularity required in special pleading.

Appeal from district court, Parker county.
Hood, Lanham & Stephens, for appellant.
E. P. Nicholson, for appellees.

GAINES, J. This suit was brought by appellant against appellees to recover a tract of land consisting of 160 acres. Defendant Jackson disclaimed as to the west half of the tract, but made defense as to the east half, and recovered a judgment. Plaintiff obtained a judgment against the other defendants, and they have not appealed. The controversy is now solely between the plaintiff and defendant Jackson as to the title to the east half of the tract. The case was tried by the court without a jury, and the judge's findings of fact sufficiently state the case. They are as follows: "(1) On the 19th of January, 1885, the defendants J. R. Plumlee and D. M. Key executed and delivered to one Martin Stults their non-negotiable note or obligation for \$690, payable in three annual installments of \$230 each. This note was given for the purchase money on part of the land described in plaintiff's petition; the balance of the purchase money being paid down. At the same time Stults and wife executed and delivered to Plumlee and Key a deed to the land described in plaintiff's petition, in which they expressly retained a vendor's lien to secure the payment of the said note or obligation. (2) On the 22d of June, 1885, defendants Key and Plumlee divided said land between them, Key taking the east half, and Plumlee the west half. * * * (3) On the 2d of November, 1885, defendant Key and wife deeded to W. H. Little their east half of the land. Little paid them \$185 down, and agreed to pay M. Stults three notes, for amounts as follows: \$72.50, due December 25, 1885; \$80, due December 25, 1886; and \$80, due December 25, 1887. Little also executed and delivered to Key his note for \$85, which Key subsequently transferred for value to Jackson. A lien was expressly retained in this deed to secure the payment of all the notes. Little never executed the notes to Stults, but paid the \$72.50. (4) In February, March, and April, 1886, Plumlee paid the balance due on the notes to

Stults; he having paid some amounts before that time, and Little having paid the \$72.50. Plumlee took up the Stults note, and held the note until the 25th of December, 1886. (5) On the 25th of December he sold to one Bullard his claim against Little for \$160, and turned over to Bullard the note executed to Stults, with directions to Bullard to get Little to execute to him (Bullard) his two notes, as he had agreed to do to Stults in his deed from Key and wife, and Plumlee directed Bullard, upon his obtaining the notes of Little, to return the M. Stults note to him, (Plumlee.) (6) Bullard failed to get Little's notes for \$160, but took the note of Plumlee and Key, executed to M. Stults, upon which there was indorsed only the following payments, \$72.50 and \$22.30, and traded the same to H. W. Kuteman for \$80, and told Kuteman there was owing only \$160 on the Stults note. (7) On the 20th of January, 1887, Kuteman brought suit in the district court of Parker county on the M. Stults note for the two installments which appeared to be due, * * * less only the credits indorsed, against J. R. Plumlee, D. M. Key, and Lucy B. Sumerall, who had in the meantime bought out Little, and was in possession, and by fraudulent promises to defendants induced them not to appear, and on the 11th of February, 1887, obtained a judgment by default for \$365.20 and costs against the parties above named, and foreclosed the lien, as stated in the Stults note, on the land described in plaintiff's petition; and under an order of sale under said judgment on the 3d of May, 1887, at public sale, A. R. Andrews bought the land, paying to Kuteman the amount of the judgment and costs therefor. (8) On the 24th of December, 1886, Jackson instituted suit in the district court of Parker county on the \$85 note, due by Little, which he had bought from Key, against Key, Little, and Mrs. Lucy B. Sumerall, who had bought out Little, and was in possession, and sought to foreclose his vendor's lien; and on the 11th of February he obtained a judgment by default against said parties for \$86.33 and costs, and foreclosed his lien on the land described in his answer, and on the 3d of May, 1887, bought in the land under said order of sale. (9) The plaintiff in this suit had notice, before he purchased the land, of the claim of Jackson, and had notice that the note had been paid off before he paid the purchase money to the sheriff. Jackson had notice of plaintiff's (Andrew's) claim at the time he purchased under the judgment."

The first two assignments presented in appellant's brief complain of the admission of testimony over his objection. It is not usual for the court to reverse a judgment on account of the admission of improper testimony, when the case has been tried before the judge without a jury. If the testimony be merely immaterial, its admission is no ground for reversal. The testimony of the witnesses, as to the fraudulent promises of Kuteman made to induce the defendants in the first

suit not to defend the action, did not affect the merits of the present suit. Though it may have been calculated to prejudice a jury against the plaintiff's cause, it is not to be presumed that it had such an effect upon the mind of the judge. This is more especially true when, as in this case, his findings upon all the material issues are amply sustained by the evidence. The testimony of Plumlee and other witnesses was objected to upon the ground that it was irrelevant, and that it was not competent by such evidence to impeach the validity or effect of the judgment through which appellant claims title to the land in controversy in this suit. The testimony was introduced to show that Plumlee paid the balance due upon the note executed by him and Key, intending to discharge the debt, and to rely only upon the claim Stults held against Little by virtue of his promises made to Key at the time the latter executed the deed to him. That it was competent for appellee Jackson to prove that the note given to Stults had been discharged when Kuteman brought suit upon it will be shown when we come to discuss the vital question in the case.

The appellant also assigns that the third paragraph of the court's conclusions of fact is erroneous because the same is vague and misleading. We fail to see the application of this objection to the finding. It is a clear and explicit statement of certain facts indisputably proved by the evidence. If there was any fact established by the evidence not found by the court which in appellant's opinion should have appeared in the conclusions, he should have made a request for additional findings, and should have pointed out specifically in what respect the conclusion of fact filed by the court were deemed deficient. The fourth and fifth conclusions of fact, which are also complained of by appellant, are well sustained by the evidence. There was a mutilated writing upon the note made to Stults, which contains enough to show that it was an order or a request from Stults to Little to make the payments he had promised to make upon the note to Plumlee. Plumlee testified that in his transaction with Bullard he transferred to the latter only his claim upon Little, and that he delivered Bullard the note for the purpose merely of having it exhibited to Little with a view to induce him to execute notes to Bullard for the two installments, of \$80 each, he had promised to pay on the original note. This warranted the court in finding that the Stults note had been discharged, and that the claim upon Little for \$160 only remained.

Certain of the court's conclusions of fact are assigned as error, because, as appellant claims, the facts so found were immaterial. This is no ground for reversing the judgment. If immaterial, they are harmless. The question in every such case must be whether or not the material facts found by the court are sufficient to support the judgment.

The seventh conclusion of fact is sufficiently specific. It was not necessary that the court should have set out plaintiff's title with the same particularity that is required in special pleading, as appellant appears by his tenth assignment to contend. The ninth conclusion of fact is supported by the evidence, and is sufficiently specific. There is no error pointed out by appellant's thirteenth assignment. It seems, as well as others, to be based upon a radical misconception of the manner in which a judge should state his conclusions of fact.

Appellant's remaining assignments of error complain of the court's conclusions of law. We need not consider them in detail, because it is immaterial whether the propositions of law announced by the court as the grounds of its judgment be correct or not, provided a proper judgment has been rendered. The correctness of the judgment depends upon the question whether the rights of appellee Jackson were affected by the decree in the suit brought by Kuteman on the Stults note, and by the sale to appellant by virtue of that decree. It is held in this court that all persons who have a right to redeem land which is subject to a mortgage are proper parties to a suit to foreclose. *Lockhart v. Ward*, 45 Tex. 227. In *Webb v. Maxan*, 11 Tex. 678, it was decided that, if a junior incumbrancer at the time of acquiring his lien had agreed to pay off the prior mortgage, he was bound by a judgment foreclosing the prior mortgage, and a sale in pursuance of such judgment, although he was not made a party to the suit; but it is intimated in the opinion that, if the first mortgagor had had notice of the subsequent incumbrance, the holder of that incumbrance should have been made a party. But, should it be law that the holder of a vendor's lien whose debt is unpaid may, without making a junior lienholder a party to his suit, enforce his lien by a sale of the land, and thereby deprive the latter of his right to discharge the prior incumbrance, and to perfect his own security, it does not follow that such should be the effect of the decree and sale, when in fact the first debt was paid before the institution of the suit. It may be that if the second lienholder knew of the first lien, and if it has not been discharged, he should be held to take notice of the suit to foreclose, and that upon his failure to redeem before sale his right is lost. But, should the first debt be paid, then he would have no reason to expect a suit for its enforcement, and we know of no principle that would justify a holding that he is concluded by a judgment enforcing the lien when he has not been a party to the suit. That such a ruling is calculated to work a great injustice to the junior incumbrance it needs no argument to show. In this case the evidence shows and the court, in effect, found that Plumlee paid the original purchase-money note given by him and Key, intending to claim only against Little upon his promise to pay to Stults the two installments of \$80

each. When the claim against Little was transferred to Bullard, the note was delivered to Bullard for the purpose only of being exhibited to Little as an evidence of his right to receive the money the latter had promised to pay. Bullard was to return it to Plumlee. It was not an obligation in Plumlee's hands, and, being non-negotiable, Kuteman took no higher right by the attempted transfer to him. It was discharged, and the sale by virtue of the judgment obtained upon it was a nullity as to appellee Jackson. Jackson, by his purchase at the sheriff's sale under the decree enforcing his lien, acquired all the title conveyed to Little by Key and wife, and is entitled to recover the land, as between the parties to this suit. That title may still be subject to the payment of the two installments which Little promised to pay to Stults, but the question is not before us, and we give no opinion upon it. We find no error in the judgment, and it is affirmed.

TAYLOR v. DAVIS.

(Supreme Court of Texas. April 23, 1890.)

APPEAL—BILL OF EXCEPTIONS—FALSE IMPRISONMENT—INADEQUATE DAMAGES.

1. Where the bill of exceptions shows that a judgment and petition in a case between plaintiff and a third person were offered in evidence, but they are not made part of the bill, papers in the record, purporting to be the judgment and petition in an action between plaintiff and such third person, but not identified as the papers referred to in the bill of exceptions, do not form part of the bill.

2. Error cannot be predicated on the refusal of the trial court to charge, on an inquiry made by the jury after they had retired, where it does not appear by the bill of exceptions, but only by an affidavit filed with the motion for a new trial, that the jury requested additional instructions.

3. Plaintiff, in an action for false imprisonment, testified as to the discomforts of the prison; that when arrested he was employed at \$35 a month and board; that he suffered "both bodily and in mind, and felt degraded, shamed, and humiliated at being put in jail;" and that the employment which he lost was worth \$250. He did not state that he could not have gotten equally good employment after he was discharged, nor that he had not lost his employment before he was arrested. Held, that a verdict for \$50 would not be set aside as inadequate.

Appeal from district court, Clay county.

M. J. Tomkins and *W. W. Flood*, for appellant. *L. T. Miller* and *R. Cobb*, for appellee.

STAYTON, C. J. Appellee, as sheriff, having a *capias* for the arrest of one Brown, arrested appellant under the belief that he was the person for whose arrest he held the writ, or rather he received him from another officer who had arrested him, and placed him in jail, where he remained until the mistake was ascertained. This action was brought to recover damages for this wrongful imprisonment, and resulted in a judgment for appellant for \$50, from which he appeals.

At the time appellee, through a deputy, received appellant from the officer who had him in custody, that officer informed the

deputy that appellant was claiming to be a person that he knew him not to be, and on the trial the declaration of the officer to that effect was proved, the officer testifying to the same facts made known by him to the deputy. The evidence of the officer was not objected to, and after its admission we do not see that the evidence objected to could have operated injuriously to the appellant. The evidence was doubtless offered for the purpose of showing that the custody was in good faith, false personation being a fact that might properly be shown in such cases; but, whether admissible or not, as the case stood, the admission of such evidence furnishes no ground for reversal. Appellee had alleged in effect that appellant had obtained a judgment against the officer who originally arrested him on practically the same cause of action set up in this case, and that the judgment had been satisfied. It is claimed that the petition and judgment in that case was offered in evidence in this, and it is urged that this was error. There is an agreed statement of facts which does not contain either the petition or judgment. There is also a bill of exceptions, which shows that a judgment and petition in a case between appellant and the other officer were offered in evidence, but they are not made a part of the bill of exceptions. We find in the record papers purporting to be a petition and judgment in a case in which appellant was plaintiff and the other officer defendant, but they are in no manner identified as the papers to which the bill of exceptions refers, and for this reason we cannot consider them. Parties, in taking bills of exceptions, should make them complete within themselves, or by reference to such other parts of the record as under the rules may be thus referred to. The petition and judgment found do not constitute properly any part of the record.

It is urged that the court should have given a charge upon an inquiry made by the jury after their retirement; but it does not appear, otherwise than by an affidavit filed with the motion for new trial, that the jury requested additional instructions. Matters of this kind can be reviewed only when it is shown by bill of exceptions what was done. Such matters cannot be presented by *ex parte* affidavits unless where a bill of exceptions is thus authenticated in cases in which this is allowed by the statute.

It is further urged that a new trial should have been granted because the evidence required a larger verdict. Appellant stated the discomforts of the prison in which he was confined; that when arrested he had employment at \$35 and board per month, which would have continued for five months. But he did not state that he could not get other equally profitable employment after he was discharged, nor does he show that he had not lost his employment when first arrested, and before he went into custody of appellee. He stated that he suffered "both bodily and in mind, and felt degraded, shamed, and humil-

lated by being put in jail," and that the employment he lost was worth to him \$250. Under this evidence the jury might have awarded heavier damages than they did, but there is nothing in the evidence from which we can declare they ought to have done so. It was the province of the jury to assess the damages, in view of all the evidence, and no fact was shown which, as matter of law, entitled appellant to more than the jury awarded him. There is no error in the proceedings that led to the judgment shown by the record, and it will be affirmed.

WARREN v. FREDERICKS.

(Supreme Court of Texas. March 28, 1890.)

TRESPASS TO TRY TITLE—ADVERSE POSSESSION—EVIDENCE.

1. In trespass to try title, where a decree of partition between the heirs of one under whom defendant claims is in evidence, it is competent to prove that a parol partition making the same disposition of the land had been previously made, and that the decree was obtained simply on account of the death of some of the parties.

2. Where the evidence shows that a tenant of one C., who had been in possession of the land, and under whom plaintiff claims by adverse possession, moved off the land, and a stranger took possession and occupied it for several weeks, the possession of C., and his vendors and tenants, cannot help plaintiff, and he cannot connect their possession with the possession of himself and his immediate vendor.

3. A decree of partition, made on the report of commissioners based on the consent of the parties when no want of jurisdiction in the court to make partition is shown, is admissible in evidence without introducing the written agreement between the parties showing such consent, or the report of the commission.

4. Where a person has testified in an action of trespass to try title, in which plaintiff claims, by adverse possession, that he was in possession of the land in controversy as a tenant of plaintiff, evidence as to actions or declarations of such tenant while in possession are incompetent to show want of title in plaintiff.

5. Where the evidence conflicts as to whether the person in possession was plaintiff's tenant, it should go to the jury with instructions to disregard it if they find that the relation existed.

6. Evidence of statements made in regard to the land, by one in possession, while negotiating for its purchase, are inadmissible against plaintiff where it does not appear that plaintiff claimed through the occupancy of such person, or that such person sustained any relation to plaintiff which would make the declarations binding on him.

7. The admission in evidence of a deed through which defendant derails title is not objectionable on the ground that it does not come from the proper custody, where it appears that the deed is over 80 years old, and that, on search suggested by the recitals in a power of attorney, found among the grantee's papers, executed by the grantor, authorizing certain persons to make a valid conveyance if the deed should prove defective, it was found by the attorney of the grantee's heirs among papers labeled in the grantee's name, in the county clerk's office, which was the repository of colonial grants, and that since then it has been in the custody of such attorney and the heirs.

8. An instruction which makes plaintiff's claim by adverse possession to all of the land, down to the time when he was evicted, dependent on the coverture of a married woman through whom defendant claims, is error where it appears that the married woman only had title to part of

the land, and conveyed that interest 10 years before plaintiff's eviction.

Appeal from district court, Goliad county. *Daniel D. Claiborne and A. B. Peticoles*, for appellant. *Glass & Callendar and Fly & Davidson*, for appellee.

HENRY, J. The appellant filed his petition in the district court to recover a tract of land containing 150.9 acres. He claimed by his petition to have title by reason of the adverse possession of himself, and those under whom he held, under the 10-years statute of limitations. He charged that the adverse possession was taken on the 1st day of January, 1854, and was continuously maintained until the 26th day of May, 1884. The defendant answered by plea of not guilty, and that during the period of the alleged occupancy the land was owned by one Phoebe E. Angell, who was a married woman, and that defendant derails title through her.

The evidence shows that possession of the land was taken by one Toombs in 1856 or 1857. He remained on it until 1886, when he sold out to E. N. Cassells, who moved on the land when Toombs moved off. Cassells remained on the land until 1870, when he leased it to one Statsman for two years. Statsman went on the land, and remained until the fall of 1871, when he moved off. After Statsman left, one Hall moved on the land, and was in possession of it a few weeks. If he held under or for anybody, the record does not disclose it. He did not claim the land. Shortly after Hall left, in December, 1871, the mother of plaintiff moved on the land. She shortly afterwards married one McCaig. In the spring of 1872, Cassells sold out to McCaig; and he remained until he sold to plaintiff, who took possession and kept it until he was dispossessed, on the 26th May, 1884, through a suit of forcible entry and detainer brought by defendant. The evidence indicates that plaintiff's mother occupied the land with the consent of Cassells. There is some doubt made by the evidence as to whether the land was at any time occupied in hostility to the true owner, and as to whether the occupants claimed or bought or sold anything but the improvements.

The defendant proved that the land is part of a league patented to Solomon Hall on 13th November, 1845. She introduced a deed from Solomon Hall to W. W. Walker for the league, dated November 8, 1837, and evidence of the death of Walker and his wife, also evidence showing who their heirs were. A decree of the county court of Fort Bend county was introduced, showing a partition of the Solomon Hall league among the heirs of Mary Jarman. This decree is dated 29th January, 1869. The evidence shows that Mary Jarman was the wife of W. W. Walker when the land in controversy was acquired by him. After the death of Walker, she married Jarman, and died without other issue than her children by Walker. Evidence was introduced that there had been a parol parti-

tion of the Solomon Hall league, between the heirs of W. W. Walker and wife, previous to the war, by which the same disposition of the land was made as by the decree of the Fort Bend county court, and that said parol partition was satisfactory, and acted on by the parties, and that the cause of having the court make a second one was that some of the children sharing in the first one had in the mean time died without issue. The decree of partition allotted the land in controversy to Phoebe E. Angell and John W. Rundell. On the 30th day of November, 1869, John W. Rundell conveyed his interest in the land to Phoebe E. Angell and her husband, E. P. Angell. The record indicates that this deed conveyed an undivided half interest in the land, and there is nothing in the deed or in the record to indicate that it had other than its ordinary effect of vesting the title in the community. P. E. and E. P. Angell conveyed the land to James Angell on the 20th day of July, 1874; and he conveyed it to William Hoff on the 10th day of November, 1882. William Hoff conveyed it to appellee on 1st June, 1888. The evidence shows that Phoebe E. Angell was the wife of E. P. Angell from the year 1855. When the deed from Solomon Hall to W. W. Walker was filed, the plaintiff filed an affidavit that he believed it was a forgery, but offered no evidence in support of his affidavit. In connection with her offer of the deed, the defendant proved by W. L. Davidson that he had been the attorney of the heirs of William W. Walker; that among the papers placed in his hands by them was a power of attorney purporting to be executed by Solomon Hall to certain named parties, reciting that he had, before obtaining his certificate, conveyed the league of land granted him by the state of Texas to William Walker, and empowering said parties, or any of them, in case said deed of conveyance was not sufficient to pass title, to make for him and in his name a valid conveyance of said league to said Walker; that the recitals of this power of attorney caused him to make search for the instrument therein referred to, and that, after searching in various places, witness found the deed in a wooden box in a pigeon-hole in the office of the county clerk of Austin county, Tex., in a package of papers labeled "W. W. Walker;" that the deed, since so found by him, several years before the trial had been in his custody, and the custody of the heirs of W. W. Walker, until filed in this case. There is evidence in the record showing that the said clerk's office had been the place of deposit of colonial grants until their removal to the general land-office, and also that such deeds between parties are still kept there as archives. Evidence tending to contradict defendant's evidence with regard to the power of attorney and the custody of the deed was introduced by plaintiff.

There was no error in permitting the witness Davidson to testify that before the war a parol partition of the Hall league was made, and that the subsequent partition in the

county court of Fort Bend county was made between some of the same parties, because others of them had died.

We think the evidence that in the fall of 1871 the tenant in possession left the land unoccupied, and that a stranger moved onto it, and was in possession of it for a period of time, made the charge given by the court on the subject of breaks in the possession proper. The charge complained of was as follows: "If the jury find from the evidence that one or more persons had possession of this land, other than Cassells and those who were there by his permission and authority, between the time Cassells took possession and the fall of 1871, then the possession of Cassells and his tenants, and also the possession of Cassells' vendor, can avail the plaintiff nothing, and he cannot connect it with the possession of himself and his immediate vendor."

The evidence produced of the partition in the county court of Fort Bend county consisted of a certified copy of the decree of partition only. The decree shows that it was made upon the report of commissioners based upon the consent of the parties. It shows that the distribution was made between five heirs of William Walker, and that Phoebe E. Angell was one of the five. The introduction in evidence of the decree was objected to on the grounds—*First*, because it purports to have been made on a written agreement, and the agreement was not produced; *second*, because, before it was introduced, titles should have been shown in Mary Jarman; *third*, because the transcript did not include the report of the commissioners; *fourth*, because it appears that all the heirs were of lawful age, and, being competent to partition the land among themselves, the court had no jurisdiction to do so. We think these objections were properly overruled. The record contains nothing indicating a want of jurisdiction in the county court to make the partition, and it was not necessary for the defendant to produce more of the proceedings in that court than she did.

A witness for defendant was permitted to testify that, while Stump Warren was living on the land in controversy, he sent him word that it was for sale, and that Warren came to him, and offered to purchase the land; that they failed to trade because Warren stated he did not have the money to purchase the whole tract, and the witness declined to sell him less than the whole. The witness subsequently sold the land to Hoff. This evidence was objected to by plaintiff upon the ground that said Warren had testified that he was a tenant of plaintiff when the statements were made, and therefore he could not be permitted to affect the rights of the plaintiff. Stump Warren, on cross-examination by defendant, was permitted to testify to the same conversation with the witness Payne, and his evidence was objected to upon the same ground. Title to land by limitation may be acquired by one by adverse possession of it through another who is his

tenant. Notwithstanding the trespass, the relation of landlord and tenant may exist between the occupant of the land and the person for whom he is holding the possession. Under the operation of the rules governing the relations between landlord and tenant, and under the circumstances of this case, we do not think the evidence should have been admitted. Where there is a conflict in the evidence as to whether the party in possession was in fact there as a tenant, the evidence should go to the jury with appropriate instructions to disregard it if they find that the relation of landlord and tenant in fact existed.

E. R. Lane, witness for defendant, was permitted to testify that "Mac Cassells, the brother of Elias Cassells, proposed to buy the land in controversy from the witness as the attorney of Angell, telling witness that he had as much right as his brother Elias to buy the land, as their father, Elias Cassells, then dead, had settled on the land with an agreement with Angell that he should have the refusal of the land when it should be put on the market; and that at the time of the statements the witness was at the house of said Cassells, who was then residing upon the land in dispute." The evidence was objected to by plaintiff upon the grounds that it was hearsay, and because plaintiff was not claiming under said Mac Cassells. The objections should have been sustained. It does not appear that plaintiff claims the land through the occupancy of said Mac Cassells, or that he was in any manner so related to him as to make the declarations binding upon him.

The deed from Solomon Hall to William Walker was read to the jury by defendant. Plaintiff objected to it upon the following grounds: (1) Because proof of any action having been taken under it was insufficient; (2) because it did not come from the proper custody; (3) because it had been attacked as a forgery. The deed was over 30 years old. Defendant produced it, and offered evidence tending to account for its custody while it was out of the actual possession of the heirs of William Walker. The power of attorney that was testified to as having been found among the papers of Walker, and referring to it, was properly considered. We think that, under these circumstances, the ruling permitting the deed to be read was correct. When the preliminary proof upon which the deed is permitted to be read is disputed or is conflicting, it is proper for the court, under proper instructions, to submit the issue to the jury. If it had been requested, it would have been proper to submit that issue in this case.

The court also charged that, if Mrs. Angell was a married woman when McCaig took possession of the land under Cassells, in 1872, then the possession of plaintiff, and that of those under whom he claims, can avail him nothing. Previous to the partition, in 1869, it seems Mrs. Angell owned no more than

an undivided one-fifth interest in the land; and therefore her coverture up to that time could not affect the operation of the statute as to the remaining four-fifths interest. In the partition the land in controversy was allotted to her and her brother John W. Rundell. She never acquired but one-half of her brother's interest, so that, at the period named in the charge, she owned, and her coverture affected, three-fourths undivided interest, and not the whole tract. When, on the 20th day of July, 1874, she and her husband conveyed the whole of the land to James Angell, her coverture ceased to affect the question of limitation at all, while the charge of the court made it operate until 1884.

Except as mentioned, we do not find error in the charges or rulings of the court. For the errors noticed, the judgment is reversed and the cause is remanded.

MILLER v. STATE.

(Court of Appeals of Texas. March 12, 1890.)

BURGLARY—INSTRUCTIONS—APPEAL.

1. Under an indictment charging a burglary by force, threats, and fraud, an instruction as to an entry effected by each of such means is reversible error where the evidence conclusively shows that it was accomplished by the use of force alone.

2. Where the indictment charges the entry to have been effected with intent to commit theft, but the evidence strongly tends to show that it was with intent to commit robbery, crimes differing in their essential elements and punishment, (Pen. Code Tex. arts. 722, 724,) it is error to omit to instruct that the entry must have been made with the specific intent charged in the indictment.

3. An exception to the refusal of the trial court to permit a witness to answer certain questions will not be considered where it fails to show the testimony expected to be elicited.

Appeal from district court, Dallas county; B. E. BURKE, Judge.

R. B. Seay, for appellant. W. L. Davidson, Asst. Atty. Gen., for the State.

WILLSON, J. While the indictment charges a burglary by means of force, threats, and fraud, the evidence shows conclusively that the means used was force alone. There is not a particle of evidence that threats and fraud, or either, were used in accomplishing the crime. Notwithstanding such is the case as made by the evidence, the trial judge instructed the jury as to a burglary committed not only by force, but by threats and fraud. This was error, and, having been promptly excepted to by the defendant, requires a reversal of the judgment of conviction. *Levine v. State*, 22 Tex. App. 683, 3 S. W. Rep. 660; *Lott v. State*, 17 Tex. App. 598; *Serio v. State*, 22 Tex. App. 633, 3 S. W. Rep. 784.

In this case the indictment charges that the intent with which defendant entered the house was to commit theft. The evidence tends strongly to show that the specific crime intended to be committed was robbery. Theft and robbery are different offenses. They differ in essential elements, and also in the punishments prescribed.

Pen. Code, arts. 722, 724; *Harris v. State*, 17 Tex. App. 132; *Gage v. State*, 22 Tex. App. 126, 2 S. W. Rep. 638; *Loza v. State*, 1 Tex. App. 494. When the case of *Skipworth v. State*, 8 Tex. App. 135, was decided, the punishments prescribed for theft, when a felony, and robbery were the same, and hence we do not consider that decision as applicable in this case. In view of the evidence the court should have instructed the jury that the entry into the house must have been made with the specific intent charged in the indictment, that is, with the intent to commit theft; and that, if the evidence did not show such specific intent, they must acquit the defendant. Defendant excepted to the charge because it did not contain such instruction, and the exception must be sustained. *Coleman v. State*, 26 Tex. App. 252, 9 S. W. Rep. 609; *Turner v. State*, 24 Tex. App. 12, 5 S. W. Rep. 511; *Hamilton v. State*, 11 Tex. App. 116.

Defendant's bill of exception to the refusal of the court to permit the witnesses Ellicott and Miller to answer certain questions propounded to them by defendant's counsel is defective, in that it fails to show the testimony that he expected to elicit by said questions. In view of another trial, however, we will say that we can see no valid objection to the questions propounded, they having been propounded on cross-examination, and manifestly for the purpose of affecting the credibility of said witnesses. Ordinarily any question which may tend to affect the credit of a witness is allowable on cross-examination. *Willson, Crim. St. § 2511*.

As the case will be remanded for another trial, we will not comment upon or express any opinion as to the sufficiency of the evidence. The judgment is reversed and the cause is remanded.

GILMORE v. STATE.

(Court of Appeals of Texas. Feb. 19, 1890.)

THEFT—EVIDENCE.

On a trial for the theft of a horse, testimony for the state showed that one C. hired the horse to go to W.; that, while C. was getting it at the stable, defendant came and called for C., but went away on C.'s motioning for him to do so; that defendant went with C. to W., and that the horse was there sold as C.'s property, defendant vouching for C., and his ownership of the horse. Defendant's brother testified that C. tried to hire him to drive on the trip, but that he could not go, and told C. where he could find defendant. Defendant testified that C. hired him to drive, and when they reached W. told him that the horse belonged to him, and he was going to sell it; that he believed the horse belonged to C., and told the auctioneer who sold it that he knew C., and that C. was all right. Held, that the evidence did not warrant a conviction, as none of the facts were inconsistent with his innocence.

Appeal from district court, Johnson county; J. M. HALL, Judge.

Indictment of one Jim Gilmore for the theft of a horse. John Guthrie testified, in substance, that on January 6, 1890, he hired a wagon and team to John Clark to go from

Cleburne to Grand View after a load of brooms. While Clark was hitching the team in witness' yard, defendant came to the gate and called: "John." Witness' name being John, he responded. Defendant replied that he wanted to see John Clark. Clark, from the yard, then motioned to defendant to go away; and defendant left. Witness did not see him again until after his arrest. Witness recovered one of the horses, but did not recover the wagon and the other horse. Other testimony for the state showed that Clark and defendant went with the wagon and team to Fort Worth, where the wagon and horses were sold at auction as the property of John Clark; the defendant vouching for Clark and the property as belonging to Clark. Tom Gilmore, defendant's brother, testified for the defense that Clark proposed to hire him, on the morning of January 6th, to go with him to Fort Worth for a load of brooms. Witness could not go, but told him where he could find the defendant. Defendant testified in his own behalf that, on the morning of January 6th, John Clark hired him to drive his (Clark's) wagon and team to Fort Worth. He told witness that his wagon and team were at the house of his uncle, Mr. Guthrie. He left, and soon afterwards witness went to Mr. Guthrie's and called for "John." Mr. Guthrie responded, and witness told him he wanted to see John Clark. Guthrie replied that John Clark was in the yard, hitching up his team. Clark then motioned to witness to go away, and witness went back to town, and waited until Clark came. They then went to Fort Worth. Upon reaching Fort Worth, Clark told witness that he was going to sell the wagon and team. Witness told him that he ought not to sell his father's property. He replied that he (John) owned one of the horses, and his father owned the other horse and wagon, but that he (John) was authorized to sell them. The auctioneer sold the horse claimed by John as his, first, and the auctioneer asked him if there was anybody in Fort Worth who knew him, (John.) Clark pointed witness out, and witness told the auctioneer that he knew Clark, and that Clark was all right. The witness believed the horse belonged to Clark, and had no reason to think contrary.

Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. As presented in the record, the evidence does not, in our opinion, warrant the conviction. It is shown by the evidence that one John Clark committed the theft of the horse by means of a false and fraudulent pretext. It is not shown by the evidence that the defendant in any way aided the said Clark in obtaining possession of the horse, or that he knew that Clark intended to fraudulently obtain the same, or had so obtained it, or even that the horse did not belong to Clark. None of the facts proved are inconsistent with defendant's innocence of the theft, while, on the other hand, his own uncontradicted explanation of his con-

nection with the transaction is reasonable and probable, and shows his innocence of the charge. Because, in our opinion, the conviction is not supported by the evidence, the judgment is reversed, and the cause remanded.

SISK v. STATE.

(Court of Appeals of Texas. March 12, 1890.)

PERJURY—INDICTMENT—EVIDENCE—WITNESS—GAMING.

1. On indictment for perjury, it is sufficient to allege that the false statement on which perjury is assigned was material without alleging the facts which show materiality.

2. Where several statements are assigned as perjury, it is not error for the judge, in charging the jury, to designate the statement which is material, and submit it alone.

3. A room furnished and occupied as a sleeping apartment only, no other room in the house being occupied, is an "outhouse," within the meaning of Pen. Code Tex. art. 355, prohibiting card-playing in "outhouses."

4. Where, on indictment for perjury, the intoxication of defendant at the time he made the false statement is relied on as a defense, a charge giving the provisions of Pen. Code Tex. art. 189, providing that "a false statement made through inadvertence or under agitation or by mistake is not perjury," is sufficient without calling special attention to defendant's intoxicated condition.

5. Where the perjury is alleged to have been committed in the grand jury room, it is not error to permit the foreman, on the trial, to read the indictment which was being investigated when the perjury is alleged to have been committed, in order to refresh his memory as to the statements made by defendant on the investigation, when the witness afterwards testifies from memory.

6. It is not competent for defendant to prove what a member of the grand jury said in regard to defendant's intoxicated condition while testifying before the grand jury, since such testimony is mere hearsay, and does not come within the rule of *res gestæ*.

Appeal from district court, Parker county; J. W. PATTERSON, Judge.

The appellant was awarded a term of five years in the penitentiary upon his conviction for perjury under an indictment, the charging part of which reads as follows: "Matt Sisk, on or about May 23, 1889, in the county and state aforesaid, did then and there personally appear before the duly-organized grand jury for said county, which was then and there in session for the May term of the district court for said county, and of which said grand jury W. J. Carson was then and there the legally appointed foreman; and the said Matt Sisk did then and there take his corporal oath, and was duly sworn as a witness, before said grand jury, said oath being then and there duly administered to him by the said foreman of the said grand jury, who was then and there authorized by law to administer the same, and which said oath was so administered for the ends of public justice. Whereupon it then and there became and was a material inquiry before said grand jury, and necessary for the due administration of the criminal law of said state, whether the said Matt Sisk had seen any cards played in Frank Hathaway's room, in the town of Weatherford, in said county and state, which

said room was then and there an outhouse where people did then and there resort, and whether he, the said Matt Sisk, had played cards in said room since the 1st day of September, 1888, with several persons, among whom were Ab Lewis and Ben Hartgraves, about the month of April, 1889. And the said Matt Sisk did, on the day hereinbefore first named, in said county, before and to the grand jury, under the sanction of said oath administered to him as aforesaid, willfully and deliberately state and testify that he had not seen any cards played in the town of Weatherford, in said county and state, since the 1st day of September, 1888, in Frank Hathaway's room, and that he had not played cards in said town of Weatherford and in Frank Hathaway's room since the 1st day of September, 1888, and that he did not play cards about the month of April, or in the month of April, 1889, with Ab Lewis and Ben Hartgraves, or either of them, in said Frank Hathaway's room, in said town of Weatherford, in said county and state, whereas, in truth and in fact, the said Matt Sisk had seen cards played in Frank Hathaway's said room, in said town of Weatherford and in said county of Parker, state aforesaid, since the 1st day of September, 1888, and the said Matt Sisk did play cards in or about the month of April, 1889, in said Frank Hathaway's said room, in the town, county, and state aforesaid, with Ab Lewis and others, which said room was then and there an outhouse where people did then and there resort. Which said statements so made by the said Matt Sisk before and to the grand jury, as aforesaid, were willfully and deliberately false, and the said Matt Sisk knew them to be false when he made them,—against the peace and dignity of the state."

The state first introduced in evidence the minutes of the district court of Parker county for the May term, 1889, showing the organization of the grand jury as charged in the indictment. W. J. Carson, the foreman of the grand jury before which the perjury was alleged to have been committed, and which returned this indictment, was the first witness for the state. He stated that, unless he was permitted to read the indictment to refresh his memory, he could not repeat the forms of the questions propounded by him to the defendant when the defendant testified before the grand jury. Over the objections of defendant, he was permitted to read the indictment. He then stated that, after administering the oath to defendant, he asked defendant if he saw any card-playing in Frank Hathaway's room, in Weatherford, Parker county, Tex., subsequent to September 1, 1888, and if he played cards in that room with Ab Lewis or Ben Hartgraves and others on or about April 1, 1889, or during said month. In reply to these questions the defendant replied, promptly, in the negative. Witness designated the Hathaway house to defendant, and read to him from the statutes to show him that he would not criminate

himself by testifying about the matter. Defendant did not appear to the witness to be drunk when he testified before the grand jury. Two other members of the grand jury testified to substantially the same facts, corroborating Carson in every particular. Two witnesses, Bell and Buchanan, testified that they played poker with cards in Frank Hathaway's room, in Weatherford, on the 23d day of April, 1889. Defendant, Ben Hartgraves, and Ab Lewis played in the same game. Defendant quit the game before it closed, and went to sleep on Hathaway's bed. The entire party drank whisky during the game; the defendant, more than the others, becoming affected by the liquor. Buchanan testified that, after he was indicted for playing that game, and while his case was pending, defendant asked him what he was going to swear in court about the matter. Witness replied that he was going to tell all about it, and defendant replied that he did not blame witness for telling the truth about it, but that he was so drunk when he played he did not know what he was doing; that, when he woke up on Hathaway's bed on that evening, he was at a loss to know when or how he got there. The house in which was Hathaway's room stood on Austin avenue, about 40 feet north of the saloon, on the north-east corner of the square. The ground floor was partitioned off into three rooms; the front room being Hathaway's room, and the one in which the games were played. That room contained a bed, table, washstand, book-case, chairs, etc. The other two rooms contained nothing but a number of mattresses. A shed-room adjoined the house, which, until recently before the playing, had been occupied by Ed Boyd as a restaurant. Ed Boyd testified for the state that he occupied the shed-room adjoining Hathaway's room as a restaurant until April 16, 1889. Witness often had orders to serve oysters in Hathaway's room as late as midnight. As often as he went into that room, he saw several parties sitting around, but never saw any card-playing. People went in and out of that room with great frequency while witness kept that restaurant. It was a common thing for the young men about town to have oysters served in their bed-rooms after night. State closed. W. C. Patterson testified, for the defense, that he was the proprietor of an hotel in Weatherford situated about 100 feet north of the Hedrick building, of which said building Hathaway's room was a part. Witness rented the said Hedrick building about November 1, 1888, and occupied it in part as a storage house for furniture until about January 1, 1889. Frank Hathaway occupied the first room on the ground floor as a sleeping apartment when the witness first rented it, and continued to so occupy it during witness' tenancy. He continued to occupy the said room under Mr. Miller, who succeeded witness as landlord. Witness again rented the building about the middle of April, 1889; and Hathaway continued to oc-

cupy the said room until about May 1st, when witness rented the entire ground floor to a business firm. During all of the time covered by this testimony, Hathaway boarded at the witness' hotel. The witness visited Hathaway's room very often, but never saw a game of cards played, nor a deck of cards in the room. The room was furnished as a gentleman's sleeping-room. James Gibson testified for the defense that he saw the defendant when he was taken before the grand jury on the day alleged in the indictment. He was then so drunk that he was unable to walk without staggering. H. S. Sisk, sheriff of Parker county and uncle of the defendant, testified in his behalf that, on the day of the alleged card-playing in Hathaway's room, he (witness) was informed of the playing, and that defendant was participating in the game. Witness went to the Hedrick building with the intention of breaking into Hathaway's room and arresting the parties, but concluded that the room was a private sleeping apartment, and decided that he had no authority to enter it by force. Defendant was very drunk at the time of the card-playing. He was drinking heavily when called before the grand jury in May, 1889, but witness could not say how drunk he was on that occasion. Very little whisky would affect the defendant. The defense closed. Two witnesses for the state testified in rebuttal that they saw the defendant during the time he was before the grand jury; that they observed him closely, and did not think he was drunk.

A. Stevenson and H. W. Kuteman, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. We do not think the exceptions to the indictment are maintainable; and we hold, therefore, that they were correctly overruled. It is charged that the statements upon which perjury is assigned were material, and this general averment is sufficient without alleging the facts which show materiality. *Washington v. State*, 22 Tex. App. 26, 8 S. W. Rep. 228; *Pertain v. State*, 22 Tex. App. 100, 2 S. W. Rep. 854. With respect to the allegations as to the character of the house in which the card-playing occurred, we think they show, when considered in connection with the allegations of materiality, that said house was an outhouse where people resorted at the time of card-playing.

In the charge to the jury the judge designated the material statement assigned as perjury; said statement being that defendant "did not play cards about the month of April, or in the month of April, A. D. 1889, with Ab Lewis and Ben Hartgraves, or either of them, in the said Frank Hathaway's room, in said town of Weatherford, in said county and state." It was proper for the court to thus designate from among the several statements assigned as perjury that which was material, and submit it alone to the jury.

Washington v. State, 23 Tex. App. 336, 5 S. W. Rep. 119; *Jackson v. State*, 15 Tex. App. 579; *Donohoe v. State*, 14 Tex. App. 638.

We think the evidence sustains the allegation in the indictment that, at the time the card-playing occurred, the house in which it occurred, known as "Hathaway's Room," was an outhouse where people resorted, within the meaning of the statute prohibiting card-playing in such houses. Pen. Code, art. 355. The fact that the room in which the card-playing occurred was occupied at the time as a bed-room did not prevent it from being an "outhouse," within the meaning of that term as used in the statute. As we understand the construction placed upon the term "outhouse" by our supreme court in the cases of *Wheelock v. State*, 15 Tex. 253, 257, 260, the house in question in this case was an outhouse at the time of the card-playing.

"A false statement made through inadvertence or under agitation or by mistake is not perjury." Pen. Code, art. 189. This provision of the law was given in charge to the jury; and it was unnecessary, we think, that the jury should have been instructed as to the intoxication of the defendant at the time he made the alleged false statement, or at the time the card-playing occurred. It was for the jury to determine from the evidence whether or not the alleged false statement was willfully and deliberately made, or whether it was made through inadvertence or under agitation or by mistake; and in determining this they would, of course, take into consideration the mental condition of the defendant at the time he testified and at the time of the card-playing.

Defendant's bill of exception No. 3 shows no error. It was competent for the state to show that the defendant testified before the grand jury that he had not seen any card-playing in Frank Hathaway's room. Such testimony bore directly upon the issue in the case, and was in support of the allegations in the indictment.

It was not error to permit the witness Carson to read the indictment, and thereby refresh his memory as to the statements made by the defendant when testifying before the grand jury. *White v. State*, 18 Tex. App. 57; *Hubb. v. State*, 8 Tex. App. 597. Said Carson, after examining the indictment, testified from memory as to defendant's said statements.

Bill of exception No. 6 shows no material error. The question and answer complained of were immaterial to the issue submitted to the jury, and were harmless.

Bills of exception Nos. 7 and 8 show no error, as the rejected testimony was irrelevant and immaterial, and could not legitimately have affected the result.

Bill of exception No. 10 shows no error. It was not competent for the defendant to prove what a grand juror said in the grand jury room, at the time defendant testified there, as to the defendant being then in an intoxicated condition. Such testimony would

have been mere hearsay, and not within the rule of *res gestæ*, under the facts of this case.

There is no bill of exception in the record to the overruling of defendant's application for a continuance; and we are, therefore, not required to revise that ruling.

We cannot say that any error was committed in refusing defendant's application to postpone the trial to enable him to obtain the testimony of the witness Pickard; that is, any such error as entitles the defendant to have the conviction set aside. While the absent testimony may be regarded as material, we cannot say, in view of the evidence adduced on the trial, that it was probably true. On the contrary, the truth thereof appears to us to be improbable.

We have carefully considered each of the supposed errors presented in the record, and our conclusion is that no good reason appears for a reversal of the judgment, and it is therefore affirmed.

CHILDERS v. STATE.

(Court of Appeals of Texas. March 5, 1890.)

MURDER—EVIDENCE—INSTRUCTIONS.

1. Though the record shows that a bill of exceptions, filed in term-time, was filed more than 10 days after the trial, it will be presumed, in the absence of anything to the contrary, that the bill was regularly presented to the judge within the 10 days prescribed by law, as it is the presentment, and not the filing, that is required within that time.

2. In a murder case it appeared that defendant refused to pay a hack-driver, and that deceased was killed while interfering. *Held*, that the driver's testimony that he insisted on being paid because he saw defendant ordered away from an hotel, and that defendant gave him a wrong name, was immaterial, and prejudicial to defendant.

3. The definition of "malice aforethought" is essential to the charge in a murder case, and its omission is not cured by the presence of definitions of express malice and implied malice.

Appeal from district court, Bexar county; G. H. NOONAN, Judge.

Conviction in second degree for murder of one Draper. The evidence showed that one Cochran, acting for himself and defendant, hired one Rudder, with his hack, to drive them and two ladies to various places about the city of San Antonio; that at a public resort Cochran and one of the ladies separated from defendant and the other lady; that Rudder then drove defendant and his lady to two or more places, at one of which places, according to Rudder, the defendant was ordered to leave; that upon returning to the hotel with defendant Rudder demanded payment of his hack hire; that defendant became infuriated by the demand, cursed and denounced Rudder, applying foul epithets to him; that Draper, who was standing near, exclaimed, "You cannot call a cripple a son of a bitch!" and started towards defendant in a threatening manner, making apparent efforts to take off his coat, when the defendant fired the fatal shot, and fled. The answer of the witness Rudder to the question of the state: "What was the reason you wanted your money?" was as follows: "My

reason was this: The defendant was ordered away from that house, and I drove him back there, and that is where I first heard the name called, and I would not have known the gentleman's name had he not called it himself. He said: 'My name is Cooper, and you go away from here;' and, putting all this together, I thought it was best to get my money that night." This testimony referred to occurrences which preceded the meeting of defendant and deceased.

W. Aubrey, A. W. Houston, and N. O. Green, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. Counsel for defendant question the constitutionality of section 1, subd. 3, of the act dividing Bexar county into two judicial districts. Acts 21st Leg. c. 140, p. 165. We decline to consider and pass upon the validity of said section for two reasons: (1) The question is not presented in the record. (2) Its decision is not essential in this case, and, even if said section were held to be unconstitutional, such holding would not affect the validity of the indictment in this case. It is beyond question that the indictment in this case was presented by a legal grand jury, in a court of competent jurisdiction.

Defendant's bills of exception were filed during the term, but not within 10 days after the conclusion of the trial. It does not appear, however, that they were not presented to the trial judge for his action within 10 days after the conclusion of the trial. It is the presentment to the judge and not the filing of a bill of exception that is required to be within the time named. Nothing appearing to the contrary, we must presume that the bills of exception in this case were presented to the trial judge within the prescribed time, and are therefore entitled to consideration. *Golden v. State*, 22 Tex. App. 1, 2 S. W. Rep. 531; *Clement v. State*, 22 Tex. App. 23, 2 S. W. Rep. 379; *Tomlin's Case*, 25 Tex. App. 676, 8 S. W. Rep. 931.

Bill of exception No. 1 is to the action of the court refusing defendant's application for continuance. As the conviction will be set aside for reasons hereafter to be stated, the said ruling of the court need not be considered, as it can have no bearing upon another trial of the cause.

Bills of exception 3 and 4 are, we think, well taken. All that portion of the witness Rudder's testimony which is set forth in said bills appears to us to be irrelevant, and could have no other effect than that of prejudicing the minds of the jury against the defendant.

There is a fundamental defect in the charge of the court. It does not explain to the jury the legal meaning of the term "malice aforethought." The omission to give such explanation is not supplied by the definitions of express malice and implied malice contained in the charge. *Crook's Case*, 27 Tex. App. 198, 11 S. W. Rep. 444. For the errors above mentioned the judgment is reversed, and the cause is remanded.

JOHNSON v. STATE.

(Court of Appeals of Texas. March 5, 1890.)

THEFT—EVIDENCE.

On the trial for the theft of a yearling it appeared that defendant, for a valuable consideration, executed a writing to one M., reciting that defendant sold to M. 10 head of yearling cattle, marked with defendant's brand, which he was to keep during the winter, and deliver in the spring. There was no other description. It appeared that defendant had other cattle, and there was no evidence but that some of them were of the same age and brand, nor did it appear that the one named in the indictment was one of the 10 mentioned in the writing. Said 10 head of cattle were never separated from defendant's other cattle, were never designated and set apart as M.'s cattle, and were never delivered to M. Held, that this evidence did not warrant a conviction for theft of one of said cattle, as the sale was executory, and the title and possession never changed.

Appeal from district court, Stephens county; T. H. CONNER, Judge.

J. H. Davenport, Viale & Son, and R. B. Truly, for appellant. *W. L. Davidson*, Asst. Atty. Gen., for the State.

WILLSON, J. This conviction is for the theft of a yearling alleged to be the property of R. H. McCain, and to have been taken from the possession of said McCain. It appears from the evidence that on November 12, 1886, in consideration of \$65 paid by said McCain to defendant, the latter executed and delivered to the former an instrument in writing, reciting that he (the defendant) sold to the said McCain 10 cattle, yearlings, branded in defendant's brand, which cattle defendant obligated himself to keep through the winter, and to deliver to the said McCain on the 1st day of April, 1887. At the time of executing said writing defendant owned other cattle. There is no description of the 10 head of cattle mentioned in the said writing, further than their age and brand. It does not appear from the evidence that said cattle were the only ones of that age and brand owned by defendant at the time of the execution of said writing, nor does it appear from the evidence that the animal named in the indictment was one of the 10 head mentioned in said written contract. Said 10 head of cattle were never separated from defendant's other cattle; were never in any manner designated and set apart as said McCain's cattle; were never at any time delivered to said McCain. It is for the theft of one of the cattle mentioned in said written contract that the defendant has in this case been convicted.

As we understand and construe the contract as to said 10 head of cattle, it does not evidence a complete sale of said cattle, so as to transfer the title to and possession of them to said McCain. The transaction was an executory sale merely of the cattle. It remained for the defendant to keep said cattle through the winter, and deliver them to McCain in April, 1887. It remained for him to separate said cattle from his other cattle, and in some way designate them as the cattle sold by him to said McCain. If any or all of said cattle had died or been lost while in charge of the

defendant, the loss would have fallen upon him, and not upon said McCain. We think that the evidence shows that the title and possession of said cattle was never changed from the defendant to said McCain, and that, therefore, this conviction is against the evidence and the law. *Allen v. Melton*, 64 Tex. 218; *Cleveland v. Williams*, 29 Tex. 211.

It is unnecessary that we should determine other questions presented in the record, as they are of a character not likely to occur on another trial. We will state, however, that the remarks of the district attorney, complained of by defendant, which remarks were in the hearing of the jury, and to the effect that if the defendant testified in his own behalf he should be required to do so before the witnesses for the defense testified, etc., were improper, but we will not determine whether it was such error as would require the conviction to be set aside. Because, in our opinion, the evidence does not warrant the conviction, the judgment is reversed, and the cause remanded.

COCHRAN v. STATE.

(Court of Appeals of Texas. March 8, 1890.)

HOMICIDE—INSTRUCTIONS—EVIDENCE.

1. In a murder case, in which there was no evidence that deceased, in striking defendant, caused pain or bloodshed, the court instructed that "adequate cause" sufficient to reduce the homicide to manslaughter is such as would commonly produce a degree of rage or terror in the mind of a person of ordinary temper sufficient to render the mind incapable of cool reflection, and that mere insulting words or gestures or an assault and battery so slight as to show no intention to inflict pain or injury, are insufficient; but that, if pain or bloodshed is caused by an assault and battery, it is such adequate cause. Held error, as the jury should have been left to determine the question of "adequate cause" from all the facts, and not restricted to a single cause not shown by the evidence.

2. The true test as to murder in the second degree and manslaughter is that if the homicide was committed under the immediate influence of sudden passion, for which there was adequate cause, the homicide, if not justifiable, would be manslaughter, but if such cause did not exist, and the homicide was not justifiable, then it would be murder in the second degree. Any circumstance capable of and actually creating sudden passion, such as anger or terror, rendering the mind incapable of reflection, whether or not accompanied by bodily pain, is "adequate cause;" and if defendant killed deceased at a time when the latter's actions and words, in connection with his physical strength, produced such "adequate cause," and defendant, under its influence, and while not acting in self-defense, killed deceased, he would be guilty of manslaughter.

3. In judging of the danger the circumstances must be viewed as they appeared to defendant, and if, when he shot deceased, the latter was violently attacking him under circumstances which reasonably indicated an intention to murder, maim, or inflict serious bodily injury, and the weapon and the manner of its use were reasonably calculated to produce either of such results, then the law presumes that deceased intended to murder, maim, or inflict such injury on defendant, (Pen. Code Tex. art. 571,) and the homicide would be justifiable; and though the danger was not real, but merely apparent, the homicide would be justifiable, if at the time the conduct of deceased was such, under the circumstances, as to reasonably induce defendant to

believe that deceased was about to kill or inflict serious bodily injury on him.

4. The testimony of a person, who was, at the time, standing to the left of defendant, that he passed behind defendant from his left to his right side because he expected deceased would strike at defendant with a billiard cue, and that he feared being hit, is admissible as bearing on the effect likely to be produced on defendant's mind by the conduct of deceased.

Appeal from district court, Johnson county; J. M. HALL, Judge.

Poindexter & Padelford, for appellant.
W. L. Davidson, Asst. Atty. Gen., for the State.

WHITE, P. J. This appeal is from a conviction for murder of the second degree. The main errors complained of are the instructions given by the court in the charge upon manslaughter and self-defense. The facts in the case clearly raised both of these issues, and demanded of the court a plain and pertinent exposition of the law applicable to the facts which presented them. Deceased and defendant were strangers, who had never seen each other before the fatal meeting. Defendant came into the room where deceased and another were engaged in a game of billiards. As he entered the door some one pulled off his hat and placed another upon his head, which he jerked off, and, in throwing it from him, it fell upon the billiard table. Deceased became enraged, approached defendant, and addressed him in an angry and threatening manner. Defendant apologized; made every effort to pacify him; begged for peace. Deceased would accept no apology, but became more and more enraged and threatening in his words and conduct. He had his billiard cue in his hand, uplifted in a striking attitude, and slapped defendant in the face or on the breast. Defendant was much the smaller man, and unable to contend with him. He gave back, or was pushed back by third parties, until he had retreated, or been shoved, to the wall. Deceased, too, was shoved back by third parties, who were endeavoring to separate and keep them apart, but deceased, pushed by these parties, advanced again with his drawn billiard cue, a deadly weapon, swearing he would kill defendant; and when he (the deceased) had gotten within four or six feet of defendant, but not within striking distance of him, at the time, with said billiard cue, the defendant fired the fatal shots in rapid succession. There is no evidence that when deceased slapped or tapped defendant on the face or breast he inflicted either pain or bloodshed upon him.

As to what would constitute "adequate cause" sufficient to reduce the homicide to manslaughter, the court, in the seventh paragraph of its charge, instructed the jury as follows: "By the expression 'adequate cause' is meant such as would commonly produce a degree of rage, anger, resentment, or terror in the mind of a person of ordinary temper sufficient to render the mind incapable of cool reflection. Insulting words or gestures, however insulting they may be, or an assault and

battery, so slight as to show no intention to inflict pain or injury, are not adequate causes sufficient to reduce a homicide from the degree of murder to the grade of manslaughter. But an assault and battery, causing pain or bloodshed, is a sufficient cause to reduce an unlawful homicide to the grade of manslaughter." This is the only explanation of adequate cause given. Under the facts it was insufficient, and was calculated to mislead the jury. In like circumstances this identical charge was given by the same learned trial judge in *Hawthorne's Case*, 28 Tex. App. 212, 12 S. W. Rep. 603, and Judge WILLSON, delivering the opinion of the court, says: "While this portion of the charge is abstractly correct, it is not applicable to the evidence. There was no proof * * * of an assault and battery, causing pain or bloodshed. Under this charge the only 'adequate cause' was an assault and battery * * * upon the defendant, causing pain or bloodshed. Of course, the jury would conclude under this charge that adequate cause did not exist because no such assault and battery was committed. * * * Adequate cause should not have been so restricted. Any condition or circumstance which is capable of creating sudden passion sufficient to render the mind of a person of ordinary temper incapable of cool reflection may constitute 'adequate cause,' and where the evidence shows a number of conditions or circumstances tending either singly or collectively to constitute what a jury might consider adequate cause, the charge should leave the jury at liberty to consider them all in determining whether or not adequate cause existed. * * * The jury should have been left free to determine the question of 'adequate cause' from all the facts in evidence tending to show such cause, instead of being restricted, as they were, by the charge to a single cause, and that a cause not shown by the evidence." Willson, Crim. St. § 1030; *Orman v. State*, 24 Tex. App. 495, 6 S. W. Rep. 544; *Miles v. State*, 18 Tex. App. 156; *Wadlington v. State*, 19 Tex. App. 266; *Johnson v. State*, 22 Tex. App. 206, 2 S. W. Rep. 609.

Defendant's counsel excepted to the sufficiency of the charge of the court upon manslaughter, and asked the court to give the following requested instructions: "(1) That you may understand the difference between murder in the second degree and manslaughter, you are, in connection with the general charge of the court upon murder in the second degree and manslaughter, further instructed as follows: When an unlawful killing takes place under the immediate influence of sudden passion, and no cause exists which will, under the law, justify or excuse its commission, then, in order to determine whether such homicide is murder in the second degree, or manslaughter, the true test is, was there adequate cause to produce such passion? If such adequate cause existed, the homicide, if not justifiable, would be manslaughter. If such adequate cause did not exist, and if the

homicide was not justifiable, then it would be murder in the second degree. (2) And you are further instructed that any condition or circumstance which is capable of creating, and does create, sudden passion, such as anger, rage, sudden resentment, or terror, rendering the mind incapable of reflection, whether accompanied by bodily pain or not, is in law 'adequate cause.' (3) And in this case, if you should find from the evidence that the defendant shot and killed John McLennan, and that at the time he did so the actions and words of said McLennan, taken in connection with the physical strength of the said McLennan, were of such a nature as to produce 'adequate cause,' as above explained, and did produce such 'adequate cause' sufficient to render the defendant's mind incapable of cool reflection, and if, under the immediate influence of anger, rage, sudden resentment, or terror, the defendant shot and killed said John McLennan, and if you are satisfied from the evidence, beyond a reasonable doubt, that the defendant did not kill said McLennan in self-defense,—then you should find him guilty of manslaughter." These instructions were apt, pertinent, and comprehensive, and it was error for the court to refuse them.

Upon the law of self-defense, applicable to the facts of the case as made by the evidence, we are also of opinion that the charge of the court was insufficient as to apparent danger, and in not instructing the jury that in judging of the danger the facts and circumstances surrounding the defendant must be viewed and estimated from his stand-point, and as they appeared to him. "If the jury might believe from the evidence that at the time the defendant fired the fatal shot the deceased was making a violent attack upon him, under circumstances which reasonably indicated an intention to murder, maim, [or inflict upon him serious bodily injury,] and the weapon, and the manner of its use, were such as were reasonably calculated to produce either of those results, then the law presumed that the deceased intended to murder or maim [or inflict such injury upon] the defendant, and the jury should have been so instructed in explicit terms, (Pen. Code, art. 571; Kendall v. State, 8 Tex. App. 569,) and that in such state of case the homicide would be justifiable. Furthermore, upon this subject the charge should have instructed the jury that if the conduct of the deceased at the time of the homicide was such, under the circumstances, as to reasonably produce upon the mind of the defendant the belief that the deceased was then about to kill or inflict serious bodily injury upon him, the homicide would be justifiable, although in fact the danger was not real, but only apparent." Jones v. State, 17 Tex. App. 602; Bell v. State, 20 Tex. App. 445; Spearman v. State, 23 Tex. App. 224, 4 S. W. Rep. 586; Patillo v. State, 22 Tex. App. 586, 3 S. W. Rep. 766; Brumley v. State, 21 Tex. App. 222. Defendant's special requested instructions, which were re-

fused, called the attention of the court to the defects in the charge above pointed out.

Defendant offered to prove by the witness Wilshire, who was standing just to the left of defendant immediately before the shots were fired, that "the reason he [the witness] passed from defendant's left side around behind his back to his right side was that he [witness] expected that deceased would strike at defendant with that billiard cue, and that he feared deceased might miss defendant and hit him." An analogous question is discussed in Thomas v. State, 40 Tex. 36, and it was held that such character of evidence was admissible as tending to explain the effect the acts of the party would likely have produced upon the accused. It was said that "the effect produced on a by-stander by the conduct of Wren would illustrate the effect likely to be produced on the mind of the party himself, and we can perceive no good reason why it should not have been allowed." It was error to reject the evidence.

For errors above discussed, the judgment is reversed and the cause remanded.

SIMS v. STATE.

(Court of Appeals of Texas. March 12, 1890.)

FALSE PRETENSES—VENUE.

Where property is acquired in one county by means of false and fraudulent representations made in another county, the venue of the offense must be laid in the county in which the property was delivered.

Appeal from district court, Eastland county; T. H. CONNER, Judge.

Hammons & Cotton, R. B. Truly, and J. H. Davenport, for appellant. *W. L. Davidson*, Asst. Atty. Gen., for the State.

WILLSON, J. This conviction is upon an indictment which charges the offense of swindling, in that the defendant, by means of false pretenses and devices and fraudulent representations, did acquire from G. C. Fort a horse of the value of \$100. The venue of the offense is laid in Eastland county, and the conviction had in said county. It appears from the evidence that the false pretenses and devices and fraudulent representations were made by defendant to said Fort, as alleged in the indictment, in Eastland county, but the horse was delivered to defendant by said Fort in Brown county. Upon the question of the venue of the offense, the court instructed the jury, in substance and effect, that, if the offense was begun and partly committed in Eastland county, and was consummated and completed in Brown county, the allegation of venue in Eastland county was sustained. Defendant excepted to said instruction, and requested a special instruction to the effect that, if the horse was acquired by the defendant in Brown county, he could not be prosecuted for the offense in Eastland county.

To constitute the offense of swindling, there must be an acquisition of property by means

of some false or deceitful pretense or device, or fraudulent representation, etc. The title to the property in question must pass from the injured party to the accused. *Cline v. State*, 43 Tex. 494. It is the acquisition of the property that completes the offense. In this case, no offense was committed in Eastland county, because the horse was not there acquired by the defendant. His false and deceitful pretenses and fraudulent representations in Eastland county did not constitute swindling. In all cases not specially named in the Code, the proper county for the prosecution of offenses is that in which the offense was committed. Code Crim. Proc. art. 225. Swindling, not being one of the offenses enumerated in the chapter on "Venue," comes within the general rule above stated. We are of opinion that the offense of swindling is committed in the county in which the property is acquired by the accused, and that a prosecution therefor can only be maintained in such county. This precise question has not heretofore been determined by this court or by our supreme court, but analogous cases in harmony with our present opinion have been decided by this court. *Robberson v. State*, 3 Tex. App. 502; *Brockman v. State*, 16 Tex. App. 54; *Gage v. State*, 22 Tex. App. 123, 2 S. W. Rep. 638; *West v. State*, 11 S. W. Rep. 635. Our views here expressed are also supported by the rules of the common law in the kindred offense of cheats. 2 Whart. Crim. Law, §§ 1206, 1207, and notes. Because the law as to the venue of the offense was incorrectly given to the jury, and because the evidence does not sustain the allegation of venue, the judgment is reversed and the cause remanded.

TUGWELL et al. v. EAGLE PASS FERRY CO.

(Supreme Court of Texas. October 30, 1888.)¹

FERRY—BETWEEN STATE AND FOREIGN COUNTRY.

1. In a suit to enjoin the operation of a rival ferry, plaintiffs, on showing that they are licensed by law to operate their ferry, and have paid their tax, and that defendant has no license, are entitled to an injunction, though they allege in their petition that they have the exclusive ferry privilege; the commissioners' court, which granted the exclusive privilege, having no power to do so.

2. A state has authority to grant a license to operate a ferry across a stream constituting the boundary between it and a foreign country.

On motion for rehearing. For former report, see 9 S. W. Rep. 120.

J. A. Ware, for appellants. *John H. Clark* and *Robertson & Williams*, for appellee.

GAINES, J. It is urged, upon a motion for rehearing in this case, that, because the plaintiffs set up in their petition that they had acquired an exclusive ferry privilege from the commissioners' court of Maverick county, they were not entitled to the relief sought, unless their exclusive right was established; and it is claimed that it is therefore necessary for this court to pass upon the question presented in appellee's brief of the

power of the commissioners' court to grant such exclusive franchise. Such is not our view of the question. It appears, it is true, that the commissioners' court undertook to grant the appellant Tugwell an exclusive right to operate a ferry across the Rio Grande at Eagle Pass. It is none the less true that the court did grant a license, as the statute requires, upon the payment of a stipulated fee therefor. The license recited that the bond had been given, and, in absence of proof to the contrary, the presumption is that this was the bond required by the statute. Conceding, therefore, that the court undertook to grant more than it had the power to grant, it does not follow that the grant was not good to the extent of its power; nor does the fact that they exacted a tax for the license greater than the limit fixed by the statute operate to defeat the grant. The overcharge worked an injury to no one but appellants. The court would not be permitted to say: "We have charged you too much for your privilege, and it is therefore void." We are far from saying that the action of the court was regular, or in accordance with the law, but we do say that it had the power to grant a license, and that it did grant the franchise which gave the appellants the privilege of operating a ferry across the river at Eagle Pass. The appellee had no license.

The legal question, then, presents itself, is the grantee of a ferry privilege entitled to an injunction against one who, having no license, undertakes to operate another ferry in competition with that which is licensed? In the former opinion this question was decided in the affirmative, and that decision is sustained by authority. *Smith v. Harkins*, 8 Ired. Eq. 618; *Stark v. McGowen*, 1 Nott. & McC. 387; *McRoberts v. Washburne*, 10 Minn. 23, (Gil. 8); *Ferry Co. v. Hankey*, 31 Md. 346; *East Hartford v. Bridge Co.*, 10 How. 511; 3 Bl. Comm. 219. It is not necessary that the grant should exclude the power to grant a license for another ferry. It is sufficient that no such second license has in fact been granted. The operation of an unlicensed ferry is unlawful, and a license is entitled to protection against a competition carried on in violation of law. The plaintiffs alleged fully in their petition and claimed that they acquired thereby an exclusive ferry privilege. The facts alleged and proved show that they have a license to operate a ferry, and that defendants have none. Whether the commissioners' court had the right to grant an exclusive privilege or not, the plaintiffs were entitled to show, and have, under the allegations in their petition, that they acquired a lawful ferry franchise, and that defendant was operating a competing ferry without authority of law. This entitled them to the injunction prayed for. Though they may not have established their right to the full extent claimed, they established a sufficient right for the purpose of their suit. It is further insisted that the court misconceived the scope and effect of

¹ Publication delayed by failure to receive copy.

the decision in the case of Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. Rep. 826. It is claimed that, properly considered, it overrules the case of Conway v. Taylor, 1 Black, 608, cited by us in support of the conclusion that the state has the power to grant a license to operate a ferry across a stream which constitutes its boundary. Having again carefully examined the opinions in the two cases, we find no ground for this assumption. In Gloucester Ferry Co. v. Pennsylvania, supra, Mr. Justice FIELD, who delivered the opinion of the court, in speaking of ferries "over waters separating" the states, concedes "that the privilege of keeping a ferry, with a right to take toll for passengers and freight, is a franchise grantable by the state, to be exercised within such limits and * * * convenience of the public." 114 U. S. 217, 5 Sup. Ct. Rep. 835. If the establishment of a ferry over a river separating two states is not an interference with interstate commerce, the establishment of one over the boundary between the state and a foreign country is not an interference with foreign commerce, and it follows that the establishment of such ferries is a matter within the jurisdiction of the states, respectively, and not of the congress of the United States. We conclude that the decision in Conway v. Taylor is not overruled, either expressly or by implication, and that it is decisive of the question in support of which it was cited. The motion for a new hearing is overruled.

MOLLHENNY et al. v. BINZ et al.

(Supreme Court of Texas. March 29, 1890.)

RAILROAD COMPANIES—INSOLVENCY—RECEIVERS—PRIORITY OF CLAIMS—PLEADING.

1. A railroad company alleged its insolvency, and prayed for a sale of its property, and distribution of the proceeds among its creditors. A receiver was appointed. A mortgage creditor filed a cross-bill asking foreclosure of two mortgages, on both of which default in the interest had been made, but the debt secured by the second only was due. Held, that both mortgages were properly foreclosed, though by its terms the first was not subject to foreclosure until default in payment of the principal at maturity.

2. Even if it had been error to foreclose the first mortgage, the railroad company was not injured thereby, where it was hopelessly insolvent.

3. It was not error to direct that the property of an insolvent company, when offered for sale to the highest bidder, should not be sold for less than a certain sum.

4. Testimony by a witness that he became book-keeper for a corporation at a time when it had no minute-book; that he wrote up, in a certain book, minutes of meetings of directors, purporting to have been held in previous years, from memoranda and dictation furnished by the president, and that he did not know of such meetings, though he would have known of them if they were held, and was satisfied that they were not held,—is not admissible to rebut, when offered by the corporation, evidence from the book, which is identified by the corporation's secretary as the only book in which records of the directors' meetings are kept, of what purports to be a record of a certain meeting of the directors.

5. Where, on bill to foreclose a mortgage, plaintiff shows *prima facie* the execution thereof, and there is no contrary evidence, it is not error to di-

rect a verdict for plaintiff on defendant's plea of *non est factum*.

6. Where, in a petition for the appointment of a receiver of a railroad company, plaintiffs claim as heirs and legatees of their father, who, they allege, owned all the stock of the company, it is not error to dismiss without prejudice a subsequent pleading, filed by them shortly before trial, which recites that it is filed in lieu of their original petition, and in which they allege that their father fraudulently converted community property, one-half of which belonged to their mother, to the building of the railroad, and claim as heirs of their mother.

7. Where a mortgage given by a railroad company in pursuance of a resolution of the directors, to render effectual what was attempted to be done by a former one, whose validity is doubted, contains no reference to the former mortgage, and neither the resolution nor the second mortgage expresses an intention that the latter shall cover the same property as the first, the description in the second cannot be aided by that in the first.

8. Debts incurred by a railroad company for construction of new road within six months before the company's insolvency and the appointment of a receiver, are entitled to priority in payment out of the net earnings of the road while in the hands of the receiver, over mortgages executed when the road was unfinished, and which show that it was contemplated that the road should be completed, and which attach to new road as fast as finished.

9. Where net earnings have been applied to the payment of interest on the bonded debt of the company, and to improvements on the property subject to the mortgages, whereby its value is enhanced to the amount expended on it, the debts incurred for construction before the appointment of the receiver are entitled to be paid from the *corpus* of the property in preference to the mortgage debts, though the mortgage creditors were not parties to the suit at the time of the application of the net earnings to the purposes mentioned.

10. The mere lapse of more than six months between the time within which claims for operating and construction expenses accrued, and the appointment of a receiver, does not deprive them of priority over the mortgages where they arose within twelve months before, and were, by Sayles, Ann. St. Tex. art. 8179a, given a lien for that time, though the court fixed six months before the appointment of the receiver as the limit for such claims, which it ordered paid, and though the statutory lien was inferior to that of the mortgages.

11. Claims by boarding-house keepers for board furnished to railroad laborers and operatives, and by grocers for supplies furnished to the boarding-house keepers, under an arrangement whereby the company retained from the wages of the laborers the amounts due for their board, and credited the boarding-house keepers and grocers therewith, are properly treated as claims for wages assigned to the holders, and allowed priority as such.

12. The taking from the railroad company of notes indorsed by a stockholder for claims is not a waiver of any lien which such claims may have, in the absence of any intention to waive it.

13. Notes given for money borrowed to pay interest on the railroad bonds, each of which stipulates that a certain amount of the gross earnings of the road from date "is pledged in liquidation of this note," are not thereby given priority over the bonded debt, as the stipulation is ineffectual.

14. Two claims for coal furnished to the railroad company for the purpose of operating the road, one of which arose a little more, and the other a little less, than six months before the appointment of the receiver, are both entitled to priority over the mortgages.

15. The question of the authority of attorneys who signed and filed a pleading cannot be raised for the first time on appeal.

Appeal from district court, Harris county.

Wheeler H. Peckham, Baker, Botts & Baker, and Gresham & Jones, for the Union Trust Company of New York. Wm. H.

Crank, for the Dickson Manufacturing Company. *F. Rohde, Hutcheson, Carrington & Sears*, for S. K. McIlhenny and the Houston, East & West Texas Railway Company. *Houston Bros.*, for appellees Johnson & Hansen. *McLemore & Campbell and Jones & Garnett*, for appellees Jacob Binz and others. *John G. Tod*, for appellees Milby & Dow. *O. T. Holt* and *Gustave Cook*, for appellees Dozier and others.

GAINES, J. This suit was originally instituted by the Houston, East & West Texas Railroad Company and Mary Louise Bremond, Edward L. Bremond, Harriet Tempson, John A. Dozier and his wife, Mary Pauline Dozier, Kate Bremond, Walter E. Lufkin and his wife, Henrietta C. Lufkin, and Julia Bremond, a minor, against T. W. House and other creditors of the company. The petition alleges that the company was incorporated by an act of the legislature of Texas approved March 11, 1875; that Paul Bremond had died shortly before the institution of the suit, being the owner of the whole of the stock; and that the co-plaintiffs of the corporation, except John A. Dozier and Walter E. Lufkin, were his devisees, legatees, and heirs at law. The petition also averred that the corporation was largely indebted both to secured and unsecured creditors, and that it was unable to meet its obligations. It was further alleged that certain unsecured creditors had prosecuted their demands to judgment, and had caused executions to issue thereon, and to be levied upon the rolling stock of the company, and that such rolling stock was under mortgage to secure the outstanding bonds of the company, and was necessary to enable it to operate its road, and to perform its duties to the state and the people. The prayer was for the appointment of a receiver to take charge of the assets of the corporation, and that, upon final hearing, its franchises and property be sold as an entirety, and that the proceeds of the sale be distributed among its creditors according to their respective rights, equities, and priorities, and the balance among the stockholders. At the time of the filing of the petition, neither an executor of the will of Paul Bremond, deceased, nor an administrator of his estate, had been appointed. The subsequent history of the suit is fully detailed in the brief of the appellant the Union Trust Company, and from that brief we make up the following summary of the proceedings:

The petition having been filed on the 7th of July, 1885, on the next day the court made an order appointing a receiver, and directing that "all debts of said railway company for work and labor performed by its employees and laborers, and for supplies and materials furnished for equipping, operating, repairing, or improving the road, and all obligations incurred in the transportation of passengers and freights, or of injuries to persons or property, which have accrued within six months last past, shall be paid out of the

earnings of the road as may be hereafter ordered." A special master in chancery was appointed in the same order, with the powers usually incident to that position. Soon after this original bill was filed, the defendants Jacob Hornberger, Johnson & Hansen, Jacob Binz, and T. J. Todd filed their answers to said original bill, setting up the company's indebtedness to them, all of which, their pleadings show, accrued after the date of the first mortgage, and most of it after the date of the second mortgage, and claiming what they call an "equitable lien" on the company's property to secure their debts. These answers will be seen on pages 14 to 46 of the transcript. Afterwards, and before the Union Trust Company of New York became a party to the suit by answer and cross-bill, most of the creditors of said railway company intervened in said suit, and their debts were referred to the special master, who, very uniformly, reported most of the claims as entitled to priority of payment. On the 2d day of December, 1887, the Union Trust Company, as trustee in the two mortgages intended to secure the bonds of the company, obtained leave of the court to make itself a party to the suit, and on the 5th day of March, 1888, filed its answer to the original bill, and also filed a cross-bill seeking to foreclose the mortgages. To this cross-bill the railroad company filed an answer attacking the validity of the mortgages. On the 26th of April, 1889, S. D. McIlhenny, as administrator of the estate of Paul Bremond, and the railway company, filed a joint answer to the Union Trust Company's cross-bill, which, among other things, denied that the mortgages were issued in the manner authorized by law. On October 7, 1889, the children and heirs of Paul Bremond, who were co-plaintiffs with said railway company in the original petition filed in this cause, and therein claimed that their father owned the entire capital stock of said company, and the same had descended and passed to them as his devisees, legatees, and heirs at law, filed their amended petition attacking said mortgages, and denying that said railway company was ever organized, claimed that their father falsely and fraudulently assumed to have organized the company under said act, and then spent in the construction of said road the community fund of himself and his deceased wife, and claimed one-half of said road through their deceased mother. They prayed for partition, and, in the event that relief could not be had, that the road be sold, and that one-half of the proceeds be paid to them. To this a demurrer was sustained. On the 23d of April, 1889, the special master made a report of all claims against the company which had been presented, including those of the Union Trust Company. At the fall term, 1889, of the court, the cause came on for trial, and by consent was submitted to the court without a jury as to all the issues presented, except the pleas of *non est factum* to the mortgages. The issues made by their

pleas were tried before a jury, who returned a verdict in favor of the Union Trust Company. The court thereupon rendered a decree ordering a sale of the property of the company, including its franchises, as an entirety, and ranking certain of its debts into three classes, denominated, respectively, as, "statutory claims," "operating expenses," and "construction claims," and directing that from the proceeds of the sale their claims, so classified, should be first paid, that then the mortgage bonds should be next paid, and that the balance should be distributed among the general creditors. Such are the salient features of the decree. The details and other particulars need not be stated in this connection. From the judgment the railroad company, S. D. McIlhenny, administrator, and the trust company have appealed. The heirs of Mary Bremond and Melby & Dow, intervening creditors, have filed cross-assignments of error, which are properly presented in briefs on file.

The appellant the Houston, East & West Texas Railway Company complains that the court erred in decreeing a foreclosure of the first mortgage, and in decreeing a sale of the properties of the railway company to pay the bonds secured by that mortgage. It is insisted that so much of the decree is erroneous "because, by the terms of said mortgage, it is provided that such foreclosure and sale can only be decreed 'in case default shall be made in the principal sum or sums by virtue of the said bonds, or any of them, or any part thereof, at maturity,' and no part of said bonds mature or become payable until the 1st day of May, A. D. (1898) eighteen hundred and ninety-eight." The contention seems to be that, since the mortgage was not subject to foreclosure for default in the payment of the interest on the bonds only, and since the principal was not due, the property of the corporation should have been sold subject to the mortgage. It may be that, according to the terms of the mortgage, the trustee was not entitled, as an original proceeding, to have a foreclosure and sale. But the cross-action of the Union Trust Company is not to be treated as such a proceeding. The railroad company first filed its bill alleging its inability to pay its debts, and to operate its road, and prayed that it might be sold, and its proceeds distributed among its creditors according to their respective priorities. Upon the propriety of such suit we are not called upon to pass. The only assignment, in any of the numerous briefs on file, which presents that question, has been expressly abandoned. But we are unwilling to leave the subject without remark, lest it should be inferred that the appointment of the receiver of the property of the corporation upon its own petition merits the approval of this court. The case of *Wabash, etc., Ry. Co. v. Central Trust Co.*, 22 Fed. Rep. 272, in a circuit court of the United States, is the only precedent we have found for this practice. On the other hand, there are author-

ities which hold that a receiver should not be appointed to take charge of the assets of a corporation upon its own original proceeding. *Kimball v. Goodburn*, 82 Mich. 10; *Hugh v. McGrae, Chase*, 467. A natural person, because of his inability to meet the demands of his creditors, has no right to place his property under the control of a court of equity for the purpose, merely, of preventing its sacrifice by its sale under execution. We see no reason why, as a general rule, a corporation does not stand upon the same footing. If a railroad corporation become insolvent, and a receivership be necessary for the preservation of its property and the distribution of its assets among its creditors, it would seem that the directors, as trustees for the stockholders and creditors, would be the proper parties to institute the suit. But, if the appointment of the receiver were erroneous, we are of the opinion that the proceedings of the court consequent upon that appointment were not void, and that, of all parties in interest in the subject-matter of the litigation, the original plaintiffs have the least right to complain of the consequences of that action. We also think that, since the report of the master, and the evidence adduced upon the trial, shows that the appellant railroad company was hopelessly insolvent, it was not injured by the action of the court in foreclosing the mortgages. If any harm had resulted from the decree in this particular, it has accrued to parties who do not here complain of that ruling. We might rest our decision upon the question presented by the assignment of error under consideration upon this ground alone. But we are of opinion that the court did not err in foreclosing the mortgages. The original petition alleged a state of facts which showed the company was unable to meet its obligations and operate its road; and the supplemental petition averred, expressly, its insolvency. When the trust company made itself a party to the suit, the court had the entire property of the insolvent corporation in the hands of its receiver, and all the creditors before it, and properly treated the assets as a trust fund for distribution among such creditors according to their respective priorities and liens. At that time default had been made in the payment of interest upon both the first and the second mortgage bonds, and by the terms of the latter mortgage the bonds secured by it had become due. Under such circumstances, we think it would have been anomalous to decree a sale of property of the company subject to the first mortgage, as this appellant contends should have been done. It may be that, if the company had remained solvent, under the stipulations in the first mortgage, the trust company would have had no right to a foreclosure, although default had been made in the payment of the interest on the bonds secured by it.

The appellant railroad company also complains that the court erred in treating a pleading filed in the cause, and styled an "amend-

ment and supplement" to the original petition, as its pleading, and in entering judgment *pro confesso* upon it. One of the grounds of objection to the action of the court is that the amended petition was not signed by the attorneys of the company. It is claimed that the attorneys who filed the pleading were the attorneys of the receiver, and had ceased to represent the railroad company. We need not inquire into the propriety of the practice of permitting the attorneys of the plaintiffs, in suits of this character, to act at the same time as attorneys for the receiver. The name of one of the attorneys in the original petition was signed to the amendment. If the pleading was filed without the authority of the plaintiff company, and if it desired to strike it out, action should have been taken in the lower court to accomplish that end. The question of the authority of the attorneys who signed and filed the pleading cannot be raised for the first time in this court. To rid itself of the pleading, it was only necessary for the company to dismiss its original counsel, and to withdraw the amendment.

There was no error in so much of the final decree as directed that the property of the insolvent corporation, when offered for sale to the highest bidder, should not be "knocked off" for a less sum than \$1,200,000. We think the court had the power to make such an order, and that the power was properly exercised, in order to prevent a sacrifice of the property. There is no reason why, after receiving enough cash to meet the expenses of the receivership, the costs of court, and of the foreclosure, and the payment of such claims as had been awarded priority over the mortgage debts, the balance should not be paid in on the first mortgage bonds.

During the progress of the trial, and after the secretary of the railroad company had testified that a certain book identified by the witness was the book in which the records of the meetings of the directors and stockholders were kept, and that he found the book in the office when he became secretary, and that it was the only book that had been recognized as such, the Union Trust Company offered in evidence from that book what purported to be a record of the proceedings of the board of directors, and of a meeting of the stockholders, authorizing the execution of the bonds, and of the first mortgage to secure the same. The railway company and McIlhenny, administrator, in support of their plea of *non est factum*, then proposed to prove by John Dozier the following facts: "In 1881, witness came into the company as its book-keeper, and to do almost any work imposed on him. There was at that time no minute-book of the company. He had knowledge of this. The witness had theretofore, from 1875, been the clerk of the City Bank of Houston, and that the railroad had no clerk. He didn't know anything of it. That he then wrote up from scraps furnished him by Mr. Bremond, the president, and dictated to him, the minutes which were found in the present

purported minute-book, and, though they were dated, a great many of them, in 1875, 1876, and 1877, and on up to 1881, yet he in fact wrote them there himself, from such memorandum and dictation as the president of the road, Mr. Bremond, furnished him, yet he is satisfied that there were no such meetings held, or he would have known at the time they were held, and that he did not know of any such, though he was Bremond's son-in-law. That he does not know of but one genuine mortgage meeting which was held, and that was the one which provided for the call of the stockholders' meeting on December 4, 1884, and the stockholders' meeting held at the time, and which then sought to ratify the execution of the bonds and mortgages of the road. That this meeting was in fact held. That he believes, and thinks he had an opportunity to know that what he believes, that the balance never in fact took place." The trust company objected to the testimony, and it was excluded by the court. The ruling of the court was correct. When a corporation seeks to destroy the effect of entries upon its books which purport to be regular records of the proceedings of its board of directors or stockholders, it should offer for that purpose testimony of a more conclusive nature than that which was offered in this case. The testimony of the witness would have served merely to create a suspicion that there was an irregularity in the manner in which the records of the company were kept. If the evidence had been more conclusive in its nature and tendency, it would have still been questionable whether, under the circumstances of this case, both the company itself and the administrator of Bremond should not be held estopped to deny the validity of the mortgages.

The execution of the first mortgage was proved *prima facie* by the evidence introduced by the trust company; and, there being no evidence to the contrary, the court did not err in instructing the jury to find for that company on the issue made by the plea of *non est factum*.

What has been said disposes of all the questions raised by the Houston, East & West Texas Railroad Company, and of all the assignments presented by McIlhenny, administrator, except one. That assignment complains that the court erred in sustaining the demurrer of the trust company to a portion of the answer and cross-bill of the administrator of Paul Bremond's estate. We are not cited to the page in the transcript which contains the ruling complained of; and, after a careful examination, we are satisfied that the record does not contain the order.

In logical order, the cross-assignment of error of the heirs of Mrs. Mary Bremond, the deceased wife of Paul Bremond, comes next for consideration. They are Pauline Dozier, wife of John A. Dozier, Kate Zimmer, wife of J. C. Zimmer, Nettie Lufkin, wife of Walter E. Lufkin, and Pauline Bremond; and they, in connection with others,

were parties plaintiff in the original petition as heirs and legatees of Paul Bremond, deceased. At the term of the court at which the case was tried, the parties named, the married women being joined by their husbands, filed an amended original petition in lieu of their original petition. For the purposes of this opinion, the case made by their amended petition is sufficiently shown by the statement in the brief of the appellant trust company, which is as follows: "These heirs allege that their father was possessed of a community estate, one-half of which they inherited through their mother after her death, but it is not alleged when she died. The petition is sworn to by Dozier, the husband of one of the heirs, and the witness whose testimony was rejected, as per bill of exceptions of said heirs and the railway company, which was considered under the assignment of errors made by the railway company and Bremond's administrator, and alleges that the corporation was never organized under the act of incorporation, and that their father falsely and fraudulently assumed to have organized a company in pursuance of said act, and proceeded to survey and build the railroad so chartered. They aver and swear that all writings purporting to be minutes or accounts of said organization were false, forged, and mythical; that no certificate of stock was ever issued to any one, although, in their original petition for a receiver, they claimed as heirs of their father, who, they alleged, owned all the stock. They also allege that there never was any meeting of the stockholders, but that their father conceived the purpose, and, intending to defraud them of their property and estate, converted the same to the building of said railroad, falsely and fraudulently pretending that the same was being built, managed, and controlled by a company under an act of incorporation; that their father kept them in ignorance of what he was doing, and they believed from his representations that he was managing and controlling the estate belonging to them to the best advantage, and for their interest, but that he concealed from them his actings, doings, and transactions, and kept them in total ignorance of the same; that their father invested more than five hundred thousand dollars in said railroad. They sue for partition, alleging that said community fund built 120 miles of said road, and ask that the same be set off to them in partition, and, if not susceptible of partition, that it be sold, and the proceeds given them." The cross-assignment of error is that "the court erred in sustaining the exceptions of M. G. Howe, receiver, to their amended original petition." We find an exception to the pleading purporting to be by "the Houston, East & West Texas Railroad Company, by M. G. Howe, receiver." The order complained of reads as follows: "Demurrer and motion to strike out all the pleadings of the heirs of Mary Bremond as made by the plaintiff the Houston, East & West Texas Railroad Company, sus-

tained, and motion granted. Ruling excepted to by said heirs, without prejudice to their rights in some appropriate proceeding." This clearly means that their amended petition was dismissed without prejudice. We think the court did not err in its ruling. The pleading states expressly that it is filed "in substitution and lieu of their original petition," and it had the effect of an abandonment by these parties of their original cause of action. Their original petition claimed as heirs and legatees of their father, and the amended petition claimed adversely to their father, and wholly as heirs of their mother. It alleged a new and distinct cause of action, and was properly treated as an original plea in intervention filed upon the eve of the trial. It sought to introduce into a suit already complicated new issues, and was well calculated to protract the litigation. Under such circumstances, the court had at least the discretion, upon motion of any party, to strike out the petition; and there would have to be a very clear case of an abuse of that discretion for this court to hold that the ruling was error. The dismissal of the petition was without prejudice, and their rights remain wholly unaffected by the result of this suit.

We will next consider the assignments of error presented by the Union Trust Company. The appellant first complains that the court erred in holding that its second mortgage does not embrace certain lands and town lots upon which a foreclosure was sought. The first mortgage was executed on the 1st day of May, 1878. On the 1st day of January, 1883, a second mortgage was executed. It conveyed all the property embraced in the first, and in addition thereto the income of the road, and also certain lands by the following description: "75,000 acres of land, or more, owned by said railway company, and lying contiguous to said trunk line and its authorized branches, the larger portion whereof being heavily timbered, (which said lands are embraced in schedules thereof marked 'Exhibit A,' and hereunto annexed as a part hereof,) and such other lands as may be acquired by said railway company in east and north-east Texas, in the section of country bordering on and adjacent to its trunk line and authorized branches, as will be shown by the records of the respective counties in which said lands may lie, save and except the blocks and lots designated and laid off in the town-sites acquired and hereafter to be acquired." Attached to that mortgage is a schedule descriptive of the lands conveyed. Doubts having arisen as to the validity or construction of the instrument, on December 4, 1884, the stockholders of the corporation, in meeting, authorized the execution of another mortgage to secure the same bonds. The resolution shows by its recitals that the main purpose of authorizing a new mortgage was to make a valid one to take the place of the former security on account of its doubtful validity. It authorized a mort-

gage of the same property except the lands; and it was probably intended that it should embrace in the main the same lands, though that purpose is not directly expressed. The description of the lands in the resolution is as follows: "75,000 acres of land, or more, owned by said railway company, and lying contiguous to said trunk line and its authorized branches, the larger portion thereof being heavily timbered; and also such as may be acquired by said company in any county through or into which said trunk line or any of its branches are now, or may hereafter be, constructed, and any and all land which said company may hereafter acquire in east and north-east Texas, in the section of country bordering on or adjacent to its trunk line and authorized branches; and also the blocks and lots laid off and designated in the town-sites of said railway, and also the town lots situated in the city of Houston, Harris county, Tex., schedules of which lands and town lots and blocks are attached to the mortgage hereinafter set forth." No schedule accompanies the resolution. In the mortgage in question the same language is used as descriptive of the land conveyed; and Schedule A and Schedule B are referred to for a more particular description of the lands and town lots, respectively. It was shown, however, that, at the time of its execution and delivery, no schedules were attached. After this suit was instituted, schedules were annexed to and recorded with the mortgage, but counsel for appellant attach no importance to that action. Nor do they claim that the description in the mortgage is sufficient of itself. If the language had clearly shown that all the lands and town lots owned by the corporation in the localities named were intended to be included, they could have been identified by proof of the lands so owned; and the reference to the schedules should be treated as mere false description, which is harmless. But there are no words used indicating that all the lands or town lots of the company were to be embraced. On the contrary, the inference is that only such as shall be named in schedules attached were to be included. We understand the specific contention of the appellant trust company to be that, because the mortgage of 1884 was intended merely to cure the defects in that of 1883, therefore the description in the latter instrument should be aided by that in the former. It is evident, we think, that the leading purpose of the mortgage of December, 1884, was to make valid and effectual what was attempted to be done by that of January, 1883; but it is by no means clear that they were intended to cover precisely the same property. If such had been the intention, it would have been appropriate and easy to have expressed such intention both in the resolutions authorizing the later mortgage and in the mortgage itself. But there is no such expression either in the resolutions or the mortgage. We think it evident that the intention in draw-

ing the mortgage was that it should contain a complete and independent description of the property conveyed, without reference to the former instrument, for which it was intended, in the main, as a substitute. It is probable that there had been some changes in the lands owned by the company,—some may have been disposed of, and others acquired; that they were not intended to cover precisely the same lands; and that on this account no reference was made in the later to the previous instrument for description. Whether such reference was purposely avoided or not, it is apparent that none exists. We think, therefore, the description in the one mortgage cannot be aided by that in the other. It results that, in our opinion, the court did not err in holding that the lands and town lots in question were not embraced by the second mortgage.

By its other assignments the trust company complain of the action of the court in allowing priority to certain creditors of the insolvent corporation over the bonds secured by the first and second mortgages. The debts of these creditors were ranked, as before stated, in three classes: "(1) Statutory claims; (2) operating expenses; and (3) construction claims."

For convenience in determining the questions involved, we will first consider the construction claims. These were certain debts incurred by the receiver in constructing new road under the orders of the court. There is no objection urged to giving these claims priority. It is, however, insisted that the court erred in allowing priority to certain debts incurred by the company in constructing new road before the receiver was appointed. Though the doctrine is of recent origin, it has become settled law in this country that, in the final distribution of the assets of an insolvent railroad corporation which has been placed in the hands of a receiver, there are certain claims against the fund which, under certain circumstances, are entitled to priority of payment over the debts of the corporation secured by mortgage upon its property. *Railroad Co. v. Cowdrey*, 11 Wall. 459; *Fosdick v. Schall*, 99 U. S. 235; *Hale v. Frost*, Id. 389; *Miltenberger v. Railway Co.*, 106 U. S. 286, 1 Sup. Ct. Rep. 140. The expenses of operating the railroad while in the hands of the receiver have been uniformly allowed, and it would seem that, as to claims of this class, there should never have been any serious difficulty. Being the expenses of administering the trust fund, they should be a first charge upon its funds, and should be awarded priority of payment. The cases cited also show that debts incurred by the company in operating its road, including necessary repairs and "useful improvements," within a limited time before the appointment of a receiver, have at least, as to the current earnings, been allowed a preference in payment over the bonded debts secured by mortgage upon its property; and, when the earnings have been diverted to the

payment of interest upon the bonds and in making betterments upon the property, the holders of these claims have been reimbursed from the proceeds of the sale of the railroad. The reasons assigned for this doctrine are not the same in each of the cases. In *Fosdick v. Schall*, supra, the proposition was laid down that, "when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income, during the receivership, of outstanding debts for labor, supplies, equipment, or permanent improvement as may, under the circumstances of the particular case, appear reasonable," and "that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipments provided, or lasting and valuable improvements made, out of earnings which ought, in equity, to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the division of funds, would have been paid in the ordinary course of business. The opinion in this case was by Chief Justice WAITE, and was concurred in by the whole court. In *Hale v. Frost*, supra, the supreme court, upon a certificate that the judges below were opposed in opinion, expressly affirmed the proposition "that the net earnings of the road while in possession of the court, and operated by its receiver, are not necessarily and exclusively the property of the mortgagees, but are subject to the disposal of the chancellor in the payment of claims which have superior equities, if such shall be found to exist." And in *Burnham v. Bowen*, 111 U. S. 777, 4 Sup. Ct. Rep. 675, the court say: "'Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim on the income.' Such being the case when the court of chancery, in enforcing the rights of mortgage creditors, takes possession of a mortgaged railroad, and thus deprives the company of the power of receiving any further earnings, it ought to do what the company would have been bound to do if it had remained in possession, that is to say, pay out from what it receives from earnings all the debts which, in equity and good conscience, considering the character of the business, are chargeable upon such earnings. In other words, what may properly be termed the 'debts of the income' should be paid from the income before it is applied in any way to the use of the mortgagees. The business of a railroad should be treated by a court of equity, under such circumstances, as a 'going concern,' not to be embarrassed by any unnecessary interference with the rela-

tions of those who are engaged in or affected by it." Such are the various principles announced in support of the modern doctrine, that, in the settlement and distribution of the assets of an insolvent railroad company which has been placed in the hands of a receiver, priority of payment should be allowed to certain claims over the mortgage debts. The principle of implied consent laid down in *Fosdick v. Schall*, supra, seems to have been disregarded in the case of *Union Trust Co. v. Railway Co.*, 117 U. S. 434, 6 Sup. Ct. Rep. 809, in which the receiver was not appointed at the instance either of bondholders or of their trustee; but the doctrine is still maintained that creditors who have labored, furnished supplies, made repairs, or usual improvements in the operation, maintenance, and betterment of the railroad, and who have been suddenly deprived of their remedies at law by the appointment of a receiver, are entitled to the equitable consideration of the court in the distribution of the assets of the company, and to priority in payment from the net income of the property while in the hands of the court.

As to what is commonly known as "operating expenses," there is no difficulty; and so much is conceded in this case. The claims we now have under consideration are for construction of new road before the receiver was appointed, and for material furnished for such construction. They accrued within six months before the appointment. It has been held that claims for construction, unless the work was done or the material furnished in pursuance of an order of the court, cannot be allowed priority. We may concede that, as a general rule, this is correct. But we think there may be construction claims which appeal as strongly to the conscience of a court of equity as the debts which are commonly known as "operating expenses," and we further think we have such claims in those now under consideration. At the time the first mortgage was executed the railroad was but an inchoate enterprise. The face of that mortgage shows that but a few miles had been completed, and that it was contemplated between the company and the mortgagees that the construction was to continue, and that the bonds secured by the mortgage should issue as the road progressed. The second mortgage also shows upon its face that the construction of the road was to continue. The mortgages covered not only the road which was completed at the time they were executed, but also that which was to be subsequently constructed. While the construction was still progressing the receiver was appointed, and the holders of the claims deprived of their ordinary remedies for the collection of these debts. From the operation of the road the receiver made net earnings amounting to \$270,721.44, a sum more than sufficient to pay these claims, and all others to which priority was allowed. This money was expended, under the orders of the court, in paying

interest on the bonds, and in making valuable and permanent improvement upon the property subject to the mortgages. The question here is as to the right of priority of payment out of the net earnings of the road while under control of the court. The opinion in *Fosdick v. Schall*, supra, recognizes that debts incurred for "useful improvements," have, as to the net income, a preference over the mortgage debts. We understand the term "useful improvements" to include, not only necessary repairs, but also such changes in and additions to structures already completed as may be deemed advantageous to the road in a financial point of view, and such as prudent management would demand. Such, we would think, would be debts created in substituting an iron and stone bridge for one made of wood. Such would be the expenses of a change from a narrow gauge to a standard gauge when the exigencies of the traffic or other circumstances are such as to demand that change in order to prevent the utter failure of the enterprise, and to keep up the railroad as "a going concern." Ordinarily, when mortgages are issued upon completed roads, it is not contemplated that its income is to be applied to the construction of new road. In such cases, debts incurred for such new construction ought to have no claim against the bondholders either as to the *corpus* or the increase of the property. But when mortgages are executed upon an unfinished road, and they show upon their face that it was contemplated that the work of construction should be prosecuted to completion, and when the mortgages attach to the new road as fast as it is finished, we are of opinion that the new road should be considered a "useful improvement," and that, if the road be put into the hands of a receiver before the work and materials are paid for, the holders of the claims for such work and material should be paid from the net income of the road while under control of the court, if there be any. The claims now under consideration accrued within six months before the appointment of a receiver; and the holders, being guilty of no laches, were prevented by the action of the court from subjecting the property to the payment of their debts through the courts of law. We think, therefore, it was the duty of the court to protect them in its final decree, if there was on hand a fund which could be applied to the payment of their debts.

The net earnings of the road were not on hand at the time of the trial, but had been expended, by order of the court, in paying interest on the bonded debt and in improvements upon the property subject to the mortgages, which enhanced its value to the full amount so expended upon it. In reference to the earnings of the road, counsel for this appellant expressly concede "that the mortgagees' rights thereto, as against common creditors, did not attach until the trustee in the mortgages took possession in person or by agent, or by a receiver appointed at their

instance." Their concession is the result of a well-established line of decisions in the highest court of the country. *Railroad Co. v. Cowdrey*, 11 Wall. 459; *Gilman v. Telegraph Co.*, 91 U. S. 603; *Bridge Co. v. Heidelberg*, 94 U. S. 798; *Fosdick v. Schall*, supra. They insist, however, that, since they were not parties to the suit when the court ordered the funds to be applied to the several purposes mentioned, and since they cannot be considered as having consented to such application, the appropriation to the payment of interest and of improvements upon the road is not to be considered such a diversion as "would require them to be reimbursed either by the mortgagees, or out of the *corpus* of the property." We do not understand that the right of creditors having an equitable claim upon the net earnings of an insolvent railroad to be reimbursed when these earnings have been diverted to another purpose depends upon the consent of any party. The principle is not that the mortgage creditors are responsible for the diversion, but that the diversion was in derogation of the rights of those entitled to the fund, and that therefore the money should be restored. The bondholders have received the entire benefit of the diversion in this case, either directly, in money, or indirectly, in the enhancement of the value of the property subject to their mortgages; and, if they have no superior right to the net earnings, it follows that they have no right to complain of the action of the court in restoring that fund from the proceeds of the sale of the mortgaged property. We have found no case in which preference to claims for work done and material used in construction of new road have been given a preference over the debts secured by mortgage. On the other hand, there are several cases in which such preference has been denied, but we think each of these cases differs in some important particular from this. In *Hale v. Frost*, 99 U. S. 389, a claim for construction material was denied priority. The report of the case is meager; but it would seem from a remark in the opinion in *Williamson v. Railroad Co.*, 33 Grat. 631, "that this material was used in the construction of an independent branch road." In *Porter v. Steel Co.*, 120 U. S. 649, 7 Sup. Ct. Rep. 741, and *Hand v. Railroad Co.*, 17 S. C. 219, the effort was to charge the construction claims upon the railroad itself, in preference to the mortgage debts. It does not appear, in either case, that there was any net income from the operation of the road while in the hands of the court. From the report of the case of *Addison v. Lewis*, 75 Va. 701, it does not appear that there was any net income to the credit of the cause, or that had been diverted. The petition of intervenor simply showed that their claim was due them as contractors in building an extension of the railroad without an averment, so far as the opinion shows, of any other circumstance entitling them to equitable consideration. It

follows that we are of opinion that the court did not err in awarding priority to the construction claims.

The appellant trust company also insists that the court erred in giving priority to the class of claims designated as claims having "statutory liens." The court found that the holders of these claims were secured by a lien upon the railroad and its equipments by virtue of the act of February 18, 1879. Sayles' Ann. St. art. 3179a, and note. The first mortgage was executed before the passage of this act, and it is urged that by reason of this fact the act is inoperative as against the bonds secured by that mortgage. The argument is that the act, as applied to the holders of obligations secured by mortgages existing on the railroad at the time the act took effect, is in derogation of the constitution of the state and that of the United States, and is therefore void. We doubt whether this position can be successfully maintained, (*Institution v. Jersey City*, 118 U. S. 506, 5 Sup. Ct. Rep. 612;) but we do not deem it necessary to decide the question. The special master found that all these debts were due for labor performed in the construction, operation, and maintenance of the railroad, within 12 months before the appointment of the receiver. The report, in this respect, was not contested. The claims are, therefore, of such a character as to entitle them to priority of payment out of the net earnings of the property in the hands of the receiver, unless priority should be denied them by reason of the fact that they did not accrue within the six months next preceding the receiver's appointment. When a court appoints a receiver of the property of a railroad company, and makes an order directing him to pay claims of its operatives for services rendered prior to the appointment, it would seem proper to prescribe a period of time within which the debts to be so paid should have accrued. But we think such an order should be only provisional, and that it could not properly be held conclusive against any one not a party to the suit at the time the order was made. In this case the court, in accordance with the more general practice, fixed that limit as to time at six months before the receiver's appointment. Such a limit is purely arbitrary; but, as long as it is simply provisional, it is proper. The court seems to have been of opinion that the time fixed in the order of appointment should govern throughout the case. The rule laid down by the courts is that the holders of claims for operating expenses have a right to the current means superior to that of the mortgage creditors, and that it continues until it is lost by such delay in the prosecution of their claims as should be deemed sufficient to bar their equity. The period of time necessary for this purpose depends upon the circumstances of each particular case. That the period and the right are not dependent upon the implied consent of the bondholders to the order of the court which appoints the receiver,

and directs the payments of claims of certain classes which have accrued within a fixed period of time prior to the order, is shown by the case of *Union Trust Co. v. I Co.*, 117 U. S. 434, 6 Sup. Ct. Rep. 809, in which the mortgagees were not parties to the suit at the time the receiver was appointed and the order was made. The limitation not longer than six months has been the rule in the trial courts; but, in the supreme court of the United States, claims have been allowed which accrued for a much longer period before the receiver's appointment. In *Hale v. Frost*, supra, the claim of Hale, Ayer & Co., which was allowed priority, was for supplies to the machinery department furnished nearly two years before the receiver took possession. In *Burnham v. Bowen*, supra, it did not appear that the debt accrued within six months before the appointment. In the following cases, also, that limit appears to have been disregarded: *Douglass v. Cline*, 12 Bush, 608; *Williamson v. Railroad Co.*, 33 Gratt. 624; *Skiddy v. Railroad Co.*, 3 Hughes, (U. S.) 320; *Atkins v. Railroad Co.*, Id. 307. In *Blair v. Railroad Co.*, 19 Fed Rep. 861, the court recognized liens accruing under the statutes of Missouri, and gave to similar claims from other states, when there was no statute allowing such liens, an equal dignity. If it was meant to place them upon the same footing, merely, as to the time of their accrual, the principle would seem sound. Equity follows the law; and, if there be no law directly applicable, it will follow the analogy of the law. The creditors whose claims are now under consideration had a lien given by law upon the railroad and its equipments. Let it be conceded that it was subsidiary to the mortgages. They, nevertheless, had a lien as against the railroad company, and a right to enforce it against the equity of redemption in the property. The 12 months during which that right continued to exist had not elapsed when the court took control of the assets of the company. We are of opinion that they should not be held guilty of laches in prosecuting their claims until their liens were lost by delay, and that the mere lapse of more than six months between the time in which the claims accrued and the appointment of a receiver does not afford a sufficient reason for denying a priority to which they would otherwise be entitled.

To some of these claims there are more specific objections. It is urged that the claims embraced in Exhibit B of the master's report were not for labor furnished upon the railroad. The report of the master is that "Exhibit B is a list of claims for board alleged to have been furnished either by intervenors or by others, and the claims therefor assigned to intervenors, to mechanics, laborers, and operatives employed by said railroad company, in the construction, maintenance, and operation of its railroad or its equipments." It appears that it was the understanding between the company, the laborers, and the boarding-house keepers that the com-

pany should retain a sufficient amount of the wages of the laborers to pay their board, and that the wages so retained should be paid to the keepers of the boarding-house in discharge of the board. In contemplation of law, the transaction is the same as if the laborers, after the wages were due, had, in settlement of their board, given orders upon the company for an amount sufficient to pay it, and the company had accepted them. In equity, at least, it is a valid assignment of the debts due for wages. So, also, there was an arrangement between the company, the laborers, the boarding-house keepers, and the grocers who furnished supplies to the latter, to the effect that, of the money retained from the wages of the laborers for the benefit of the boarding-house keepers, the company should hold and pay to the grocers an amount sufficient to discharge these claims for the supplies so furnished. In pursuance of these agreements the company credited the boarding-house keepers with the wages of the laborers retained, and also credited the grocers with the amounts of their bills. The claims so accruing in the hands of the boarding-house keepers and in the hands of the grocers were properly treated as claims originally due laborers, etc., and duly assigned to the holders. That a right to priority attaching to a claim of this character is not destroyed by assignment is settled by the cases of *Burnham v. Bowen*, 111 U. S. 777, 4 Sup. Ct. Rep. 675, and *Trust Co. v. Walker*, 107 U. S. 596, 2 Sup. Ct. Rep. 299. This court has held that where a vendor sells land upon a credit, and the vendee executes a note for the purchase money payable to a third party, the payee has a lien upon the land for its payment. *Pinchain v. Collard*, 18 Tex. 883. If the lien of the vendor passes to the payee in that case, we see no reason why the principle should not apply to these claims. In some instances, where a number of these debts due for wages had become the property of one person, the company gave the assignee a promissory note for the aggregate amount. This merely changed the evidence of the indebtedness, and did not change the character of the debts.

Appellee Jacob Binz was the holder of many of these claims, for some of which he took the notes of the company, indorsed by Paul Bremond. It is insisted that this was a waiver of his lien, if any he had. The claim for priority is held not to be a lien, and hence the law of liens is not applicable. But the special master found in relation to these claims, as a matter of fact, that in taking the indorsement there was no intention to waive a lien against the company. In this state, we hold, as to vendors' liens, at least, that the taking of an independent security of any character is *prima facie* a waiver of lien, but that in every case it is a matter of intention to be determined by the evidence.

It is also assigned that the court erred in giving priority to the claim of the Dickson Manufacturing Company. It is not objected that these claims were not for operating ex-

penses, and, as originally incurred, would not have been payable under the court's order made when it appointed the receiver. The objection is that the claim consisted, in part, of two promissory notes made by the company and indorsed by Bremond. The special master found that there was no intention to waive any lien in taking Bremond's indorsement. What we have previously said is sufficient to dispose of this question.

The appellant the Union Trust Company also complains that the court erred in adjudging that a claim of appellee Binz, consisting of three promissory notes which purported to be secured by a pledge of three-fourths of the gross earnings of the railroad, were "entitled to priority *pari passu* with the claims for operating expenses." These notes were given for money borrowed to pay interest on the bonds, and each contained a stipulation as follows: "Three-fourths of the gross earnings of the road from date is pledged in liquidation of this note." We are unable to see how a mere stipulation of this character can have any legal effect. If the company had placed the road in the hands of the payee, or of some third person, to be operated until, from three-fourths of the gross income, the notes would have been paid, the contract, except as to the rights of third parties, would have been valid. So also, perhaps, if it had been made the duty of some one, who had accepted the trust, to receive and apply the income. In *Jones, Liens*, it is said that "the rule that an equitable assignment can be effected only by a surrender of control over the funds or property assigned is one that is strictly held to. A mere promise that the goods shall be held in trust for the benefit of another, and that the proceeds shall be paid to him, does not amount to an equitable assignment of the goods, or specific lien upon them; for in such case the owner retains control of the goods, and may appropriate them or their proceeds to the payment of other creditors, and the holder of such promise cannot follow the goods any more than he could follow their proceeds. He has no lien either upon the goods or their proceeds. The owner has violated his promise, and for this he is personally responsible." Section 51. The text is supported by the case cited. *Gibson v. Stone*, 43 Barb. 285. A mortgage upon a stock of goods, with a right expressly or impliedly reserved to the mortgagor to remain in possession, and to continue to sell them in ordinary course of trade, is void, if for no other reason, because the reservation of the right to sell is inconsistent with the idea of a lien. Moreover, if a mortgagee's right to the net earnings of a railroad is not effectual until he takes possession either by himself or through a receiver, in pursuance of the terms of the mortgage, as was held in *Gilman v. Telegraph Co.*, *supra*, we do not see how the appellee Binz has acquired any claim upon the gross earnings in this case. We think the court erred in giving these claims priority over the bonded debt.

This disposes of all the assignments of error presented by brief, except that of appellees Melby & Dow. They intervened for the establishment of two claims against the railroad company, which were for coal furnished for the purpose of operating its road. One accrued in December, 1884, and the other in January, 1885,—the one a little more, and the other a little less, than six months prior to the appointment of the receiver. Priority in payment was allowed to the junior claim, but was denied to the older. We see no sufficient reason for the distinction, and it seems to us arbitrary. There was no circumstance disclosed by the report of the master, or the evidence upon the trial, to show laches as to the one claim more than as to the other. In the case of Burnham v. Bowen, supra, priority was allowed to a claim for the price of coal furnished to the railroad company, although it did not appear that the claim accrued within six months before the receiver's appointment. It is evident from the opinion that the period of six months was treated as a matter of no importance. We think the court should have held both the claims of these appellees as entitled to payment prior to the mortgage bonds.

So much of the decree of the lower court as awards priority of payment over the mortgage debt to the claims of appellee Binz consisting of three promissory notes, and amounting at the date of the decree to the sum of \$2,890.25 principal and interest, and so much of the decree as refuses such priority to the claim of appellees Melby & Dow for \$541.65, is reversed, and a decree will be here rendered directing that the said claim of appellee Binz be classed and paid *pro rata* with the general creditors, and that the claim of Melby & Dow be classed and paid prior to the mortgage bonds. In all other respects the judgment is affirmed.

The Houston, East & West Texas Railway Company will pay all costs of its appeal. The heirs of Mary Bremond and S. K. McIlhenny, administrator of Paul Bremond, will pay all cost incurred by reason of their cross-appeals. The Union Trust Company will recover of appellee Binz one-fiftieth of the costs of its appeal, and will be adjudged to pay all other costs by it incurred.

HOWARD OIL CO. v. DAVIS.

(Supreme Court of Texas. March 25, 1890.)

JURY—NEGLIGENCE OF MASTER—DAMAGES.

1. Rev. St. Tex. art. 3053, provides that the jurors shall be selected from the names included in the list drawn by the jury commissioners for the week; and article 3055 provides that the court may adjourn the whole number of jurors for the week, or any part thereof, to any subsequent day of the term. At the court's direction the jury for the week ending November 2, 1889, reported November 4th, and defendant, after exhausting his challenges, was compelled, against his objection, to take one of these, who had already served six days. Held, that section 3055 must be construed as an exception to the general provision of section

3053, so as to give effect to both, and there was no error in overruling defendant's objection.

2. In an action for personal injuries, probable future disability to earn money is an element of damages proper to be considered; and it is not error to permit the plaintiff, who was injured while acting as an engineer, to testify that he was not a skillful engineer, but intended to become one, and to follow the business as a permanent occupation.

3. Where, in a suit for damages for personal injuries caused by the bursting of an engine, plaintiff avers that the injury was caused by a crack, unknown to him, but known to the defendant, in the piston-head of the engine, which piston-head broke and knocked out the end of the cylinder, the testimony of a witness that he knew nothing about the piston being cracked, but had several times called the attention of the chief engineer to the clicking of it, and told him something was wrong in the cylinder, was directly in support of the issue, and not irrelevant.

4. Where the testimony of four witnesses strongly tends to show that the accident was caused by the negligence of plaintiff, but there is positive evidence to the effect that it was due to a defect in the machinery, a verdict for the plaintiff will not be set aside on the ground that it was not supported by the evidence.

5. Where the evidence showed total disability for six months, and probable partial disability for life, and there was no fact indicating passion or prejudice on the part of the jury, a verdict for \$3,000 is not so clearly excessive as to warrant the appellate court in setting it aside.

Appeal from district court, Harris county.

Action by B. F. Davis for damages for personal injuries sustained on January 27, 1888, by the bursting of an engine belonging to the defendant company. The plaintiff was in the employ of defendant, and it was his duty to run and operate the engine as night engineer. It appeared, however, that he was not an experienced engineer, but was in process of learning the business. The accident consisted in the blowing out of the cylinder-head of the engine; and the plaintiff contended that it was caused by a crack in the piston, which had existed for some time, and was known, or ought to have been known, to the defendant; but that he himself had no knowledge of such defect, and, by the exercise of ordinary care, could not have discovered it, as it was no part of his business to repair the engine. Upon this point the evidence was conflicting, there being much testimony on both sides. As to the extent of his injuries, the plaintiff testified that his right arm was broken, and the elbow dislocated at the ball joint; that the ball still remains out of the socket, and by reason thereof he has no wrist motion, and very little grip in his right hand, and cannot raise it to his head; that he had suffered a great deal of pain, and for months could not draw a long breath. He was 25 years old at the time of the accident, and was then earning \$56 per month. There was evidence contradicting the plaintiff on some parts of the foregoing; and it was shown that he had gone back to work for the defendant on the 1st of August following the accident, and had drawn full pay while absent; that he had earned about as much money per month during part of the year, at least, as before he was hurt. There was a verdict and judgment for the plaintiff

in the sum of \$6,000. Defendant company moved for a new trial, which was denied, and it then brought this appeal. Additional facts are stated in the opinion.

Baker, Botts & Baker, for appellant.
Hutcheson, Carrington & Sears, for appellee.

COLLARD, J. There is a conflict in articles 3053 and 3055 of the Revised Statutes in reference to the organization of juries for the week. Article 3053 provides that the jurors shall be selected from the names included in the list drawn by the jury commissioners for the week, and article 3055 provides that the court may adjourn the whole number of jurors for the week, or any part thereof, to any subsequent day of the term. The court below directed the jury for the week ending November 2, 1889, to report on November the 4th for a continuance of service; but stated to them that so many of them as had served for six days would not be compelled to serve for the next week. Three of the jurors who had served for six days during the week ending November the 2d reported for service on the following Monday, without being summoned in the regular way by the sheriff, and were taken as jurors for the week. Defendant, after exhausting his challenges, was compelled to take one of these jurors, after protesting against them by motion, which was overruled by the court. The question, then, is, did the court have the power to order the jurors for one week to return for service the next week, and so constitute them a part of the jury for that week? Under the circumstances of the case as presented, both of the clauses of the statute quoted cannot be followed. Which of the two, then, shall have precedence? Mr. Bishop lays down the correct rule for such a conflict, as follows: "It is a common doctrine, never questioned, that, for the purpose of interpretation, all the parts of a statute are to be looked at together, and one part may control another. If possible, they are to be reconciled. Thus, where there are words expressive of a general intention, and then of a particular intention incompatible with it, the particular must be taken as an exception to the general, and so all the parts of the act will stand." *Bish. Writ. Laws*, § 64; *Sedg. St. & Const. Law*, 249. There can be no doubt as to the meaning of the parts of statute under consideration. It was clearly the intention of the law-makers to confer upon the court the power and right to adjourn jurors for one week, or any of them, to another week or day of the term for service. In doing this the court would interfere with the general provision of the law of forming juries. This particular intention of the law ought to have effect when it conflicts with the general intention. It stands as an exception to the general law; that is, the general law as to the formation of juries will be followed, unless the court, under the power given by this special provision, has ordered jurors of a previous day of the term to

attend for service. The general law must in such case yield to the extent that it is so interfered with.

The court permitted the plaintiff to testify that he was not a skillful engineer, was acting as engineer at the time of the accident, was receiving \$56 per month for his services, was educating himself in the business and intended to be an engineer, but was incapacitated by reason of his injuries from following that business. Defendant objected to his stating that he intended to be an engineer, because the evidence was irrelevant, as shown by bill of exceptions. Error is assigned upon the ruling. It has been frequently held in this state, and has been generally so held, that impaired capacity to labor and follow a business or vocation is a proper element of damages in cases like this. *Railroad Co. v. Lyde*, 57 Tex. 505; *Walker v. Railway Co.*, 63 Barb. 260; *Pierce, R. R.* 301, 302, and note 3. The general rule has been laid down as follows: "The age and occupation of the injured person; the value of his services—that is, the wages which he has earned—in the past; whether he has been employed at a fixed salary or as a professional man,—are proper to be considered. He is entitled to recover for the disabling effect of the injury upon his capacity to earn, not only up to the time of the trial, but for all probable future disability in that respect." 2 Wood, Ry. Law, 1239, 1240. Mere possible or speculative consequences are too remote, says the same author. If fairly probable, and not merely possible, they are a proper element of damages. *Id.* 1241. The jury are to a great extent governed by mere probabilities in estimating such damages. If it would be legitimate, as it is, to presume that plaintiff would have continued his occupation as an engineer if he had not been disabled, there can be no reason why he could not prove it, if true, at least in connection with the fact that he was following the occupation at the time. Additional skill that one might be expected to acquire was held a proper inquiry. *Railroad Co. v. Ormond*, 64 Tex. 490. To do this it would not be improper to know, or at least to have the most certain evidence attainable, as to the future occupation. In view of the fact that plaintiff was employed as an engineer at the time he was injured, we think he could show that it was his intention to continue in that occupation.

Appellant assigns the following error: The court erred in permitting the witness Carl Court to testify as follows: "I don't know anything about the piston being cracked, but I called Mr. Johnson's attention to the click of it several times, and there was a constant tightening up of the piston, to which I objected all the time. I kept telling Mr. Johnson that it was in the cylinder, and told him that if he tightened the quarter boxes they would not last two months, and I told him then there was something wrong in the cylinder;" which evidence was admitted over defendant's objection, made at the time, as

shown by bill of exceptions. The bill of exceptions complains of the evidence, "because the witness had said that he did not know anything about a crack in the piston-head; because the facts testified to were not alleged in the petition, and were irrelevant to any issue in the case; and because the plaintiff should be confined in his evidence to defects in the cylinder-head, and not in the cylinder." Plaintiff's petition alleges that while he was operating the engine the piston-head thereof broke, and knocked and broke the end of the cylinder, and said piston-head and the end of the cylinder were blown out of and from the cylinder of the engine in which said piston-rod worked; that the engine and its parts appeared to him to be in good order and safe; but said piston-head had been cracked and damaged for some time before it was blown out, but plaintiff did not know of it," etc. This same witness testified that the tightening of the quarter boxes put additional strain on the spider, and was calculated to crack it; and, again, that the tightening up of the engine put such a strain on the spider that it broke. He also stated that "the spider was a part of the piston-head." Proof of the tightening of the quarter boxes, we see, then, was not irrelevant, but was responsive to the very issue made in the petition. The piston-head worked in the cylinder, and the testimony of the witness as to the defect being in the cylinder, taken in its proper connection, may be fairly construed to mean that it was inside the cylinder, in the piston-head, and was directly in support of the issue.

Appellant says the court should have granted the motion for a new trial, because the evidence of its witnesses Schaumleffler, Boggs, Johnson, and Cathcart conclusively shows that the accident occurred by the negligence of plaintiff in permitting water to get into the cylinder. The evidence of these witnesses does strongly tend to show that the accident so occurred; but, on the other hand, there is quite positive evidence to show that there was a crack in the piston-head, which finally gave way and caused the explosion. There is a conflict in the evidence, and nothing more. It is not our province to declare that the jury gave more weight and credence to the testimony of plaintiff's witnesses, and less to that of defendant, than it was entitled to, especially after the court below has refused a new trial on that ground. We do not think the verdict is so clearly excessive as to warrant an appellate court in setting it aside. To a great extent, the damages are awarded as a compensation for pain and suffering, for the estimating of which there are no definite rules. There is no reason why we should discuss this question further, or reiterate what has been so often said by our courts. There is no error in the charge of the court; none is claimed by appellant. Neither the amount of the verdict, nor any other fact in the case, indicates passion or prejudice on the part of the jury. The verdict was approved by the judge who tried the case, and

we see no grounds for interference by the appellate court. *Walker v. Railway Co.*, 63 Barb. 260; *Railway Co. v. Douglas*, 73 Tex. 325, 11 S. W. Rep. 333; *Railroad Co. v. Porfert*, 72 Tex. 344, 10 S. W. Rep. 207; *Railroad Co. v. Johnson*, 72 Tex. 95, 10 S. W. Rep. 325; *Railroad v. Gilbert*, 64 Tex. 536; and authorities cited in these cases. We conclude the judgment should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

GULF, C. & S. F. RY. CO. v. COMPTON.

(*Supreme Court of Texas. Jan. 28, 1890.*)

MASTER AND SERVANT—DEATH OF EMPLOYEE—EVIDENCE—DAMAGES.

1. A water train, in charge of an engineer, fireman, and one brakeman, having collided with a passenger train between A. and H., killing the fireman, testimony of a witness that, when the water train was at a certain station, he saw a man get off the engine, and heard the operator tell him he ought to meet the passenger train at A., to which he replied: "I am hungry. Can't we make H.?" and was answered, "No," and got on the engine and went off,—is admissible, as part of the *res gestæ*, though the witness did not identify the man as the engineer.

2. Though it is customary with other roads to send out water trains with a conductor, negligence of the company in not putting a conductor in charge will not authorize a verdict for the killing of the fireman occasioned by failure of the engineer to obey orders to await the passenger train at a certain station.

3. An hypothetical question to an expert as to the number of persons who should be put in charge of a water train where there were four regular trains, each day, passing over the road, is properly allowed, though it appears that only two of the trains would be met by the water train, as the opposite party can embody that fact, if material, in a question put on cross-examination.

4. Under Rev. St. Tex. art. 2899 et seq., allowing a parent to recover damages for the death of a child by negligence, the amount of recovery by the mother, being the sole surviving parent, is not limited to the value of the services of the deceased during minority.

5. The parent need not introduce evidence of her expectancy of life in order to recover for loss of services after majority of the son.

6. The parent cannot recover exemplary damages, especially where no accident had occurred on defendant's road for many years, and the water train on which the son was killed had been for a year sent out without a conductor, as at the time of the accident.

7. The water train on which deceased was killed not having been in charge of a conductor, it is not admissible to show that such trains were afterwards put in charge of a conductor.

Appeal from district court, Wharton county; WILLIAM H. BURKHART, Judge.

J. W. Terry, for appellant. *Brady & Ring* and *Parker & Pearson*, for appellees.

GAINES, J. This suit was brought by appellee against appellant to recover damages for injuries resulting in the death of Alexander Compton, her minor son. His death was alleged to have been caused by the negligence of the defendant company. The son was 18 years old at the time of the accident, and had, with the consent of plaintiff, been

employed by defendant in its shops as a "wiper," whose duty it was to clean engines. On the afternoon of the day of his death, he was sent out on a water train as fireman. The train left Galveston about 4 o'clock P. M., and ran to Duke, a station four miles north of the city. Upon the return trip, at about 9½ o'clock at night of the same day, it collided with a passenger train running north. The plaintiff's son was killed by the collision. The accident occurred south of the station known as "Alvin" and north of that known as "Hitchcock." The train consisted of 11 water-cars and an engine, and was operated on the trip by an engineer named Hitchcock, Alexander Compton, who acted as fireman, and one brakeman. The plaintiff adduced testimony tending strongly to show that it was a general custom among railroad companies to man such trains with a conductor, an engineer, a fireman, and at least one brakeman, and that it was not regarded as prudent to run such a train without such employees. The facts were very fully alleged in the petition, and the negligence of the company in failing to send out a conductor in control of the train was charged to be the proximate cause of the injury. The defendant pleaded a general demurrer, and specially answered that the accident was caused by the negligence of Hitchcock, the engineer, who was the fellow-servant of Alexander Compton, the deceased, and that therefore the plaintiff could not recover.

During the progress of the trial, defendant's counsel offered to prove by a witness the following facts: That he (the witness) was present at Duke station in the afternoon of the night of the 18th of November, just before the water train which afterwards collided with the passenger train left Duke for Galveston, and that he heard the following conversation between the operator at Duke and a man who got off the engine of the water train, who was either the engineer or fireman: The operator told the man he ought to meet the passenger train at Alvin. The man then said to the operator: "I am hungry. Can't we make Hitchcock?" a station south of Alvin and south of Halls; to which the operator said: "No." The man then got on the engine, and the train departed in the direction of Galveston. When the witness was asked how he knew that this man was the engineer or fireman, he stated that he did not remember the appearance of the man well enough to describe him. He looked like he had been working on the engine. He got off the engine, had the conversation with the telegraph operator, then got back on the engine, and went off with the engine. The plaintiff objected to the testimony on the grounds "(1) that it was hearsay; and (2) that the witness did not identify the man as the engineer." The evidence was excluded. We are of opinion that this was error. The testimony tended to prove that an order was given to the person in charge of the train to stop at Alvin, and to await the

passage of the north-bound passenger train, and that his desire was to hasten forward, and to meet the latter train at Hitchcock. Therefore, its tendency was to show that the accident was the result of the negligence of the engineer. The conversation was a part of the transaction, and was, as such, admissible. It was, therefore, not hearsay, as is claimed in the first ground of objection. *Railway Co. v. Collier*, 62 Tex. 818. The second ground of objection was not more tenable. The witness, it is true, did not know the engineer, and could not describe him; but the facts that there were but two persons on the engine, that the man in question left the engine apparently for instructions, and immediately resumed his place upon it, and that the engineer was the proper person to receive the orders, together with the conversation itself, were circumstances which, taken together, tended very strongly to show that he was the engineer. If the engineer believed that he could reach Hitchcock before meeting the passenger train, and if he attempted to accomplish this contrary to his instructions, and thereby caused the collision, then the accident was not the result of the failure to provide the train with a sufficient number of men to operate it safely in every emergency, but was proximately caused by the engineer's own negligence. It is insisted on behalf of appellee that, if the company was negligent in sending out the train without a conductor, and the collision would not have occurred if the conductor had been sent, it is liable for the injury notwithstanding the engineer may have been negligent. But we are not of that opinion. We think that, if the accident would not have happened but for the negligence of Hitchcock, his want of care was the proximate cause of the injury, and that the result cannot be imputed to the negligence of the defendant in failing to provide a conductor for the train. For this reason, we think the testimony which was excluded was relevant and material, and, being legal, that its exclusion is error for which the judgment must be reversed.

Since the judgment is to be reversed, we consider it unnecessary to discuss at length the correctness of that part of the charge of the court which is complained of in appellant's third assignment. We think the charge is objectionable because it gives too much prominence to the alleged custom of other railroad companies to send out trains equipped with a conductor in addition to the engineer and brakeman. We are of opinion that the mere fact that railroad companies generally adopted such a custom would not make it negligent in the defendant company to fail to observe it, provided its method of operating its trains was, in point of fact, reasonably safe. The paragraph of the instructions in which the law is applied to the facts of the case is as follows: "If you believe from the evidence that an established rule, custom, or usage prevailing in the railway service in Texas on properly regulated

railroads was violated in the sending out of the said water train in charge of the engineer, Hitchcock, unaccompanied by a conductor, and that the observance of such custom or usage so violated was reasonably necessary for the reasonable safety of the defendant's employees and the public generally, and that such usage was violated with the knowledge, or with the consent or acquiescence, of defendant's general managing officers, or that they failed to use reasonable diligence in enforcing the observance of the same, and were thereby guilty of negligence, and that such negligence on their part was a direct or proximate cause of said collision, and that Alexander Compton, deceased, when he went out with said Hitchcock on the occasion on which he was killed, did not know the existence of such rule, custom, or usage, or, if he did know of the same, he did not know of the danger resulting from violation of the same, and that, under the circumstances, he could not reasonably have been expected to have had such knowledge, you will find for the plaintiff; otherwise, you will find for the defendant." We are not prepared to say that this involves any legal proposition that is not sound. But, taken in connection with the previous portions of the charge, we think the jury may have concluded that, if the custom of other railroad companies was proved, it was negligence in the defendant company not to observe it, without reference to the fact whether the presence of a conductor upon the train in question was reasonably necessary to its safety or not. Without deciding whether or not the judgment should be reversed on account of the charge, we deem it sufficient to intimate its defect, in order that it may be remedied upon another trial.

In course of the trial the court admitted, over the defendant's objection, the answer of certain witnesses, shown to be experts, to the following hypothetical question: "It is claimed in the case at bar that an ordinary water train, consisting of eight or twelve cars, was sent from a certain city in southern Texas to a point some 40 miles, or thereabout, distant therefrom, for the purpose of getting at said point a load of water from an ordinary water-tank, and then return to said city with the water on the same day; that said train, on said trip, left said city about 4 or 4:30 P. M. in the afternoon of a certain day in the month of November; that the said forty miles of railroad track over which the train was sent between said city and the point to which the above train was going for the water was then being used by four daily passenger trains and the same number of regular daily freight trains, while about 28 miles of the same track was then being used by two more daily passenger trains; it being a single track, and in first-class condition. Please state the number of employees which, in accordance with ordinary rules, customs, or usages of the railway service, would accompany said water train on said trip, and

state the names of the positions that each of such employees, respectively, would hold on such trains, and the duty which each would perform in connection therewith." The answer admitted was as follows: "Such a special train would, ordinarily, be accompanied by an engineer, fireman, conductor, and two brakemen. The engineer would attend to his engine; the fireman would assist the engineer; and the conductor have full control of the employees of the train, would look out for the running of the train, and would see that it kept out of the way of all trains, and would run according to orders from the dispatcher's office. One brakeman would be at the rear end of the train, and the other at the head end." The evidence was objected to on the ground that the hypothetical case upon which the opinion of the witnesses was asked was not the precise case shown by the evidence. There was evidence to show that during the hours required for the water train to make the trip from Galveston to Duke, and to return, there were but two regular trains assigned to run on that part of the road,—one going north and the other south,—although, during the 24 hours, eight trains did run as stated in the question. Concerning this matter, there was no conflict in the evidence. It is therefore insisted that the question should have been whether or not it would have been safe to operate a train such as is described in the question over a road where, during the time of its trip, it would meet but two trains. We understand the rule to be that the opinion of an expert upon an hypothetical case will be excluded unless there be evidence tending to prove the supposed facts; but we have found no authority which holds that an hypothetical case must embrace every fact proved, or which there is evidence tending to prove. In *Filer v. Railroad Co.*, 49 N. Y. 42, it is said: "Some latitude must necessarily be given in the examination of medical experts, and in propounding hypothetical questions for their opinions, the better to enable the jury to pass upon the questions submitted to them. The opinion is the opinion of the expert, and, if the facts are found by the jury as the counsel by his question assumes them to be, the opinion may have some weight; otherwise, not. It is the privilege of counsel, in such cases, to assume, within the limits of the evidence, any state of facts which he claims the evidence justifies, and have the opinion of experts upon the facts thus assumed." The facts assumed in the question before us were established by the evidence in the case. If counsel for defendant desired the opinion of the witnesses as to the safety of operating a train between the hours when only two other trains were to be encountered, he could upon cross-examination have asked his opinion based upon that state of facts. We think there was no error in admitting the testimony.

The court did not err in refusing the following instruction asked by appellant: "You

are instructed that the measure of damages in this case is the value of the services of Alexander Compton from the day of his death to the time he would have attained the age of twenty-one years, less the cost of his maintenance and support during that period." The appellee, being the sole surviving parent of Alexander Compton, was entitled to his services during minority, and hence, at common law, could have recovered their value during that period in the event the appellant was found liable for the injury. But it does not follow that this right abridges in any manner her claim for the compensation given by the statute. Rev. St. art. 2899 et seq. It happens in this particular case that the plaintiff, being the sole surviving parent of the deceased, is entitled to recover, if at all, damages not only for the loss of services during her son's non-age, but also for the loss of any prospective pecuniary benefits which she may have received from him after he attained his majority. She has sued for the whole in the statutory action, as we think she had the right to do, and her right to recover in such action cannot be restricted to the period of her son's minority.

Neither did the court err in refusing to charge the jury that, by reason of the plaintiff's failure to prove her expectancy of life, she could recover damages only for the loss of her son's services during his minority. Evidence of the probable duration of life by experts in the business of life insurance is admissible in such cases, but is not necessary. Our statute contemplates that the jury shall judge of this upon proofs being made of the party's age and physical condition. It was, in effect, so held in two cases decided by this court at the last Tyler term. *Railway Co. v. Lester*, 75 Tex. 56, 12 S. W. Rep. 955; *Railway Co. v. Lehmborg*, 75 Tex. 61, 12 S. W. Rep. 838.

The questions presented by the other assignments of appellant are not likely to arise upon another trial, and need not be considered.

The appellee presents the following cross-assignments of error: "The court erred in charging the jury as follows: 'You are charged that you can find no exemplary damages in this case;' and also in failing to give the second special charge requested by plaintiff; the same embracing the issue of exemplary damages." We are of opinion that the court did not err in giving the instruction quoted in the assignment, or in refusing that requested by appellee. The plaintiff does not allege in her petition the value of her son's services during his minority, and hence her suit must be considered as brought wholly under the statute. In *Winnt v. Railroad Co.*, 74 Tex. 32, 11 S. W. Rep. 907, it was held that in such a case the mother cannot recover exemplary damages. Besides this, it appears from the evidence that no collision had occurred upon defendant's road for many years, and it is alleged in the petition that the defendant had run the water train in

question without a conductor for the space of 12 months. It was shown that the road from Galveston bay to Duke was straight and level, and that there were but two regular trains to be passed in making the trip. If the train had run regularly for 12 months without a conductor and without accident, it was not gross negligence, on the occasion in question, to send it out in the same manner. The evidence did not warrant a recovery of exemplary damages, even if the statute had given such damages to the parent in such a case.

During the trial, appellee offered to prove by a witness that, ever since the accident, defendant's water train had been accompanied by a conductor. The testimony, upon objections being made by defendant, was excluded by the court. The court did not err in its ruling. This court has held that, in a suit for damages claimed to result from the negligence of a railroad company, it is not competent for the plaintiff to show that after the accident the company have taken additional measures to prevent a recurrence of the casualty. *Railway Co. v. McGowan*, 73 Tex. 355, 11 S. W. Rep. 336, and cases cited. For the errors pointed out the judgment is reversed, and the cause remanded.

NALLEY v. STATE.

(Court of Appeals of Texas. Feb. 26, 1890.)

MURDER—JUROR—INSTRUCTIONS—EVIDENCE—MISCONDUCT OF COUNSEL.

1. After a mistrial on indictment for murder, a special venire man is not incompetent on the second trial, simply because he was challenged peremptorily by defendant on the first trial.

2. Such objection cannot be considered where, on the second trial, defendant fails to exhaust his peremptory challenges before obtaining a jury.

3. On the question of a reasonable appearance of danger to justify homicide, the court properly charged that "it is the right of the defendant to have the facts considered by the jury as they reasonably appeared to him at the time they transpired, and if, as the facts reasonably appeared to the defendant, he would be justified under the law as given in this charge, he should be acquitted. It would make no difference that the facts were mistaken by the defendant, and that he was in no real danger if it be so."

4. It is the duty of the court to submit the question of murder in the second degree in all cases where there is any evidence tending to present that issue. Evidence of defendant that, after the quarrel ensued, the deceased, who was a bar-keeper, seized what defendant supposed to be a knife or pistol, and rushed towards one end of the counter, and, just as he was about to turn the counter, defendant fired, is sufficient to justify such charge.

5. Under Willson's Crim. St. Tex. § 2311, providing that "the court shall allow testimony to be introduced at any time before the argument of a cause is concluded, if it appear that it is necessary to a due administration of justice," it is not error to permit a state's witness to testify to independent matter after evidence for the state and defendant had closed.

6. On objection by defendant to a question asked a state's witness, the district attorney stated, in the presence and hearing of the jury, that he expected to show that the brother of defendant had induced the witness to leave the county so as not to testify. There was no attempt

to connect defendant with such effort to suppress testimony, and the jury were not instructed to disregard the statement. Held, that defendant was entitled to a new trial.

Appeal from district court, McLennan county; J. R. DICKINSON, Judge.

Indictment of S. A. Nalley for murder. The deceased was a bar-keeper, and was killed in the saloon. Defendant and the deceased had engaged in a violent quarrel on the night before the killing, and during the next day defendant made several unsuccessful attempts to procure a pistol, and at last succeeded in borrowing one. A number of witnesses for the defense testified to repeated threats to kill defendant uttered by the deceased on the night and day preceding the killing, which, according to one witness, were communicated to defendant. A witness for the state testified that, a few minutes before the homicide, defendant walked towards the saloon, and said to witness, referring to the deceased, "I am going to make the son of a bitch take back-water or do him up," and another state's witness testified that immediately before the killing, she saw defendant standing against a post on the sidewalk in front of the saloon, and looking into the saloon. Several witnesses testified that defendant stepped out of the saloon immediately after the fatal shot was fired, with a pistol in his hand, and that he ordered them to stand back. No third person was in the saloon at the time of the killing. Defendant testified in his own behalf that he went to the saloon to get some money which the owner of the saloon had authorized him to get; that, when he told deceased what he wanted, deceased replied, "I will pay you! I will kill you!" and thrust his hand under the counter, seized what witness took to be a knife or pistol, and rushed towards the east end of the counter, and, just as he was about to turn the end of the counter, defendant fired, and left the saloon. As he stepped out he met Joe Williams, and said to him, "He [deceased] ran at me with a knife, and I shot him." An old broken-bladed knife was found on the floor near the body of the deceased. Several witnesses testified that, according to reputation, deceased was a man who would execute a threat.

Willson's Crim. St. Tex. § 2311, provides that "the court shall allow testimony to be introduced at any time before the argument of a cause is concluded, if it appear that it is necessary to a due administration of justice."

J. C. Jenkins and Pearre & Boynton, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. There were two trials of this case in the lower court, the first having resulted in a mistrial. On the first trial three of the special venire men, to-wit, Orand, Miller, and Fields, were peremptorily challenged by the defendant after they had been

accepted by the state. On the second trial these same three parties were again summoned on the special venire, and were again accepted as jurymen by the state. Defendant objected to being required to pass upon them as jurymen, for the reason that they had been summoned on the former jury, and he had then peremptorily challenged them. His objection was overruled, and he again challenged them peremptorily, saving his bill of exceptions to the ruling of the court. He did not exhaust his peremptory challenges, and therefore his bill of exceptions, if well taken, would be entitled to no consideration, no objectionable or incompetent juror having been forced upon him. Willson, Crim. St. § 2293; Hudson v. State, ante, 388. But the jurors were not incompetent and subject to challenge for cause for the reasons stated. They did not sit upon the former trial. Had they served on the petit jury in a former trial of the case, then the challenge for cause would have been a good one, under the eighth subdivision of article 636 of the Code of Criminal Procedure. As presented, there is no merit in the bill of exceptions.

Several objections are most strenuously insisted upon, based upon bills of exceptions reserved to the charge of the court upon self-defense and reasonable appearances of danger. Some of the isolated excerpts commented upon, if standing alone and considered by themselves, might be obnoxious to the criticisms made upon them, but when considered as a whole we do not believe the charge is either illegal or objectionable. It fully embodies the law of justifiable homicide and self-defense as enunciated in our Penal Code; and as to reasonable appearances of danger the jury were expressly instructed that "it is the right of the defendant to have the facts considered by the jury as they reasonably appeared to him at the time they transpired, and if, as the facts reasonably appeared to the defendant, he would be justified under the law as given in (this) charge, he should be acquitted. It would make no difference that the facts were mistaken by the defendant, and that he was in no real danger if it be so." Willson, Crim. St. § 1070. As we understand it, this is the law aptly and concisely expressed, and in such a plain and intelligible manner as that no jury of ordinary intelligence could have failed to comprehend their duty under it.

Exception was taken to the charge because it submitted murder of the second degree. We are of the opinion the court properly submitted this issue, and, had it failed to do so, the defendant might have been here strenuously urging the omission as fatal error. As was said by this court in Blocker's Case, 27 Tex. App. 16, 10 S. W. Rep. 439, "trial judges should be exceedingly cautious in murder trials in declining to charge upon murder in the second degree. Instances are comparatively rare in which such a charge may be properly dispensed with. It is only when there is no evidence

tending to present that issue that such a charge may be safely omitted."

Defendant objected to the state being permitted to have the witness Williams to testify to independent matters after the evidence for the state and defendant had closed. The objection was that no evidence, unless in rebuttal, could be heard after the defendant had closed his testimony. This objection is untenable. "When essential to the due administration of justice, it is within the discretion of the trial judge to receive evidence at any stage of the trial before the conclusion of argument, and the exercise of such discretion will not be revised on appeal, unless it plainly appears to have been abused." Willson, Crim. St. § 2312; Code Crim. Proc. art. 661.

But with regard to this witness' (Williams') testimony, and in connection with its introduction, it is made to appear by bill of exceptions that when first called to the stand the prosecution asked the witness if he (witness) had not had a conversation a few days before this trial with Sam Nalley, who was a brother of defendant, to which question defendant objected; when the district attorney immediately, and before defendant could interpose objection, stated to the court, in the presence and hearing of the jury, "that he expected to show by the said witness Williams that the said Sam Nalley had induced him, said Williams, to leave the county so as not to testify." The court signs this bill of exceptions without qualification or explanation, nor are the jury instructed by the court to disregard the statement of the district attorney. There was no statement by the district attorney to the effect, and no pretense, that he sought to inculcate the defendant in any manner directly with this attempt to suppress the testimony. Even if the prosecuting officer could have proved what he stated, such testimony would have been clearly inadmissible against defendant, unless he had been directly connected with the matter. *Favors v. State*, 20 Tex. App. 158; *Marshall v. State*, 5 Tex. App. 273. There being no proof that these overtures to the witness were made by the authority or with the knowledge of the accused, such statement by the district attorney was illegal and unjust, and was highly calculated to prejudice the accused. *Barbee v. State*, 23 Tex. App. 199, 4 S. W. Rep. 584. Anything Sam Nalley, the brother, might have done in the matter, in the absence and without the knowledge of defendant, was most clearly inadmissible against and could not be binding upon him, (*Maines v. State*, 23 Tex. App. 568, 5 S. W. Rep. 123,) and afforded no reasonable presumption or inference pertinent to the issue in the case for which defendant was on trial, and the court should have so instructed the jury. *Taylor v. State*, 27 Tex. App. 464, 11 S. W. Rep. 462. "No improper means should be resorted to to prejudice the minds of the jury against the defendant in the remotest degree. No testimony should be offered on the part of the

prosecution that is not relevant and legal. No remarks should be made by the counsel for the state which are not fully warranted by the evidence." *Gazley v. State*, 17 Tex. App. 267. That the course of the district attorney in this matter was calculated to prejudice the rights of defendant is, we think, manifest. How far he has been prejudiced, in the absence of any attempt upon the part of the court to obviate and avert the prejudice, it is impossible to tell. The law demands a fair, impartial, and legal trial. For this apparent wrong done the defendant in the trial below, the judgment is reversed, and cause remanded. Reversed and remanded.

HENDRICKS v. STATE.

(Court of Appeals of Texas. March 8, 1890.)

MURDER—ORDER OF EVIDENCE—MISCONDUCT OF JURY.

1. Code Crim. Proc. Tex. art. 661, permitting the introduction of testimony at any time before the conclusion of the argument, if in the interest of justice, makes it discretionary for the court to allow the prosecution on a murder trial, to examine a witness in rebuttal as to matters independent of the rebuttal after defendant has closed his testimony; and such discretion is not reviewable, except in case of manifest abuse.

2. Code Crim. Proc. Tex. art. 777, subd. 7, which provides for a new trial in case "the jury, after having retired to deliberate on a case, have received other testimony," does not authorize the granting of a new trial in a murder case because the jury inspected the clothing worn by deceased at the time of the homicide, after they had retired, where the clothing was inadvertently left in the jury-room, and other undisputed evidence, besides the clothing, showed that deceased was shot in the back, and all the jurors testify that its inspection did not influence their verdict.

Appeal from district court, Robertson county; J. N. HENDERSON, Judge.

W. I. Purdom, for appellant. W. L. Davidson, Asst. Atty. Gen., for the State.

WHITE, P. J. Appellant was convicted in the lower court of murder of the second degree. Two supposed errors are relied upon for reversal of the judgment. The first is that after appellant had closed his testimony the state called a witness in rebuttal, which witness was permitted, over objection of defendant, to testify in full as to all the facts in regard to the homicide from the beginning of the difficulty to its end. The objection was that the said witness, being called in rebuttal, could only legally testify to matters in rebuttal, and could not testify to other independent matters, or generally as a witness in the case. Our statute provides that "the court shall allow testimony to be introduced at any time before the argument of a cause is concluded, if it appear that it is necessary to a due administration of justice." Code Crim. Proc. art. 661. This matter is confided to the discretion of the court, and its action will not be revised unless it plainly appears to have been abused. Willson, Crim. St. § 2312; *Farris v. State*, 26 Tex. App. 106,

9 S. W. Rep. 487; *Testard v. State*, 26 Tex. App. 260, 9 S. W. Rep. 888; *Nalley v. State*, ante, 670.

The second supposed error complained of is that the court overruled defendant's motion for a new trial. Among the various enumerated statutory causes for a new trial set forth in article 777, Code Crim. Proc., the seventh subdivision is "where the jury, after having retired to deliberate upon a case, have received other testimony," etc. This statute in this particular has always been construed to mean that the testimony or other matter received by the jury after their retirement, in order to demand the granting of a new trial, must be such as would probably influence the verdict. *Willson*, Crim. St. § 2545; *McKisick v. State*, 26 Tex. App. 678, 9 S. W. Rep. 269; *Lucas v. State*, 27 Tex. App. 322; 11 S. W. Rep. 443.

As bearing upon the question as here presented, the facts proved on the motion for a new trial were, substantially, that the clothing worn by the deceased at the time of the homicide had been left inadvertently by some one in the room which the jury subsequently occupied while deliberating upon their verdict. Some one of the jurors picked up one of the garments, when the sheriff or bailiff in attendance upon them, and who happened to be present at the time, remarked that the clothing was that which the deceased had on when he was killed. The clothing was then examined by the jury, and its condition and appearance commented upon before they had arrived at a verdict. But each of the jurors who testified as to the matter on the trial of the motion for a new trial stated positively and emphatically that the examination of said clothing did not in any manner affect or influence his verdict, but, on the contrary, that his verdict was made up alone from the evidence heard from the witnesses upon the stand. The clothing showed that deceased had been shot in the back. The fact that he had been shot in the back was testified to by other witnesses, and admitted by defendant, who testified on the trial. In explaining the bill of exceptions saved by defendant in relation to this matter the learned trial judge says: "The evidence submitted of the jurors it is agreed is a statement of what actually occurred as to all the jury. The jurors all state that the clothing had nothing to do with their verdict, and it is the opinion of the court that the examination of the clothes did not prejudice the case with the jury. As to the shot-holes in the back of the garments, it would, of course, be impossible to tell whether the same were produced by the first or the last shot. Dr. Jones and the defendant both testify as to a shot in the rear, and the shot-holes in the back of the garments correspond to evidence both of state and defendant; * * * and it is the opinion of the court, after reviewing the whole case, that the exhibition of the clothes in the jury-room could not have operated to the prejudice of any right of the defendant, this opinion being corroborated by the statements of the jurors themselves."

ated by the statements of the jurors themselves."

The precise question here presented has never been before the courts of this state. In *McCoy v. State*, 78 Ga. 490, 3 S. E. Rep. 768, it was held that "for the jury, without the knowledge or consent of the prisoner, and without leave of the court, to receive and keep in their room, while deliberating on the case, the gun with which the state contends the homicide was committed, and the coat worn by the deceased at his death, and pierced with the fatal shot, is unwarranted by law." But that case was reversed upon other grounds. In California the statute with regard to new trials, where the jury has received evidence out of court, is substantially similar to ours. The case being tried was libel, based upon a single paragraph, embracing two or three lines only, of a pamphlet which contained many pages of libelous matter. On retiring for deliberation, the jury found the pamphlet in their room, and read portions of it besides the libelous matter charged. It was held that this entitled the defendant to a new trial. *People v. Thornton*, 74 Cal. 482, 16 Pac. Rep. 244. In another case, before the same court, it was shown that "on the trial the prosecution offered in evidence the horns of an animal, which had no peculiar marks upon them, but which were identified by certain of its witnesses as the horns of the stolen cow. During a recess of the court, while the judge and a portion of the jurors were absent, one of the jurors picked up and examined the horns, held them in his hands for some time, turned them over, and looked at them." It was held "that the examination made by the juror did not amount to receiving evidence out of court, so as to warrant a new trial." *People v. Tipton*, 73 Cal. 405, 14 Pac. Rep. 894. In the case of *Titus v. State*, where the jury, after their retirement, procured a magnifying glass, and with it examined the wooden fibres sticking to the dress of the murdered woman, and compared them with those of a wooden platform, both the dress and platform having been introduced in evidence, and sent with them to their room by the court, it was held that "the entire identity of appearance of these wooden filaments was an undisputed fact in the case, and the jury therefore knew such facts as well before making their test as they did afterwards. * * * If there had been conflicting testimony touching the matter thus looked into by the jury, the present motion would have assumed a very different aspect; but as these facts stand, we are entirely satisfied that the irregularities in question did not in the faintest degree prejudice the defendant, nor did they even tend to do so." *Titus v. State*, (N. J.) 7 Atl. Rep. 624. In the case in hand there was no conflict as to the fact that deceased had been shot in the back. The clothing examined by the jury only showed the same fact. The jury swear they decided the case without reference to the appearance of the clothing; in other

words, that they did not receive or use the clothing as "other testimony" in the case. We cannot, under these facts, see how the defendant could possibly have been prejudiced, or how it can be said that the verdict was probably influenced in the premises. That the conduct of the jury in examining and discussing the appearance of the clothing was an irregularity we cannot deny, but we do not believe it to be such an irregularity as would authorize us to set aside the verdict and judgment, and, so believing, the judgment is affirmed.

BALLARD v. STATE.

(Court of Appeals of Texas. March 12, 1890.)

ASSAULT AND BATTERY—"DEADLY WEAPONS."

Neither a pistol nor brass knucks are necessarily deadly weapons, and on trial of an indictment for an aggravated assault and battery, alleged to have been committed with a pistol and brass knucks, the same being "deadly" weapons, the state must show the deadly character of such weapons by proving their size or the manner of their use.

Appeal from Lavaca county court; T. A. HESTER, Judge.

Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. The appellant was charged by indictment with an aggravated assault and battery, the same alleged to have been committed "with a pistol, which was then and there a deadly weapon, and with a brass knucks, which was then and there a deadly weapon." He was convicted of an aggravated assault and battery, but there is no proof in the record that the pistol or the brass knucks which were used by him were deadly weapons. Neither a pistol nor brass knucks are necessarily deadly weapons. Whether or not a pistol in the particular case was a deadly weapon must depend upon its size or the manner of its use. Willson, Crim. St. § 844; Hilliard v. State, 17 Tex. App. 210; McGrew v. State, 19 Tex. App. 302; Gladney's Case, 12 S. W. Rep. 868. To sustain the conviction, it is essential that the evidence should have established the deadly character of the weapons used; and, because this was not done, the judgment is reversed, and the cause remanded.

WILLIAMS v. TUTT.

(Supreme Court of Missouri. March 10, 1890.)

Appeal from St. Louis circuit court; L. B. VALLIANT, Judge.

Action by Robert E. Williams, administrator of William S. Reid, deceased, against D. G. Tutt, surviving partner of D. G. Tutt & Co. Judgment for plaintiff, and defendant appeals.

W. C. Marshall, for appellant. *Seddon & Blair*, for respondent.

BRACE, J. This case was tried in the circuit court of St. Louis on an agreed statement of facts. There is but one question in

the case, and that is whether a surviving partner is entitled to commission for his services in settling the partnership estate. The only amount in dispute is the amount claimed for such commission, to-wit, the sum of \$2,496.96, and, this sum being below the amount in which this court has appellate jurisdiction, the case will be transferred to the St. Louis court of appeals for decision, (Const. art. 6, §§ 12, 27; Const. Amend., Rev. St. 1889, p. 87, § 5;) and it is accordingly so ordered. All concur.

McCLANAHAN et al. v. WEST et al.

(Supreme Court of Missouri. March 22, 1890.)

JUDGMENT—VACATING—PARTITION.

1. A domestic judgment rendered by a court of general jurisdiction cannot be impeached by a party thereto, merely because the record is silent as to the service of process on such party.

2. Where the files show affirmatively that there was no service of process, judgment may be impeached thereby; and in case of their loss, proof of their contents may be made.

3. Where a party to a suit has agreed to the admission of an affidavit as evidence for the purpose of trial, to prevent a continuance, he is estopped from assigning its admission as error.

4. Where one has taken the proceeds of a partition sale, and receipted therefor, with knowledge of the source of the proceeds, she cannot repudiate the transaction, though the partition proceedings were void for irregularities.

5. Where a judgment in partition proceedings is void on its face, there is no necessity for an equity suit to set it aside; there is an adequate remedy in ejectment.

Error to circuit court, Jackson county; TURNER A. GILL, Judge.

This proceeding, an equitable one, was instituted by plaintiffs in May, 1885, whereby they sought to set aside and hold for naught a judgment and sale in partition, the sheriff's deed, and subsequent conveyances, on various grounds set forth in the petition, which, in substance, alleged: William K. Anthony died in 1853, the owner of the land described in the petition; that he left, as his only heirs at law, Robert G., Marion, George, Jackson, Lewis, Lillie, and Nancy T.; that, soon after the death of said William K. Anthony, his daughter Marion married Thomas West; that in 1854 a proceeding was begun in the circuit court of Jackson county for the partition of these lands, to which all the heirs were made parties; that at the March term, 1855, an order of sale of the lands was made by the court, and at the March term, 1857, the sheriff filed his report of sale, which was presented to be confirmed. It is alleged that the judgment and proceedings are void on their face; that said Thomas West pretended to purchase said lands at said sale for a nominal price; that the plaintiff Nancy T., who some time before the bringing of this suit married her co-plaintiff McClanahan, had no notice of the pendency of said partition proceedings; that she was not served with any process, and as to her they were void; that the suit was instituted by the said Thomas West, who conspired with Robert, one the Anthony heirs, to cheat and defraud the plaintiff Nancy out

of her share of her father's estate; that she was then a small girl, and after the close of the war she inquired of Thomas West and his wife, Marion, what had been done with her father's land, and was told by them that it had been sold for debt, and that West had bought it at sheriff's sale. It is further alleged that she believed these statements, and placed special trust and confidence in them, and was thus thrown off her guard, and prevented from making further inquiry. It is further alleged that West made these false representations with the view to cheat and defraud the plaintiff, and that, in order to conceal his deceit and fraud, he forbade intercourse with her relations and friends, and induced others to keep quiet, and lest she might discover the fraud he sent her into Morgan county, telling her that there was a little money coming to her from her father's personal estate, and that her guardian would send it to her when she arrived at her majority. It is further alleged that plaintiff Nancy never learned of said fraud and concealment until within two years immediately preceding the filing of this petition, when a copy of the petition filed by the Kansas City Belt Railway Company, for a condemnation of a part of the land, was served upon her. This aroused her suspicions. It was further stated that Thomas West died in 1873. The petition further states that her guardian, at his settlement in 1870, asked her for receipts, which she gave, but she disclaims any knowledge of their purport. She alleges that she did not understand that she was receipting for her share of her father's land, and she asks, if any receipt or conveyance of her share in her father's land is offered in evidence, it may be declared void, as she supposed she was receiving only her share of her father's personal estate. It is further alleged that said partition suit was never prosecuted to a final end; that the record shows that no order of distribution was ever made; and that no deed to the purchaser under the sale therein appears to have been acknowledged in open court, as required by law. The heirs of Thomas West are made parties to the bill, and it is alleged that the widow, Marion, and the children have sold part of the lands to defendant Shaefer, who purchased for defendant Blair. Allegation is further made that West in his life-time, and his widow and children since, have pretended to purchase or have caused to be purchased by others, for their benefit, the interest of the heirs of the said William K. Anthony, except that of the plaintiff Nancy, and that they tried to purchase hers, and by so doing admitted her right to one share, as tenant in common, to one-seventh of the lands. It is further alleged in the bill that the decree in the partition suit is incomplete, fraudulent, and void, and that all mesne conveyances from the pretended sale thereunder are fraudulent and void, and plaintiffs claim that they are entitled to the possession of the one undivided seventh part of said lands, and pray for

a decree of possession. Further prayer is that the said judgment in partition, and the sale made in pursuance of the same, and the deed, be declared null and void, and be set aside, especially as to them; that all intermediate conveyances be declared fraudulent, null, and void, especially as to the plaintiffs; and that the possession of the undivided one-seventh part of said lands be adjudged to the plaintiffs; and for other relief. The answers of the adult defendants were in fact, or in effect, (1) general denials; (2) pleas of the statute of limitations; (3) an estoppel arising from the receipt by the plaintiff Nancy after she arrived at her majority, with full knowledge of the facts, of her proportion of the proceeds of the partition sale. The replies were general denials. The answer of the guardian *ad litem* of the minors was as usual in such cases. Having heard the testimony in the cause, the lower court dismissed the petition, and plaintiffs brought error.

James A. Spurlock, for plaintiffs in error. *Johnson & Lucas, C. O. Tichenor, W. J. Ward, and Gage, Ladd & Small*, for defendants in error.

SHERWOOD, J. The petition in this cause does not charge that any fraud was used in obtaining the judgment of partition. If this had been done; if it had been charged that fraud was used in the very "concoction" of that judgment,—it would have been admissible to establish such fraud in the present proceeding; regarding it, in that event, as a direct attack on that judgment. *Bigelow, Fraud*, 86-88, 90, 94, 95, 636; *Bigelow, Estop.* (3d Ed.) 162, 163; *Payne v. O'Shea*, 84 Mo. 129. The authorities differ on the point whether a judgment can be attacked collaterally for fraud, or whether it can alone be done in a direct proceeding. Very strong reasons may be urged in behalf of either view. *Bigelow, Fraud*, 86, 88, 90, 94, 95, 636; *Bigelow, Estop.* 161-164. The eminent author just cited holds that no just distinction can be taken between the right of a party injured to attack "a judgment concocted in fraud," whether such attack be directly made, or made collaterally. *Id.* 164. But it is unnecessary to rule the point now, for the obvious reason that there is no tendency in the testimony adduced by plaintiffs to show fraud in the proceeding or concoction of the judgment, nor any connection of the defendants therewith. This being the case, parol testimony was wholly out of place to show that plaintiff Nancy had not been served with process in the partition suit. And this is true, notwithstanding that the judgment in that suit is silent as to the acquisition of jurisdiction by service of process upon her.

A domestic judgment rendered by a court of general jurisdiction cannot be impeached, by the parties to it, merely because the record is silent as to the acquisition of jurisdiction. Such judgment is equally as conclusive on the parties thereto whether it recites, or whether it fails to recite, that jurisdiction

has been acquired. Nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so. *Freem. Judgm.* (3d Ed.) § 132; *Crepps v. Durden*, 1 Smith, Lead. Cas. pt. 2, (8th Ed.) 1137, and cases cited; *Freeman v. Thompson*, 53 Mo. 183; *Lackland v. Stevenson*, 54 Mo. 111; *State v. Williamson*, 57 Mo. 192; *Huxley v. Harrold*, 62 Mo. 516; *Gates v. Tusten*, 89 Mo. 13; *Jeffries v. Wright*, 51 Mo. 215; *Hallowell v. Page*, 24 Mo. 590. But, though parol testimony was wholly inadmissible for the purpose aforesaid, yet it was competent to supply the missing files in the partition cause. Such files could be supplied by pursuing the method pointed out by the statute, or, as at common law, by proving their loss, and then proving their contents, or any material parts thereof. For this reason it was that the affidavit filed by the defendants for a continuance, on account of the absence of the witness C. J. Bower, was properly admitted in evidence to show that the missing files in the partition cause showed the service of process on plaintiff Nancy, thus establishing that there was nothing in the lost files at variance with the presumptions incident to, and attendant on, the doings of a court of general jurisdiction. These files, if in existence, could have been used to contradict the record, if at variance therewith, and to show that no jurisdiction had been acquired, even as against jurisdictional recitals in the record, (*Cloud v. Inhabitants*, 86 Mo. 357, and cases cited; *Milner v. Shipley*, 94 Mo. 106, 7 S. W. Rep. 175; *Blodgett v. Schaffer*, 94 Mo. 652, 7 S. W. Rep. 436; *Adams v. Cowles*, 95 Mo. 501, 8 S. W. Rep. 711;) and, for the same reason, secondary evidence of their contents, when lost, was admissible, though, if no such secondary evidence had been introduced, those favorable presumptions which always attend the acts and doings of a court of general jurisdiction could still have been invoked in behalf of the judgment in question.

It is claimed, however, by plaintiffs that this affidavit was improperly admitted in evidence, and when it was offered to be read the plaintiffs objected; but they were in no position to object after they had agreed to admit the affidavit to be read in evidence "for the purpose of a trial." Having done this; having thereby cut off the defendants from obtaining a continuance which otherwise would have gone,—they are clearly estopped from now assigning as error what beforehand they agreed should be done. Parties litigant are not allowed to trifle with the court or with each other. They are not allowed to assume inconsistent positions. Having made their election, and thereby caused their adversary to elect to pursue a certain course, they cannot, after such a course has been pursued at their instance, take advantage of it, deny its validity, and thus "tread back, and trip up the heels" of their adversary. *Slack v. Lyon*, 9 Pick. 62; *Brown v. Bowen*, 90 Mo. 184, 2 S. W. Rep. 398; *Bigelow*,

Estop. (3d Ed.) 562, 601, 602, and cases cited.

This conclusion renders unnecessary any discussion of the validity of the statute which authorizes the affidavit for a continuance in a civil cause to be read in evidence. But, for the sake of argument, it might be granted that the parol evidence introduced to show that no service of process was had on plaintiff Nancy was competent, and still the result reached by the trial court could not be successfully questioned, since the great weight of the evidence shows that due service of process was had upon plaintiff Nancy, as well as upon the other three minors. This is established in the most pronounced manner, not only by the parol testimony, but by the sheriff's book showing service on the minors, as well as by the testimony of the sheriff himself, whose deputy served the process, and made report to him when he made the charge in his book, as was his custom. Besides, the record itself shows that George W. Buchanan was appointed guardian *ad litem* for the four minors, and that he filed answers for them, from which statements it will be presumed that the proper service was had upon the minors, and that the court, cognizant of this fact, thereupon appointed the guardian *ad litem*; and it will be presumed, also, that the attorney then appointed guardian *ad litem* would not have filed an answer for minors who had not been personally served, as required by law. And then there are the receipts given by the minors, and by the plaintiff herself after she attained her majority, when acting in the presence and under the advice of her counsel, for her share of the proceeds of the sale in partition. If she knew from what source these proceeds came, and still receipted for them, and there is good reason to believe she did know, she certainly would not be allowed to repudiate the transaction now, even if the partition proceedings were in fact void. She certainly could not have both the money and the land. *Austin v. Loring*, 63 Mo. 19, and cases cited.

It is charged in the petition that the partition proceedings are void on their face. If this is true, the plaintiffs have stated themselves out of court; for in such case the remedy at law by action of ejectment would be adequate and ample. But we have discovered nothing in the proceedings which varies from the requirements of the law as then in force. The order of sale was properly made, the rights of the parties being therein determined and adjusted; and, if the judgment was rendered at the first term of the court after service had, this was but an irregularity, not going to the jurisdiction of the court; and the sale of the property was duly made, the deed of the sheriff executed and acknowledged, and the sheriff who conducted the sale made proper report thereof to the court, which was approved by the court, and this was all that was necessary in such cases. If the sale of the land was valid, of course this ends the matter of the plaintiffs' claim for relief on that point; but, looking over this whole rec-

ord, we find nothing to induce the belief that plaintiff Nancy has been defrauded in the slightest particular, or that any fraud whatever was practiced upon her. No one can read this record with any degree of attention without being impressed with the idea that this litigation originated in the fact that the land in question sold in the partition suit in 1855 for a small sum, but was worth when this proceeding was instituted some \$900 per acre. This appears to be all the fraud there is in this case. And it is to be distinctly understood that this court views with disfavor proceedings like the present, instituted nearly the life of a generation after the transactions on which they are supposed to be based occurred, and which, if successful, to paraphrase the strong language of Judge SCOTT on one occasion, would "make the dead sin in their graves." See *State v. West*, 68 Mo. 229; *Lenox v. Harrison*, 88 Mo. 491; *Burdette v. May*, 12 S. W. Rep. 1056.

It is said that the judgment in this cause is erroneous, because rendered against the plaintiff Nancy, a married woman. This error can be easily corrected by striking out her name from that portion of the judgment for costs. *Cruchon v. Brown*, 57 Mo. 38; *Weil v. Simmons*, 66 Mo. 617; *Mueller v. Kaessmann*, 84 Mo. 330; *Wescott v. Bridwell*, 40 Mo. 146; *Shaw v. Davis*, 55 Barb. 389; *Hunt v. Railway Co.*, 89 Mo. 607, 1 S. W. Rep. 127; *Byerly v. Donlin*, 72 Mo. *loc. cit.* 272. We affirm the judgment. All concur, except Brother BARCLAY, J., who holds that all the former decisions of this court already cited on jurisdictional points should be overruled, and this reason only allows him to concur in the result.

STATE ex rel. ATTORNEY GENERAL v. MILLER.

(Supreme Court of Missouri. April 28, 1890.)

CONSTITUTIONAL LAW—TITLES OF STATUTES—AMENDMENT—LOCAL AND SPECIAL LAWS.

1. The title of Act Mo. March 30, 1887, (Laws Mo. 1887, p. 272,) entitled "An act fixing the number of directors in public school boards in certain cities, and providing for election of such directors, and for districting said cities therefor," is not within the prohibition of Const. Mo. art. 4, § 28, which declares that no bill shall contain more than one subject, which shall be clearly expressed in the title.

2. By the act of 1887, portions of the special act (Act Mo. Feb. 13, 1883) creating the school board of St. Louis are repealed or modified, but the sections repealed are not mentioned, nor are the sections modified set out in their modified form. *Held* not a violation of Const. Mo. art. 4, § 34, declaring that no act shall be amended by providing that designated words be stricken out or certain words inserted, but "the act or section amended shall be set forth in full as amended," because the change is not by inserting or striking out designated words, but is, in effect, a repeal by implication.

3. The act of 1887, prescribing the number of school directors "in all cities of this state now having, or hereafter attaining, a population of over three hundred thousand inhabitants," is not a special or local law, within the meaning of Const. Mo. art. 4, § 53, which declares that the general assembly shall not pass any local or special law regu-

lating the management of public schools. *Distinguishing St. Joseph Pub. Schools v. Gaylord*, 86 Mo. 406.

F. M. Estes, Thos. P. Bashaw, and Willis H. Clark, for relator. *Campbell & Ryan*, for respondent.

BLACK, J. This is an information in the nature of a *quo warranto*, prosecuted by the attorney general to test the right of the respondent to the office of director in the public schools in the city of St. Louis, and the controversy is made to turn upon the constitutionality of the act of March 30, 1887, (Laws 1887, p. 272.) The special act of February 13, 1883, and the special amendments thereof, (2 Ter. Laws, 399, and 2 Rev. St. 1879, p. 1536,) created a corporation for school purposes by the name of the "Board of President and Directors of the St. Louis Public Schools," embracing the territorial limits of the city of St. Louis as then or thereafter established. Two directors were elected from each ward of the city for the term of three years. To entitle a person to vote for a director, or to hold the office of director, he must, among other things, have paid a city tax; these are some of the features of the special law. The act of March 30, 1887, the one now in question, is entitled "An act fixing the number of directors in public school boards in certain cities, and providing for election of such directors, and for districting said cities therefor." The first section is as follows: "Section 1. In all cities of this state now having, or hereafter attaining, a population of over three hundred thousand inhabitants, the number of school directors or trustees, or number of members of any board having charge of public schools or public-school property in such cities, under and by virtue of any special charter or general law, shall be twenty-one; seven to be elected on general ticket at large by the qualified voters of such city, and fourteen to be elected by districts by the qualified voters of such city districts." Other sections make it the duty of the circuit court of any such city to divide the city into fourteen districts, and to certify the division to the school board. At the first election under the act one director is to be elected from each of the fourteen districts, and seven are to be elected at large. The terms of the old members are to cease when their successors are elected and qualified. Provisions are made whereby part of the directors thus elected at the first election hold for four years, and others for two years. Thereafter the directors are elected, except to fill vacancies, for four years. Payment of a school tax for two consecutive years next before the election is made an additional qualification to hold the office of director. The sixth and last section repeals all conflicting acts and parts of acts. Twenty-one directors were elected under the provisions of this law at the November election, 1887, the respondent being one of the persons then elected as a director at large. He qualified by taking the oath of office, and entered upon

and has ever since continued to discharge the duties of a director. The pleadings admit that he possesses all of the qualifications to hold the office. The claim of the relator is that the act of March 30, 1887, is unconstitutional on several grounds, and of these in their order.

1. The title of the act, it is urged, does not conform to section 28 of article 4, which declares: "No bill * * * shall contain more than one subject, which shall be clearly expressed in its title." This section, in the constitution of 1875, and one of a like import in the constitution of 1865, have been the subject of frequent consideration in this court. Its demands are that matters which are incongruous, disconnected, and without any natural relation to each other must not be joined in one bill, and the title must be a fair index of the subject-matter of the bill. A very strict and literal interpretation would lead to many separate acts relating to the same general subject, and thus produce an evil quite as great as the mischief intended to be remedied; hence a liberal interpretation and application must be allowed. In *Ewing v. Hoblitzelle*, 85 Mo. 64, the following rule, taken from *Sedgwick on Statutory and Constitutional Law*, (page 521, note,) was approved: "When all the provisions of a statute fairly relate to the same subject, have a natural connection with it, are the incidents or means of accomplishing it, then the subject is single, and, if it is sufficiently expressed in the title, the statute is valid." Substantially the same rule had been laid down in several previous cases. *City of St. Louis v. Tiefel*, 42 Mo. 578; *State v. Mathews*, 44 Mo. 523; *State v. Miller*, 45 Mo. 495; *City of Hannibal v. County of Marion*, 69 Mo. 571; *State v. Mead*, 71 Mo. 268. The act in question fixes the number of directors in cities of over 300,000 inhabitants, prescribes their qualifications, and determines how and for what length of time they shall be elected. All these matters are closely related, and, under the rule before stated, constitute but one subject.

The opposing argument seems to be that while the legislature may deal with one general subject, in one act, under one general title, yet, when it undertakes to deal with particular regulations only, each particular regulation must stand by itself in a single act, with an appropriate title. The act in question, it is said, is bad because it contains three particular regulations, namely, number of directors, election of directors, and districting the cities for these elections. The argument is too subtle and refined to meet with our approval. As we have seen, the act treats of but one subject, namely, the election of directors in certain cities. All the other provisions have a natural relation to and are a part of that one subject. The other requirement is that the subject of the bill must be clearly expressed in the title. In adopting a title, the legislature may select its own language, and may use few or many words. It is sufficient that the title fairly embraces the

subject-matter covered by the act; mere matters of detail need not be stated in the title. We see no valid objection whatever to the title of the act now in question. It is a fair index to all that is embraced in the law.

2. The next contention of the relator is that the act violates section 34 of article 4 of the constitution, which declares: "No act shall be amended by providing that designated words thereof be stricken out, or that designated words be inserted, or that designated words be stricken out and others inserted in lieu thereof; but the words to be stricken out, or the words to be inserted, or the words to be stricken out and those inserted in lieu thereof, together with the act or section amended, shall be set forth in full as amended." The object of this section is sufficiently stated in *Morrison v. Railway Co.*, 96 Mo. 602, 9 S. W. Rep. 626, and 10 S. W. Rep. 148. It is there shown that when an act undertakes to amend a former statute it is not sufficient to say certain words are stricken out, or certain words inserted, but the section as amended must be set out in full, and this is all that is required. Here, it is true, portions of the special act creating the school corporation are repealed or modified by this act of March 30, 1887, and the last-named act does not name the sections which are thereby repealed, nor are the sections thereby modified set out in their modified form. This may lead to inconvenience in requiring a comparison of the old and the new law, but such legislation is not prohibited by the provision of the constitution before quoted. The constitution of 1865 contained a provision much like the one now in question, under which it was held that repeals by implication were not prohibited. *State v. Draper*, 47 Mo. 29; *State v. Maguire*, Id. 35. The repealing clause of the act now under consideration is no more, in effect, than a repeal by implication. This act does not seek to amend any former law by simply striking out designated words, or by inserting certain words, or by striking out words and inserting others in lieu thereof, and is not within the constitutional prohibition.

3. The next objection is that the act of March 30, 1887, is a local and special law, and therefore violative of several sections of the constitution, and especially those clauses found in section 53 of article 4, which declare: "The general assembly shall not pass any local or special law * * * regulating the management of public schools, * * * creating corporations, or amending, renewing, extending, or explaining the charter thereof. * * * In all other cases, where a general law can be made applicable, no local or special law shall be enacted." In the brief filed by or in behalf of respondent, much reliance seems to be placed upon *St. Joseph Public Schools v. Gaylord*, 86 Mo. 406. In that case the school corporation had been created by a special act, and the question was whether it had the power to issue bonds. The existence of the power depend-

ed upon the question whether section 11 of chapter 47 of the General Statutes of 1865 amended the special school law, and we held it did. The question does not appear to have been made that section 11 was a local or special law. Indeed, it is so general in its terms that there is no foundation for such a claim. The case is an authority for the proposition that the act in question, if of any validity at all, does amend the special school law of St. Louis; but it has no bearing upon any other questions involved in this controversy. The general observation made in *Wheeler v. Philadelphia*, 77 Pa. St. 338, "that a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special, and comes within the constitutional prohibition," was approved in *Ewing v. Hoblitzelle*, 85 Mo. 75, and in *State v. Tolle*, 71 Mo. 650. In the case last cited, section 320, Rev. St. 1879, was questioned on the ground that it was a special law. That section made it the duty of the judges of the circuit court, in all cities having a population of more than 100,000 inhabitants, to let a contract to some newspaper for the publication of all advertisements, judicial notices, and orders of publication, and the law was upheld. In *State v. Herrmann*, 75 Mo. 346, the court had under consideration the law commonly called the "Notary Act," (Laws 1881, p. 172.) The first section provided that "the governor shall appoint and commission, in all cities having a population of one hundred thousand inhabitants or more, one notary public only to every 3,500 inhabitants in said cities." The fourth section, among other things, enacted that "the office of any notary public in such city, holding a commission bearing date prior to the passage of this act, and whose term of office as such notary public has not expired at the time this act becomes a law, shall be abolished, at the expiration of ten days after the taking effect of this act," etc. The fourth section was held to be a special law, and therefore void, but the court at the same time declared that it was not its purpose to say aught against the other sections. The ruling in *State v. Tolle*, supra, was in terms approved.

The rule that a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things is a special law, is but a statement of a general rule, and was only intended as such when laid down in *Wheeler v. Philadelphia*, supra, as will be seen from the context of the opinion. A law which applies to certain school corporations only, may be general, or it may be special. Much depends upon the particular matter of which the legislature is treating. To make such a law general, there must be some distinguishing peculiarity which gives rise to the necessity for the law as to the designated class. A mere classification for the purpose of legislation, without regard to such necessity, is simply special legislation of the most per-

nicious character, and is condemned by the constitution. Mere differences, which would serve for a basis of classification for some purposes, amount to nothing in a classification for legislative purposes, unless such differences are of such a character as, in the nature of things, to call for and demand separate laws and regulations. The underlying principle is well stated by Chief Justice BEASLEY in *State v. Hammer*, 42 N. J. Law, 436, where he says: "But the true principle requires something more than a mere designation by such characteristics as will serve to classify; for the characteristics which thus serve as the basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree, at least, account for or justify the restriction of the legislation. Principles of this sort can be best elucidated by examples. I have already given a sample of a merely arbitrary classification, founded on no casual relation between the subject-matter of such legislation and the things so classified. A sample of the other or legitimate kind would be signified in a law that should give to all cities in the state situated on tide-water the privilege of using such waters in connection with their sewers." The same principle is developed in *Ayer's Appeal*, 122 Pa. St. 266, 16 Atl. Rep. 356, and a practical application made of it in *Randolph v. Wood*, 49 N. J. Law, 86, 7 Atl. Rep. 286.

We must take judicial knowledge of the fact that there is but one city in this state having, at this time, a population of over 300,000 inhabitants, and that is the city of St. Louis; but the statute in question is not confined to that city. It applies and governs the election of directors of public schools in all cities hereafter attaining that population. It is said there is no reasonable probability that any other city in this state will attain that population during the life of the law. There is no limit to the act in point of duration. A like argument was made against some other laws made applicable in cities of 100,000 or more inhabitants but a few years ago, but the prediction proved a false one in a very short space of time. Another answer to the argument is that the validity of the law does not depend entirely upon the number of public schools to which it may, by its terms, apply. It is natural, proper, and reasonably necessary to the well being of our public schools that in cities having so large a population there should be more directors than in cities having a much less population. The vast amount of money and property to be managed, and the school-houses to be erected, and the schools to be

maintained, make it necessary that these large school corporations should be equipped with a large number of directors. There is therefore a fair and reasonable necessity for a classification for legislative purposes in this respect. Suppose the legislature should deem it wise to repeal all of the special laws in the state concerning public schools, and enact one law, under one title, to govern and regulate all of the public schools. No one could question the power of the legislature to pass such a law, and such a law might well provide for a greater number of directors of schools in cities of over 300,000 inhabitants than in cities of a less population. It is true the act in question, besides fixing the number of directors and providing for election districts, goes on to prescribe the qualifications of the directors, and their terms of office; but these are mere incidents to the general object of the act, and do not make it a special or even a local law. The act is as unobjectionable as the law considered and upheld in *State v. Tolle*, supra; and the whole of the notary act considered in *State v. Herrmann*, supra, might be deemed unconstitutional, and still the law now in question upheld. We conclude the act in question is not a special or local law, and it is therefore unnecessary to consider other objections made to it, such as a want of notice of an intention to apply for it under section 54 of article 4 of the constitution of 1875. The act now in question does not concern the government or powers of cities and towns, and hence section 7 of article 9 of the constitution has no application to this case. Since there is a growing disposition to evade the prohibitions against special laws, we repeat that peculiarities and differences, which will serve to distinguish persons or things as a class for many purposes, do not necessarily furnish any basis whatever for a legislative classification. To justify such legislation, the distinguishing features must be such as to call for and demand a separate rule of statute law. The rule upon the respondent to show cause is discharged, and the writ denied. All concur.

STATE ex rel. ATTORNEY GENERAL v. MACKLIN.
(*Supreme Court of Missouri*. April 28, 1890.)

F. M. Estes, Thos. P. Bashaw, and W. H. Clark, for relator. *Campbell & Ryan*, for respondent.

PER CURIAM. This case is in all respects like the case of the same relator against Charles F. Miller, ante, 677, (just decided,) and the judgment will be the same in this as in that case.

HARGIS v. KANSAS CITY, C. & S. RY. CO.
(*Supreme Court of Missouri*. March 22, 1890.)
ADVERSE POSSESSION—RAILROAD RIGHT OF WAY.

A railroad company entered on lands, and, in the presence of the owner, and on his verbal promise to give a right of way, staked off a right of way of the usual width of 100 feet. The company constructed its tracks, and had actual, exclusive, and continuous possession of the 25 feet

along the center of the right of way occupied by the tracks for the prescriptive period, claiming title to the whole strip, and exercising over it such usual acts of ownership as the nature of the property permitted. Held, in an action of ejectment by the grantee of the land, who purchased with knowledge of the existence of the road, that the company had title, under the statute of limitations, to the 100-foot strip.¹

Appeal from circuit court, Cass county;
CHARLES W. SLOAN, Judge.

Wallac Pratt and I. P. Dana, for appellant. *Bogges & Moore*, for respondent.

RAY, C. J. This is an action of ejectment, in common form, brought in March, 1886, in the circuit court of Cass county. On its face the petition seeks to recover the described quarter section, but the answer of defendant disclaims all interest therein except as to the strip or right of way, of 100 feet in width. As to this strip or right of way, defendant sets up and claims that, in 1870 or 1871, its predecessor in title entered, and located and constructed the railroad thereon, with the knowledge and consent and by agreement with the then owner of said land, and in accordance with said agreement appropriated for the right of way and railroad said strip of 100 feet, being 50 feet on each side of the center line of said track, and that defendant, and those under whom it claims, have ever since continuously claimed and occupied the same for said purposes. The case was tried by the court, and plaintiff recovered judgment for 37½ feet on each side of a strip of 25 feet through the middle, on which the railroad track is actually located and constructed, and which, plaintiff concedes, defendant has the right to hold and enjoy. The real controversy, therefore, is as to the remaining 75 feet, being the two strips of 37½ feet each on each side of said 25-foot strip through the center of the 100-foot strip or right of way.

Defendant admits that the plaintiff has the valid record title, by warranty deed, to the quarter section described in the petition; and plaintiff concedes that defendant is the legal successor to the St. Louis, Lawrence & Denver Railway Company, which, about the year 1870, built its railroad and laid its track across said quarter section. At that time, in 1870 or 1871, one Browning was the owner and resided on this quarter section. It is conceded that, before the said company entered upon the land, said Browning said he would give the right of way; that he was present while the engineers were locating the same, and subsequently declared that he had given the right of way. But plaintiff contends that this entry was under a mere license, and that the company did not occupy thereunder more

¹Actual possession of part of a tract of land under a patent for the whole is not possession of the whole, so as to confer title thereto by adverse possession. *Turner v. Stephenson*, (Mich.) 40 N. W. Rep. 735; *Ivey v. Petty*, (Tex.) 7 S. W. Rep. 793; *Wright v. Lassiter*, (Tex.) 10 S. W. Rep. 297. In general, as to what will support a claim of title by adverse possession, see *Baxille v. Murray*, (Minn.) 41 N. W. Rep. 233, and note; *Chesebro v. Powers*, (Mich.) 38 N. W. Rep. 233, and note.

than 25 feet, and therefore can claim to that extent, but no further. In other words, the position of plaintiff is that Browning, and those claiming under him, had and have the legal title to the whole quarter section, subject to the license given by Browning to the railroad company, and that they have the actual and constructive possession to all of it, except what the railroad company has in its actual possession; that is, the road-bed on which the track is actually laid.

The learned and able counsel for plaintiff has pointed out that a right of way, properly so called, is an easement,—an interest in land of another,—and ordinarily it can only be acquired by deed, or what is equivalent thereto, and that a parol license is insufficient for that purpose. So, too, he concedes that a parol license, when executed, operates by way of estoppel, and may ripen into title by prescription, but claims that the right or title thereunder extends in no case beyond the boundary of the executed license. The propriety, in general, of these views, may be conceded; but their application in given cases, such as the one now before us, may be, and often is, somewhat difficult. How far, for example, with respect to the possession, shall the license, regarding the transaction in question as of that character for the present, be deemed to have been executed? This may depend, we think, upon a variety of conditions and circumstances presented by particular cases. Obviously, in cases like the one now under consideration and review, the principal use of the strip of land given for the railroad will be to support the railroad track or tracks over which the trains will run from time to time. The expenditure of labor and money which creates the equitable estoppel, if any is created at all, as against the land-owner and his grantees, is made upon that portion. But should the license, if such it is, be held to be executed only so far, and the right of possession taken thereunder be limited to the actual road-bed, in cases of this sort, where the facts are as in the record before us?

Perhaps a few citations from the evidence, which is undisputed in this behalf, will best show what actually took place, with reference to the strip in question, between the original land-owner and the original company making its entry thereon. A. C. Briant testified: "I was interested in having road built, and, with John Bartleson and some one else, was appointed a committee to get right of way. Bartleson and I went to Dr. Browning's house, and talked with him about it, and he said he would give the right of way for the road." And on cross-examination: "John Bartleson and I, and some one else,—I don't remember who,—were on a committee to get right of way. We saw Dr. Browning between preliminary survey and permanent location of road. He said: 'I'll give the right of way.'" John C. Bartleson testified: "Through the company's attorney, Mr. Van Waggoner, of St. Louis,

I was employed to assist in procuring the right of way for said railroad through the section of country in which I then lived, and in company with Mr. Van Waggoner went to George W. Browning, who had full control and possession of this Duncan farm, to secure right of way across same; and, in my presence and hearing, said Browning granted and pledged to Mr. Van Waggoner a right of way for said railroad across and through his said land, the Duncan farm. Mr. Browning granted this right of way freely, fully, and without any reservation; and the railroad was constructed across his land without any opposition from him or any one else, he at that time residing on this farm, where he resided for a long time thereafter. He was, to my knowledge, a strong supporter of the railroad, and anxious for its construction." It is obvious upon this evidence that said Browning intended to give, and did verbally agree to donate, the right of way. As to the extent thereof, it appears, we think, that he intended and expected the same to be the usual width, of 100 feet. For example, the witness A. C. Briant testifies, among other things, that the "railroad track was built across it about 1871. Was there when survey was made and when road was located, and know it was staked off. There was more than one line of stakes. I think there were three. There was a center line and two outside lines, which were, I think, one hundred feet apart. I never measured the distance, but judged from the looks. Browning was there when the road was staked off. There were eight or ten men locating it. They had usual instruments of railroad engineers. * * * Dr. Browning was there when the stakes were set." Bartleson says: "As I understood it, the right of way granted by Mr. Browning was of the usual width granted in that neighborhood to the railroad. I think the width of the right of way granted was a hundred feet. It was the full right of way,—all that was asked by the railroad; but I would not state that there was any mention in that conversation of any specific width. To the best of my recollection, this right of way was granted in February or March, 1871, and it was granted by Mr. Browning at his place of residence on said Duncan farm." Jackson Farrell testifies: "Me and Dr. Browning had a contract to furnish ties to that road. We sold them for twenty-five cents a tie, and delivered them on the railroad. Dr. Browning lived about a quarter mile north on same quarter section where we delivered ties. Dr. Browning told me he had given the right of way for the railroad, and was glad it was being built, and that he would try and get a switch, and could then sell his timber. The doctor did not say to me what width he had given. He told me that he voted for the bonds to help the road."

This shows, we think, that said Browning was willing to give, and did verbally agree to give, what the railroad company was asking; that is, the usual right of way, or such

as the corporation could acquire in proper condemnation proceedings. But, even if there was no specification or agreement as to the width of the right of way so given, then, in the absence of anything to the contrary, we think the entry, and occupation and construction of the railroad across the quarter section, under the said permission and verbal donation, is to be construed as an appropriation by the corporation to the extent the law authorized it to take land for right of way for railroad purposes. The company was not, it is true,—and as is suggested by counsel,—proceeding to condemn the land under the statute, which limits the amount taken to an amount not exceeding 100 feet. In such proceedings, under the statute, the company may, by the proper step, appropriate, at its option, less than 100 feet; but, if the company fails to designate and limit the amount, it has been held that its entry and construction of the road must be regarded as an appropriation of the amount authorized by law. *Railroad Co. v. Cochran*, 3 Lea, 482; *Prather v. Telegraph Co.*, 89 Ind. 501; *Day v. Railroad Co.*, 20 Amer. & Eng. R. Cas. 359. In some of the cases the corporations have sought to limit their liability to the amount actually occupied, but have been held to a liability for the amount provided by law, unless their intention to take less has been appropriately manifested. Suppose, for example, that the railroad in question had, without the license or leave of said Browning, but under circumstances otherwise similar, entered upon and constructed the railroad over this quarter section. Could it, we may ask, limit its liability to the 25 feet actually occupied by the road-bed, in an action for damages by the land-owner? Although the proceeding was not under the statute, yet we apprehend that for sake of certainty, if for no other reason, the rule of law as to width, as shown by the statute, should prevail, in the absence of a proper and definite showing on the part of the company of its intention to appropriate less. So, too, in this case, supposing there was no definite agreement as to width of the right of way, but an intention on the part of the land-owner to give the right of way, then we think the railroad company, in entering thereunder and building its road, at large expense, acquired the right of way of the extent authorized by law. The land-owner has not, in the case before us, manifested his intention to give less than the company could acquire under the statute, nor has the company sought to limit its appropriation to any less amount; and it seems to us that the only rule that would be fair and just to both parties, in most cases of this sort, so far as extent of appropriation is concerned, is the rule which the law provides. Authorities are abundant to this effect, and a number of them are cited in the briefs of counsel for defendant. In the case of *Campbell v. Railroad Co.*, 110 Ind. 490, 11 N. E. Rep. 482, to which we are referred, the company took

possession with the license of the owner, whose grantee, after the construction of the railroad, sued the company in the action of ejectment. The court say, in the course of its opinion: "When, therefore, it appeared that the appellee, with the leave and license of Joseph Campbell, under whom appellant claims title, had entered upon and taken possession of the strip of land described in the complaint herein, and upon the faith of such license had expended large sums of money in the construction and maintenance of its line of railroad thereon, it was properly held, we think, that appellee's right of way thus acquired, in the absence of any limitation thereon appearing to the contrary, extended to the full statutory width of six rods or one hundred feet." If, then, the original land-owner, Browning, intended to give the whole 100 feet, and did so orally, as we think the evidence indicates, and the original corporation, as he knew, intended to and did appropriate that amount, as shown by its surveys and locations, and went into possession thereof claiming 100 feet, and thereafter constructed, without objection, the railroad thereon, with said expenditures of money and labor, in reliance upon said oral agreement, why, we may ask, if the equitable estoppel arises as to any part of the strip, does it not also arise and extend to the whole? It is, we think, clear that said Browning himself could not subsequently repudiate the transaction in whole or in part. Nor did he ever seek so to do, though he continued to reside on said quarter section for some years thereafter, until his death.

So far as plaintiff is concerned, the evidence shows, we think, that he purchased with knowledge of the defendant's claim upon the whole strip, or under such conditions and circumstances as subjects him to the equities which existed as between the original parties. He testifies as follows: "I first knew the quarter section about 1875, and Dr. Browning was then living on it; and the railroad then ran across it, and has ever since. I first owned the quarter section in 1880. Bought it in September of that year, of Mr. Selecman, and sold it next year to Mr. Barnett; and he sold it to Gill, to whom I made the deed in 1881. Did not own it again until July, 1883, when I bought it from B. F. Hargis, and have owned it since. J. E. George is now in possession, and has been for some time. I traded it to him for some land in Jackson county on condition that, after this suit is settled, he shall have all except fifty feet on each side of the railroad; but no deeds have passed yet. Knew the railroad ran across the quarter when I bought it." It also appears from plaintiff's own testimony that, when he purchased the land, there was a section-house, built by the company, extending, as plaintiff himself says, over 50 feet, and as far out to the south as the claim of the right of way. Other evidence shows that the section-house had been built as early as 1872, and had been

occupied thereafter by the employes, and was there at the date of plaintiff's purchase. With knowledge of this sort as to the possession by the railroad or railroads, the plaintiff is, we think, chargeable, under the law, with actual notice, or means of knowledge, of the defendant's claim. If he did not in fact know, he could and should have inquired as to the extent of the defendant's claim of title. Plaintiff was chargeable with the knowledge that, under the law, the corporation could take to the extent of 100 feet. He bought the quarter section subject to the donation made by said Browning, his predecessor in title, to the railroad company, and was aware of its possession, as above stated; and this, we think, is sufficient to estop him from claiming as an innocent purchaser for value.

As before stated, the evidence, we think, shows the original corporation was put in possession of the right of way, consisting of 100 feet, by the said owner of the land at that time, and that the entry of said corporation was with color and claim of title to said extent and width. Said original corporation and successor remained in the actual and exclusive and continuous possession of the 25 feet, at least, under color and claim of title to the whole strip, exercising in all that time such usual acts of ownership as the nature of the property permitted. This is, we think, a possession of the whole strip, and gives defendant title under the statute of limitations.

A number of other questions are suggested and discussed in briefs of counsel, but their consideration is unnecessary to the proper disposition of the case, and need not be further noticed. For the reasons hereinbefore stated, the judgment of the circuit court is reversed, in which all the judges concur.

KEITH v. BINGHAM.

(Supreme Court of Missouri. March 22, 1890.)

SPECIAL TAXES—STREET IMPROVEMENTS—EVIDENCE.

1. The provision of Const. Mo. 1875, art. 2, § 31, that private property cannot be taken or damaged for public use until compensation has been actually paid, applies only to the exercise of eminent domain, and it is no defense to special tax-bills for street improvements that the property was damaged by the improvement and no compensation has been made therefor.

2. As the law requires that the city engineer shall take a receipt from the contractor for street improvements before delivering special tax-bills to him, it will be presumed, in an action on such bills, in the absence of evidence to the contrary, that the law was complied with.

3. Moreover, the bills being *prima facie* evidence of the liability of the property to the charge stated in them, under Sess. Acts Mo. 1875, p. 252, art. 8, § 4, the burden is on defendant to prove that receipts were not given therefor.

4. The claim for damages to property by reason of changes in the street is a personal claim of the owner of the property at the time of the injury, and does not run with the land.

5. As the judgment can be levied only on the land against which the special tax is a charge, it is no defense to the action that defendant does not own the land, or that an action of ejectment for the land is pending.

6. It is not necessary that the tax-bills shall show that every prerequisite step necessary to their validity has been taken. Laws Mo. 1875, pp. 251, 252, art. 8, §§ 2, 4.

Appeal from circuit court, Jackson county; J. H. SLOVER, Judge.

This is an action to enforce two special tax-bills, issued under the charter of Kansas City, Mo., for grading the road-way and sidewalks of May street, in that municipality. The petition is in the usual form in such cases, demanding special judgment against certain real estate described, "claimed by defendant," and alleged to be chargeable with said bills, under the city charter. The answer, besides a general denial, contained an equitable defense, noticed more fully hereafter, as well as the following: "Defendant, for a third defense to the tax-bills sued upon, states that the lot described in plaintiff's petition is now, and was at all the times stated in plaintiff's petition, private property; that the grading mentioned in plaintiff's petition was done for public use, and damaged, and did not benefit, said lot; that no compensation was made or tendered to, or paid into, court for any person, as the owner of said lot, on account of said damages. Wherefore, the defendant asks judgment." To this last defense the trial court sustained a demurrer. The remaining issues were tried, and on findings for plaintiff special judgment was rendered, in due form, for the amount of the tax-bills to be levied upon the property described. The form which the bills have is best shown by this copy of one of them: "No. 24. Special tax-bill for grading a street, avenue, or highway, exclusive of sidewalks thereon. The City of Kansas, in the county of Jackson, the state of Missouri. I, William B. Knight, city engineer of the City of Kansas, aforesaid, certify that there has been completed the work of grading the sidewalks thereon, to be done as provided by ordinance No. 23,277 of the City of Kansas, aforesaid, entitled "An ordinance to grade a part of May street," approved October 19, 1882; that when such work was completed I computed the cost thereof, and apportioned such cost among the several lots and parcels of land to be charged therewith, according to the values thereof fixed by the city assessor, according to law, and charged each lot and parcel of property with its proper share of such cost; that, after so apportioning and charging the cost of such work, I made out this special tax-bill, according to such apportionment and charge, in favor of Kansas City Grading Company, by James Lillis, superintendent, the contractor to be paid, against the following described lot or parcel of land in the City of Kansas, in said county and state, to-wit: Lot 26, block 6, Hubbard's addition to the City of Kansas; that said land has been and is charged as aforesaid with two hundred and sixty-eight and twenty-six one-hundredths dollars, (\$268.26,) its proper share of such costs, which sum, if not paid in thirty days after the issue hereof,

shall bear interest from the issue hereof at the rate of fifteen per cent. per annum. The work so completed consisted of 8,242.5-10 cubic yards of rock excavation, costing \$2,107.68, and 24,827 cubic yards of earth-work and furnishing materials therefor, costing \$4,934.37, making the total cost for the grading of said street, between the points as above named, \$7,042.00, and said lot or parcel of land against which this special tax-bill is issued is charged as aforesaid for the ^{268.26} 7,042.00 part of such work, materials, and total costs. I certify this special tax-bill to be correct, this 20th day of July, 1883. WILLIAM B. KNIGHT, City Engineer of the City of Kansas." And indorsed on the back thereof the following: "Special tax-bill. For street. Registered. No. 24. For \$268.26. Vol. 5, page 420, in city engineer's office. Issued July 26, 1883, by city engineer. Assignment. February 5, 1884. For value received, this special tax-bill and the lien thereof is hereby assigned to Richard H. Keith, and he is authorized to sign the name of the Kansas City Grading Company to the receipt. KANSAS CITY GRADING COMPANY. BY JAMES LILLIS, Superintendent."

After the usual steps therefor, defendant appealed to the Kansas City court of appeals. That court sent the case here, because a constitutional question was raised and discussed by counsel. The other essential facts appear in the course of the opinion.

Wash Adams, R. H. Field, and Rollins Bingham, for appellant. *Bryant & Holmes*, for respondent.

BAROLAY, J., (after stating the facts as above.) 1. We will first consider the ruling of the trial court on the demurrer to the third defense, as what may be said on that branch of the case may possibly abbreviate the discussion on other points. It is claimed by defendant that the tax-bills in suit were issued in violation of that section of the constitution which declares "that private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained * * * in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed." Const. 1875, art. 2, § 21. Looking at this defense from the most favorable standpoint, it is evident that it is untenable. The section of the constitution just quoted refers to, and is intended to regulate the exercise of, the right of eminent domain, whereas special assessments for local improvements, such as the tax-bills before us, are referable to, and sustainable under, the taxing power. This distinction is well recognized both here and elsewhere in the United States. *Garrett v. St. Louis*, (1857,) 25 Mo. 505; *Lewis, Em. Dom.* § 5. If the taxing power has been called into play in the mode required by law for the purpose of paying for a local improvement, such as paving or grading a street, it is no defense

to a bill issued therefor to say, as is said here, that the street or the improvement damaged, and did not benefit, the property, though, if such were the fact, the party injured might have his action, on a proper showing, under the constitution for such injury. *Householder v. City of Kansas*, 83 Mo. 488. If the city had invoked the power of eminent domain unlawfully in the premises, it could be held accountable therefor; but that would not interfere with the collection of the special tax-bill for an improvement regularly made under the taxing power. The right of action which a person might thus have against the municipality would constitute no just defense to the claim of the contractor, who had made the improvement, and to whom, under the law in question here, the tax assessment is payable. The nature of these special taxes has been already so fully explained by judicial decisions in this state that little that would be new could now be added. As in other applications of the taxing power, it is not always possible to establish a scheme of assessment which shall bear with absolute uniformity on all property subject to the tax. Much latitude of discretion in exercising that power belongs to the legislative department, and the courts will not interfere with it unless there is some manifest abuse which is not claimed in this case.

The third defense in the answer is otherwise insufficient. It does not allege that defendant was the owner of the land when it was damaged, as claimed. In the absence of such an allegation, no defense would exist, even under defendant's theory of the purport of the constitutional provision relied upon. We have recently held that such damages are a personal claim of the owner of the property at the time of the injury, and that they do not run with the land. *Hilton v. St. Louis*, 12 S. W. Rep. 657. Hence, in any view taken of the answer, the ruling of the trial court on the demurrer to it was correct.

2. Defendant next contends that the tax-bills could not be liens in any event unless the contractor had receipted for them, as required by the city charter. There was no evidence that such receipt was or was not given. But plaintiff produced the tax-bills in evidence, and the law required the city engineer to take such receipt from the contractor before delivering the bills. In the absence of any contrary showing, it would be presumed that the city engineer acted rightfully in the premises, and that the receipt was therefore given. Apart from that, the bills themselves are made *prima facie* evidence of the liability of the property to the charge stated in them. *Sess. Acts 1875*, p. 252, art. 8, § 4. The burden was, hence, on defendant to prove that such receipt was not given. No such proof was offered.

3. The assignment of error next calling for notice is that based on the assumption that defendant is not the owner of the land against which these special taxes are a charge. If this be so, she cannot be prejudiced by any

judgment in the cause, for the reason that it can only be levied on the property described. But she evidently claims an interest in it, and the city charter declares that "it shall be sufficient for the plaintiff to * * * allege that the party or parties made defendants own, or claim to own, the land charged, or some estate or interest therein, as the case may be." Sess. Acts 1875, p. 252. The legislative intent in that enactment is clear enough. It is to permit the tax-bill to reach and hold such interest or estate as defendant may actually have, and to make a claim of title a sufficient basis to bring a party into court as a defendant. By a stipulation in the cause it was furthermore conceded that defendant was in possession of the property, and unexplained possession is *prima facie* evidence of title.

4. The equitable defense set up in the answer seeks to obtain relief against the prosecution of this action because of the pendency of an ejectment suit for the land affected by the tax-bills between defendant and a corporation of which plaintiff is president and manager. This is obviously no defense, in view of what has been already said in this opinion. Only such interest or estate as defendant actually owns can be charged with the lien of the bills, and the pendency of an action to try the title affords no reason to stay the enforcement of a special tax suit against such interest or estate, on the facts here disclosed, under the charter of Kansas City.

5. It is not necessary that each tax-bill should show on its face, as defendant claims, that every prerequisite step necessary to its validity has been taken. The law does not require that. The charter declares on this point that "the city engineer shall, after so apportioning and charging the cost of any work, make out and certify special tax-bills, according to such apportionment, and charge * * * against the several lots or parcels of land charged. * * * Each tax-bill shall contain a description of the lot or parcel of lands against which it is issued, full and correct enough to identify the same. * * * No such tax-bill need give the name of any party owning or interested in the land charged and bound by lien." Charter, art. 8, §§ 3, 4; Laws 1875, pp. 251, 252. All that need be said further on this point is that we regard the tax-bills before us as complying with the law in so far as concerns any objection that has been called to our attention. No other assignment of error seem to require discussion. All the judges concurring, the judgment is affirmed.

CITY OF ST. LOUIS v. THOMAS *et al.*

SAME v. WETZEL *et al.*

(Supreme Court of Missouri. March 22, 1890.)

MUNICIPAL CORPORATIONS—OPENING STREETS—APPEAL.

Under Rev. St. Mo. 1879, p. 1607, §§ 6-10, (St. Louis city charter,) providing that, in proceedings

to open alleys, the city may dismiss at any time before final action by the circuit court on the report of the commissioners, an appeal by the property owners from an order denying a new trial is premature where final action has not been taken on the report, though at the time of the appeal the court was in a position to take final action.

Appeal from St. Louis circuit court; L. B. VALLIANT, Judge.

E. T. Farrish, for appellant. *Leverett Bell* and *C. S. Broadhead*, for respondent. *William E. Fisse* and *Henry Kortjohn*, for Thomas.

BRACE, J. This was a proceeding in the circuit court of St. Louis to open through the premises of the defendant Thomas an alley 70 feet 2½ inches long by 16 feet wide. The premises of Thomas are situate in block 695 in said city, and extend from the east to the west side of said block, along the south line thereof. Previous to the institution of this suit an alley 16 feet wide, running north and south, had been dedicated and opened through this block from Miller street, on the north, southwardly to the north line of Thomas' premises; and these proceedings were instituted to extend the alley south 70 feet 2½ inches through the Thomas property to Barry street, on the south side of said block. The commissioners, by their report, valued the strip of ground thus proposed to be taken, with the improvements thereon, at the sum of \$820, and, to pay for the same, assessed benefits against each of the owners of the ground in said block, including said Thomas, abutting along the entire line of the alley from Miller to Barry street, to pay the same. The defendants, owners of the land abutting on said alley other than the said Thomas, excepted to the report of said commissioners apportioning the benefits aforesaid to each of them; and, their exceptions having been overruled, they excepted; and, their motion for a new trial having been overruled, they appeal. The defendant Thomas moves to dismiss the appeal on the ground that no final judgment has been rendered by the circuit court from which an appeal will lie.

The provisions of the charter governing in such cases are as follows: Rev. St. 1879, p. 1607. "Sec. 6. When the commissioners shall have viewed the property, and assessed the value and damages and benefits, they shall make their return of such assessment, in writing and under oath, to the circuit court, which shall be filed by the clerk thereof. In making such report, the value and damages allowed to each owner, and the benefits assessed against each individual, shall be separately stated. Sec. 7. The report of said commissioners may be reviewed by the circuit court on written exceptions filed by either party in the clerk's office within ten days after the filing of such report, and the court shall make such order therein as right and justice may require, and may order a new appraisal on good cause shown; but the hearing of such exceptions shall be summary, and the court shall fix a day therefor, without de-

lay, upon the filing of any such exceptions, or within ten days after the expiration of the time given said city to report the same to the assembly, as hereinafter provided." "Sec. 9. Upon the report of said commissioners being filed in the circuit court, or with the clerk thereof, the court shall give to the city of St. Louis, upon application of the city counselor, reasonable time to report the result of the same to the assembly for its information and approval, during which time no action shall be had in or by said court upon said report; and the city of St. Louis shall have the right, at any time before the final confirmation of said report, to dismiss and withdraw said proceedings on payment of the costs thereof. Should the city dismiss or withdraw any proceedings for condemnation after the report of the commissioners has been filed, no action for such condemnation shall be had for a period of ten years next thereafter, unless upon the petition of the owners of three-fourths of the property fronting on the line of the proposed improvement, or upon payment by the city of the entire value and damages such as aforesaid. Sec. 10. When the report of the commissioners shall have been approved, or final action taken thereon, by the court, the clerk of the circuit shall make a certified copy of the report, and the final action of the court thereon, and deliver the same to the city comptroller, who shall forthwith record the same in a book to be provided for that purpose. It shall be the duty of the comptroller, as soon as the same is recorded, to furnish a copy thereof to the assembly; and the assembly shall, at its first session thereafter, make an appropriation for the payment out of the city treasury of all damages assessed in favor of the owners of property appropriated, and the city treasurer shall cause the same to be paid to the parties entitled thereto, respectively, or into court for their use, as provided by ordinance. Any failure of the assembly, within the time above stated, to make such appropriation, shall operate as a dismissal of such proceedings; and no further action for such condemnation shall be commenced for a period of ten years, except as hereinbefore provided in case of a dismissal by the city."

The report of the commissioners appointed in this case was filed in the circuit court on the 8th day of December, 1886. Within 10 days thereafter, to-wit, on the 17th of December, 1886, the appellants herein filed their exceptions to such report; and no further action was taken thereon by the court until the 27th of June, 1887, thus affording the city counselor ample time to report to the assembly the action of said commissioners before the court proceeded further, at which date, the city having failed to dismiss or withdraw said proceedings, as it might have done by payment of costs, under section 9, supra, and said exceptions coming on to be heard, they were on the day last aforesaid overruled, to which action of the court the appellants duly excepted. That the case at this stage of the proceedings, under the charter provisions

cited, was in condition for final action by the court, we think, there can be no question; but the court took no such action. A motion for new trial was made and overruled, and an appeal granted, without any action by the court upon the report of the commissioners; and that report remains there undisposed of. Until final action is taken by that court upon such report, there is nothing finally determined, and nothing to appeal from. The appeal, consequently, being premature, must be dismissed. All concur.

STATE v. BURNS.

(*Supreme Court of Missouri. Jan. 27, 1890.*)

For majority opinion, see 12 S. W. Rep. 801.

SHERWOOD, J. I dissent, for the following reasons: It is among the fundamentals of criminal jurisprudence that, in indictments for felonies, nothing material can be supplied by implication or intendment. 2 Hawk. P. C. c. 25, §§ 60, 61; 1 Chit. Crim. Law, 172; 1 Bish. Crim. Proc. §§ 79-81, 86, 88, 517, 518, 519, especially last three sections. See, also, 2 Hale, P. C. 193; Russ. Crimes, (4th Ed.) 676, note; State v. Hayward, 83 Mo. 299; State v. Herrell, 97 Mo. 105, 10 S. W. Rep. 387; State v. Meyers, 12 S. W. Rep. 516,—which last cases cited from our own Reports the foregoing opinion virtually overrules. That opinion is a new departure from all precedent form and authority. If it be sufficient to say in an indictment that the defendant, with a certain knife, "did strike, stab, and thrust, in and upon the left side of the body of him, the said Frank Phelan, one mortal wound," why would it not be also sufficient to say, in another indictment, that the defendant, with a certain pistol, "did shoot, strike, discharge, and fire off, in and upon the left side of the body of him, the said Frank Phelan, one mortal wound?" Would any one contend that such an indictment would be good? If not good in the latter case, how then good in the former? If all forms are to be discarded and held for naught; if only what the indictment means is to be considered,—then prosecutions in criminal causes will certainly be greatly simplified. If, for an instance, a man is to be charged with uttering, or passing counterfeit money, all that the indictment need charge is that he "shoved the queer." If he is to be charged with forgery, all that need be said is that he "wrongfully imitated the handwriting of A. B."

CLARK v. FAIRLEY.

(*Supreme Court of Missouri. March 23, 1890.*)

Appeal from St. Louis circuit court; DANIEL DILLON, Judge.

A. A. Paxon, for appellant. Frank Hobson and E. A. B. Garesche, for respondent.

PER CURIAM. The appellant has filed briefs in this case, but he has filed nothing which is, or professes to be, an abstract or abridgment of the record, as required by consolidated rules 15 and 16; and because of a failure to comply with these rules the judgment is affirmed.

COLE COUNTY v. DALLMEYER.

(Supreme Court of Missouri. March 22, 1890.)

COUNTY TREASURERS — SETTLEMENT OF ACCOUNTS — EVIDENCE.

1. The county court, before which Rev. St. Mo. 1879, § 5378, makes it the duty of a county treasurer, or the personal representative of a deceased county treasurer, to settle his accounts, does not, in such examination, act in a judicial capacity, but merely as an auditor of public accounts, or as financial agent of the county.

2. Rev. St. Mo. 1879, § 5379, requires certain officers, not including county treasurers, to settle their accounts with the county court at each term, and pay into the treasury any balance found due; and section 5380 gives the county court authority, if they neglect to render true accounts, to adjust their accounts according to the best information it can obtain, and ascertain the balance due, for which, under section 5383, it may enter judgment. *Held*, that these sections do not provide for or contemplate a judgment against the personal representative of a deceased officer.

3. The proceeding provided by these sections is special and summary, and does not oust the circuit and probate courts of their general jurisdiction.

4. Rev. St. Mo. 1879, § 192, giving probate courts jurisdiction of suits against executors and administrators on demands against deceased persons, gives them jurisdiction of claims by a county against the personal representative of a deceased county treasurer.

5. For any balance due a county from its treasurer, the county may either sue on his official bond or sue the treasurer in *assumpsit*; or, if the treasurer is dead, it may enforce its claim in the probate court against his estate.

6. Rev. St. Mo. 1879, § 5378, requiring the outgoing county treasurer, or, if he be dead, his administrator, to deliver to the successor in office all moneys belonging to the county, does not require suits for such moneys against the outgoing treasurer or his administrator to be brought in the name of such successor; but, under sections 5356, 5357, giving counties express authority to sue in their own names for money due them, the suit should be brought in the name of the county.

7. The probate court made an order adjourning until August 26th, across the entry of which was written, "Vacated;" this being a method of setting aside orders once entered on the record. On August 23d an order was entered adjourning the regular term, and providing for an adjourned term on August 26th, on which day another order was entered adjourning, and providing for another adjourned term on September 11th. *Held*, that the probate court had jurisdiction to allow demands at either of the adjourned terms, under Rev. St. Mo. 1879, § 1044, providing that adjourned sessions may be held in continuation of the regular terms, where so ordered in term-time, and section 193, providing that demands may be allowed by the probate court at an adjourned term.

8. A receipt by a succeeding treasurer, purporting to be in full of the balance due the county from a deceased treasurer on a certain fund, is only *prima facie* evidence of payment in full; and the county can show the amount due, and the treasurer's personal representative the amount paid, by other evidence.

Appeal from circuit court, Cole county.

For report on former hearing, *sub nomine*

Cole County v. Schmidt, see 10 S. W. Rep. 888.

Silver & Brown, for appellant. *Draffen & Williams* and *Edwards & Davidson*, for respondent.

BLACK, J. Frank Schmidt was elected treasurer of Cole county at the November election in 1882. He qualified and continued to discharge the duties of his office until his death, which occurred in November, 1884. Jacob Tanner became the successor of Schmidt. Kunigunda Schmidt qualified as the executrix of the deceased treasurer. Cole county filed a claim in the probate court against the Schmidt estate for \$1,647.74, balance claimed to be due on the county interest fund, which claim was allowed by the probate court; and the executrix appealed. The circuit court, on a trial anew, sustained a demurrer to the evidence, and the county sued out this appeal, pending which the executrix died; and the cause has been revived in the name of Dallmeyer, administrator with the will annexed.

1. For the defendant, it is insisted that the probate court had no jurisdiction to allow the demand; and, if it be so, then it must follow that the circuit court had no jurisdiction of the appeal. The claim is founded on the notion that the statute gives the circuit court exclusive jurisdiction to hear and determine such demands. Section 5378, Rev. St. 1879, makes it the duty of the county treasurer to settle semi-annually with the county court at specified terms of the court; and, in case of his death, it is made the duty of his executor or administrator to make immediate settlement, and deliver to the successor in office all money belonging to the county, "and at each settlement the county court shall immediately proceed to ascertain by actual examination and count the amount of balance of funds in the hands of such treasurer to be accounted for, and to what particular fund or funds it appertains, and cause to be spread on its records, in connection with the entry of such settlement, the result of such examination and count." The county courts of this state have many duties to perform, some of which are judicial, and others are not of that character. The court, in making the stated settlements with the treasurer and other officers, does not act in a judicial capacity. It acts in the capacity of an auditor of public accounts, or as the financial agent of the county. This matter has been so often considered by this court that it is sufficient to cite the following cases: *Marion Co. v. Phillips*, 45 Mo. 76; *State v. Roberts*, 60 Mo. 402; *State v. Roberts*, 62 Mo. 388; *State v. Smith*, 65 Mo. 464.

Section 5379, Rev. St. 1879, makes it the duty of collectors, sheriffs, marshals, clerks, constables, and other persons chargeable with moneys belonging to any county, to settle with the county court at each stated term,—there being four of these terms,—and to pay into the treasury any balance found due; and

section 5380 declares: "If any person thus chargeable shall neglect or refuse to render true accounts, or settle as aforesaid, the court shall adjust the accounts of such delinquent according to the best information they can obtain, and ascertain the balance due to the county." And section 5383 enacts: "Unless the delinquent appear on the first day of the next succeeding term, and show good cause for setting aside such settlement, the court shall enter up a judgment for the amount due, with 30 per cent. per annum until paid, and issue execution therefor. Such delinquent shall, moreover, be deemed guilty of a misdemeanor in office, and proceeded against accordingly." This proceeding commenced and carried on by the county court under sections 5380 and 5383, is a different thing from the stated settlements made on the presentation of the officers' accounts, and is, undoubtedly, judicial in its character. *Owens v. Andrew County Court*, 49 Mo. 372. If these sections have any application to the treasurer at all, they do not provide for or contemplate a judgment against an executor or administrator of a deceased officer. Certainly an execution could not be issued by the county court against a dead man's estate.

Again, there is not a word in any of the sections before noted that professes to give the county court exclusive jurisdiction. The proceeding pointed out for the county court to pursue is special and summary, and does not oust the circuit and probate courts of their general jurisdiction. The remedy provided for in these sections of the statute is cumulative, and, if resorted to at all, must be had at the time and in the manner specified. Turning now to the administration law, we see the probate courts have jurisdiction to hear and determine all suits against executors and administrators upon demands against deceased persons. Section 192. Debts due a county, except taxes, must be allowed and classed as other demands, though a priority is given to them. From all this there can be but one conclusion, and that is this: That the summary proceeding which may be had in certain cases in the county court does not in the least affect the jurisdiction of the probate and circuit courts. The demand of the county against the officer may be established by the judgment of the circuit, or, if he be dead, then by the circuit or probate court.

2. The next point made is that the suit should have been on the bond of the treasurer. The county could, of course, sue on the bond, but it is not restricted to that remedy. The giving of the bond did not extinguish the treasurer's general obligation to pay over whatever funds of the county were in his hands at the expiration of the term of his office. For any balance the county could either sue on the bond or sue the treasurer in *assumpsit*. *Walton v. U. S.*, 9 Wheat. 651. And, the treasurer being dead, the claim may be allowed against his estate by the probate court.

3. Again, it is insisted that the succeeding treasurer is the only party who can maintain this suit, and this claim is based on section 5378 of the statutes before noted. That section makes it the duty of the outgoing treasurer, or, if he be dead, then of his administrator, to deliver to the successor in office all things pertaining thereto, and all moneys belonging to the county; but no express authority is given the succeeding treasurer to sue in his own name for moneys due the county. By sections 5356 and 5357, express authority is given to the county to sue in its own name for any money due to it. Where the funds sued for belong to the county, and the suit is upon a bond given to the state as obligee, the suit should be in the name of the state to the use of the county; but, if the action is not on a bond or contract in the name of a third person, then the suit should be in the name of the county. This is not only the plain letter of the statute law, but it is the result of the former adjudications of this court. *State v. Rubey*, 77 Mo. 618; *State v. Sappington*, 68 Mo. 454; *Lafayette Co. v. Hixon*, 69 Mo. 581; *Barry Co. v. McGlothlin*, 19 Mo. 308.

4. It is also contended by the defendant that the claim was allowed by the probate court after it had adjourned until court in course, and for that reason the probate judge had no jurisdiction to hear or allow it. The facts as disclosed by the record are these: The regular term began on the 10th of August, 1885, and the transcript shows the following orders: August 20, 1885. "Ordered that the court adjourn until August 26, 1885," and across this entry is written: "Vacated." August 22, 1885. "It appearing that the business of this court requires an adjourned term, it is hereby ordered that one be held commencing Wednesday, August 26, 1885; and it is further ordered that the present regular term of this court be adjourned without day." On August 26th a like order was made for an adjourned term on the 11th of September, and adjourning court without day. The demand was allowed on the 11th of September. The effect of writing the word "Vacated" across the entry of August 20th was to set aside that order. This is an informal method of vacating an order once spread upon the records of a court, but the intention is clear enough. The order made on August 22d, after providing for an adjourned term on the 26th of the same month, goes on to say that the regular term is adjourned without day. This order must be taken and construed as a whole; and, when this is done, it amounts to saying this: "The regular term is now closed, but an adjourned term will be held on the 26th of this month." The statute concerning courts of record provides that "special or adjourned sessions" may be held in continuation of the regular terms when so ordered in term-time. Section 1044. These special or adjourned terms are continuations of the regular term, and yet they are called "adjourned terms;" and the statute pro-

vides that demands may be allowed by the probate court at a regular or adjourned term. Section 198. The order made on August 22d was sufficient, and it gave the court the power to hold an adjourned term on the 26th of that month, and the order made on that day gave the court the power to hold a further adjourned term on September 11th, and the court had the power to allow demands at either of these adjourned terms; notice of the presentation of the same having been given, which was done in the present case.

5. The evidence tends to show that Schmidt made a settlement with the county on May 6, 1884; that there was then due the county interest fund \$6,252.64; that subsequently he received other amounts from the collector due the same fund, making in all \$7,046.49; that he and his executrix paid out various amounts, leaving in his hands to that fund \$1,646.79. The amount paid by the executrix is evidenced by the receipt of Tanner, the succeeding treasurer, showing a payment of \$11,877.55, "being in payment of the following balances found due the following funds;" and, among others, "county interest fund, \$2,053.15." Although this receipt professes to be a receipt in full for the balance due the interest fund, still it shows the exact amount paid on that fund; and, if there is in fact a balance still due, the receipt is no obstacle in the way of recovering that balance. The receipt is but *prima facie* evidence; and, as no formal pleadings are required in the probate court, or in the circuit court on appeal, it was competent and proper for the county to show that there was still an unpaid balance due to it. On the other hand, it was competent for the defendant to show that the whole amount paid by the executrix was all that was due the county on the various funds.

6. Many other matters are suggested why the judgment should not be reversed, but we think enough has been said to show that this case must be tried on its merits; and to that end the judgment is reversed, and the cause remanded.

SHERWOOD, J., dissents. The other judges concur.

ROGERS v. WHEATON et ux.

(Supreme Court of Tennessee. April 26, 1890.)

FORCIBLE ENTRY—EVIDENCE—UNRECORDED DEED—CERTIORARI.

1. Acts Tenn. 1869-70, c. 64, relating to unlawful entry and detainer, provides that proceedings in such actions may, by writ of *certiorari* and *supersedeas*, be removed to the circuit court within 30 days after judgment, upon a petition showing merits. Held that, where such petition is not filed until after the 30 days have elapsed, it must, in addition to showing merits, show a good and sufficient cause for the delay, and such as would entitle the petitioner to relief under the general rules of removal on such writs.

2. In an action of unlawful entry and detainer, defendants claimed under a lease for 15 years from plaintiff's grantor. It appeared that J. and H., a married woman, had owned the land, J. hav-

ing an estate for life, and H. the remainder; that J. had leased to H. his interest; and that she, with the parol consent of J., had leased to defendants for 15 years, giving them a writing signed by herself, but which was not registered. Afterwards J. and H. conveyed to plaintiff, who registered his deed. The lease given by H. did not appear to have been executed by her under private examination. Held that, under Code Tenn. § 2030, requiring leases for more than three years to be registered, and section 2074, providing that a registered instrument shall be of effect as against an unregistered instrument of earlier date, the lease to defendants was inoperative as against plaintiff's deed.

Appeal from circuit court, Shelby county; L. H. ESTES, Judge.

Action for unlawful detainer brought by S. A. Rogers against Vincent Wheaton and wife. There was judgment for defendants, and plaintiff appealed.

T. W. and R. G. Brown, for appellant. A. H. Douglass, for appellees.

LURTON, J. This is an action of unlawful detainer. The suit was begun before a magistrate, who rendered judgment for the plaintiff. More than 30 days after judgment, the defendants obtained writs of *certiorari* and *supersedeas* to remove the case to the circuit court. This petition showed merits, but gave no reason for failing to appeal. A motion to dismiss the petition was overruled by the circuit judge. The case was then heard upon the merits, and judgment rendered for the defendants, and from this judgment the plaintiff has appealed, and assigns error. By the act of 1869-70, c. 64, carried into the compilation of Milliken & Vertrees at sections 4092 and 4093, it is provided that proceedings in actions of unlawful entry or detainer may, by writs of *certiorari* and *supersedeas*, be removed to the circuit court upon petition showing merits "within thirty days after rendition of judgment." The petition, in such case, need not show any reason for failing to appeal; it need only show merits. Elliott v. Lawless, 6 Heisk. 123. But to entitle the petitioner to this relief upon the merits alone, the petition must be filed within 30 days, as required by the statute. If more than 30 days have elapsed before application for writs of *certiorari* and *supersedeas*, the petitioner must show a good and sufficient reason for his delay, such as would entitle him to relief under the general rules applicable to the removal of causes to the circuit court upon such writs. Section 3362 of the Code, which permitted such causes to be taken to the circuit court by *certiorari*, at any time before the writ of possession is executed, was repealed by the act of 1869-70, and the time within which the cause may be removed by *certiorari* fixed at 30 days. The petition should, upon motion, have been dismissed. But upon the merits the judgment should have been for the plaintiff. This property was part of a larger parcel, originally owned by A. B. Jewell and Mrs. S. C. Holt, the former owning an estate for life and the latter the remainder interest. By permission of the owner of the life-estate Mrs. Holt oc-

cupled the lot in controversy as tenant at will, paying no rent. While thus in possession, she sublet, with the parol consent of the life-tenant, this lot to the defendants for a term of 15 years. A writing to this effect was signed by Mrs. Holt and her husband, and delivered to defendants. This lease was never signed by the life-tenant, and the privy examination of Mrs. Holt was never taken, and the lease never registered. In this situation the plaintiff bought the entire property, including the leased portion. He took deed in fee from both Jewell and Holt and wife, with covenants of seizure and warranty. This deed was duly executed and at once registered. An action of unlawful detainer was then instituted to dispossess defendants. There was judgment for defendants. This judgment, as appears by memorandum opinion upon the record, was affirmed by this court upon the ground that defendants were tenants from year to year at will, and could not be dispossessed after another yearly renting had begun, no notice having been given before expiration of the year of an intention to terminate the tenancy. Afterwards notice was given, and a new action brought at expiration of the current year, with the results above stated.

A lease for more than one year is by the statute of frauds required to be in writing. Code, § 1758. If for more than three years, it is such an instrument as is required to be registered. Code, § 2030. The lease of a married woman, required to be in writing or registered, is invalid, and does not estop her, unless her acknowledgment be taken after privy examination in the manner prescribed for the execution of deeds and "other instruments" by the statute. Her privy examination is part of the execution of the instrument. It is the privy examination, and not her signature, which gives validity to her deed. *Perry v. Calhoun*, 8 Humph. 551. By section 2074 of the Code effect is given to the instrument first registered over one of earlier date, unless it be proven in a court of equity that the party claiming under the subsequent deed had notice of the previous instrument. Under this provision a court of law can look only to the priority of registration, and proof of notice of the unregistered instrument was irrelevant and incompetent. *Bledsoe v. Rogers*, 3 Sneed, 466. The parol consent of Jewell, the tenant for life, to a letting for a term of 15 years was, under the statute of frauds, ineffectual and invalid, and had no other effect than to ratify the tenancy of defendants as tenants at will from year to year. The non-execution of the lease by Mrs. Holt in manner required by statute makes the lease as a lease for more than one year void as to her. The non-registration of the lease made it ineffectual as to Rogers in a court of law, his deed having been first registered, even if valid as to the lessors. The result is that Wheaton and wife were tenants at will from year to year, the written lease being a nullity. They were lessees by parol for 15

years, which constitutes them tenants at will from year to year. *Shepherd v. Cummings*, 1 Cold. 354. The judgment of the circuit court will be reversed, and petition dismissed, with costs.

HARMON v. HAGERTY *et al.*

LOUISVILLE BANKING CO. v. SAME.

(*Supreme Court of Tennessee. May 1, 1890.*)

NEGOTIABLE INSTRUMENTS — BONA FIDE HOLDER.

The fact that the payee of a negotiable note, at the time he negotiated it with plaintiff bank, deposited collaterals to secure it, does not import notice to plaintiff of failure of consideration where plaintiff's president and cashier testify that they knew nothing of the consideration, except that it was given for some kind of property, and that the payee told them that the note was good, and that he preferred to have it discounted so that he would not be appealed to by the maker for an extension of time.

Error to chancery court, Shelby county; B. M. ESTES, Chancellor.

Gault & Patterson, for plaintiff in error.
Myers & Sneed, for defendants in error.

FOLKES, J. These cases were consolidated in the court below, and heard together, resulting in a decree in favor of the banking company against Hagerty for principal, interest, and protest fees upon a certain note for \$3,333.33, executed by said Hagerty, payable to the order of Archer Harmon, and by the latter indorsed, before maturity, to the said banking company. The decree is now before us on writ of error.

The contention on behalf of the maker of the note is that the note was given for an undivided one-fourth interest in certain patent-rights, the title to which was not wholly in the vendor, and that the assignment of the interest so purchased was incumbered with certain reservation of royalties, the existence of which were kept secret from Hagerty, and that, by reason of these matters and other transactions growing out of such purchase, and connected with the partnership formed for carrying on the business in which the patent-rights were to be used, the said Hagerty had equities against said note sufficient to defeat any recovery thereon, and that the Louisville Banking Company was not an innocent holder for value of said note, so as to defeat such equities. The chancellor held that there was no fraud in the procurement of the note, and that no valid defenses existed thereto, even against Harmon, the payee. He also adjudged that the bank was an innocent holder, and could recover on the note even had there been the fraud and failure of consideration as charged by Hagerty.

In the view we have taken of the case, it is unnecessary here to discuss the voluminous proof on the question of fraud in the inception of the note. If the bank be an innocent holder of the note, the decree in its favor must be affirmed. Inasmuch as this note does not disclose on its face that it was given for an interest in a patent-right, it does not fall

within the act of 1879, c. 228, carried into the Mill. & V. compilation at section 2481, allowing all defenses, legal and equitable, against the indorsee that might be made against the original payee.

With this statute out of the way, we have to consider whether the bank is an innocent holder under the law-merchant. The maker of the note predicates his contention that it is not such holder upon the fact—which, it is claimed, is developed in the proof—that the payee, at the time the note was discounted, agreed to and did leave with the bank an amount of money equal to the face of the note as collateral security for the ultimate payment of the note, and that in consequence of, and as a part of, said agreement, the bank assumed to and has used the maker, without appropriating said money or collateral of the indorser. This fact, it may be and is conceded, is a matter that can be looked to by the court as proof tending to show that the bank did not discount said note in good faith; and this fact, unexplained or unqualified by other proof, might well warrant the court or jury, as the case may be, in finding that the transaction was a mere device resorted to for the purpose of making out a case of *bona fide* purchase or discount on the part of the bank, so as to defeat the equities of the maker as against the payee. But, where the purchase or discount of the note is otherwise made in good faith, with no knowledge of any infirmities in the note, and nothing to excite suspicion in the mind of the party discounting or purchasing the same, the mere fact that the bank, being unacquainted with the maker, and knowing nothing of his financial rating, required or accepted collateral security from its customer, the indorser, at whose instance and for whose benefit the discount was made, will not be sufficient to require the court to hold, as a matter of law, that such bank is not an innocent holder. Here the president and cashier of the bank both swear positively that they knew nothing of the consideration for which said note was given, save that it was for some kind of property; that they discounted it for the accommodation of the payee, who was a regular customer and depositor with the bank; that their customer told them at the time the note was good, and the payee solvent, and that he had no doubt but what it would be paid at maturity, but that he preferred to have it discounted, so that he would not be appealed to by the maker, as his friend, for delay or extension. It is urged by counsel for the bank that the agreement as to collateral was not made at the time of the discount, but only after the maker had defaulted; and such is the statement of the payee in his deposition. But, from the testimony of the president of the bank, while his language may be open to the same construction, it appears to us to point to the time of the discount as the time when such agreement was made; and, in reaching the conclusion that it does not defeat the right of the

bank to recover as an innocent holder in due course of trade, we have accepted the proof as showing that the agreement was contemporaneous with the act of purchase.

The decree of the chancellor will be affirmed, so far as it renders judgment on the note in favor of the bank against Hagerty. But, inasmuch as there is still pending in the court below one of these bills for the settlement of the partnership accounts between Harmon, Hagerty, and Warren, growing out of the business connected with these patents, in which the matters of fraud in the procurement of said note by Harmon may be material to Hagerty, it is deemed proper to so modify the decree of the chancellor as to leave open the question of fraud and failure of consideration for said note as between Hagerty and Harmon.

POWELL v. VIRGINIA CONST. CO.

(Supreme Court of Tennessee. April 20, 1890.)

MASTER AND SERVANT—INDEPENDENT CONTRACTOR.

A construction company engaged in building a railroad made a subcontract for the construction of the road from a given point as far as the company's chief engineer might determine, the company to furnish a locomotive and train, with engineer, fireman, and brakeman, for the use of the subcontractors in such work. Held that, while engaged in such work, the subcontractors were independent contractors, for whose negligence in the management of the train the company was not liable.

Appeal from circuit court, Shelby county; L. H. ESTES, Judge.

Action by John W. Powell against the Virginia Construction Company. Defendant obtained judgment. Plaintiff appeals.

M. B. Frizant, for appellant. J. H. Watson, for appellee.

LURTON, J. The defendant is a corporation engaged in the business of doing railway construction under contract. It had a contract for the construction of the Tennessee Midland road from Memphis to Jackson. It sublet a portion of the tracklaying to a firm of contractors known in the record as Meridith & Horton. The plaintiff, while the general servant of defendant, and while acting as a brakeman, was injured in making a coupling, and sustained the loss of an arm. The negligence alleged was that of Meridith, one of the subcontractors; and the case turns upon the question of the liability of defendants for his negligence. The contract between Meridith & Horton and defendant was in the following words and figures:

"Virginia Construction Company. Articles of agreement (signed in triplicate) made and concluded this 15th day of November, 1887, by and between J. P. Meridith and J. R. Horton, under the firm name of Meridith & Horton, parties of the first part, and the Virginia Construction Company, party of the

second part: Witnesseth, that the party of the first part does hereby agree to lay the track of the Tennessee Midland Railway Company east from a connection with the M. & C. R. R. tracks at or near McGhee's Junction as far as the chief engineer of the party of the second part may determine and order, for the sum of four hundred and seventy-five dollars (\$475.00) per mile, including all handling and rehandling of materials, to-wit:

For unloading rails, ties, and fastenings on arrival per mile	\$15 00
Reloading and unloading same during progress of work	60 00
Distribution of ties	125 00
Laying and surfacing track	275 00

Total,—laying and surfacing per mile, complete, including all handling of materials of every kind..... \$475 00

—It is understood that the party of the second part will furnish push-cars, locomotive, flats, and engineer, fireman, and one brakeman; that there shall be two thousand eight hundred and sixteen (2,816) ties to the mile, full spiked; that the fish-plates shall have four (4) bolts to the joint, carefully adjusted; and that the track shall be surfaced with the best material found contiguous to the road-bed, but material for surfacing is not to be taken from the embankments, but procured outside of the slopes; and, where necessary, said material shall be hauled. In crossing the river bottoms, or at other places where surfacing material is difficult to get, such extra allowances may be made as the chief engineer deems equitable. The parties of the first part hereby agree to put in the cattle-guards upon that part of the road where the track is laid by them as per plan furnished, including excavation of pit and all materials for guard and fencing, for \$45.00 each. The lumber used in cattle-guards to be of heart white oak, heart past oak, or heart yellow pine, free from all defects calculated to impair strength; the whole to be done, in a thorough and workman-like manner, to the satisfaction of the chief engineer of the party of the second part. Approved as being in accordance with proposal of party of the first part. R. H. TEMPLE, Chief Engineer. MERIDITH & HORTON. Witness: T. T. TALLEY, C. L. POWERS, JR. VIRGINIA CONSTRUCTION COMPANY. By —, V. P. & G. M. Attest: R. L. TRAYLOR, Asst. Secty."

No question is made as to the competency of the several members of the crews of the train for the posts to which they were assigned by defendants, in whose general service they were. The negligence alleged is that Mr. Meridith temporarily displaced the engineer on one of the construction engines, and ordered his fireman to act as engineer, while plaintiff, a brakeman on same train, did some necessary coupling. By the negligent and unskillful conduct of this acting engineer, in the management of the engine while making this coupling, plaintiffs arm

was crushed. It is charged that the unfitness of this fireman to manage an engine was known to Meridith, and unknown to plaintiff. Plaintiff's suit was originally against both the Tennessee Midland road and the Virginia Construction Company. There have been two trials of the cause. The first resulted in a verdict and judgment in favor of plaintiff, but against the construction company alone. This verdict as against defendant was set aside, and new trial granted. Upon the second trial, there was verdict and judgment for defendant. Both records are before us, but no error is assigned upon the failure of the circuit judge to set aside the verdict in the first trial in favor of the railway company.

Was Meridith the agent or servant of the Virginia Construction Company in the management of this construction train? If he was, defendant is responsible for his negligence. If, however, he was not the agent or servant of defendant, but an independent contractor with reference to the work he had contracted to do, and in the management and control of this train, and the defendant had no right to control his conduct in the particular matter complained of, then plaintiff's remedy would be against Meridith & Horton, the subcontractors, and not against defendant. An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to control of his employer, except as to the result of his work. The employer of such a contractor, if he be a fit and proper person, and the work be not in itself unlawful or a nuisance in itself, or necessarily attended with danger to others, will not be responsible for his negligence, or that of his subcontractors or his servants. Mr. Thompson, in his work upon Negligence, says that "in every case, the decisive question is, had the defendant the right to control, in the given particular, the conduct of the person doing the wrong?" 2 Thomp. Neg. 909. The fact that the general contractor sublets a part of the work embraced in his own contract, and stipulates, as in the contract under consideration, "that the work is to be done, in a thorough and workman-like manner, to the satisfaction of its chief engineer," will not be such an assumption of a right to control, as to the details or methods of doing the work, as will make him responsible for wrongs of such subcontractors or his servants. Such a provision is nothing more than is usual and necessary in order to enable the employer to see that the work contracted for is carried out, and neither implies nor authorizes any such control of the details as would make the contractor his servant. Id. 913; Pack v. New York, 8 N. Y. 222; Erie v. Calkins, 85 Pa. St. 247; Clark v. Railroad Co., 36 Mo. 202. The fact that this contract provided that the track was to be laid as far as it should be ordered by the chief engineer of defendant does not take it out of the rules

applicable to independent contractors. *Hughes v. Railroad Co.*, 15 Amer. & Eng. R. Cas. 100.

There can be no serious doubt but that, upon the face of this contract, Meridith & Horton were independent contractors, within the rule we have stated, in so far as their engagement applies to the surfacing and laying of track. The difficulty presented arises upon that provision by which the defendant contracted to furnish them with "push-cars, locomotive, flats, and engineer, fireman, and one brakeman." Now, if this be construed as an engagement whereby the defendant agreed to do part of the work,—such part as required the use and services of a train,—and that it was to do this part with its own cars, engines, and train servants, so that this part of the work was to be done by it independently of Meridith & Horton, or in conjunction or co-operation with them, then the defendants would be in the control of this train, and its crew would be not only their general servants, but their special servants, engaged in the special work of defendants. In such case, if Meridith & Horton were permitted by defendants to manage and control this train exclusively, or in co-operation with it, they would be their agents and servants with respect to such contract and management, although, as to the other work to be done by them, they would be independent contractors.

But, upon looking to this contract in all its parts, we do not think that it was contemplated that any part of the work involved in it should be done or carried on by defendants, either independently or in co-operation with the subcontractors. The contract requires M. & H. to unload the rails, ties, and fastenings. Now, this clearly contemplated the delivery of these materials to them, and, presumably, at the point where the track to be laid made connection with some completed railway over which this material had been shipped. Having unloaded the material at the place of arrival from the cars of the carrier, the contract then plainly requires (1) the reloading upon their own train for distribution along the line of the progressing work; (2) the unloading at points convenient for use or redistribution; (3) the distribution of ties in advance of tracklaying; (4) the laying of the track and its surfacing. It is manifest that this work would require one or more construction trains, with crews necessary for operation. Now, in view of the situation and the work to be done, the meaning of the contract seems to be this: That, inasmuch as, in the transportation of material from point of beginning to points along the advancing way, and in the distribution thereof, it would be necessary, in order to do their work, that the contractors for tracklaying should have the use of push and flat cars, and an engine, and the services of an engineer, fireman, and brakeman, familiar with management of trains, and, inasmuch as the defendant owned and had upon the

ground such engine and cars, and had in its services competent men to operate such a construction train, it was, therefore, agreed that defendant should furnish such construction trains and crew to Meridith & Horton, to be under their control, to aid them in doing their work, and that defendant should on this account pay them as much less for the work they were to do as such appliances and servants would cost them if they had had to find the engines and cars, and pay the men, themselves. Obvious economic reasons would require that the train distributing materials should be under the control of the men who had contracted to lay the track.

But it is urged very earnestly, that, inasmuch as this contract implies that the servants operating this train were to be selected and paid by the defendant, therefore they continued to be the servants of the defendant, and that no power to control them, or this train could be vested by contract in another save by way of delegation, and that, as matter of law, the person exercising control would be the agent of the general master. This argument seems very plausible, and furnishes the real point of difficulty in the case. The question which is thereby raised is for the most part a new one, and the decisions—few in number—show a diversity of judicial opinion. After careful consideration, we think the weight of opinion as well as of reason is that the fact that one is the general servant of one employer will not, as matter of law, prevent him from becoming the particular servant of another. The question as to who originally employed the servant, or who pays him, is not always a conclusive test as to who was his master in and about a particular work upon which he was engaged. The better test would seem to be, was he, in regard to the particular matter in which he was employed, doing the work of his general master; or was he engaged in doing the work of another, over whom the general master had no control? If he was performing a special service for another, who, with reference to the details of such work, was an independent contractor, then the servant will, as to that particular service, be the servant of the one for whom such service was performed, although he may be the general servant of another.

The case of *Railroad Co. v. Norwood*, 62 Miss. 565, and of *Burton v. Railroad Co.*, 61 Tex. 526, have been pressed upon us by counsel. They are not in harmony with the view we have reached, in so far as they seem to rest the question upon the power of employment and discharge, and the duty of paying. Those tests would prevent the general servant of one from, under any circumstances, becoming the particular servant of another. The general master would always stand responsible for his negligence, although engaged in doing the work and under the control of another. We think the better rule, and the better supported rule, to be that announced by Chief Justice COOKBURN in

Rourke v. Colliery Co., 2 C. P. Div. 209. In that case the learned judge said: "When one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him." The case in which this principle was applied was this: The colliery company contracted with one Whittle to sink a shaft and remove the soil. The services of an engine and engineer were necessary to the accomplishment of this work. The colliery company, having such an engine and an engineer in its service, contracted to let Whittle have this engine and engineer to aid him in doing his work, and to be under his control, and that it should pay Whittle as much less for his job as he would have had to pay if he had had to find the engine, and pay the engineer, himself. By the negligence of this engineer, the general servant of the colliery company, the plaintiff, Rourke, sustained an injury for which he sued the colliery company. It was held that the engineer, being under the control of Whittle, an independent contractor, and being engaged in doing his work, was while thus engaged the particular servant of Whittle, though he had been selected and paid by the colliery company, and was its general servant, yet the latter was not liable for his negligence while thus engaged. The same principle was applied in the following cases, the facts of which brought them within the same general principles as are decisive of the case now under consideration. *Miller v. Railroad Co.*, 39 N. W. Rep. 188; *Cunningham v. Railroad Co.*, 51 Tex. 503; *Railroad Co. v. Grant*, 46 Ga. 417; *Vary v. Railroad Co.*, 42 Iowa, 246; *Jaslin v. Ice Co.*, 50 Mich. 516, 15 N. W. Rep. 887.

The construction of this contract by the learned circuit judge was in accord with the view we have taken of it. It was, of course, competent for the plaintiff to show that, as matter of fact, the parties had put a different construction upon it by their conduct, and that defendant had in fact exercised a supervision and control over the work, in its details, inconsistent with the presumed character of Meridith & Horton as independent contractors, thus making a liability outside of the contract. It was also competent to show that, with reference to the control of the construction train, Mr. Meridith was in fact the agent and servant of defendant, either by express authority or by implication arising from the conduct of the parties, and the uses to which the train was put. All proof which tended to show any of these things was admitted, and the jury properly and clearly instructed as to its legal effect. There is an abundance of evidence to support, under our rule, the finding of the jury for defendant, and there was no error in the charge. There was no error in setting aside the first verdict in this case, and none in refusing to set aside the last. Judgment affirmed.

CHESAPEAKE, O. & S. W. R. Co. et al. v. FOSTER.

(Supreme Court of Tennessee. April 27, 1890.)

PRACTION ON APPEAL—INSTRUCTIONS—RAILROAD COMPANIES—NEGLECTOR.

1. A charge of the court, which, though copied into the transcript, is not included in the bill of exceptions, will not be considered on appeal.

2. The refusal to give special instructions cannot be assigned as error when such instructions are asked for before, instead of after, the general charge has been given, and such general charge is not preserved in the bill of exceptions.

3. Under Code Tenn. § 1167, which declares that in every case of non-observance by a railroad company of certain precautions to prevent accidents the company shall be liable for the damages caused thereby, the fact that the injured person was guilty of contributory negligence, though admissible in mitigation of damages, is no bar to the action.

Appeal from circuit court, Dyer county; THOMAS J. FLIPPIN, Judge.

Parks & Johnston, for appellants. *Holmes Cummings and Latta, Parks & Draper*, for appellee.

CALDWELL, J. On the 2d day of August, 1888, David Foster, a colored man, about 70 years of age, while walking upon the railroad track about one mile south of Newbern, Tenn., was overtaken by a freight train, struck by the locomotive, and so severely injured that he died within an hour. Eliza Foster, his widow, having first taken out letters of administration on his estate, brought this action against the plaintiffs in error, claiming \$10,000 damages. She obtained a judgment for \$300, and the defendants below have appealed in error. Appellants assign error (1) on the original charge of the trial judge; (2) on his action in refusing to instruct the jury as requested; (3) on what is termed the "second charge."

1. The first assignment cannot be maintained, because the original charge of the court upon which it is based, and which is complained of as erroneous, is not made a part of the record by bill of exceptions. It is true that what purports to be a charge in the case is found in the transcript, but it precedes the bill of exceptions, and is in no way made a part of it. Therefore, under a familiar and well-established rule of practice, it cannot be considered for any purpose in this court. *Huddleston v. State*, 7 Baxt. 55; *Bass v. State*, 6 Baxt. 583; *McGhee v. Grady*, 12 Lea, 96; *Owens v. State*, 16 Lea, 1.

2. The next assignment fails for equally conclusive, but different, reasons. To put the trial judge in error for refusing to give special instructions to the jury it must appear that they were requested after, and not before, he submitted his general charge, the object of such instructions being not to suggest in the first instance what the charge shall be, but rather to supply some omission or correct some mistake made in the general charge, to present some material question not treated at all, or to limit or extend, eliminate or more accurately define, some proposition already submitted to the jury. Under the practice

of this court, as laid down in *Roller v. Bachman*, 5 Lea, 158, 159, the several propositions, which it is insisted were erroneously refused in this case, cannot be considered for purposes of reversal, because they were submitted to the trial judge "at the conclusion of the evidence," and no request for additional instruction was made after he had delivered his charge. Of course, we know it is usual for counsel, by oral argument or written statement, (sometimes both,) to present their views of the law of the case in advance of the charge. That is a proper practice, and instead of being condemned is to be encouraged. Yet such presentation is not to be treated as a request for additional instruction, and made ground for reversal, if not adopted by the trial judge. The office of special or additional instruction is that already indicated. It may be said that counsel, who have submitted one view of the law, should not be put to the useless and embarrassing task of repeating it, in the form of an additional instruction, after the court has given a contrary proposition in charge. That is true. But in that case nothing is lost if the request is not made, because, if the charge as given is erroneous, a reversal will follow, without the request, and, if correct, the request could not change the result. Again, the record, after setting out the propositions submitted for charge, recites that the request was "refused, and the court did instruct the jury as follows." As a matter of fact nothing follows, and the bill of exceptions remains in that incomplete condition, failing to show what instructions were given instead of those requested. So far as we are informed, they may have contained a full and accurate statement of the law applicable to every question arising in the case. Whether this be true in reality cannot be ascertained, but it must be presumed to be so in the absence of those instructions themselves. *Lane v. Keith*, 2 Baxt. 189; *Insurance Co. v. Sturges*, 12 Heisk. 339.

3. The other assignment is made on the following recital in the bill of exceptions: "The jury, having considered the case, returned, and asked the court whether, if they found that the defendant had not strictly complied with all the statutory rules or precautions as given in charge, yet that the deceased's own want of care and gross neglect was the direct cause of his injury and death, they could not yet find for the defendant; to which the court replied that they could not, but should consider such contributory neglect on the part of the deceased in mitigation of damages. If they found the railroad company wanting in full performance of statutory duties, plaintiff would be entitled to some damages in any event." It is insisted that this action of the court was erroneous, and that he should have answered the question of the jury in the affirmative. Taking the case as stated in the question, the contention is that, inasmuch as the gross neglect of the deceased was the direct cause of his in-

jury and death, his negligence should operate, not merely in mitigation of damages, but as a bar to the action, notwithstanding the failure of the railroad employes to observe the precautions prescribed in section 1166 of the Code. Learned counsel make an able and forcible argument in support of this view; yet we think it contrary to the obvious meaning of the statute. The response of the trial judge is in conformity to the construction announced by this court in numerous decisions, some of which we cite: *Railroad Co. v. Smith*, 6 Heisk. 174; *Hill v. Railroad Co.*, 9 Heisk. 823; *Railroad Co. v. Walker*, 11 Heisk. 383; *Railroad Co. v. Nowlin*, 1 Lea, 523; *Railroad Co. v. Smith*, 9 Lea, 470. Section 1166 of the Code (Thomp. & S.) prescribes certain precautions to be observed by railroads for the prevention of accidents. The next two sections declare, in the plainest terms, the legal consequences of observance and non-observance. By section 1167 it is declared that in every case of non-observance the railroad shall be liable for the damages done, and by section 1168 it is declared that in every case of observance it shall not be liable at all. By the positive language of the statute liability flows from non-observance, and non-liability follows observance. Neither liability nor non-liability is made to depend on the cautious or incautious conduct of the person injured. Both are to be determined by the conduct of the railroad employes. The injured person may be ever so negligent in the one case and yet recover something, while in the other case he may be entirely without negligence and yet recover nothing. At the common law contributory negligence may bar the action, but under the statute it is to be considered only in mitigation of damages. This distinction is forcibly illustrated and pointedly enforced in the 9 Lea case, just cited. There the plaintiff's intestate walked some distance on the track in the direction of the coming train, and in full view of it, though several times warned of her danger by others near by. Indeed, "her conduct was so unaccountable as to induce the belief upon the part of some that her death was intentional." There were two counts in the declaration, the first charging a failure to observe the statutory precautions, and the second charging common-law negligence. Among other things, the trial judge was requested to charge the jury that it was the duty of an intelligent being to exercise reasonable care to avoid danger, and that this precaution must be in proportion to the danger and knowledge of its existence. He responded: "Such is the law applicable to the second count, but not to the first." To the question thus presented this court, speaking through Judge MCFARLAND, said: "The proposition was applicable to both counts, the difference being, however, that contributory negligence does not defeat the action under the first count, but only mitigates the damages, whereas under the second count it might defeat the action altogether." 9 Lea,

474. The same distinguished judge, in delivering the opinion of the court in Walker's Case, said: "It will be observed that the statute does not make the liability of the company depend upon whether or not the accident or collision was the consequence of the failure of the employees to observe these precautions, but, on the contrary, the company shall be liable to all damages resulting from any accident or collision in all cases where the company fail to prove that the precautions were observed. Therefore, if the precautions have not been observed, the company is liable, although it may appear that the observance of the precautions would not have prevented the accident." 11 Heisk. 385. In Nowlin's Case this court said: "The frequent and constant ruling of this court has been that if railroads shall comply fully with the requirements of sections 1166-1168, inclusive, of the Code, they are not liable in any case covered by the statutes, and, on the other hand, if they do not thus comply, they are liable. So far as any defense may go in bar of the action, it must be such an one as the statute requires. From this it will be seen that no defense in bar of any such action as this can be predicated upon contributive negligence of the party suing, be it never so gross. On the other hand, this court has held that, although the railroad may be and is liable because of a failure to comply with the statutes, yet the contributory negligence of the party suing will go in reduction of damages." 1 Lea, 523. In Hill's Case it appeared that his intestate was walking on the track, meeting the train, when stricken and killed. Other men, who were with him, stepped off the track before the train got dangerously near. To explain his non-compliance with the statute, the engineer said he saw the other men step off, and "supposed the deceased would do so, too, as he might have put himself out of danger by a single step." The liability of the railroad company for damages was denied on the ground "that deceased came to his death by his own reckless incaution," by "his own willful act." Though the supposition of the engineer was a very natural and reasonable one, the judgment below was affirmed, this court saying: "The statute does not brook the slightest speculation upon things that are probable or possible, either by the court or by the company's agents, but demands an absolute obedience to its provisions, whether they seem necessary or not." 9 Heisk. 827. The deceased in the case in 6 Heisk. was killed by a locomotive, while he was lying upon the track, drunk and asleep. This court held that "the negligence of deceased in contributing to the accident would be no bar to the action;" that the only means of escaping liability was by showing that "the precautions laid down in the Code, § 1166, subsec. 5, were observed." 6 Heisk. 176, 177. Further citation and review of our cases on this subject would be unprofitable. They are all of one accord. Had the facts justified it, the

failure to comply with the requirements of the statute could have been excused and liability avoided by showing that compliance was impossible after the deceased appeared upon the track and could have been seen by a proper lookout. Railroad Co. v. Swaney, 5 Lea, 119. No such excuse was claimed, however, but, on the contrary, the engineer admitted that he saw the deceased on the track for at least a quarter of a mile back, and came almost upon him before attempting to observe the statutory precautions, his reason for his failure being that he saw the deceased look back, and supposed he would get out of the way in time to prevent a collision. Let the judgment be affirmed.

CHESAPEAKE, O. & S. W. R. CO. *et al.* v. HENDRICKS.

(Supreme Court of Tennessee. May 1, 1890.)

REMOVAL OF CAUSES—EXCESSIVE DAMAGES.

1. A petition for the removal of a cause from a state to a federal court, under Removal Act Cong. 1887, alleged that the controversy was wholly between petitioner and plaintiff, who were citizens of different states; that co-defendant was joined solely to defeat the right of removal, and to defraud petitioner of its rights; that plaintiff formerly sued petitioner and co-defendant on the same cause of action, which action he dismissed as to co-defendant, thereby admitting that he had no cause of action against co-defendant, whereupon petitioner procured from the federal court an order of removal; and that plaintiff then dismissed that action, and brought the present one. Plaintiff denied all fraud, and any admission that petitioner alone was liable, and insisted that both defendants were jointly and severally liable. No evidence was offered to support the petition. Held, that no cause of removal was shown.

2. Deceased was postmaster and express agent at a station on defendant's railroad. He was killed by an engine running ahead of the express train, and on the same schedule, at about 30 miles an hour. At that point all persons having business with trains were obliged to cross the track in front of them. The view of the track was obstructed. Deceased, supposing that the train which struck him was the regular train, and would stop, attempted to cross the track. Deceased was a prudent man, and the engineer was very reckless. Held, that a verdict for \$15,000 would not be disturbed.

3. Where requests to charge are made before any charge is given, error cannot be predicated on their refusal, where they are not afterwards repeated.

Error to circuit court, Dyer county; THOMAS J. FLIPPIN, Judge.

Holmes Cummins and W. S. Draper, for plaintiffs in error. Hamilton Parks, for defendant in error.

TURNER, C. J. The action is to recover damages for the killing of J. C. Hendricks on December 12, 1887. The first assignment of error is upon the refusal of the circuit court to transfer the cause to the United States circuit court. The grounds of the petition are that petitioner, at and before the commencement of suit, was, and is now, a citizen of Connecticut, and that Hendricks, administrator, was and still is a citizen of Tennessee; that the controversy is wholly between the petitioner, Newport News & Mississippi Val-

ley Company, and the plaintiff, citizens of different states; that the Chesapeake, Ohio & Southwestern Railroad Company is neither a necessary nor proper party to this suit; that plaintiff has joined said railroad company as a defendant simply for the purpose of endeavoring to defeat petitioner's right of removal; that the cause of plaintiff is a fraudulent, unjust, and illegal attempt to deprive said United States court of its lawful jurisdiction, as well as a fraud on petitioner's right, etc.; that in 1888 plaintiff commenced his suit against the defendants for the same matters and things set forth and complained of; that, after beginning suit, plaintiff dismissed his said action against the Chesapeake, Ohio & Southwestern Railroad Company, and proceeded alone against petitioner; thereafter, on one of the days of March term, 1888, petitioner filed a petition for the removal of the cause to the circuit court of the United States; the circuit court of the state granted the prayer, etc.; afterwards plaintiff dismissed that suit, having theretofore begun the present one against the two companies, joining the latter fraudulently, and for the single purpose of divesting the federal court of its jurisdiction, and depriving petitioner of its right, etc.,—he having no claim whatever against the Chesapeake, Ohio & Southwestern Railroad Company; that by his dismissal of his former suit the plaintiff admitted and confessed that he had no cause of action against the party, and that his sole cause of action was against petitioner alone. The petitioner was answered with a definite denial of all fraud, of any admission or confession that the petitioner was alone liable, and insisting that both corporations were jointly and severally liable. The prayer of the petition was refused.

It is here insisted: "The sole question upon the petition for the state court to determine was whether, upon the face of the petition, a good cause for removal was made. If so, then the removal was matter of right, and, of course, subject, however, only to inquiry in the federal court as to the truth of the allegations of the petition." To support this position, reference is had to several cases from the United States supreme court. The latest utterance to which our attention has been called is in the case of *Railroad Co. v. Wangelin*, 132 U. S. 601, 10 Sup. Ct. Rep. 203, in which Justice GRAY says: "It is equally well settled that in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court." While, in the case before us, there is an allegation of fraud, which is denied, there was on proof offered to sustain it.

The condition of the record in the state court at the time of filing the petition was not such as to warrant a removal. Trying the question by the face of the record, the jurisdiction of the state court was exclusive. That condition is sought to be changed by the unsworn petition of the defendant below, who moves for a removal upon extraneous allegations without proof. In *Stone v. State*, 117 U. S. 432, 6 Sup. Ct. Rep. 799, Chief Justice WAITE says: "A state court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which on its face shows that the petitioner has a right to the transfer. * * * The mere filing of a petition for the removal of a suit which is not removable does not work a transfer. To accomplish this, the suit must be one that can be removed, and the petition must show a right in the petitioner to demand the removal. This being made to appear on the record, and the necessary security having been given, the power of the state court in the case ends, and that of the circuit court begins." In this case no application was made to the federal court, and, of course, that court could not settle the question. The federal question of removal was presented to the state court, and before that court could be authorized to order the removal it was its duty to ascertain and determine that "a case had been made which on its face shows that the petitioner has a right to the transfer," and "was not bound to surrender its jurisdiction" before.

We are unable to agree with counsel for the petitioner that the language of the supreme court, in construing the statutes of removal, means that a petition like the present, without more, ousts the state court of its jurisdiction, and transfers it to the federal court. This may be so when the petition and bond are filed in the latter court, and the duty of investigation imposed upon it. Such is clearly, we think, the true meaning of the cases. The right to petition attaches to either court at the election of the petitioner, but when he has made his election he must submit to that election for all the purposes and provisions of the statutes under which he is proceeding, and, when either has passed upon the questions, he is bound by the ruling, except he may appeal from the final judgment of the state court when, perhaps, he cannot from that of the federal court. When the supreme court says the petitioner must make a case for removal, it means he must make it under the statute, and to the satisfaction of that court to which he makes the application, and not that he can, by piecemeal, try the question in the two courts. If the contention is sound, we will have the anomaly of a cause removed from the state court, and suspended until the federal court can pass upon the merits of the application; the parties in the mean time not knowing where the cause pends, and neither court knowing which has jurisdiction. Since this opinion was filed, it has been suggested that,

under the act of congress of 1887, the application for removal can be made only in the state court. If this were so, it affords a stronger reason that that court must pass on the sufficiency of the grounds laid for removal. A case must be made for removal, and made to the court asked to remove. Under the rule insisted upon, every case involving the jurisdictional amount could be removed, or its trial retarded until after action of a federal court. Under the rule in this state, there is nothing in the allegation that the dismissal of the former suit, as to one of the parties, was an admission that there was no cause of action against that party, as tortfeasors are jointly and severally liable.

The second assignment is, the verdict and judgment for \$15,000 is excessive. Deceased was postmaster and express agent at Trimble, on the Chesapeake, Ohio & Southwestern Railroad. He was struck by an engine and train of one car and a freight caboose, running on the schedule of the regular passenger train, which carried the mail and express matter. The engine and train which did the killing was running ahead of the passenger train, at a speed of 30 to 40 miles per hour. The postmaster and express agent, passengers, and all persons having business with trains, had to cross the track in front of trains,—a most dangerous and careless arrangement; one that must not be overlooked. There were standing cars, lumber, and other things calculated to obstruct the view. The train made no check of speed. The deceased, in attempting to cross, was struck by the engine, knocked 46 feet, against a bank, and rebounded to the cross-ties. He lived about 45 minutes. Several other persons barely escaped a similar fate. It was supposed to be the regular train, and that it would slow to about four miles per hour. No notice had been given of its approach, except the signal whistles. It should have slowed down or stopped at the telegraph office for orders. That it was being run at a very high and dangerous speed, without proper and continuous signals, is conceded, and was running on the time of the regular passenger train, which regularly slowed down in approaching, and stopped at said station, a village of about 300 inhabitants. Deceased was a careful, prudent man, and not careless about crossing tracks in front of trains; was about 33 years of age.

The facts do not make out a case for reversal for excessive damages. The conduct of the engineer, who is shown to be a fast runner, and had that day passed Dyersburg at the speed of 60 miles per hour, was reckless in the extreme. The throwing of the body 46 feet, with a rebound, leaves no room to doubt the recklessness of the engineer, and his utter disregard of human life.

The several requests to charge were made before any charge was given; none of them were repeated afterwards. Under the rule in this state, it was not error to refuse to give them. *Roller v. Bachman*, 5 Lea, 159; Railroad

Co. v. Foster, 4 Pickle, —, ante, 694. Counsel should first hear the charge, and then make such requests as in their opinion are right and proper, in extension or modification. The court makes up his charge in the progress of the case in proof and argument, and is usually prepared to deliver it at the conclusion of the argument. It would be the imposition of great labor to require him to lay aside his own charge, and study one or more prepared by counsel of the respective sides, and remodel his to conform to many requests, as in this case. Such a practice would result in much confusion, and a multiplication of error, as well as delay in the trial of causes. In this case a practice was adopted which we recommend to the profession, and one we would be glad to see adopted by it.

The bill of exceptions does not set out the testimony of each witness on either side, but simply states that the proof for each tended to show certain facts. It is well done, of easy comprehension, and presents what would otherwise have been a cumbersome record in a small compass, and yet fully, pertinently, and distinctly raises every question of law and fact.

On his motion for new trial, the able counsel presented all his grounds in writing, thereby giving to the court every opportunity to detect any error he may have committed. On the trial here, only these grounds were formally and fully drawn out, and made up the assignments of error. We see no reason, at present, why circuit courts should not require counsel to point out in this way the grounds on which they base such motions, and treat as waived such as are not thus designated. There is no reversible error in the charge as given, and the judgment is affirmed.

KANSAS CITY, FT. S. & M. R. Co. v. DAUGHTERY.

(Supreme Court of Tennessee. May 1, 1890.)

DEATH BY WRONGFUL ACT—EXEMPLARY DAMAGES.

Where gross negligence is shown in an action against a railroad company for killing plaintiff's intestate, exemplary damages may be recovered, though death was instantaneous. Following *Haley v. Railroad Co.*, 7 Baxt. 242.

Error to circuit court, Shelby county; L. H. ESTES, Judge.

C. H. Tremble and J. W. Buchanan, for plaintiff in error. Gault & Patterson and Turley & Wright, for defendant in error.

TURNER, C. J. The first nine assignments of error are based on the failure of the court to give in charge requests made before the court had charged the jury. Under our rule, there was no error in the refusal. It was not error to allow the jury to assess exemplary damages. This question was directly raised and decided in *Haley v. Railroad Co.*, 7 Baxt. 241. In that case the circuit judge instructed the jury that, "if plaintiff's intestate was killed by defendants, and died in-

stantly, no vindictive or exemplary damages in this case could be received." Chief Justice DEADERICK, after a full review of the cases of this and other states, concludes: "We are of opinion that the charge of the court complained of was erroneous as given, and, if the elements of fraud, malice, gross negligence, or oppression existed in the case, whether death was instantaneous or not, exemplary damages might be recovered." This ruling has been followed for 16 years, and we see no reason to disturb it. It is sound and just. We have passed upon the question of removal to the federal court in a case just disposed of, with very similar facts. Railroad Co. v. Hendricks, ante, 696. The other matters assigned do not contain reversal error. Affirm.

ST. LOUIS, I. M. & S. RY. CO. v. HENDRICKS.

(Supreme Court of Arkansas. May 8, 1890.)

RAILROAD COMPANIES—INJURIES TO STOCK—SIGNALS.

1. Mansf. Dig. Ark. § 5478, requiring engineers of locomotive engines to ring the bell or blow the whistle before reaching public crossings, and making the railroad company "liable for all damages which shall be sustained by any person by reason of such neglect," includes injuries to cattle.

2. Where the engineer fails to ring the bell or blow the whistle as required by section 5478, the fact that the killing could not have been avoided after the cattle were discovered is not sufficient to remove the presumption of negligence raised by section 5544, which provides that the killing of stock on any railroad shall be *prima facie* evidence of negligence.

Appeal from circuit court, Lonoke county; J. W. MARTIN, Judge.

Action by T. E. Hendricks against the St. Louis, Iron Mountain & Southern Railway Company, to recover for injuries to stock. Mansf. Dig. Ark. § 5544, provides that "the killing of stock on any railroad track shall be *prima facie* evidence that it was done by the trains, and the *onus* to prove the reverse will be on the railroad company."

Dodge & Johnson, for appellant. T. E. Hendricks, pro se.

BATTLE, J. Section 5478, Mansf. Dig., provides: "A bell of at least 30 pounds weight, or a steam-whistle, shall be placed on each locomotive or engine, and shall be rung or whistled at the distance of at least eighty yards from the place where the said road shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under a penalty of two hundred dollars for every neglect to be paid by the corporation owning the railroad; * * * and the corporation shall also be liable for all damages which shall be sustained by any person by reason of such neglect." This statute evidently intends that signals shall be given near public crossings for any purpose which they might naturally or reasonably subserve. In many states where similar statutes are in force, it has been held that railroad companies are liable

for all damages that are attributable to or caused by the omission to give such signals in the manner required by the statute, including injuries to cattle. Railroad Co. v. Jones, 65 Ga. 681; Palmer v. Railroad Co., 38 N. W. Rep. 100; Railroad Co. v. Henderson, 66 Ill. 494; Howenstein v. Railroad Co., 55 Mo. 33; Railroad Co. v. Thomas, 5 Heisk. 262; Railroad Co. v. Smith, 9 Heisk. 860. We think this is the correct construction of our statute. The words of the statute are: "And the corporation shall also be liable for all damages which shall be sustained by any person by reason of such neglect."

The proof of the killing of an animal by a train, under the laws of this state, in the absence of other evidence, is *prima facie* evidence that it was the result of negligence; and the burden is upon the railroad company to overcome this presumption by proving that it used due care. Railway v. Payne, 33 Ark. 816; Railroad Co. v. Jones, 36 Ark. 87; Railway Co. v. Vincent, Id. 451; Railway Co. v. Henson, 39 Ark. 413. In this case, appellant could not have avoided the killing after it discovered the animal was in danger of being injured by its train; but that is not sufficient to remove the presumption of negligence. The failure to ring the bell or blow a steam-whistle when the train had approached within 80 rods of the public crossing, and to continue to ring or blow the same until it had crossed, was negligence. The animal was killed when appellant was guilty of a neglect of his duty, and the jury had the right to infer that such neglect contributed to the killing. Turner v. Railroad Co., 78 Mo. 578; Halferty v. Railway, 82 Mo. 90; Stoneman v. Railroad Co., 58 Mo. 503; Railroad Co. v. Geddis, 33 Ill. 304; Railroad Co. v. Phillips, 20 Kan. 9; Railroad Co. v. Morgan, 13 Amer. & Eng. R. Cas. 499; Railway Co. v. Hagan, 42 Ark. 122, 125; Railway Co. v. Trotter, 37 Ark. 593, 597; and authorities cited above.

Judgment affirmed.

TAYLOR v. VAN METER.

(Supreme Court of Arkansas. May 8, 1890.)

TAX-DEEDS—WEIGHT OF EVIDENCE ON APPEAL.

1. Mansf. Dig. Ark. §§ 5780, 5781, providing that, if land sold for taxes shall remain unredeemed for two years, the clerk of the county court shall execute a deed to the purchaser, which shall be "*prima facie* evidence" that the county officers have performed all duties required to make a valid title, cannot prevent the owner from showing that the sale was void because not made on a day appointed by law.

2. Where there is a special finding of facts and no motion for a new trial, the sufficiency of the evidence to sustain the finding cannot be considered on appeal.

Appeal from circuit court, Craighead county; J. E. REDDICK, Judge.

Action of ejectment by J. M. Van Meter against R. J. Taylor. Plaintiff appeals. Mansf. Dig. Ark. §§ 5780, 5781, provide that, if land sold for taxes shall remain un-

redeemed for two years, the clerk of the county court shall execute a deed to the purchaser, which shall be "*prima facie* evidence" that all the prerequisites required to be performed by the county officers to make a valid title have been complied with.

F. G. Taylor, for appellant. *Thomas P. Chambers*, for appellee.

PER CURIAM. 1. There is a special finding of facts by the court, and no motion for a new trial. The sufficiency of the evidence to sustain the finding is not, therefore, presented. *Smith v. Hollis*, 46 Ark. 17.

2. That a sale for taxes not made on a day appointed by law is void was ruled in *Vernon v. Nelson*, 33 Ark. 748. The same provisions of the statute relied upon by the appellant to cut off this defense were in force when that case was decided. In the subsequent case of *Radcliffe v. Scruggs*, 46 Ark. 96, it was explained that those provisions of the statute could not now be construed so as to cut off any meritorious defense to a tax-deed. Affirmed.

STATE NAT. BANK *et al.* v. NEEL.

(Supreme Court of Arkansas. March 29, 1890.)

RECEIVER'S SALE—MODIFICATION OF TERMS.

Where a court orders a receiver's sale to be confirmed on condition that the bid is increased a certain amount, the order becomes final on the acceptance of the terms by the purchaser, and the court has no power, at a subsequent term, to modify it.

Appeal from circuit court, Jefferson county; JOHN A. WILLIAMS, Judge.

N. T. White, for appellants. *M. S. Bell*, for appellee.

HUGHES, J. In the suit of appellants, attaching creditors of C. M. Neel, John M. Clayton was appointed receiver, and was ordered by the court to sell part of the property that came to his hands; and on 14th February, 1887, the receiver filed his report of the sale. Exceptions were filed to his report of the sale of 82 mules, purchased by C. M. Neel, Jr., by the creditors, who alleged that the price at which they were bid off was inadequate, being an average of \$63.72 per head; and they offered that, if a resale should be ordered, to make them bring \$90 per head. The court ordered that, unless C. M. Neel, Jr., would pay the sum of \$20 per head more than his bid for the mules, the sale should be set aside, and a resale ordered, but that, if he would accept the terms proposed, and give his note for the increased price, the sale should be confirmed. Neel accepted the terms, and gave his note accordingly. This was at the March term, 1887, (10th day of March,) of the Jefferson circuit court. At the same term of court, on the 17th of June, 1887, C. M. Neel, Jr., filed his petition to be relieved of the \$1,640, the increased price of the mules as fixed by the court. On the 18th of July, 1887, after the attachment of

appellants had been sustained, the court ordered the receiver to disburse the funds among the various creditors. At the September term of the court, in 1887, on the 10th day of January, 1888, the court appointed the receiver and two other persons a committee to ascertain and report to the court the value of the 82 mules purchased by C. M. Neel, Jr., and the reasonableness of the bid therefor. The receiver reported that the mules were worth from \$80 to \$100; and one of the other committeemen reported that the first sale was a fair one, and that the price bid for the mules was reasonable. The other committeeman did not report. On the 24th of February, 1888, the court made an order revoking the order of the 10th of March, 1887, and relieved the said C. M. Neel, Jr., from the payment of the \$1,640, the amount of the increase in the price of the mules over his bid for the same. An appeal was taken from this last order.

Had the court the power to make this order setting aside the order of confirmation of the sale after the lapse of the term at which the confirmation was made? Was the order of confirmation a final judgment from which an appeal would lie? In judicial sales the court is the vendor, and it may confirm, or refuse to confirm, a sale made under its order, in the exercise of a sound judicial discretion. *Penn v. Tolleson*, 20 Ark. 682; *Sessions v. Peay*, 23 Ark. 39; *Thomason v. Craighead*, 32 Ark. 391; *Morrow v. McGregor*, 49 Ark. 67, 4 S. W. Rep. 49; *Ror. Jud. Sales*, §§ 124, 126, 128, 394-396. It was within the discretion of the court to refuse to confirm the sale as originally made to C. M. Neel, Jr., and to confirm it upon his acceptance of the terms of the court's order that it would be confirmed upon his agreeing to pay \$20 in addition to his bid on the average price of each of the 82 mules. When Neel had done this the sale was confirmed, and he became liable to the attaching creditors of C. M. Neel, Sr., for the \$1,640. C. M. Neel, Jr., became a party to the controversy only by becoming the accepted bidder at the sale. The confirmation of the sale vested in him the title to the mules, and determined all questions as to the sale, and was a final adjudication and judgment as to its regularity, reasonableness, etc., and left nothing further to be considered or done in regard to it. It was a final order upon this branch of the case, from which an appeal could be taken. *Sessions v. Peay*, 23 Ark. 39; *Penn v. Tolleson*, 20 Ark. 652; *Ror. Jud. Sales*, §§ 24, 25, 132; *Tugwell v. Bussing*, 2 Hun, 160; *Williams v. Field*, 60 Amer. Dec. 427, and cases cited in note.

It cannot be assumed that there was any fraud by which the confirmation of the sale was procured, or any mistake in making the order of confirmation, for which the same should have been set aside; nor did the purchaser bring his application to vacate the order of confirmation within any of the provisions of section 8909. *Manuf. Dig.*

When the term of the court at which the order of confirmation of sale was made, lapsed, the order became final, and the court had no power to set it aside at a subsequent term. *Turner v. Vaughan*, 33 Ark. 454; *Ex parte Hardy's Ex'rs*, 26 Ark. 94; *Leigh v. Armor*, 35 Ark. 123; *State v. Shall*, 23 Ark. 601; *Gaines v. Hale*, 26 Ark. 212. Wherefore the judgment of the Jefferson circuit court setting aside the order of the 10th of March, 1887, and releasing C. M. Neel, Jr., from his agreement to pay \$1,640, which he agreed to pay, in addition to his first bid, for the 82 mules sold by John M. Clayton, receiver, was erroneous, and is reversed; and this cause is remanded for further proceedings in this behalf.

JEFFERSON v. DUNAVANT.

(*Supreme Court of Arkansas*. April 12, 1890.)

ATTACHMENT—CLAIMANT—DAMAGES.

The omission of claimant of attached property to demand damages for being deprived of the use of it will not bar his subsequent action therefor. The direction to the court (Mansf. Dig. § 858) "to make such order as may be necessary to protect his rights," when the judgment is in his favor, refers only to his right to the property, and not to an award of damages.

Appeal from circuit court, Mississippi county; J. E. RIDDICK, Judge.

Action by H. C. Dunavant against J. W. Jefferson. The facts in this case are, briefly, these: On the 12th day of March, 1882, plaintiff, H. C. Dunavant, purchased a mule from one Grandison Boyd; but, before he had taken the mule into manual possession, defendant, Jefferson, replevied from Boyd, and gave bond and took possession. At the January term of the Mississippi circuit court, 1885, there was a trial, verdict, and judgment in favor of Boyd. Jefferson appealed to the supreme court, and Boyd's judgment was affirmed. Then Jefferson attached the mule in another suit against Boyd, and Dunavant interpleaded, claiming title under his purchase of March, 1882. The issue was found for Dunavant, and the mule was turned over to him. Dunavant then instituted the present action for damages against Jefferson for the use of the mule, and for injuries inflicted upon it, etc. Jefferson filed an answer in which he set up for his defense the fact that, in the action in which Dunavant interpleaded for the recovery of the mule, he claimed no damages, and none were awarded him, and denied that, in fact, he was damaged by being deprived of the use of the mule, etc. The court refused to give the following instruction requested by defendant: "If the jury find from the evidence that heretofore the defendant sued out an attachment against Grandison Boyd for the mule, for the use and damage of which the plaintiff, H. C. Dunavant, sues in this action, and that said Dunavant interpleaded for said mule, and recovered the same in said action, but claimed no damages, he cannot bring another suit for damages, and the jury will find for the defendant."

The court held that the failure to ask damage in the interpleading suit did not prevent a recovery in this suit unless the question for damages had been at issue in the former suit. Verdict for plaintiff, and damages assessed at \$165. Motion for a new trial overruled, and the case taken to the supreme court by appeal.

Compton & Compton and *J. J. Horner*, for appellant. *H. M. McVeigh*, for appellee.

PER CURIAM. The record does not show that Dunavant was allowed to interplead for the mule in the replevin suit of *Jefferson v. Boyd*. No judgment rendered therein could, therefore, affect his rights. He interpleaded for the mule in the attachment suit by *Jefferson* against *Boyd*, and it is argued that damages for the detention of the mule could have been assessed in that case, and that the failure to do so is a bar to any further action for damages. The statute authorizing intervention in such cases contemplates only the trial of the right of property, or of the claimant's interest therein. When determined in his favor, the court is directed to "make such order as may be necessary to protect his rights." Mansf. Dig. § 358. But that can refer only to the protection of the right the jury has tried, not the award of damages.

Affirm.

SMITH et al. v. JAMES.

(*Supreme Court of Arkansas*. April 12, 1890.)

PAYMENT TO AGENT.

An agent, with power to sell and receive payment, cannot bind his principal by accepting, in lieu of payment for goods sold, a cancellation of his own debt to the purchaser, where the latter knows, or by the exercise of reasonable diligence could know, of the agency.

Appeal from circuit court, Crawford county; JOHN S. LITTLE, Judge.

Action of replevin by F. H. Smith and others, constituting the firm of F. H. Smith & Co., against J. D. James, to recover three wagons sold to defendant by Loudon Bros., acting as plaintiffs' agents. It appears that Loudon Bros., who were authorized to sell plaintiffs' wagons, and to receive payment therefor, were largely indebted to defendant, James, and that, several days before they failed, had agreed to let James have three wagons, to be credited on their account. James paid no cash and made no note, and Loudon Bros. never accounted to plaintiffs for the sale of the wagons. Defendant testified that he bought in good faith; that he knew nothing of the title to the wagons, or of the terms of the contract between plaintiffs and Loudon Bros.; and that he knew the latter were shaky, and wanted to save himself. The court found that the title passed to James as against plaintiffs, who now appeal from the judgment.

Brown & Sandels, for appellants.

PER CURIAM. An agent, with power to sell and receive money in payment for his

principal, has not the apparent authority to accept a cancellation of his own debt due to a vendee who knows, or by the exercise of reasonable diligence could know, that his debtor is acting as agent, because he knows that the benefit of the sale will inure to the agent only,—a result inconsistent with the agency. *Arnett v. Glenn*, 52 Ark. —, 12 S. W. Rep. 497; *Story*, Ag. § 77; *Belton Compress Co. v. Manufacturing Co.*, 64 Tex. 337; *Williams v. Johnston*, 92 N. C. 532. The court found only that James did not know the terms of the agency, and declared, upon that, that his title was superior to the principals'. That was error. It was only necessary that James should know that the person with whom he dealt was an agent, in order to be apprised that the transaction was beyond the scope of his authority. Reverse and remand.

LOCKE et al. v. ADAMSON et al.

(Supreme Court of Arkansas. April 12, 1890.)
CHattel Mortgage—Husband and Wife—Es-
TOPPEL.

Defendant, who had, with his wife's knowledge, mortgaged his cotton crop to secure supplies from plaintiffs, bought a wagon from them, which he paid for with cotton covered by the mortgage. He afterwards mortgaged the wagon to plaintiffs, who sought to replevy it on his default in payment. Held that, in the absence of proof that plaintiffs were influenced by defendant's wife to take the mortgage on the wagon, or to extend defendant's credit on the faith of it, she was not estopped to claim it on the ground that the cotton with which it was paid for was her own.

Appeal from circuit court, Crawford county; JOHN S. LITTLE, Judge.

Action of replevin by W. R. & S. B. Locke against George W. Adamson and Sarah Adamson, for a wagon and about 800 pounds of seed cotton, claiming title by virtue of a chattel mortgage given to secure a note of \$56.32. It appears that in September, 1886, George W. Adamson bought the wagon in suit, giving his note therefor, which he afterwards paid with cotton. On December 21, 1886, he was indebted to plaintiffs in the sum of \$56.32, and gave them as security a chattel mortgage on such wagon, and all the cotton raised on his home place in 1887. The mortgage debt matured November 1, 1887, and Adamson made default. Sarah Adamson, wife of George W. Adamson, interpleaded, claiming the wagon as her own in the following manner: Each year her husband let her have 10 acres of land rent free, and helped her work her crop. In 1886, she made two bales of cotton, and with the proceeds her husband, as her agent, paid for the wagon. It appears that, in order to secure supplies, Adamson had previously mortgaged two horses and all the cotton raised on the home place in 1886 to plaintiffs, with his wife's knowledge, and that the two bales with which the wagon was paid for were raised on the home place and covered by the mortgage. It was not shown that plaintiffs knew that the wife claimed the wagon as her

own. On appeal from the justice's court, and trial *de novo* in the circuit court, there was a verdict for plaintiffs for the cotton, and for the interpleader for the wagon. From the judgment, plaintiffs appeal. The only assignment of error is the refusal of the court to instruct the jury that, "if you believe from the evidence that George W. Adamson, the defendant, in order to get supplies advanced during the year 1886, mortgaged to plaintiffs all the cotton to be raised on his place during said year, and that subsequent to execution of said mortgage, and with full knowledge of its execution, interpleader worked and gathered a crop of cotton on said land, she is estopped from laying claim to any of the cotton raised on said place during said year, or any property paid for with the proceeds thereof, as against the plaintiffs."

Brown & Sandels, for appellants.

PER CURIAM. The only question presented for our consideration is, was Mrs. Adamson estopped from claiming the wagon in controversy? She swore that her husband, as her agent, bought it for her, and paid for it with her cotton. It was proved that he purchased it, and executed his note for the purchase money, and afterwards paid the note with cotton. The cotton used in making the payment was thereby appropriated according to the requirements of the mortgage thereon that he had previously executed. When he paid the note, appellants had no claim to or lien upon the wagon; and he was at liberty, if it was his, to dispose of it as he desired. There was no evidence that appellants were thereafter influenced by any conduct of Mrs. Adamson to take a mortgage on it, or, on the faith of the mortgage that was taken thereon, to extend to her husband additional credit, or do any other act. She was not, therefore, estopped from claiming it; and the court below committed no error in refusing to give the instructions asked for by appellants. Judgment affirmed.

STEENBURGEN v. GREENWOOD.

(Supreme Court of Arkansas. April 19, 1890.)

HOMESTEAD—EVIDENCE—FINDINGS OF COURT.

W. purchased certain premises in 1878, and moved into the house the following spring. He occupied it for several months, but, finding it inconvenient, moved to another house, belonging to his wife. While so occupying the premises, a judgment was rendered against him. W. afterwards sold the land to plaintiff, who in time sold to defendants. The land was sold under an execution on the judgment against W., and purchased by defendants. In an action to enforce plaintiff's lien on the land as vendor, defendants set up their title as purchasers at the execution sale. On the trial, W. and others testified to his occupancy of the premises as a homestead, and also that he had intended to rebuild the house. Held, that the question whether the premises were the homestead of W. or not was one of intention, and a finding that the land was such homestead would not be disturbed.

Appeal from circuit court, Jackson county; J. W. BUTLER, Judge.

Action in equity, brought by A. M. Greenwood against S. N. Steenburgen, James Bundy, V. Y. Cook, and Jackson, Pfouts & Douglass. It appeared that on April 21, 1879, Jackson, Pfouts & Douglass had obtained a judgment against one A. Weatherford and T. H. Weatherford, late partners as Weatherford & Bro., for \$289; that, prior to the rendition of the judgment, Weatherford had purchased the lands in controversy, and had entered into possession and occupied the land with his family; that he so occupied the land for several months, and raised a crop; that, finding the house inconvenient for his family, he moved to another house, belonging to his wife, with the intention, as he claimed, of repairing or rebuilding the house. Afterwards, he sold the land to plaintiff, who in turn sold to defendants Steenburgen and Bundy. The contract of sale by plaintiff to Steenburgen and Bundy provided that, if the land was found to be subject to the lien of the judgment rendered against Weatherford, and in favor of Jackson, Pfouts & Douglass, then the notes given in payment of the purchase price of the land should be offset that amount. Subsequently the land was sold under execution on the judgment, and bought in by Steenburgen and Bundy, who refused to pay the notes; and plaintiff brought this action to enforce his lien as vendor. There was judgment for plaintiff, and defendants appealed.

W. R. Coody and J. W. & J. M. Stayton, for appellants. *M. M. Stuckey*, for appellee.

PER CURIAM. That Weatherford was residing on the land in question as his homestead when the judgment under which Cook claims was rendered, is established by a preponderance of the testimony. The chancellor found that the homestead thus established was never abandoned, notwithstanding Weatherford was not residing thereon at the time of his sale to the plaintiff; and, as the question is one mainly of intention, we are not willing to disturb the finding. *Euper v. Alkire*, 37 Ark. 283. It follows that the judgment was never a lien on the land, that the sale under the execution passed no title, and the plaintiff is free to enforce his lien for purchase money against the land; Cook having purchased with notice that the purchase money was unpaid. Affirm.

SNEED v. DEAL et al.

(Supreme Court of Arkansas. April 19, 1890.)

LEASE BY PARTNERSHIP—DISSOLUTION—RIGHTS OF PARTNERS.

1. Plaintiff and defendants, as partners, leased a certain store-building for future possession. Prior to the commencement of the term, a dissolution of partnership being contemplated, defendants, without plaintiff's knowledge, secured a cancellation of the lease, and leased again, in their own name. Afterwards the partnership was dissolved; plaintiff buying out the interest of defendants in the partnership property and business. Held, that defendants held their lease of the building in trust for plaintiff.

2. Where, from lapse of time, specific relief cannot be given to plaintiff, he can recover of defendants for any repairs he had made in the building in contemplation of occupancy.

Appeal from Faulkner chancery court; D. W. CARROLL, Chancellor.

Action by John S. Sneed against S. G. Smith and B. T. Deal. There was judgment for defendants, and plaintiff appealed.

E. A. Bolton, for appellant. *J. H. Harrod*, for appellees.

BATTLE, J. On the 1st of September, 1886, John S. Sneed, S. G. Smith, and B. T. Deal formed a partnership, and thereafter did a mercantile business in the town of Conway, in this state, under the firm name and style of Sneed & Co. While doing business in partnership, they occupied a store-house known as the "Bruce Store." Finding a more desirable store, they rented it on the 1st of December, 1887, from J. E. Martin, for a period of one year commencing on the 1st day of March, 1888, and caused the contract to be reduced to writing and signed. Some time about the 1st of February, 1888, they talked about a dissolution of partnership. On the 13th of the same month, Deal and Smith secretly, without the knowledge or consent of Sneed, undertook to cancel the lease, and made a written contract with Martin by which they leased his store-house for the same time, and upon the same terms, Sneed & Co. had previously rented it. On the 28th of February, the same month, the partnership of Sneed & Co. was dissolved, and Sneed purchased and paid for the interest of Smith and Deal in the property and business thereof without any knowledge or information of the effort of Smith and Deal to cancel the lease. His intention was to occupy, and do business in, the house rented from Martin; but, finding that Smith and Deal had canceled the lease thereof to Sneed & Co., and had rented the same, and were in possession thereof, he brought an action in the Faulkner chancery court, and asked in his complaint therein that the lease to Sneed & Co. be reinstated, or that Smith and Deal be declared trustees holding the lease to them in trust for him, and that he be placed in possession of the store-house. The court refused to grant to him any relief, and dismissed his complaint; and he appealed.

The lease of the store-house of Martin was the property of Sneed & Co.; and Smith and Deal, while partners of Sneed, could not privately, without his knowledge or consent, cancel it and take a new one in their names, and for their individual benefit. They held the lease so taken in trust for the partnership. When it was dissolved, and Sneed purchased their interest in the business and assets of Sneed & Co., he became the owner of the lease, and entitled to use the store-house of Martin for the time it was rented. *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Clegg v. Fishwick*, 1 Macn. & G. 294; *Clements v. Hall*, 2 De Gex & J. 173; *Alder v. Fouracre*,

3 Swanst. 489; Leach v. Leach, 18 Pick 68. But the term of the lease has expired since the appeal herein was taken, and it is not in the power of the court to grant the specific relief asked for by appellant in his complaint. Smith and Deal have paid the rent due on the lease, except \$99.25 paid by Sneed in the way of work done upon the store-house in the month of February, 1888; and it does not appear that the lease was of any value beyond the rent paid. Under these circumstances, Sneed is only entitled to judgment for the \$99.25, and lawful interest thereon from the time it was paid, and all his costs.

The judgment of the chancery court is therefore reversed; and judgment will be entered here against Smith and Deal for \$99.25, and 6 per cent. per annum interest thereon from the 1st day of March, 1888, and the costs.

STATE v. HICKS.

(Supreme Court of Arkansas. April 19, 1890.)

TAXATION—FORFEITURE OF LANDS—DONATION—LEASE.

1. Defendant, having obtained a donation certificate for lands forfeited to the state for taxes, made a contract with a tenant already in possession under another person claiming as landlord, by which the tenant agreed to hold under defendant. Within 18 months the tenant cleared and put in cultivation 10 acres of the land, and defendant made proof of that fact, in compliance with Act Ark. March 14, 1879, prescribing the method of acquiring state lands forfeited for taxes. There was no evidence that the former landlord had any title, as it was admitted that the lands had been forfeited. *Held*, that it was not necessary that defendant should have dispossessed the tenant in order to get the benefit of his improvements, since, the former landlord having no claim, the contract between him and the tenant was against public policy, and the rule that a tenant cannot deny his landlord's title has no application to such case.

2. It was not necessary that defendant or the tenant should have resided on the land, since the statute (Act Ark. March 14, 1879) provides that if the applicant, "instead of residing thereon, has cleared, fenced, and put in readiness for cultivation ten acres," within 18 months from the date of his application, he shall be entitled to a deed.

Appeal from circuit court, Little River county; R. D. HEARN, Judge.

W. E. Atkinson, Atty. Gen., and Dan. W. Jones, for appellant. Feazel & Rodgers, for appellee.

BATTLE, J. The donation deed the state seeks to cancel in this action was executed to appellee under the act of the general assembly approved March 14, 1879. Section 1 of that act provides that "the right of the state to all lands, other than town and city lots, which have been forfeited to the state for non-payment of tax, penalty, and cost due thereon, may be donated to any adult citizen of the United States in tracts not to exceed 160 acres to each applicant therefor." Section 2 provides: "Any person wishing to obtain such donation shall apply therefor to the commissioner of state lands, and at the same time shall file in the office of such commissioner his or their affidavit, stating that he or

she is over the age of twenty-one years, and that the land applied for is for the purpose of settlement and cultivation for his or her own use and benefit, and not with a view to speculation." And section 3 provides "that, upon filing with the commissioner of state lands a written application and the affidavit provided for in section two of this act, such commissioner shall issue a certificate under his hand and seal, setting forth that such applicant had applied for a donation of the right of the state to the land described in the application; which certificate shall further state that if, within eighteen months from the date of the application, the applicant shall present proof to the commissioner that he or she resides upon, and has cleared, fenced, and in readiness for cultivation, five acres, or, instead of residing thereon, has cleared, fenced, and put in readiness for cultivation ten acres, of the land described in such certificate, the donee shall be entitled to a deed from the state conveying all the right, title, and interest of the state in and to the land mentioned in such certificate." And section 5 provides as follows: "That, on presentation to him of the proof of improvement provided for in section four of this act, the commissioner of state lands shall execute to the donee, or to his heirs or assigns, a deed under his hand and official seal, conveying all of the right, title, and interest of the state in and to the land so donated, which deed shall have the same force and effect as other deeds which such commissioner is authorized by law to execute on behalf of the state to forfeited lands."

Upon the issue of a certificate to appellee in accordance with this act, he caused a survey of the land described therein to be made. He found it in possession of one Gib Hamiter, who was holding under a lease from Burrill Hawkins. He did not dispossess him. He found it unnecessary. Hamiter was willing to hold under him, and he made a contract with him, by which Hamiter agreed to clear, fence, and put the land in cultivation, for the use of it, for three years. Within 18 months after the issue of his certificate, Hamiter, in performance of this contract, cleared, fenced, and put in cultivation 10 acres of the land, and appellee presented proof thereof to the commissioner of state lands. Now the state contends that this was not in compliance with the act of March 14, 1879, because Hamiter had leased the land of Hawkins before the issue of the certificate to appellee, and was thereby estopped from disputing Hawkins' title. But this did not affect the contract of appellee and Hamiter, or deprive appellee of the benefit of Hamiter's labor thereunder; for it does not appear that Hawkins had any claim to the land, and it is admitted that the land was forfeited to the state. Hawkins and Hamiter were trespassers on the land. Finding Hamiter there without right, appellee could have ejected him. But Hamiter was willing to lease from him, and he hired him to clear

and fence the land, and put it in cultivation, for the use of it for a specified time. This contract was based upon a valuable consideration, and was valid. In order to make it, it was not necessary for him to go through the form of dispossessing Hamiter, and putting him in possession under a lease. According to the rule laid down in *Sherman v. Eakin*, 47 Ark. 351, 1 S. W. Rep. 559, if the land had been donated to Hamiter instead of appellee, Hamiter would not have been estopped from disputing the title of Hawkins. Public policy would forbid. How, then, could Hicks be defeated by Hawkins' lease in obtaining the benefit of Hamiter's labor? Hawkins' lease could not create any trust relations between Hawkins and Hamiter, or impose upon either of them obligations which tended to retard or defeat the state in her policy of settling and developing her land. To give to it the force or effect claimed for it by appellant would contravene the policy of the state in offering lands forfeited for taxes to those who will put them into cultivation, in quantities not exceeding a quarter section, for a nominal consideration. But it has no such effect. Appellee was entitled to the benefit of the labor of Hamiter performed for him.

It is insisted that appellee did not reside on the land. The law did not require him to do so. He was entitled to a deed, if, within 18 months after the date of his application, he cleared, fenced, and made ready for cultivation 10 acres of the land donated, and presented proof thereof to the commissioner of state lands, which appellee did. Judgment affirmed.

PHILLIPS *et al.* v. OVERFIELD *et al.*

(Supreme Court of Missouri. May 19, 1890.)

RESULTING TRUST—IDENTITY OF FUND—EVIDENCE.

On a bill to enforce a resulting trust against the estate of the administrator of plaintiffs' ancestor, it appeared that there came to the hands of the administrator 3,000 acres of land, and about \$100,000 in personality. A small portion of this was distributed to those entitled. Final settlement, 10 years after the grant of letters, showed a balance of \$25,382 due the estate, and was approved by the probate court, but on appeal to the circuit court the balance was adjudged to be \$71,894. The administrator owned a large plantation, but no other property of consequence. During his administration he engaged extensively in business, and suffered heavy losses. He also bought lands to the amount of \$50,000, which constitute a part of the property sought to be affected with the trust. At his death his estate inventoried \$75,000 in notes and accounts, mostly worthless, and a little other property. His debts were \$60,000, consisting in part of notes given in payment for the lands he had purchased, besides the amounts due from him as administrator to plaintiffs. Held, the evidence failed to show that the estate sought to be subjected was the product of the trust-estate, or to identify any part of it as the trust property, and did not establish a resulting trust.

Error to circuit court, New Madrid county.

Wilson Cramer, for appellants. *D. H. McIntyre*, for respondents.

BLACK, J. This is a suit in equity by Murray Phillips in his own right, and as

guardian of Amos P. Klein, a minor, against the administrator *pendente lite* of the estate of Amos R. Phillips, and the creditors of said estate, to enforce a resulting trust. The following is an outline of the facts: Shapley R. Phillips died at the county of New Madrid, in this state, in the early part of 1863, leaving a large estate, consisting of lands, personal property, and slaves. He left a widow, Adele T. Phillips, who elected to take a child's part, and one son by her, and also one daughter and two sons by a former marriage, namely, Sallie D., Amos R., and Murray Phillips. The estate, therefore, descended to the widow and children in five equal parts. Amos R. Phillips administered upon his father's estate in 1866, and the administration had not been closed when he died, which was in the year 1873. In the mean time the widow and her son died, the son dying first, and the widow left as her heirs David Stengle, Mary Stengle, and Mattie Dormer. Sallie D. Phillips married Leroy Klein. Both died, leaving one child, Amos P. Klein, whose name was changed to Amos R. Phillips, but he will be designated by his original name. It does not appear when his parents died. The inventory filed by Amos R. Phillips in 1863, as administrator of Shapley R. Phillips, discloses lands to the amount of nearly 3,000 acres, notes and accounts and allowances against estates, aggregating, with accrued interest, \$88,780, and an appraisal bill of other personal property and slaves amounting to \$26,862. The eighth and final settlement of Amos R. Phillips was filed in the probate court in September, 1872, nearly 10 years after the grant of letters of administration. This settlement shows a balance due the estate of \$25,382, and was approved by the probate court. David and Mary Stengle and Mattie Dormer appealed to the circuit court, and at the March term, 1873, the matters in dispute were referred. In August of the same year the referee reported a balance due the estate of \$71,894, and to this report exceptions were filed by the administrator. Before these exceptions were heard Amos R. Phillips died testate, and Murray Phillips was appointed administrator *de bonis non* of the estate of Shapley R. Phillips, executor of the last will of Amos R. Phillips, and guardian of the minor, Amos P. Klein. At this juncture of affairs Murray Phillips purchased the interest of David and Mary Stengle and Mattie Dormer in the estate of Shapley R. Phillips. The further history of the final settlement, as disclosed by disconnected scraps of evidence, is this: Stengle and others, the appellants, and Murray Phillips, as administrator *de bonis non* of Shapley R. Phillips, appeared in the circuit court at its September term, 1874, and represented to the court that all matters of dispute had been adjusted, and the appeal was dismissed by consent. At the March term, 1876, the appellants moved to reinstate the cause, but the court overruled the motion. An entry made at the September

term, 1876, shows that the appellants appeared by attorney, and that Murray Phillips appeared for himself and as administrator *de bonis non* of the estate of Shapley R. Phillips, and as executor of Amos R. Phillips, and as guardian of Amos P. Klein; that the exceptions to the report of the referee came on to be heard, and were overruled, and the report confirmed; and it was adjudged that there was in the hands of Amos R. Phillips, late administrator of Shapley R. Phillips, the sum of \$71,894 for distribution; and it was further ordered that a copy of the judgment be certified to the probate court. While Amos R. Phillips was the administrator of his father's estate, he purchased a large amount of lands and other property. This property, remaining on hand, was inventoried by his executor, Murray Phillips; and in 1874 the executor procured an order to sell the lands for the payment of debts, but made no sale. In 1880, Murray Phillips, for himself and as guardian of the minor child, Amos P. Klein, brought this suit against the creditors of Amos R. Phillips. The substance of the charge is that Amos fraudulently converted to his own use the assets of his father's estate, and with such assets purchased the personal and real property specified in the inventory filed by the executor; and the plaintiffs seek to have declared and enforced a resulting trust in all of the property in the proportion of their distributive shares in the estate of Shapley R. Phillips. The court awarded a decree according to the prayer of the petition.

The first question is whether the evidence makes out a case for declaring a resulting trust as to either the personal or real estate. The estate of Amos R. Phillips is insolvent, and all of the sureties on his bond as administrator of his father's estate are insolvent, except one person, and it is clearly shown that not more than two or three thousand dollars can be collected of that surety. When Amos administered upon his father's estate, he was 22 years old, and just out of school. He owned some 9,000 acres of land, which had been conveyed to him by his father in the preceding year. About 1,500 acres of this land was cleared, and, as we understand the evidence, was in cultivation. He had no other property worthy of mention. The personal assets of his father's estate amounted to something over \$100,000. Of this property slaves to the appraised value of sixteen or seventeen thousand dollars were distributed among the heirs early in the administration. From 1863 to 1873, and while Amos R. Phillips was administering upon the estate, he carried on his own farm. He bought and sold mules and other live-stock in large numbers, and he and his brother Murray purchased a wharf-boat, and as partners carried on a boating business. The evidence is that heavy losses were sustained in all of these ventures. During this time he purchased a large quantity of lands, the deeds put in evidence showing the aggregate consideration of over \$50,-

000. The defendants put in evidence the inventory of the estate of Amos R. Phillips, filed by Murray Phillips, the executor, in 1873, which shows notes and accounts to the amount of \$75,000, most of which are worthless, and a sale bill of personal property, amounting to the sum of \$6,658. The debts allowed against the estate amount to \$60,000, besides the amount due to the distributees of the estate of Shapley R. Phillips. Some of these debts allowed against Amos' estate are evidenced by notes given by him in the purchase of lands against which the plaintiffs seek to enforce a resulting trust. It is upon evidence of this general character that the circuit court based its decree.

If a person holding a fiduciary character purchase property with the trust funds in his hands, and take the title in his own name, a trust in the property will result to the persons entitled to the fund with which the property was purchased. This principle of law applies to executors and administrators who purchase property with the money belonging to the estate, and in such cases a trust results to the heirs and legatees. 1 Perry, Trusts, (3d Ed.) § 127. But the distributees and legatees have no preference over the other creditors where the means of identification fail. *Id.* § 128. In *Buck v. Ashbrook*, 59 Mo. 200, the evidence was that the money intrusted to the executor had been used, "part in business, part in improvements, and part in the purchase of the lots in controversy." And it was held that such evidence was too indefinite to form the basis of a decree. The mere change of the fund or trust property from one state or form to another will not defeat the trust. The trust will attach to the property which is the product or substitute for the original thing, and the trust ceases only when the means of ascertainment fails. But when property is turned into money, and mixed in a general mass of property of a like description, the trust ceases. 2 Story, Eq. Jur. § 1259. To follow money into land, and impress the land with a trust, the money must be distinctly traced, and clearly proved to have been invested in the land. It must be clear that the lands have been paid for out of the trust money. It is not sufficient to show the possession of moneys of the estate by the executor or administrator, and the purchase of the lands by him. *Ferris v. Van Vechten*, 73 N. Y. 113.

According to these principles of law, the plaintiffs have failed to make out a resulting trust as to all of the property, real and personal, lest it be the real estate embraced in three deeds, hereafter mentioned. There is a failure to identify or trace any of the property of the estate of Shapley R. Phillips. The claim made for the plaintiffs is that the administrator had no means of his own, and he must therefore have used the assets of the estate in the purchase of personal and real property. But it must be remembered that, during all this period of 10 years, he trans-

acted a large business of his own, and became indebted to the amount of \$60,000, besides the amount owing to the heirs of his father's estate. On this general and indefinite evidence, it is just as fair to say that the property which he owned at his death is the product of money and property received from the defendant creditors, as it is to say it is the product of the assets of his father's estate. The assets of the father's estate have not been traced to a single piece of property now on hand. In some cases, like that of *Harrison v. Smith*, 83 Mo. 210, where an agent or trustee mixes a known or defined amount of trust money with his own, so that it cannot be distinguished, equity will follow the money by taking out the amount due the beneficiary. The present is no such a case. The creditors of Amos R. Phillips are entitled to some consideration as well as the distributees. The nearest approach to an identification of any of the property of the estate of Shapley R. Phillips is in three instances, where Amos became the purchaser of real estate at sales under executions issued upon judgments recovered by him as administrator, and deeds were made to him as follows: One dated April 22, 1868, for 97 acres of land; one dated 21st April, 1869, for 50 acres of land; and the third dated 27th March, 1878, for the interest of Pressley Phillips in five or six hundred acres. These purchases aggregate the sum of \$8,493. If these lands were purchased by simply crediting the executions with the amount bid, then, in the absence of further evidence, a trust would result in favor of the plaintiffs according to the interests which they represent by inheritance and purchase in the estate of Shapley R. Phillips. It is quite probable that these lands were paid for by Amos by simply crediting the executions, but the fact is not made to appear by this record, and without which proof there can be no resulting trust. As to all the other property specified in the petition, real and personal, there is a complete failure of proof. Some other questions are discussed in the briefs, but we deem it advisable not to consider them on the present state of the record. The judgment is reversed, and the cause remanded. All concur.

GLAESSNER v. ANHEUSER-BUSCH BREWING ASS'N et al.

(Supreme Court of Missouri. May 19, 1890.)

MUNICIPAL CORPORATIONS — USE OF STREETS — NUISANCE.

1. The power granted to the city of St. Louis "to regulate the use of streets" (Charter, art. 3, § 26, subd. 2) extends to public uses only, and does not authorize an ordinance permitting a private corporation to build a railroad track and run trains across streets of the city for the transaction of its business.

2. The evidence showed that plaintiff owns improved property on one of the streets, where he lives and does business as a retail merchant; that the street on both sides of the crossing is populous, filled with stores, shops, boarding-houses, and real-

dences; that the proposed railroad track will divert travel from it, decrease the value of plaintiff's property, and take away some of the trade which he now enjoys. Held a sufficient showing of special injury to enable plaintiff to maintain a bill to enjoin the crossing as a public nuisance.

Appeal from St. Louis circuit court; DANIEL DILLON, Judge.

James O. Broadhead, for appellant. *Andrew M. Sullivan*, for respondent.

BLACK, J. By the decree entered in this case the defendant the Anheuser-Busch Brewing Association, a corporation created under the laws of this state, was enjoined from constructing and maintaining a single or double railroad switch track on, over, or across Broadway, Seventh, and Ninth streets, in the city of St. Louis; and the city, its mayor, and other officers, were enjoined from delivering possession of the streets to the brewing association for such purposes. The pleadings and the proof disclose the following facts: The corporate authorities of the city passed an ordinance giving to the brewing association the right to lay down and operate, with steam or cable power, subject to all laws and ordinances then or thereafter passed in relation to the obstruction of public streets, a single or double railroad switch from its brewery to the Mississippi river, over and across Broadway, Seventh, and Ninth streets. These streets run north and south, and the track is to be laid between Dorcas and Arsenal streets, which run east and west. Other provisions are made whereby the brewing association engages to protect the city against damages that may arise to persons or property by the construction and operation of the switch, and it is to be constructed under the supervision of the street commissioner. The ordinance also provides: "The said Anheuser-Busch Brewing Association shall place and maintain upon each graded, guttered, and paved street having sidewalks laid thereon, at the point across which the said railroad shall run, a gate, at each side of the said railroad track, of such character and dimensions as shall be approved by the street commissioner; and the said brewing association shall keep a watchman at all the street crossings where gates are required as aforesaid, both day and night, while cars are running over the said tracks, whose duty it shall be to see that the said gates are closed while trains or cars are crossing the said streets; and no cars shall be run or operated across any of the said streets between the hours of eight o'clock and nine o'clock in the forenoon, nor between the hours of eleven o'clock in the forenoon and one o'clock in the afternoon, nor between the hours of three o'clock and half past four o'clock in the afternoon of any day between the first day of September and the first day of July of the succeeding year, inclusive. * * * In no case shall cars be allowed to obstruct public travel on any street crossed by said tracks for a longer period than five minutes at any one time." The brewing association buildings occupy a

large space of ground on the west side of Ninth street. The proposed switch tracks go east from the brewery over that street, then across Seventh and Broadway streets, and thence onto the river front, where they are connected with the tracks of the St. Louis, Iron Mountain & Southern Railroad; the whole distance being about a quarter of a mile. By reason of a park and the Barracks to the east of Broadway street, a large travel going north and south is made to pass over Ninth, Seventh, and Broadway streets, and the latter is the principal thoroughfare. The plaintiff owns improved property having a front of 56 feet on the west side of Broadway street, and in which he lives and carries on the business of a retail merchant of dry goods and notions. His property is 70 or 75 feet north of the proposed crossing of the track. The property on the street, on each side of the proposed crossing, is used for stores, shops, boarding-houses, and residence purposes. The business of the brewing association is large, and it is estimated that the shipments of beer and receipts of material will average 40 car-loads per day. Aside from the streets and alleys, the association owns the property on which it is proposed to build and operate the switch; and the first question is whether the city has any authority in law to grant the right to construct and operate railroad switch tracks for private purposes across these streets. By article 3, § 26, par. 11, of the charter of the city of St. Louis, the city has power "to grant to persons or corporations the right to construct railways in the city, subject to the right to amend, alter, or repeal any such grant, in whole or in part, and to regulate and control the same, as to their fares, hours, and frequency of trips, and the repair of their tracks, and the kind of their rails and vehicles." This provision of the charter applies only to railroads of a public character, and has no reference to railroad tracks constructed for private purposes only. Indeed, the defendant does not rely upon this paragraph of the charter for authority on the part of the city to grant the right claimed in this case; but reliance is placed upon that part of paragraph 2 of the same article and section which gives to the mayor and assembly power "to construct and keep in repair all bridges, streets, sewers, and drains, and to regulate the use thereof."

We have held that this power to regulate the use of streets is not limited to the mere right to regulate travel thereon, but under it the city may authorize the laying of gas, water, and sewer pipes, and all such like uses as the public good and convenience may require. The rights of the abutting property owners must yield to all such new public uses. *Ferrenbach v. Turner*, 86 Mo. 416. And in the more recent case of *Association v. Bell Telephone Co.*, 88 Mo. 258, it was, among other things, in substance said that, when the public acquires a street, by condemnation, grant, or dedication, it may be applied to all uses consistent with, and not

subversive of, the use contemplated by the grant, dedication, or condemnation. It was accordingly ruled that the erection of telephone poles was a proper use of the street; but the ruling is based upon the ground, and can stand on no other, that the use was a public one. The case furnishes no authority for the proposition that, under the general power to regulate the use of streets, the city may devote a street, or any part thereof, to private use. The logic and argument of the opinion is a refutation of any such power. The cases before cited are in perfect accord with *Belcher Sugar-Refining Co. v. St. Louis Grain El. Co.*, 82 Mo. 124, where it is held property acquired for public use cannot be appropriated to private use. "The latter," says the court, "can no more be done than could the property in the first instance have been condemned for such use."

It has been held in a number of cases in this court that a steam railroad, built and operated upon a street in a city or town by legislative authority, is not a nuisance. *Porter v. Railroad Co.*, 33 Mo. 128; *Randle v. Railway Co.*, 65 Mo. 325; *Cross v. Railroad Co.*, 77 Mo. 318. But in all of these cases the railroad was a public corporation, and it was considered that the use of the streets for such purposes was not a perversion of the highway from the purposes for which it was dedicated. The question here is whether the city, under its general power to regulate the use of the streets, has the power to legalize the construction and operation of railroads thereon for private purposes only. On the question of such general power, it has been said: "The king cannot license the erection or commission of a nuisance, nor in this country can a municipal corporation do so by virtue of any implied or general powers. A building, or other structure of a like nature, erected upon a street without the sanction of the legislature, is a nuisance, and the local corporate authorities of a place cannot give a valid permission thus to occupy streets without express power to this end conferred upon them by charter or statute. The usual power to regulate and control streets has even been held not to authorize the municipal authorities to allow them to be encroached upon by the adjoining owner, by erections made for his exclusive use and advantage, such as porches extending into the streets, or flights of stairs leading from the ground to the upper stories of buildings standing on the line of the streets." 2 Dill. Mun. Corp. (3d Ed.) § 660. Under the general power, the city may determine to what extent the streets may be incumbered with building material, and there are many other necessary limitations upon the right of the public to an unobstructed way which are the proper subjects of municipal regulation. All these temporary obstructions are justified on the ground of necessity, and can be allowed on no other ground. Here, however, the city has attempted to devote the streets to a use which is unusual, is of a permanent character, and

for a purpose which is purely private. Gates are to be placed at the crossings, and the ordinance prescribes other regulations, all designed to protect the public. But all the details show that the proposed use of the streets is no ordinary one. That the public travel will and must be greatly obstructed is clear, and, if such an ordinance as this is to be upheld, there is no telling where such municipal legislation will end. The trust reposed in the city of St. Louis to regulate the use of the streets is for the purpose of keeping them open and free to all, and we can but conclude that the ordinance in question violates that trust, and is void. The city having no rightful authority to enact the ordinance, the switch tracks constructed thereunder on the public highway would be a public nuisance; and, in order for the plaintiff to maintain this injunction, he must show some special injury over and above the general injury to the general public. Some of the evidence offered by the defendant is that the construction of the switch will not decrease the value of the plaintiff's property. On the other hand, it is alleged and shown that plaintiff's property is within 75 feet of the proposed crossing, and the weight of the evidence is that these proposed crossings will have the effect to divert the travel to streets west of the brewery, and thereby decrease the value of the plaintiff's property, and take away some of the trade which he at this time enjoys. The evidence satisfied the trial court, and it satisfies us, that plaintiff will suffer an injury which entitles him to maintain this suit. The judgment is affirmed. All concur.

STANLEY v. WABASH, ST. L. & P. RY. CO.

(Supreme Court of Missouri. May 19, 1890.)

CONSTITUTIONAL LAW—INTERSTATE COMMERCE.

Act Mo. March 18, 1881, §§ 1, 2, require railroad companies to furnish double-decked cars for the shipment of sheep, and provide that for the shipment of a car-load of sheep in a single-decked car they shall receive only half of the legal rate of freight on a car-load of stock. Defendant carried sheep for plaintiff to a point in Illinois in single-decked cars, and charged him the full legal rate per car. Held, that plaintiff cannot recover the excess, for the statute, as to shipments out of the state, is void, being an infringement of the power to regulate interstate commerce vested in congress by the constitution.

Appeal from circuit court, Macon county; ANDREW ELLISON, Judge.

The second count of the petition is as follows: "(2) Plaintiff, for another and further cause of action, states that the defendant, in shipping said sheep as aforesaid, placed and carried them in twelve single-decked cars, and failed and refused and neglected to furnish plaintiff with double-decked cars, as it was its lawful duty to do; and the defendant, in violation of the statute in such cases made and provided, charged and collected of plaintiff, for the carrying of said sheep from said La Plata, Mo., to East St. Louis, Ill., at the rate of twenty-five dollars per car for twelve cars, making the sum of

three hundred dollars received by the defendant for the transportation of said sheep, which was the full legal rate of freight allowed for the shipment of stock, and was one hundred and fifty dollars in excess of the amount that the defendant could lawfully charge for such transportation of said sheep in a single-decked car. Wherefore the plaintiff says an action hath accrued to him to have and recover of defendant the sum of one hundred and fifty dollars, the excess so charged as aforesaid, for which plaintiff demands judgment." This count is based upon the statute entitled "An act to require railroad companies to furnish double-decked cars for the shipment of sheep, and providing a penalty for failing so to do," approved March 18, 1881. A trial by the court, without the intervention of a jury, resulted in a judgment for plaintiff in the sum of \$105, which caused an appeal by the defendant to the Kansas City court of appeals, from which court the cause was transferred to this court on a jurisdictional ground. Other points are unnecessary to be set forth now, as they will be sufficiently stated in the opinion.

Wells H. Blodgett and George S. Grover, for appellant. *Sears & Guthrie*, for respondent.

SHERWOOD, J., (after stating the facts as above.) 1. The second count of the original opinion charged that the contract was made to ship the sheep from La Plata, Mo., to St. Louis, Mo., but the amended petition charged the contract was to ship the sheep from La Plata, this state, to East St. Louis, Ill.; and upon this it is claimed that there was a change in plaintiff's cause of action. This point need not be discussed, because it appears that the answer of the defendant to the original petition was considered as replied to the amended petition, and, this being done without objection, cannot be objected to here for the first time. Nor need the action of the trial court as to plaintiff's first count be considered, seeing that it was in favor of the defendant, and the plaintiff does not appeal. The statutory provisions upon which this action is brought are as follows: "Section 1. All railroad companies, private companies, or individuals owning or operating a railroad or railroads in the state of Missouri, are required to furnish a sufficient number of double-decked cars for the shipment of sheep to supply the demand for such cars on their respective lines, and to allow shippers to load both decks in said cars with sheep to the aggregate extent of (20,000) twenty thousand pounds; which cars, so loaded, shall be received and transported by such railroad companies, or private companies or individuals, as one car-load of stock; and it shall not be lawful for said railroad companies, private companies, or individuals to charge or receive for the transportation of a double-decked car of sheep more than the legal rate of freight allowed for the shipment of stock. Sec. 2.

Should any railroad company, or private company or individuals, owning or operating a railroad or railroads in the state of Missouri, refuse or neglect to furnish cars as provided in the preceding section, it shall not be lawful for them to charge or receive for the transportation of a car of sheep more than one-half the legal rate of freight allowed for the shipment of stock." It will not be intended that this statute was to have any extraterritorial force, since this would be beyond the power of the legislature of this state. General presumptions of this sort always attend legislative acts. *Merrill v. Railroad Co.*, 21 Amer. & Eng. R. Cas. 48, and cases cited; 2 Ror. R. R. 1151; Ror. Int. St. Law, 149-154.

2. But if, as held by the trial court, the statute under discussion can be held to apply to interstate shipments, then it is an attempted regulation of commerce, and violates article 1, § 8, of the constitution of the United States. *Gibbons v. Ogden*, 9 Wheat. 1; *Welton v. Missouri*, 91 U. S. 275; *Railroad Co. v. Husen*, 95 U. S. 465; *Hall v. De Cuir*, Id. 485; *Manufacturing Co. v. Ferguson*, 118 U. S. 727, 5 Sup. Ct. Rep. 739; *Hardy v. Railroad Co.*, 18 Amer. & Eng. R. Cas. 432, and cases cited; *Carton v. Railroad Co.*, 59 Iowa, 148, 13 N. W. Rep. 67; *Louisville & N. R. Co. v. Railroad Commissioners*, 16 Amer. & Eng. R. Cas. 1. "The legislative authority of every state must spend its force within the territorial limits of the state." *Cooley, Const. Lim.* 151. Controlled by these considerations, we reverse the judgment. All concur.

ST. LOUIS T. RY. CO. v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Missouri. May 19, 1890.)

RAILROADS — CROSSINGS AND CONNECTIONS — EMINENT DOMAIN.

1. The report of commissioners appointed by the circuit court in a proceeding under Rev. St. Mo. 1879, § 765, providing that any railroad company shall have power to cross, unite, etc., its railroad with any other, and that if the two corporations cannot agree as to the amount of compensation, or the points of connection, the same shall be determined by commissioners as in the condemnation of lands for railroad purposes, will not be set aside on appeal because it fails to recite that the commissioners went upon the premises, and viewed the points of crossings and connections, as, in the absence of evidence to the contrary, it will be presumed they performed their statutory duty.

2. Nor will such report be set aside on appeal because it does not award damages to defendant corporation, when no evidence on that point is preserved in the record.

3. A report allowing plaintiff a latitude of 10 feet in which to make the connections, with an explanation that it is for the purpose of a proper alignment of the frogs and lead-bars, is sufficiently definite under the statute.

4. Where the general direction of both roads is north and south across a street running east and west, and plaintiff's tracks approach those of defendant diagonally, it is not a ground of objection to the report that it permits plaintiff to make the connection on the north or south side of the street, in the absence of any showing in the record that defendant is prejudiced thereby.

5. But a provision in the report permitting plaintiff to occupy a certain incomplete switch of defendant for the space of 250 feet, without compensation, is virtually a condemnation of defendant's property, and is unauthorized by the order appointing the commissioners to determine the points and manner of crossings and connections, and to ascertain the damages therefor, and an exception to the report on that ground should be sustained.

Appeal from St. Louis circuit court.

Hitchcock, Madill & Finklenburg, for respondent. *Thos. J. Portis and Henry G. Herbel*, for appellant.

BLACK, J. The plaintiff, the St. Louis Transfer Railway Company, is a corporation organized under the laws of this state for the purpose of building and operating a transfer railroad from the southern to the northern portion of the city of St. Louis. The proposed route, with two tracks, is, for the most part, along the public wharf of the city. The defendant has tracks and switches which are also located on the wharf. The plaintiff desired to join and unite with some of these tracks of the defendant, and to cross others, but was unable to come to any agreement with the defendant. Thereupon the plaintiff brought this suit to have commissioners appointed to ascertain the points and manner of making the crossings and intersections, and to ascertain the compensation to be paid the defendant therefor. The suit or proceeding is founded on section 765 of the Revised Statutes of 1879, which provides that any railroad company shall have power "to cross, intersect, join, and unite its railroad with any other railroad before constructed, at any point in its route, and upon the grounds of such other railroad company," etc.; "and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined by commissioners to be appointed by the court, as is provided in this chapter for the condemnation of lands for railroad purposes." The defendant filed an answer, to which there was a reply. Upon these pleadings the court heard evidence, and made a finding to the effect that it would be necessary for the plaintiff to join, unite, and connect with the track of defendant near the foot of Rutger street, and near the foot of Almond street, and to cross and intersect with the track of defendant near the foot of Trudeau street. The court also appointed commissioners "to ascertain and determine the points and manner of the crossings and connections of said plaintiff's railroad with said tracks of or connected with defendant's railroad above mentioned, and the amount of compensation to be made therefor, respectively, if any." The commissioners in their report state "that the railroad crossing to unite and connect the track of the plaintiff's railroad with the levee track of the defendant's railroad upon the public wharf, near the foot of Rutger street, in St. Louis, should be placed within

ten feet of either the north or south lines of the street, produced eastwardly; in such manner and position, however, as that no part of said crossing or 'lead-bars' shall be opposite to the end of said street." A like report is made in respect of the Almond-Street connection, and in respect of these two connections the commissioners say: "The latitude given to the positions of the crossings at Rutger and Almond streets is for the purpose of proper alignment of railroad frogs and lead-bars placed in the common mode of crossings of parallel railroads, with proper angles and length of lead best adapted to such crossings." The report concerning the award of damages, and the crossing and intersection of Trudeau street, is as follows: "The commissioners find that the railroad crossing, to unite and intersect with tracks of the plaintiff's railroad near Trudeau street, as described in the order of the court, should be placed on the public wharf between two hundred and fifty and three hundred feet south of the south line of Trudeau street, produced eastwardly. This crossing applies only to the west track of the plaintiff. The east track of the plaintiff should occupy the portion of the wharf on which the 'wild track,' so called, of the defendant's railroad is located, for a distance of about 250 feet. To make this condition possible, a bank of earth about 8 feet high will be necessary from the point where the west track of plaintiff should cross the Iron Mountain & Southern Railroad 'wild track' to about where the north line of Trudeau street, produced eastwardly, would intersect this bank when made. In length, this bank would be about 300 feet, or such other reasonable length as will admit of a good connection and crossing to be made, which should be here made in fashion and form similar to other crossings hereinbefore described."

Numerous exceptions were filed to this report, all of which were overruled, and exceptions saved; but the record does not contain any of the evidence offered upon the hearing of the exceptions or at any other stage of the trial.

1. The report does not, in terms, state that the commissioners went upon and viewed the tracks where the connections and crossings were to be made, and for this reason it is insisted the report should be set aside. It is the plain statutory duty of the commissioners to view the premises, but there is nothing in the law which requires them to recite that fact in their report. A failure on their part to conform to this requirement might be shown in support of the exceptions made to the report. Here, however, none of the evidence is preserved, and there is therefore nothing to show that the court erred in overruling this exception.

2. The next objection is that the commissioners made no award of damages to defendant; their finding being, in effect, that defendant would not be damaged by the proposed connections and crossings. The cir-

cuit court has the power to hear evidence upon the question of the amount of compensation allowed by the commissioners, and may award a new appraisal, upon good cause shown, and the ruling of the circuit court in respect thereto may be reviewed by this court on error or appeal. *Bridge Co. v. Ring*, 58 Mo. 491; *Railroad Co. v. Almeroth*, 62 Mo. 343; *Road Co. v. Dennis*, 67 Mo. 439. Nor is the power of the court to review the report confined to the question of compensation. *St. Joseph T. R. Co. v. Hannibal & St. J. R. Co.*, 94 Mo. 536, 6 S. W. Rep. 691. But this court does not enter into a critical examination of the evidence offered on a hearing of the exceptions made to the report as to the compensation which should have been awarded by the commissioners. Their award is made from their knowledge acquired from an inspection of the premises, and it is only where the damages awarded are manifestly excessive or inadequate that this court will interfere. See authorities before cited. As the evidence offered on this objection to the report is not preserved, there is nothing before us for review, so far as compensation to defendant is concerned. It must be remembered that these crossings and intersections are all made on public property, and by the report the plaintiff must be at the cost of making and keeping them in repair, and there is nothing unreasonable in the report in allowing no damages to the defendant. It is true that, in speaking of the cost of these connections, the report mentions crossings only; but it is evident, from other portions of the report, that the commissioners had in mind connections and intersections as well as crossings.

3. A further objection is made to the report, on the ground that it is indefinite, in this: that it does not locate the points at which the crossings and intersections shall be made, and does not determine the manner of making them. We will consider, first, the Rutger-Street intersection. The eastern terminus of this street is upon the public wharf. Opposite the front of this street the defendant has one and the plaintiff two tracks, all running north and south along the wharf. As to this connection, the commissioners say it "should be placed within ten feet of either the north or south lines of the street produced eastwardly, in such a manner and position, however, as that no part of said crossing or lead-bars shall be opposite to the end of said street." The statute, it will be seen, says: "The points and manner of such crossings and connections shall be ascertained and determined by the commissioners." The commissioners say they allow the latitude given by them for the purpose of proper alignment of the frogs and lead-bars, and this is a sufficient explanation, so far as the latitude of 10 feet is concerned. But the objection that the report leaves it optional with the plaintiff to place the connection either at the north or at the south line of the street deserves more consideration. The circumstances may be

such that the point should have been fixed definitely at one of these places, but there is nothing in the record to show that the defendant is in the least prejudiced by reason of the fact that plaintiff can connect at either street line. The statute does not mean that the point of connection must, in all cases, be so specifically located that there can be no variance whatever. Much must depend upon the location and surrounding circumstances. The report on its face, and in the absence of any further showing, seems to satisfy all practical demands, and that is sufficient. The defendant argues that the question thus left open by the report may have been the very one upon which the parties could not agree, and this may be true. But no such a showing is made by this record. These observations dispose of a like objection made to the Almond-Street connection, and to the crossing of the plaintiff's west track at Trudeau street. The report contemplates that the connections and crossings shall, in their construction, conform to common usage in like cases, and we see no objection to it in this respect.

4. Finally, as to the Trudeau-Street intersection. The pleadings admit that defendant has a side or switch track which comes in upon the wharf from the north of Barton street, and runs thence northwardly, along the wharf, to and beyond the foot of Trudeau street. This track was not completed, and not in a condition for use, when the pleadings were filed in this case. This is the track which is designated as a "wild track" in the commissioners' report. The plaintiff, at this place as elsewhere along its line, proposes to construct two tracks, and the commissioners, after providing where the plaintiff's west track shall cross this incomplete switch or side track, proceed to say: "The east track of the plaintiff should occupy that portion of the wharf on which the 'wild track,' so called, of defendant's railroad is located, for a distance of 250 feet." The specific objection to this part of the report is that the commissioners were appointed to locate the crossings and intersections, and nothing more; and, without authority they dispose of 250 feet of the defendant's right of way, and that; too, without compensation. The petition does allege that this side track of the defendant was an obstruction to the public wharf, and was unauthorized; but it goes on to say that the plaintiff's projected road crosses and intersects it, and that the plaintiff had requested defendant to agree upon the point of intersection, and upon the compensation to be paid defendant. The answer denies that the location of the switch was unauthorized. The court found that defendant had partly constructed and was in possession of the switch or side track, and that it was necessary for the plaintiff to cross and intersect the same. It is very clear, from all this, that the court did not find or adjudge that the location of this switch track by defendant was unauthorized. This is

clear, too, from the fact that the court appointed the commissioners to determine the points and manner of the crossing and connection of plaintiff's road with this side or switch track of defendant, and to ascertain the damages to the defendant arising therefrom. No other power or authority was conferred upon them. Yet the report says the east track of plaintiff shall occupy 250 feet of the defendant's track. The profile map filed with the plaintiff's petition also shows that plaintiff's east track is located on this switch track. As we understand this report, it, in effect, condemns 250 feet of the defendant's side track, and appropriates the same to the use of the plaintiff. We see nothing in the order of the court which will justify any such action on the part of the commissioners. The order of the court and the commissioners' report are inconsistent, and, as we understand them, cannot be reconciled and made to harmonize. It is one thing to provide for connecting plaintiff's track with that of the defendant, but it is another and a different thing to say the plaintiff may lay its own track on 250 feet of the defendant's incomplete switch. It may be that, in point of fact, the defendant has no right to lay its side track on the wharf at the foot of Trudeau street; but these commissioners were appointed on the theory that the defendant had such right, and yet that right is disregarded in the report. As at present advised, this exception to the report should have been sustained. The judgment must therefore be reversed, and the cause remanded, and it is so ordered. All concur.

STATE *ex rel.* BROOKWITH *et al.* v. FINN *et al.*

(Supreme Court of Missouri. May 19, 1890.)

SHERIFF—FAILURE TO PAY OVER PROCEEDS OF EXECUTION—ACTION.

1. In an action against a sheriff by those claiming under defendants in execution, for failure to pay over the proceeds of property sold under execution in excess of the debt, it is not error to exclude evidence that defendant actually received more cash than appears by his return, when the amount for which the property sold is admitted; that being the sum for which he was bound to account, whether he received the money or not.

2. In an action against the sheriff by persons claiming under defendants in execution, for the proceeds of the property sold in excess of the debt, where it is shown that plaintiffs' agent bought the property for them, and gave the sheriff a receipt for such excess, and received a deed to plaintiffs, they cannot recover.

Appeal from St. Louis circuit court; WILLIAM H. HORNER, Judge.

Cunningham & Eliot, for appellants. *B. T. Farrish and Valle Reyburn*, for respondents.

BLACK, J. This is a suit upon the official bond of defendant Finn as sheriff of the city of St. Louis. There are two counts in the petition, each relating to different property and to different executions. The pleadings, proofs, and rulings of the court are substan-

tially the same on both counts, so that it will only be necessary to consider the first. An execution was issued out of the circuit court upon a judgment recovered by the collector for back taxes due upon property designated "Lots 1, 2, and 3." The execution was special, and directed the sheriff to sell each lot for the payment of the amount of taxes adjudged to be due thereon, with interest and costs. A large number of persons are named as defendants in the execution. The sheriff sold lot 1 for \$3,000, lot 2 for \$100, and lot 3 for \$25, to John F. Lee. The taxes, interest, and costs due upon lot 1 amounted to \$854.18; thus leaving a balance of \$2,145.72 to be paid to the execution defendants on account of the sale of that lot. The other two lots did not sell for the amount of the taxes due thereon. The plaintiffs, Beckwith & Lapham, acquired 11-24 of lot 1 from some of the execution defendants pending the tax-suit; and by this suit they seek to recover from the sheriff the 11-24 of the surplus arising from the sale of that lot. The petition states that Lee paid the purchase price of the three lots, namely, \$3,125, to the sheriff, and received a deed to the property, but that the sheriff failed and neglected to have the said sum or the surplus, or any part thereof, before the court, and that he failed and refused to pay to them their share of such surplus. Plaintiffs put in evidence the execution, and the sheriff's return thereon. The return shows that the three lots were sold to Mr. Lee at the prices before stated, and then goes on to say: "Making an aggregate of \$3,125, of which sum \$1,796.66 was to me paid, and by me applied to the debt, interest, and costs in this writ; the balance of said purchase money not paid." No statement is made in the return as to the disposition of the balance, or why it was not paid. The plaintiffs then called Mr. Lee, who testified that, as agent for the plaintiffs in this suit, and the other owners mentioned in the execution, he became the purchaser of the three lots at the prices before named, aggregating \$3,125; that he only paid the sheriff \$1,795.66, being the amount of the debt, interest, and costs due upon the execution; and that, for the owners of the property, he receipted to the sheriff for the balance of the purchase price, and received a deed to the property. The plaintiff then offered to show that the sheriff had not disposed of the moneys received as recited in the return, and that he had after the sale received further sums of money upon the execution, which did not appear accounted for by the return. This evidence was excluded on the objection of defendants that the return was conclusive as to the defendants in the execution, and persons claiming under them; and it seems to have been excluded on the additional ground that the suit should have been one for false return. The court then declared the law to be that, on the pleadings and evidence, the plaintiffs could not recover, and gave judgment for defendants.

1. The first question is whether the court erred in excluding the proposed evidence. As between the parties to a suit and their privies, the general rule is that the return of the sheriff to mesne or final process is conclusive. But the rule has no application in a suit against the sheriff for neglect of official duty. In such a suit the return is at most only *prima facie* evidence in the sheriff's favor. *Freem. Ex'ns*, (2d Ed.) § 366. The evidence offered by the plaintiffs could not, therefore, be properly excluded for the reason assigned in the objection made to it by defendants; nor was it necessary for the plaintiff to sue the sheriff for a false return. An action on the case does not lie for not having money levied on *fleri facias* in the court, where the sheriff has not been ruled; the proper remedy in such case being *assumpsit* or debt for money had and received. 1 Chit. Pl. (16th Amer. Ed.) *156, note *g*. Here the plaintiffs allege, the defendants admit, and the return shows, the prices at which each lot was sold, and the aggregate of the sales. The sheriff was bound to account for this aggregate amount; and that, too, whether he received any part or portion of it. That he only received a part is wholly immaterial, so far as this suit is concerned. Again, it may be true, as stated in the return, that he applied the amount which he did receive, namely, \$1,795.66, on the execution. Still, in an accounting with the defendants in the execution, or their assignees, he was not entitled to a credit for that amount. The execution did not run against the defendants therein, but against the lots only; and each lot stood charged for a separate and distinct amount, and one lot could not be made to pay any part of the amount due upon the others. As lots 2 and 3 did not sell for the debt with which they were charged, the amount which the sheriff was required to pay over to the defendants in the execution, and their assignees, was the difference between the price at which lot 1 sold, and the debt and costs charged against it. To recover this difference, it was not necessary to show or prove that the sheriff's return was, in point of fact, false in any particular. Had he made a false report as to the price at which the property was sold, then a question would arise which we are not now called upon to consider. But, if the evidence was properly excluded, the judgment should not be reversed because it was excluded for a wrong reason. As we have seen, the amount of the sales, agreed to on all hands, fixed the amount for which the sheriff was bound to account, and that, too, whether he received the money or not. Evidence aside from the return was unnecessary on that point. The execution, which was in evidence, showed conclusively the amounts to be applied thereon. The whole of the proposed evidence was therefore unnecessary, and added nothing to the plaintiffs' case. The facts had been proved by primary and better evidence, and there was no error in excluding the proposed evidence. oogle

2. The difficulty with the plaintiffs' case is that they showed by their own witness, Mr. Lee, that he purchased the three lots as the agent for these plaintiffs and the defendants in the execution, and as such agent settled with the sheriff, and, for the plaintiffs in this case and defendants in the execution, receipted to the sheriff for the balance of the purchase price. There may have been some mistake in that settlement, but the petition is not framed with a view of recovering on any such ground. The judgment is affirmed. All concur.

SOEDER v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Missouri. May 19, 1890.)

DEATH OF SERVANT—NEGLIGENCE—PROXIMATE CAUSE—EVIDENCE.

1. In an action against a railroad company for the death of a brakeman it was shown that deceased was engaged at night in switching cars on a track where there was a rail so worn as to be an inch and a half lower than the next one at the joint, so that a car passing over the joint would be jarred, and that deceased fell from the car on which he was riding, striking the ground at a point consistent with the theory that he was thrown off by the jar in passing over the joint, and that he was dragged some distance, and killed, though nobody saw the accident. *Held*, that the evidence was sufficient to take the case to the jury.

2. It is not error to allow plaintiff, the widow of deceased, to testify as to the number of her infant children, as deceased was bound for their support, and his death cast the burden on her.

3. It is not reversible error to allow plaintiff to testify that she had an infant child by a former marriage, where the verdict was for \$3,500, as such evidence does not appear to have influenced the amount of damages.

Appeal from St. Louis circuit court; **SHEPARD BARCLAY**, Judge.

T. J. Portis and *Bennett Pika*, for appellant. *A. R. Taylor*, for respondent.

BRACE, J. This is an action by the widow of William Soeder for damages for the death of her husband, alleged to have been caused by the negligence of the defendant, in whose employ the said Soeder was at the time of his death, engaged in the discharge of his duties as a brakeman. Three grounds of recovery are stated in the petition: *First*, that the accident was caused by the failure of defendant to have a sufficient number of men to manage and control the train; *second*, by reason of a defective brake upon the cars of said train; and, *third*, by the negligence of defendant in permitting its track to be and remain in a defective condition at the point where plaintiff's husband was run over and killed.

The first ground was practically abandoned on the trial; upon the second no evidence was introduced; and the case was tried, submitted, and turned upon the third alleged ground of negligence. The plaintiff recovered judgment for \$3,500. On the trial the defendant demurred to the plaintiff's evidence. The material evidence for the plaintiff bearing upon the issue submitted was, in substance, as follows: Mrs. Soeder, the plaintiff, testi-

fied that she is the widow of William Soeder; that at the time of his death, on the 27th of August, 1886, he was 29 years and 6 months old; that he was a brakeman in the employ of defendant, for whom he had been working in the yard since the 4th of July preceding his death; that he was a sober and industrious man, receiving as wages about \$70 per month; and, in answer to the question how many children she had, said: "I have one by him. I have two little ones. I have been twice married." She further testified that her husband had worked about three years as fireman and brakeman for the Missouri Pacific Railway Company before he worked for the defendant. C. W. Sergeant testified that the track upon which the accident happened was an Iron Mountain track; that from Stein street, as one goes down towards the river, the grade is very steep; that they were "hauling" Vandalia, O. & M., and C. & A. cars that night, all of which were heavily loaded; they were transfer cars, that had been taken out of the yard, loaded with ore; that they only took half the cars at a time, shoved them on the switch track, and left them north-east of the Stein-Street crossing, and went back to get the other half; that witness stood at the crossing to make the coupling; that they (he and Soeder) were shoving the cars in there around a sharp curve, and Soeder had to stand on the main track to pass signals from the engineer to witness. The examination then proceeded thus: "Question. Who had to do that? Answer. Soeder. Q. After he signaled, and the car moved, what did he do? A. He signaled back until I went in, and made the coupling. After I made the coupling I gave the signal, 'All right, back up.' I answered the signal to get up on top. Q. Is that a brakeman's place? A. Yes, sir; especially shoving in on a track like that. Q. Where did you get up? A. Right at the Stein-Street crossing. Q. How was the train moving? A. Well, you can't judge; it is down grade in there. We just made the coupling, and, after I got up on top, of course they were not moving more than three or four miles per hour." After several questions were asked and answered as to the number of brakemen on the train, and the number that such a train ought to have, the examination on the main question was resumed, thus: "Question. When did you next see the deceased, William Soeder, after you saw him get up on top of the car? Answer. Not until the engine had come around the curve. The fireman came on the gangway, and said: 'I think your partner has fallen off, and got hurt.' He then says, in substance, that he went down on the side of the train opposite to that on which Soeder was lying, and called him by name; got no answer, and went around on the other side of the train, and found Soeder lying there, about 45, 50, or 55 feet north-east of Stein street; that from the appearance Soeder must have been dragged from 20 to 25 feet; that the wheels passed

over him above the hips; his body was lying outside the rail, and his limbs were lying inside under the cars; he was dead; that he examined the track there that night when he went to work the second time; that Davis, the night yard-master, was with him; that there was a 'defective' rail there,—a short rail,—not more than from 15 to 18 feet long; that what is called the 'ball' on the short rail was completely worn off, which made a kind of 'offset' of an inch and a quarter, which would cause a car passing over it 'to bound and jump;' that there must have been from four to six feet of this rail in that condition; that the top of the rail was splintered off, and the body of the rail lay on the ties; that the condition of the rail would cause cars going over it to jump; that this defective portion of the rail commenced about three or four feet from where Soeder fell; you could see how far he was dragged, by the cinders being dragged along with him, as though the place had been swept by a broom; this sweeping commenced three or four feet north-east of the defective rail; the train was going in a north-east direction; that he has examined the condition of this rail since the accident, and it is in about the same condition as it was then; that the rail connected with this rail was in a good condition; that the outside rail was higher than this short rail; that the joint connecting this short rail with the next rail was a bad one; that there was a 'lip' on the rail there, which was a half an inch or three-quarters of an inch; that he did not notice any other rail near there; that Soeder got off on the south side of the crossing,—on the south side of Stein street; that he thinks Stein street is probably about 25 or 30 feet wide; if 30 feet wide, it was about 55 feet from where Soeder got on top of the car to the point where this defect in the track was; that he didn't see him fall, and didn't see him when he fell." On cross-examination, this witness testified "that Soeder's body was found from 40 to 60 feet from Stein street; that, if Soeder fell off from the car at the point where the appearance of dragging was, it must have been 25 or 30 feet from Stein street; that the switch which witness opened is a little south of Stein street,—15 or 20 feet; that Davis, the foreman of the crew, was not there at the time of the accident; that, the last time witness saw Soeder, he (Soeder) got onto the cars at Stein street; that he didn't know where Soeder was when he was killed, or whether he was standing up or sitting down; that he didn't see Soeder after he got on the train, and that not seeing him when he fell witness does not know how Soeder fell, or how he was killed; that when Soeder fell off the cars, if he did fall, he was about forty or forty-five feet from Stein street; that the switch he spoke of is south of Stein street, and that the defective rail was 35 or 40 feet from Stein street." The following question was asked witness in relation to the short rail: "Question. Isn't that a very common thing in a

track,—side track in a yard,—that kind of a rail? Don't you find that sort of a rail very frequently on a side track in a yard? Answer. Not a rail battered down the way that was. I have seen rails battered down; yes, sir." S. K. Harding testified, in substance, as follows: "That he is a railroad man, having been engaged as switchman and brakeman for about sixteen years; that he knows the Iron Mountain 'Ear' track at Stein street; that he saw the rail of that track, about 30 or 40 feet north of Stein, day before yesterday; that he went to look at it in company with Mr. Sergeant (the preceding witness) and a Mr. Donahue; that he saw the rail spoken of; it was a rail about 15 or 16 feet long; that the ball of the rail was worn off badly for about a distance of 5 or 6 feet from the joint, so as to give a fall of an inch or an inch and a half; that the west rail was a good rail, and was not worn off any; that the point where this rail was worn off is an inch or an inch and a half lower than the other part of the rail; that the effect of this low joint is like riding in a wagon on a country road, and the forward wheel strikes a rut like,—if you have rode in a wagon. Sitting on a car or standing on it, the sudden jar is liable to throw you off." And on cross-examination he testified "that he seen this rail a day or so ago, and had seen it last winter when he worked there; that a car going over said rail would make a jolt of an inch or an inch and a half; that a car going over such a rail, at three or four miles an hour, would give a jar; that witness, as a railroad man, had had many jars; that he does not know anything about the kind of cars that ran over the switch track the night of the accident; that he had never seen the track there before the accident, and doesn't know anything about the condition of said track at the time of the accident."

This was all the evidence upon which plaintiff relied for a recovery. The defendant did not stand on its demurrer to the evidence, but introduced evidence to sustain the issues upon its part. This evidence, however, did not tend to strengthen the plaintiff's case, but was confined to showing that the defective rail complained of had been there for an indefinite period of time before the accident; had been in continual use since, and was then in use on the day of the trial; was not in the condition testified to by plaintiff's witnesses, and was in a reasonably safe condition at the time of the accident; and the question remained for the court to determine, after all the evidence was in, is there any evidence tending to show that the defective rail was the cause of Soeder's death?

1. It satisfactorily appeared from the evidence that his death was the result of defendant's train passing over his body; that by some means his body got beneath the wheels of the train at a point on the track distant from the defective rail, in the direction in which the train was traveling, about four or five feet. The evidence would war-

rant the inference that, just before the train entered upon this defective rail, the deceased was at his post, sober, in good health, on the top of one of the cars in the train, in the discharge of his duties as brakeman, and that he was exercising due care; that the car on which he was "jolted" or jumped on entering upon this defective rail. The distance from the place where they could have inferred this jolting took place, to the place where it was found from the marks on the track that the body had fallen, considering the direction in which, and the rate at which, the cars were moving, was consistent with the theory that the fall was caused by the jolting of the car in its passage onto or over the defective rail. There is nothing in the facts tending to sustain any other theory, and under the authority of the rule laid down in the following cases, which has been reiterated in many others, the court could not have sustained the demurrer on the ground that there was no evidence tending to show that the death was caused by the defective rail. *Meyer v. Railroad Co.*, 40 Mo. 151; *Kelly v. Railroad Co.*, 70 Mo. 604; *Buesching v. Gas-Light Co.*, 73 Mo. 221; *Scovill v. Glasner*, 79 Mo. 449; *Turner v. Langdon*, 85 Mo. 438; *Cook v. Railroad Co.*, 63 Mo. 397.

2. As to whether there was a substantial defect in the track occasioned by the defective rail, or whether the defendant was familiar with this particular track, were questions also for the jury, as different conclusions might be drawn from the evidence on these subjects. Conceding, however, that the deceased was perfectly familiar with this track, and remained in defendant's employment, this, of itself, would not have been sufficient to defeat a recovery. The deceased's knowledge of the unsafe condition of the track, if it was unsafe, would not defeat a recovery, if "it was not so dangerous as to threaten immediate injury, or if he might have reasonably supposed that he could safely work about it by the use of care and caution." *Huhn v. Railway Co.*, 92 Mo. 440, 4 S. W. Rep. 937, and cases cited. The court committed no error in refusing to take the case from the jury.

3. The judgment should not be reversed because the plaintiff was permitted to testify as to the number of her infant children. The husband was bound for the support of his own child, and his death cast this burden upon her, (*Tetherow v. Railway Co.*, 98 Mo. 74, 11 S. W. Rep. 310;) and there is nothing in the amount of the damages assessed to suggest the idea that it may have been affected by the fact that she had another child by a former husband.

4. Conceding that the evidence was sufficient to take the case to the jury, as we have found that it was, the issues were presented by an admirable series of instructions, covering the whole law of the case, and including every proposition contained in defendant's refused instruction that could prop-

erly have been given. Finding no reversible error in the record, the judgment is affirmed. All concur, except BARCLAY, J., not sitting.

ROGGE v. CASSIDY.

(Court of Appeals of Kentucky. May 13, 1890.)

ASSUMPSIT—PARTIES.

1. A complaint, in an action on a note delivered to plaintiff by one of the makers without any indorsement of the payee named therein, alleging that the note was executed for discount, and that, on the refusal of the payee to discount it, plaintiff discounted it, is not demurrable for failure to make the nominal payee a party, under Civil Code Ky. § 18, providing that every action shall be brought in the name of the real party in interest. The rule that the payee who transfers a note without indorsement retains the legal title does not apply in such case, as the nominal payee never had the legal title.

2. The answer of one of the joint makers was that the note was not executed for discount, but for the purpose and with the distinct agreement that it should be delivered to the payee named in the note in renewal of a note executed by the same makers to the same payee; that he was in fact a surety for the other maker on both notes; that he would not have signed the note for discount, but only to extend the other note; and that he received no part of the proceeds of it. *Held*, a good defense, under Rev. St. Ky. c. 22, §§ 6, 21, providing that a promissory note shall not be negotiable unless negotiated in and by a chartered bank, and Civil Code Ky. § 19, providing that the assignee of any other promissory note shall hold it subject to all proper defense.

Appeal from circuit court, Kenton county.
"Not to be officially reported."

C. J. Helm, for appellant. D. A. Glenn, for appellee.

HOLT, J. The appellee, C. L. Cassidy, brought this action upon this note: "Newport, Ky., Oct. 19, 1885. Ninety days after date, we jointly and severally promise to pay to the German National Bank of Newport or order three hundred dollars, negotiable and payable at its banking office in Newport, Kentucky, for value received; and we hereby direct the proceeds of this note, when discounted, to be placed to the credit of ———. H. H. HELLMAN. CHAS. H. ROGGE." The petition avers, in substance, that it was executed by the obligors for the purpose of discount; that the German National Bank refused to discount it; and that Hellman then, by his agent, for "the price agreed upon," discounted it to the appellee. There was no written assignment of it by any one to him. A special demurrer was filed to the petition, the ground being that the German National Bank had not been made a party. The averments of the petition show, however, that it was a nominal payee, merely, and that it never had any right, or even claim to the note. These statements were admitted by the demurrer. The fact, therefore, that the appellee held the note by delivery only from the maker, and not by an indorsement from the bank, did not require it to be a party. There was no necessity for it. The Civil Code, § 18, provides that every action shall be brought in the name of the real party in interest.

The rule that, where the payee transfers a note by delivery merely, and not by indorsement, the legal title therefore remaining in him, requiring him to be a party to an action upon it, does not apply in a case of this character. A rule of law is not to be applied when there is no ground or reason for its application.

Upon the overruling of the demurrer a judgment was rendered. Two days after, the appellant presented an answer, and moved to set aside the judgment and file the answer. The court refused to do so. Why, does not appear. It was proper, however, to sustain the motion, provided the answer presented a valid defense. We will therefore assume, as is asserted in argument it did, that the lower court acted upon the belief that it was insufficient, and did not, in the exercise of its discretion, reject it upon the ground of delay in presenting it. It denies that the note was executed for the purpose of discount, but, upon the contrary, avers that the German Bank held another note, upon which Helman, Rogge, and one Bockweg were joint obligors, and which was about due; that the note sued on was executed by the appellant with the distinct agreement with Hellman that Bockweg was also to execute it, and it was then to be delivered to the bank in renewal of that much of the debt to it, Helman paying the balance; also, that Helman was then in failing circumstances, and that he did not and would not have signed it for discount, but only to extend the time of payment of the existing liability for Helman; that he was in fact the surety of Helman in the note sued on, received no part of the proceeds of it, and has no knowledge or information sufficient to form a belief as to what the appellee paid for it. The statements of the answer are to be taken as true in considering the motion to file it. So considering them, did it present a valid defense? Counsel for the appellee appear to argue the case as if the note sued upon stood upon the footing of negotiable paper. It is scarcely necessary to say that, if it did, then any agreement between the obligors to it, and which was unknown to the holder, could not affect him. In such a case, a total failure of consideration, or even fraud, between the antecedent parties, constitutes no defense as to him, provided he obtained the paper for a valuable consideration before its maturity, and without notice of any infirmity connected with it. It is true the answer does not aver that the appellee had notice of the agreement between the obligors, and the circumstances attending its execution. But it was not negotiable paper. It was so in form; but, by our statute, (Gen. St. Ky. c. 22, §§ 6, 21,) although so in form, yet it could not in fact become so unless it was negotiated in and by a chartered bank of this state. Being a mere promissory note, the assignee held it subject to all proper defenses. Civil Code, § 19. The appellee relies mainly upon the case of *Warr v. Bank*, 14 B. Mon. 283. It is not in point. It was

there decided, if a note be executed by sureties to enable the principal to raise money of a bank to which it is made payable, and it be not there discounted, yet the sureties will be held liable to an individual who advances money upon it. The case was made to turn upon the fact that the sureties signed the note to give it credit,—to enable the principal to raise money upon it; and it was therefore immaterial to them whether the money was advanced by the payee named in it, or by another party. It was intended for circulation. The sureties, by indorsing it, gave it credit for that purpose, and could not, therefore, be allowed to escape responsibility. The object they had in view in indorsing the paper had been accomplished, and they were therefore required to answer to the party who had done what they desired. The note in that case was used for the very purpose for which it was made, while here the intention in executing the note, instead of being carried out, was defeated. The grounds upon which that case was decided are fully discussed in the case of *Russell v. Ballard*, 16 B. Mon. 201, and are sustained in 1 *Daniel Neg. Inst.* 741, 743. That author says: "It is immaterial that paper executed or indorsed for accommodation is not used in precise conformity with agreement, when it does not appear that the accommodation party had any interest in the manner in which the paper was to be applied. * * * The accommodation party must have some interest in the application of the money; otherwise he is not in condition to contend successfully that there has been a misapplication of it, or of the security on which it was to be raised." Upon the other hand, the appellant relies upon the case of *Russell v. Ballard*, *supra*. It is not altogether in point, either. There the surety in a note payable to a bank became such under an express agreement that money was to be obtained for a certain purpose. The principal, however, without the assent of the surety, passed it off to the holder, not for money, as was the case here, probably, but in payment of a pre-existing debt; and the surety was exempted from liability. The fact that no money was raised upon it was evidently considered material by the court. The opinion alludes especially to this fact. The holder of it really parted with nothing of value in exchange for it. The surety not being held bound, left him as he was before he obtained the note. He still had his debt upon the principal. In this case, however, the appellee saw, before he obtained the note, that it was payable to the bank; and he knew it was not, and apparently had never been the holder of it. In fact, his petition shows that he knew Hellman was still the holder of it. Under these circumstances, he could easily have protected himself by inquiry; and his complaint that the appellant, by his conduct, put it in the power of the principal to delude him, does not, therefore, entitle him to advance equitable consideration. The appellant had not, according to his answer, executed the

note for discount merely, or to enable his principal to borrow money. He had an interest in the application of the paper. It was to be applied in renewal of an existing debt, upon which he was surety. He had a right to demand that this be done; and, not being negotiable paper, he has the right to still insist upon it. Judgment reversed and cause remanded, with directions to permit the answer to be filed, and for further proceedings consistent with this opinion.

CASEY et al. v. CASEY'S EX'RS et al.

(Court of Appeals of Kentucky. March 20, 1890.)

SALE OF DECEDENT'S LAND—RIGHTS OF VENDEE.

Where an executor, under misapprehension as to the scope of a power of attorney given to him by the devisees, sells and conveys land which is afterwards adjudged to be liable in the hands of the purchaser to decedent's debts, the purchaser, in the absence of bad faith, cannot object that certain claims would not have been allowed on the settlement, if exceptions had been filed by the devisees.

Appeal from chancery court, Kenton county.

"Not to be officially reported."

George R. McKee and Wm. Lindsay, for appellants. Hallam & Myers, for appellees.

PRYOR, J. This court in the former opinion¹ rendered held that the executor had no power to sell the real estate of the testator under the power of attorney executed to him by the devisees, and, as the will gave no such power, Worthington, the purchaser from the executor, acquired no title except the title of the devisees who united in or authorized the sale. The testator had provided in his will the mode of distributing his estate between the devisees, and for the protection of Worthington, the purchaser, it was further held that, if there was an estate sufficient after the payment of debts to give to the appellants, Mrs. Smith, etc., their interest without disturbing the purchaser, it should be done. This depended on the amount of the indebtedness. On the return of the case, when the case went to the commissioner, the debts due the banks and others by the testator, that were renewed by the devisees, were held by the chancellor not to be debts due by his estate, and that the failure of the appellant, Mrs. Smith, to except to those debts as proper vouchers against the estate, was such laches on her part as released the property purchased by Worthington from any claim she had upon it, upon the idea that, if those claims had been disallowed, there would have been property or an estate sufficient to pay these appellants without disturbing the purchaser. It may be well argued that, as this question could have been raised on the former appeal, the claims having been already allowed, or no exceptions taken to them, the whole matter was *res adjudicata*; but, whether so or not, they were

claims against the estate, although paid or the notes renewed by the executor or the devisees. In the absence of fraud or bad faith, Worthington would not be allowed to say that, in the settlement of the claims against the estate, certain claims ought not to have been allowed, and would not, if exceptions had been filed by the devisees. He had purchased property to which he had no title; it belonged to the estate of the testator. A court of competent jurisdiction had said that the claims were just, and, if the appellants have not received their distributable portion of the estate under the will of Casey, the property purchased by Worthington or its proceeds must be subjected to the payment of what they are entitled to, as indicated and adjudged in the former opinion. The judgment is therefore reversed and remanded, with directions to distribute the estate as heretofore directed, and for proceedings consistent with this opinion.

NOTE.

The former opinion, referred to, was filed September 25, 1884, and is as follows:

WORTHINGTON v. SMITH et al.

PRYOR, J. The only question necessary to be determined on this appeal arises from the construction given the power of attorney executed by the devisees of Casey to his executor. We see but little, if any, reason to question the ruling of the court below in this branch of the case. The estate was involved, and on the debts or obligations to the banks there were indorsers and sureties who had to be protected, and, as it was evident a sale of said real estate would be required to pay the debts, it was necessary to renew the paper upon which the testator was bound. In order to do that, the power of attorney was executed empowering James Casey to renew the paper, or take such other steps as he might see proper in regard to this indebtedness. There was no power to sell real estate, either expressly given or by implication, and therefore the conveyance to Worthington passed no title, except as to those of the heirs consenting to or authorizing the sale. The executor had no power to sell by any provision of the will, and certainly no power to pass the title of the devisees by reason of the letter of attorney. The devisees made by the testator must regulate the manner in which the distribution is to be made after the payment of debts. Some of the children had received, by reason of advancements, more than the others, and to equalize all, or to make such a distribution as the testator desired, he expressly provided in his will how the division or distribution should be made. Whether the appellee is entitled to an interest in the realty in controversy, or the extent of that interest, will depend upon the amount of the indebtedness, and the settlement that must be had between the heirs in order to arrive at each one's interest, as provided by the will of the testator. The appellee may be entitled to more than has been allotted her, or she may be entitled to much less. After the payment of the debts, those of the devisees consenting to the sale should be barred by it, and, if there is a sufficiency of the estate left for the distribution when the settlement is made to pay or to give to the appellee her interest under the will outside of the property in question, then the appellant should not be disturbed by the appellee. The estate is liable first to creditors, and then to the devisees, to be distributed according to the will of the testator. The case should go to the commissioner, and a settlement had so as the distribution can be made, and then the rights of these parties can be readily determined. Some of the devisees may have already received more than their portion of the estate; if

¹ See note at end of case.

so, they will be entitled to nothing in the distribution. The judgment is reversed on both the original and cross appeal, and remanded for proceedings consistent with this opinion; each party to pay his own costs.

SMITH v. MATTINGLY.

(Court of Appeals of Kentucky. April 26, 1890.)

HOMESTEAD—ABANDONMENT—EVIDENCE—REVIEW.

In ejectment to recover land sold plaintiff under execution, the evidence showed that defendant, who claimed the land as his homestead, had left it, renting it for a year, and afterwards for five years, and moved into another county, where he afterwards lived, and kept an hotel, and voted. Defendant testified that he intended to return to the land, and several witnesses testified that he so stated his intention when he left. *Held* that, the case having been submitted to the court, its finding that defendant abandoned the land as his homestead will not be disturbed on appeal.

Appeal from circuit court, Hancock county.
"Not to be officially reported."

Murray & Duncan, for appellant. *Geo. W. Williams & Son*, for appellee.

HOLT, J. The life-estate of the appellant, Levi Smith, in a tract of land of 200 acres, was sold under execution, and purchased by the appellee, George D. Mattingly. The interest of the appellant in the land was worth less than the amount allowed for a homestead. He resists a recovery in this action of ejectment upon the ground that the land was exempt to him as a homestead. In 1881 his family consisted of his wife and an adopted daughter. His own children were grown, and had left him. He then rented the land for a year, and moved to a town in the same county. When this lease expired, he rented it for a term of five years, and moved to a town in another county, where he began, and is yet, keeping an hotel. He testifies that his removal from the land was temporary; and he is supported in his statement that he intended to return to it by the evidence of several of his neighbors, who say that upon his removal he so declared. In March, 1885, his estate in the land was sold under execution; his wife having previously died. It is shown that he had not only moved from the county where the land was situated, and gone into business at his new home, but that he had voted there. It is at least questionable whether his answer is sufficient to support his claim to the land as a homestead. It does not aver that he had a family when the land was levied upon and sold, or that he was then a housekeeper. If the debtor claims land as exempt from levy and sale under execution upon the ground of homestead exemption, his pleading should aver every fact necessary to show that it was exempt at the time of the levy and sale; and, if his pleading be evasive, or if it be doubtful whether it contains the necessary averments, it will, of course, be taken most strongly against him.

Waiving the question of sufficiency of pleading, however, the judgment denying his right to the land as a homestead must be sustained upon another ground, which involves no doubt. The action is at law. A jury was

waived, and the law and facts of the case submitted to the court. Upon the appellant's request the court separated, and stated in writing, its findings of law and fact. It found as a fact that the appellant had before the sale abandoned his right of homestead in the land. The facts of the case have already been sufficiently stated to show that, if this finding is not fully sustained by the evidence, it is at least not palpably against it. The testimony does not show that the appellant was a housekeeper, or that he had a family when the levy and sale were made; and, if so, yet the circumstances in evidence are at least conflicting as to whether he had not abandoned the land in contest as a home. Upon this state of case the finding of the lower court must stand, and the judgment is affirmed.

REINDER'S ADM'R v. BLICK & PHILIPS COAL CO.

(Court of Appeals of Kentucky. May 10, 1890.)

MASTER AND SERVANT—DEATH OF SERVANT—WILLFUL NEGLIGENCE.

Failure of a coal company to repair the timbers supporting a trestle on which its employes work, and which has been in use for 15 or 20 years, where the timbers appear sound, and can only be found defective on cutting into them, is not such willful neglect as will render it liable for the death of an employe caused by the breaking of such timbers, under Gen. St. Ky. c. 57, § 3, giving the widow, heir, or personal representative of a person whose life is lost through the "willful neglect" of a company a cause of action against such company.

Appeal from circuit court, Kenton county.
"Not to be officially reported."

Gen. St. Ky. c. 57, § 3, provides that, if the life of any person is lost or destroyed by the "willful neglect" of another person or persons, company or companies, etc., the widow, heir, or personal representative of the deceased shall have the right to sue such person, etc., and recover punitive damages for the loss or destruction of such life.

Cleary & Hamilton, for appellant. *O'Hara & Bryan* and *J. F. & C. H. Fisk*, for appellee.

PYOR, J. The appellant's intestate, while in the employ of the appellee, lost his life, and the cause of his death is attributed to the negligence of the appellee. The deceased was a day-laborer, and had worked for the coal company for a long time, in transporting its coal from the elevator in a bucket over a railing constructed on a trestle some 20 feet from the ground. The railway was about 400 feet in length, and the bucket would hold about 2,000 pounds of coal. When filled, the intestate would push the bucket, by means of plank that were placed on the track, from the elevator to the place of deposit. A part of the timbers supporting the trestle-work seem to have decayed, and while the deceased was moving the bucket, loaded with coal, the timbers gave way, and the intestate fell to the ground, the bucket falling on him, causing his death. The action is under the statute to recover for the willful neglect of the com-

pany in failing to have these timbers in proper repair. The court below, at the close of the plaintiff's testimony, gave an instruction to find for the defendant.

It is apparent, we think, from the proof, that the plaintiff failed to show a case of willful neglect. His own witnesses, who examined the timber after the accident, and say that it was doted and rotten, also state that they looked sound on the outside, but on the inside were entirely decayed; that the wood looked sound, but was in fact decayed on the inside. The argument of counsel for the appellant is that the timbers had been used for 15 or 20 years, and that it was the duty of the company to have made an examination of their condition in order to insure the safety of their employes, and, failing to do so, the company is liable for the loss sustained. The failure to discover the defect in the timber, or its rotten condition, cannot be regarded as willful neglect when the wood from the outside presented every appearance of being perfectly sound, and its deceptive condition liable to mislead the most careful observer. The company had no reason to believe that their employes were in a perilous position when on this railway, nor is there the slightest proof that the condition of the timber was known to the company; and the only evidence of neglect is the presumption arising from the facts as to the necessity for repairing the railway. The failure to repair after such a lapse of time, we are asked to say, was willful neglect, when there was no other reason for believing the timbers to be out of repair. The judgment below is affirmed.

CITY OF NEWPORT v. NEWPORT & C. BRIDGE CO.

(Court of Appeals of Kentucky. May 10, 1890.)

CITY ORDINANCE—BRIDGES—TOLLS.

1. A city ordinance, subjecting any officer or agent of a bridge company to a fine if he shall refuse to sell packages of 100 passage tickets for a dollar, in accordance with a contract between the city and the company, is not a police regulation, and is invalid.

2. A contract between a city and a bridge company by which the latter agrees to sell for one dollar packages of 100 tickets, each good for one passage over the bridge, is substantially complied with by the issue for one dollar of five cards, each good for 20 passages.

Appeal from chancery court, Campbell county.

"To be officially reported."

E. W. Hawkins, for appellant. *Ramsey, Maxwell & Ramsey*, for appellee.

HOLT, J. The appellee, the Newport & Cincinnati Bridge Company, was incorporated in 1868. Its charter authorized it to charge reasonable tolls; the maximum rate, however, not to exceed that charged by the Covington & Cincinnati Bridge Company. Desiring the use of a portion of one of the streets of the appellant, the city of Newport, for the purpose of constructing its bridge, or the approach to it, the city council, on May

12, 1868, passed "An ordinance granting the Newport and Cincinnati Bridge Company the use of a portion of a street for the purpose of a bridge," the fourth section of which provides: "In consideration of the foregoing grant, the rates of toll over said bridge shall be as follows, viz.: Packages of one hundred tickets to foot passengers for one dollar to all persons applying for the same; one horse and dray, ten cents for a single crossing; one horse and express wagon, ten cents; one horse and buggy, fifteen cents." The bridge company accepted the terms of this ordinance in the construction of its bridge. There is nothing in it relating to tolls for foot passengers, save the provision relating to the sale of packages of 100 tickets for one dollar. The other rates for a foot passenger charged by the company are three cents for a single crossing; two and a half cents each way to go and return; or he can purchase what are termed seven and twenty coupon crossings, entitling him to cross, the one seven, and the other twenty, times, for ten and twenty-five cents respectively. In and perhaps prior to 1882 the bridge company, instead of furnishing packages of 100 tickets for one dollar, began issuing packages of five cards for that price, each card being good for 20 crossings, and one perforation being made in it upon each crossing. The city council in the year last named passed an ordinance subjecting any officer or agent of the bridge company to a fine for failing or refusing to sell packages of 100 tickets for one dollar; and one of the company's agents having been arrested, charged with its violation, and the city threatening to have arrested and to prosecute all of the company's agents until it should furnish and sell packages of 100 tickets for a dollar, it brought this action, enjoining the city from enforcing the ordinance. The lower court perpetuated the injunction.

If the ordinance was invalid, then the company had the right, in order to prevent irreparable injury and a multiplicity of prosecutions, to go into a court of equity for relief. The chancellor often interferes to prevent an illegal use of power by municipal authorities; and where such consequences follow the enforcement of an ordinance as will result in this instance, a proper case is presented for equitable relief, if the ordinance be invalid. *Brown v. Trustees*, 11 Bush, 435. The passage of the ordinance of May 12, 1868, was the tender of a grant by the city to the bridge company, upon the condition that the tolls should be as therein fixed. Upon its acceptance by the company, a contract arose between it and the city, and such a contract must be enforced by the judicial department of the government. It stands upon the same footing as one between individuals. It would be exceedingly dangerous to individual right and liberty, which the common law so highly regards, to permit municipalities to enforce their own construction of their contracts by pains and penalties. Whether the legislature could confer such a power we

need not inquire, inasmuch as it is not pretended that it has been attempted in this instance. Where an ordinance is penal in character, the right of the municipality to enact it must clearly appear.

The enforcement of this ordinance would not be an exercise of the police power. While it is difficult, if not impossible, to concisely define the extent of this power, yet it certainly should not be extended so far as to permit a city to enforce its view of its contracts by penal ordinances, in cases involving neither the morals, health, or safety of its people. It may by ordinance limit the speed of railroad trains or street-cars through its streets, and in the same manner regulate any matter which is conducive to the health or safety or morality of its citizens. The public welfare demands the existence of such a power, and, when properly directed, the municipality should not be restricted to a narrow limit in its exercise. But where it is a matter of contract, affecting merely the pockets of its citizens, or it financially, it must resort to the courts for relief in the same manner as individuals.

A construction of the contract between the parties was not necessary in order to afford the appellee proper relief. This was given by enjoining the enforcement of the ordinance. Its petition, however, asks that the issual of the five-card packages be adjudged a compliance with the clause in the ordinance relative to the 100-ticket packages, while the answer of the appellant not only asks a dissolution of the injunction, but in counterclaim form requests the court to order the appellee to furnish and sell packages of 100 tickets for a dollar. The lower court determined this question, holding that the issual of the five cards was a compliance with the spirit of the contract; and, as this judgment would be binding upon the city in any case where it would have the right to sue the company, it is proper to consider it. The law looks to the spirit of a contract, and not the letter of it. The question, therefore, is not whether a party has literally complied with it, but whether he has substantially done so. The ordinance in question was not designed to enable persons to purchase tickets for resale at an advanced price. The statute prohibited any such traffic. Its object was a commutation of fare to those who desired to cross the bridge frequently. The mere form of the ticket is immaterial. The purpose was to regulate the price for 100 crossings; and the issual of the five cards, each good for 20 crossings, for one dollar, was a substantial compliance with the contract.

Judgment affirmed.

SMITH v. UPTON.

(Court of Appeals of Kentucky. May 10, 1890.)

DEED—CONSTRUCTION—PARTITION.

1. S. executed a deed of his home place, absolute in form, but as security for a debt, in which his wife did not join. Afterwards his wife joined

in a conveyance of part of the land in settlement of the debt, and at the same time the creditor deeded the balance to "Helen S., wife of S., and her children." The land was sufficient to secure the debt without the wife's relinquishing her dower right, and the deed to the wife of S. made no mention that it was in consideration of her relinquishing her dower in the part conveyed to the creditor. After the death of S. his wife devised her entire interest to one child. Held, that the intention of S. was to provide for his family, and that his wife took the whole of it for life, remainder to the children.

2. Gen. St. Ky. c. 68, art. 5, § 6, and Civil Code Ky. § 490, provide for the sale of real estate held jointly or in common, in an action by either of the owners, if it cannot be divided without materially impairing its value. Held that, where there were but 85 acres in the tract, and six parties to divide it between, the court was justified in ordering it sold.

Appeal from circuit court, Butler county.

"Not to be officially reported."

B. L. D. Guffy and John L. Scott, for appellant. H. T. Clark, for appellee.

HOLT, J. July 2, 1853, H. H. Smith executed to James B. Upton what is in form an absolute deed, but which was in fact but a mortgage upon three tracts of land that composed the home farm, of about 180 acres, of the grantor. His wife, Helen Smith, did not unite in it. August 2, 1856, Smith and wife, in settlement of the debt owing to Upton, conveyed to him absolutely all of the land, save about 80 acres; and upon the same day he conveyed this 80 acres to Mrs. Smith and her children. There had then been born to her and her husband seven children, and another was born thereafter. One died intestate and without issue before the death of the father. Another died prior to the death of the mother. She devised all her interest in the 80 acres of land to one child. In this action, brought by some of the heirs asking a sale of it, her devisee claims that, under the deed from Upton, she and her children took by classes; she being entitled to one-half of it, and they to the other half. It is contended, upon the other side, that she took but a life-estate, with remainder to the children. The conveyance was to "Helen Smith, wife of Henry H. Smith, and her children." It is urged upon the part of the devisee of Mrs. Smith, in support of the claim that the title to one-half of the land vested in her, that the consideration for it was the relinquishment by her of her potential right of dower in the land conveyed to Upton. Such a relinquishment may constitute a valuable consideration for a settlement upon the wife by the husband; but the deed makes no mention of any such consideration, and there is no averment of any mistake or fraud in its execution. The intention of the parties is to be gathered from the language of the deed; it is to be read in the light of the surrounding circumstances and the relation of the parties. While the nominal grantor in the deed was not the husband of Mrs. Smith, yet, in construing it, it should be regarded as if it had been made by him. In equity, the title was really in him. The first deed to Upton was

in fact but a mortgage. The absolute deed to him was made at the same time that the deed was made to Mrs. Smith and her children. It is evident that it was the husband providing for his wife and children. She was named in it as "Helen Smith, wife of Henry H. Smith." The land mortgaged to Upton appears to have been ample to secure his debt without any release by Mrs. Smith, because it is proven that the portion left, after paying him by the conveyance of a part of it, is worth eight or nine hundred dollars. It was the home place of H. H. Smith, and what more natural than that he should wish his wife to have the use of it for life, and it then to pass to his children? If the husband makes provision for the wife and children, an intention should be presumed upon his part to give the whole of it to her for life, remainder to the children, unless a contrary purpose appears from the terms of the provision, or the circumstances attending it. Such a presumption is the reasonable one. We know from experience and observation that such is likely to be the intention, and to arrive at it is the object of construction. It is true that the wording of the deed is to "Helen Smith, wife of Henry H. Smith, and her children;" but it is evident the purpose was to provide for their children. Where a father conveys to his child, and that child's children, they are regarded as taking jointly,—they are all of his blood; but an equal reason does not exist for supposing that a husband so intends where he conveys to his wife and children, because then by her death a portion of the property might pass to those who are strangers in blood to him. This is the substance of the reasoning employed by this court in the case of *Davis v. Hardin*, 80 Ky. 672, and subsequently approved in *Helm's Ex'r v. Rogers*, 81 Ky. 568. We concur in the conclusion reached by the lower court, that Mrs. Smith took but a life-estate.

The appellant also claims that his portion of the land should have been allotted to him, and that the court below erroneously ordered a sale of the entire tract, and a division of the proceeds. It consists of two adjoining tracts,—one of 40, and the other of 35, acres. They are ordered to be sold separately. No complaint is made as to the order for the sale of the 40-acre tract. There are liens upon it which are asserted in this suit. The Civil Code (section 490) provides: "A vested estate in real property, jointly owned by two or more persons, may be sold by order of a court of equity in an action brought by either of them, though the plaintiff or defendant be of unsound mind or an infant, (1) if the share of each owner be worth less than one hundred dollars; (2) if the estate be in possession, and the property cannot be divided without materially impairing its value, or the value of the plaintiff's interest therein." If it be said that a code of procedure could not confer this power, then the answer is, even if this be true, yet the same provision is, in substance, to be found in the General

Statutes. Chapter 63, art. 5, § 6. It provides for the sale of a vested interest in real estate, whether held in joint tenancy, or by tenants in common, or coparceners, if it be incapable of division without materially impairing its value. It does not amount to the taking of the property of one person for the private use of another. If it did, then the statute would, of course, be unconstitutional. Each owner gets his own. The form merely is changed. *Kean v. Tilford*, 81 Ky. 600. It is averred in the petition that the land sought to be divided is incapable of division without a material impairment of its value. This is denied, and it is said there is no evidence in support of it. An affidavit to this effect is copied in the record, and, while it was doubtless treated as a part of the papers of the case upon the trial below, yet it does not appear to have been made so by any order of court. Aside, however, from this, it appears that the tract of land is a small one. There are six different interests in it. Each one is small, and the lower court had a right to find from the facts, and unquestionably did so correctly, that it could not be divided without a material impairment of its value. Judgment affirmed.

CROSSLAND v. POWERS.

(Supreme Court of Arkansas. April 19, 1890.)

VENDOR'S LIEN—DELIVERY OF DEED—ESTOPPEL.

1. Under *Mansf. Dig. Ark. § 474*, providing that a vendor's lien, when the same is expressed upon or appears from the face of the deed, shall inure to the benefit of the assignee of the note or obligation given for the purchase money of the land, such lien will not pass to the assignee where the vendor has conveyed by an absolute deed.

2. P., as agent for H., sold certain land to C., taking notes therefor. By mistake an unpaid note was delivered by P. to C., and P., believing all the notes were paid, delivered the deed for the lands. Upon the discovery of the mistake, P. agreed with H. that he would be responsible for the unpaid purchase money, if it could not be recovered from C.; and H. took no steps to have the deed canceled, but acquiesced in the arrangement. Held, that one claiming under H. was estopped from claiming that no title passed under the deed, it being delivered by mistake.

Appeal from circuit court, Nevada county; C. E. MITCHELL, Judge.

Action by R. J. Powers against John B. Crossland, personally and as administrator of John A. Crossland, to enforce a vendor's lien against certain lands. *Mansf. Dig. § 474*, provides that the lien or equity held or possessed by the vendor of real estate, when expressed on the face of the conveyance, shall inure to the benefit of the assignee of the note or obligation given to secure the payment of the purchase price of such real estate. The facts appear in the opinion. There was judgment for plaintiff, and defendant appealed.

Smoot, McKee & Arnold, for appellant. *Atkinson, Tompkins & Gresson*, for appellee.

HUGHES, J. Appellee sued in equity, claiming the right to enforce a vendor's

equitable lien for unpaid purchase money for land which he, as real-estate agent, sold for one Henry Holcomb, a resident of the state of Texas, to John A. Crossland, the father of appellant, for \$560,—one-fourth cash, and the residue, in three equal installments, at 6, 12, and 18 months,—for which Crossland executed to Holcomb his three promissory notes, which were retained by appellee for collection. When Crossland called to pay the first note, by mistake the second note was delivered to him with the first, which he had paid. The second was not paid, and is the foundation of this action. About the time the second note matured, Crossland requested Powers to have Holcomb prepare and execute a deed of conveyance for the land to his son John B. Crossland, as he (John A. Crossland) wished to pay the whole debt. When the deed arrived, appellee was informed by McRae, then John A. Crossland's attorney, and afterwards administrator of his estate, that the title-bond and balance due on the land had been left with him. Upon examination, appellee could find only the third note, which he delivered to McRae on payment by him of \$158.50, the amount of the principal and interest on the same; and the deed was delivered to McRae. Powers forwarded the money to his principal, who immediately wrote him that another payment was due; and appellee at once informed McRae, and requested him not to give up the deed until the matter could be arranged. Soon after he demanded of John A. Crossland the unpaid installment, and Crossland replied: "Produce the note, and I will pay it." In a suit by Holcomb the claim for the unpaid installment was afterwards established against John A. Crossland's estate. *McRae v. Holcomb*, 46 Ark. 306. Pending said suit, Powers agreed to pay Holcomb, his principal, the full amount of the claim, as the trouble arose through his mistake; and Holcomb agreed that Powers, the appellee, should have the judgment against Crossland if it should be affirmed in the supreme court. Powers paid Holcomb \$100, and took his note for the same, to be returned to Holcomb upon final settlement. The judgment against Crossland's estate was affirmed by the supreme court. Holcomb died pending the appeal, and Powers sent the balance due on the unpaid purchase money, with the \$100 note of Holcomb, to Mrs. Holcomb, widow of his principal, and received in return a written release to himself of all interest in the judgment against Crossland's estate, signed by Mrs. Holcomb, one Whitesides, and Annie, his wife, who was said to be the only heir of said Henry Holcomb. Appellee brought suit to enforce the vendor's equitable lien for the unpaid installment of the purchase money against the estate of Crossland. A demurrer to the complaint was overruled. A decree was rendered in favor of appellee upon answer and evidence, and John B. Crossland appealed.

The contention of appellee that Holcomb, the vendor, assigned to him the judgment

against Crossland's estate, and that he was subrogated to the rights of Holcomb, has not been maintained. Where a vendor of land conveys the title by an absolute deed, the equitable lien thereon for the purchase money will not pass by the assignment of the debt. In such case the lien will pass by the assignment of the debt only when retained upon the face of the deed. *Mansf. Dig. § 474*; *Shall v. Biscoe*, 18 Ark. 142; *Williams v. Christian*, 23 Ark. 155; *Morris v. Ham*, 47 Ark. 293, 1 S. W. Rep. 519; *Rodman v. Sanders*, 44 Ark. 507, 508,—as to subrogation.

It is contended by appellee that there was no valid delivery of the deed, and that, having been delivered without the consent of Holcomb, and through the mistake of Powers, the title did not pass; John B. Crossland being a volunteer, and having paid no consideration for the same. But it appears that Holcomb made no effort to have the deed canceled, but acquiesced in the promise of Powers to make him whole, and that he permitted the situation to remain thus. This contention is not sustained. The decree of the court below is reversed, and the complaint of appellee is dismissed.

JONES v. GLIDEWELL.

(Supreme Court of Arkansas. April 19, 1890.)
ELECTIONS—INTIMIDATION OF VOTERS—CONTESTS—
TRIAL BY COURT.

1. Const. Ark. art. 8, §§ 2, 3, provide that "all elections by the people shall be by ballot;" that "elections shall be free and equal;" and that "no power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage." Held, that a widespread, systematic plan, whereby all negro voters in the county, under threats of personal violence, of social ostracism, and of expulsion from the community, were compelled to vote open tickets for the purpose of disclosing to their fellows any negro who might try to vote for a Democratic candidate, will avoid the election, though there is no proof that a majority voted against their wishes by reason of the plan, and though it was also partly designed as a means of testing the returns of the election officers.

2. In an election contest, the only question to be determined is the right of the contestant to the office; and the fact that part of the returns, showing a majority in his favor, were stolen from the county clerk's office before the official canvass was made, gives him no title to the office, where it has been proved that these returns were in fact false.

3. Where, on adjournment of the trial to permit the judge to preside at a term of court in another county, the parties have agreed that the trial should proceed at a special term, which could legally last only two weeks, and the contestant has stated that he would not consume over two days in the examination of his witnesses, it is not an abuse of discretion for the court to compel him to close his case after allowing him half a day beyond the allotted time for the examination of witnesses.

4. The findings of fact of the trial judge in an election contest are as conclusive on appeal as the verdict of a jury.

Appeal from circuit court, Pulaski county; J. W. MARTIN, Judge.

F. M. Fulk, Compton & Compton, and Blackwood & Williams, for appellant. *F. T. Vaughan, T. B. Martin, and W. L. Terry*, for appellee.

COOKRILL, C. J. Jones and Glidewell were opposing candidates for the office of county treasurer of Pulaski county at the general election in 1888. Glidewell received the certificate of election, and entered upon the duties of the office. Jones thereupon instituted this contest for the office. In the circuit court, where the cause was heard on appeal from the county court, the judge found that Jones had received a majority of the votes cast at the election, but refused to award him the office upon the ground that the evidence showed that his adherents had been guilty of illegal practices of such character, and so widespread, as to avoid the election. Jones contends that the finding is not warranted by the testimony, and asks us to review the evidence for the purpose of reversing the judgment on that ground. It is not the practice of appellate tribunals, and has never been the practice of this court, to enter anew into the investigation of issues of facts which have been tried in a law case by a circuit judge upon conflicting testimony delivered *ore tenus* by the witnesses in his presence. When a jury is waived by the parties, and the issues of fact are tried before the judge, his findings of fact are as conclusive on appeal as the verdict of a jury; and when the law makes the judge the trier of facts in cases to which the constitutional right of trial by jury does not extend, the same presumption attends his findings. *Corley v. State*, 50 Ark. 305, 7 S. W. Rep. 255. The reasons which sustain the rule in the one case exist as well in the other. The statute has not established a different rule for election cases, and there is nothing in the policy of the law to warrant the courts in doing so. On the contrary, the rule was followed in *Powell v. Holman*, 50 Ark. 85, 6 S. W. Rep. 505; and in *Wheat v. Smith*, 50 Ark. 266, 7 S. W. Rep. 161; and in *Patton v. Coates*, 41 Ark. 111, where there was no special finding of facts, in the nature of a special verdict, the cause was remanded to the circuit court for a new trial, whereas, if the court were at liberty to review the facts as in an equity case, judgment would have been entered here in accordance with this court's conclusion upon the facts. But while we will not enter upon an investigation to ascertain where the weight or preponderance of the testimony lies, it is our province to determine whether a given finding or verdict has testimony to sustain it; and where there is no conflict in the evidence, or the facts are especially found, the conclusion of law or judgment to be deduced therefrom is purely a question of law to be finally determined by this court.

In the case at bar the court found generally for the contestee, refused the contestant's request to find that the evidence of illegal practices was not sufficient to warrant the exclusion of the vote of any precinct, and made a special finding of facts. The trial consumed many days, and the record is voluminous. The evidence which counsel have pointed out as material is in hopeless conflict upon most of the issues, but these conflicts have been de-

termined by the trial judge in favor of the contestee, and that determination is, as we have seen, final. The questions are, what conclusions of fact could the trial court legally draw from the evidence, and what judgment does the law pronounce upon those conclusions? It may be said that a preponderance of the testimony shows that at the outset of the campaign many of the negro electors of Pulaski county evinced a desire to vote for favored candidates on the Democratic ticket, the contestee among the number; that, as the election approached, a bitter feeling was engendered against them among the people of their own race on that account; that it grew to such an extent that negro adherents of the Democratic ticket were silenced in public meetings, stoned in political parade, and cut off in a great measure from the society and sympathy of their race, or threatened with that fate if they persisted in so doing. There was testimony tending to show that ministers of the gospel were threatened with deprivation of their pastorates, and members of churches the privilege of worship in their accustomed places, if they persisted in the design of voting for a Democrat; and that voting with that political party was denounced as a sin from some of their pulpits, and that the church influence was potent with the negro race. The practice was disproved as to the other negro churches, and it was shown that some of their most intelligent and influential men, who were adherents of the contestant, discountenanced all these practices, and advised the electors to vote intelligently as they pleased. But that the spirit of animosity was common in the townships where the black race predominated, the preponderance of the evidence establishes, and that threats of social ostracism, expulsion from the community, and of personal violence, and of persecutions from Republican candidates for township offices in case of success, and many indignities which the circuit judge has specially pointed out, were freely indulged in, even to the close of the polls on election day, the circuit judge has specially found from evidence, which we are not at liberty to disregard. These influences operated with more or less intensity at different localities, but the court was justified in finding they were the result of a common spirit on the part of a large part of the black citizens to enforce their political views at the polls against those of their race who were disposed to differ from them. To make the plan effective, political societies were formed just before the election, in some of which it was resolved, and in others the members were sworn, to vote open or unfolded tickets. The circuit judge, after finding that a systematic plan was arranged before the election to have all the negroes vote open tickets, and that it served the purpose of keeping a reasonably accurate tally for testing the returns of the election officers, and also of disclosing to his fellows any negro voter who might try to slip in what was called "a Democratic split or stripped ticket," by which was meant a un-

ion labor or Republican ticket, containing the names of Democrats pasted or written on the printed form, concluded as follows: "This object seemed to be especially emphasized by the fact that when a colored man would try to vote without exhibiting his ticket, the cry was often raised, 'Democratic negro,' 'Mark him,' 'Spot him,' 'We will remember him,' and various such like methods." "Representative colored men were shown to be at the polls for the purpose of keeping these tallies, examining their ballots, and noting how all colored men voted. There did not appear to be as much noisy demonstration at the polls as had been made on former occasions, but those regulations as to open tickets, voting and keeping tallies, seem to have been very persistently and strenuously enforced in many of the outside townships; and, as was said by some of the witnesses, it was almost impossible for a colored man to get in a vote for any part of the Democratic ticket, that is, by 'stripping' his ticket, without it being discovered. And many of the witnesses testified that the colored men, with but few exceptions, did not like to have it known that they were voting any part of the Democratic ticket."

The case of *Patton v. Coates*, 41 Ark. 111, supra, presents many of the same features as the case at bar, but there is a marked distinction between the two. There is proof here of the same spirit of intolerance, of the same efforts on the part of the blacks to enforce unanimity in politics through the influence of the church, ostracism from society, and indignities which fall little short of intimidation as defined in that case. But there is lacking in this case the element of threats and acts of violence, without which the judgment avoiding the election in that case would not have been reached. There is some proof in this case of threats and of actual violence towards negro electors who desired to vote the Democratic ticket, but it was not general, and would not justify the conclusion that it prevailed to such an extent as to render the result doubtful. There is, however, one element in this case, which did not enter into the *Patton-Coates* Case, and that is the plan of requiring voters to deposit their ballots in such a manner as to disclose the contents to the by-standers. The effect of such a practice upon an election presents an important question for determination.

The constitution declares that "all elections by the people shall be by ballot;" that "elections shall be free and equal;" and that "no power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage." Article 3, §§ 2, 3. The system of voting by ballot has been generally, though not universally, adopted in the United States, and within a score of years was adopted in England. Public or *viva voce* voting is still partially preserved, at least in the state of Kentucky, the advocates of the system claiming that it prevents hypocrisy, and tends to preserve the individual sense of responsibility.

On the other hand, it is believed that the ballot promotes tranquillity at elections, and gives greater security for independence of thought; that it presents an obstacle to coercion by undue influence, by "uncovering men's faces and concealing their thoughts;" and that it checks bribery through the uncertainty that the bribed party will vote as he promised. These, which are some of the leading reasons for the adoption of the system of voting by ballot, are all based upon the idea of secrecy. "The distinguishing feature of this mode of voting," says Judge Cooley, "is that every voter is thus enabled to secure and preserve the most complete and inviolable secrecy in regard to the persons for whom he votes, and thus escape the influences which, under the system of oral suffrages, may be brought to bear upon him with a view to overbear and intimidate, and thus prevent the real expression of public sentiment." "The system of ballot voting," he continues, "rests upon the idea that every elector is to be entirely at liberty to vote for whom he pleases, and with what party he pleases, and that no one is to have the right or be in position to question his independent action, either then or at any subsequent time." Const. Lim. *604, *605. Many of the states have provided statutes prohibiting a ballot from being received or counted, if, by color, mark, or exterior device, it can be distinguished from other ballots. That these statutes are enacted only to secure, as perfectly as possible, the benefits of secrecy, which the ballot system itself was intended to secure, is attested by all the adjudicated cases on the subject. The object of such acts, say the supreme court of Indiana, is evidently "to protect the elector from the undue influence and control of others, and secure to him entire freedom of opinion in the exercise of the elective franchise, by enabling him to cast his vote in such a manner as to prevent others, who, from their particular relations to him, might, by intimidation or otherwise, seek to control his vote, from being able to determine from the color of his ticket, or some distinguishing mark thereon, the party or person for whom he voted." *Druliner v. State*, 29 Ind. 308. The purpose is, says the supreme court of Minnesota, "to protect the secrecy of the ballot so as secure the voter against intimidation, and not to compel men to vote the 'straight ticket.'" In *re Quinn v. Markoe*, 35 N. W. Rep. 263. These views of the object of the vote by ballot are sanctioned by all the authorities. *McCrary, Elect.* § 454 et seq; *Williams v. Stein*, 38 Ind. 89; *Brisbin v. Cleary*, 26 Minn. 107, 1 N. W. Rep. 825; *People v. Cicott*, 16 Mich. 283, 97 Amer. Dec. 141, and note; *Attorney General v. Bevard of Detroit*, 58 Mich. 213, 24 N. W. Rep. 887; *Woodward v. Sarsons*, L. R. 10 C. P. 733. So jealously have the courts guarded the right when it is secured by the constitution that acts of legislatures, requiring election officers to number the ballots as they are cast, have been held to be void because they afford

the opportunity of raising the veil of secrecy which the constitution guaranties to the voter. *Williams v. Stein*, 38 Ind. supra; *Brisbin v. Cleary*, supra. See *Hodge v. Linn*, 100 Ill. 397. The framers of our constitution saw proper to remove this difficulty by providing in that instrument for the numbering of the ballots, but the officers to whom the arrangement of secrecy is intrusted by the constitution can divulge it only by the violation of a trust which the law declares a crime. As further evidence of the regard the law entertains for the secrecy of the ballot, a voter cannot be compelled to disclose for whom he voted by a court of justice. *Dixon v. Orr*, 49 Ark. 238, 4 S. W. Rep. 774. And this results, not from any direct prohibition found in the statute or constitution, but because the privilege of secrecy is inherent in the constitutional guaranty of a vote by ballot. If, then, the right is so carefully guarded against infringement by the legislature, and public policy prohibits the enforced disclosure by the voter in the courts of the contents of his ballot, can it be held that the adherents of a candidate may, by an enforced system of open voting at the polls which the voter cannot escape without incurring their odium, defeat the fundamental object of the ballot system? Such a view, says Judge Cooley, "would in effect establish this remarkable anomaly that while the law, from motives of public policy, establishes the secret ballot with a view to conceal the elector's action, it at the same time encourages a system of espionage, by means of which the veil of secrecy may be penetrated and the voter's action disclosed to the public." *Cooley, Const. Lim.* 762.

The practice is certainly inconsistent with the secrecy of the ballot. The question is, does it avoid the election? The constitution makes a vote by ballot of the essence of an election by the people. Its mandate prohibits the legislature from interfering with the system, and binds the electors themselves to its observance. Neither can dispense with it. The elective franchise is not an unrestrained license; it can be exercised only in accordance with the law. An election held by *viva voce* voting, although it should fairly record the will of the people, would not be a constitutional election. It must be conducted in accordance with the principles of an election by ballot, or it is no election. But an election by ballot means at least the privilege of exercising the elective franchise in secret, and any system practiced at the polls which makes it reasonable to believe that the electors have been prevented by the deprivation of secrecy from electing the candidate whom a majority preferred, is an illegal annulment of the will of the majority, and not a lawful election of the unpreferred candidate, whatever the ballots actually cast may purport to show. The secrecy of the ballot is a personal privilege, which the voter may waive if it is his wish, but of which he cannot be lawfully deprived; and any practice at a poll which defeats the

freedom of action of enough electors to render the result doubtful destroys the freedom of the election. *Patton v. Coates*, supra. The use of different colored ballots by political parties, by which party managers are enabled to distinguish ballots in the hand of the voter, though opposed, as Judge Cooley points out, to the spirit of the constitution, does not avoid the election, (*Cooley, Const. Lim.* *605,) because it is still the voter's privilege to change the ticket as he may desire, so that the exterior shall not in fact proclaim its contents. But when the voter is put to the alternative of opening his ticket to the view of clamorous by-standers at the polls to prove that its contents are what its color indicates, or else be subjected to the ignominy which the previous threats of his race assure him he will meet, he cannot be said to waive the privilege, but surrenders it under compulsion. The systematic plan of coercion, which the circuit judge found was prevalent before the election, although it is inimical to the intelligent administration of a republican form of government, does not, as we have seen, avoid the result, because the voters, if undisturbed at the polls, may exercise their freedom of choice without detection, and consequently without incurring the penalty attached to independent voting. But when there is no escape from incurring the penalty save by exposure of the ballot, the election ceases to be free within the meaning of the constitutional guaranty. It is not necessary to show that a majority were actually prevented from voting, or voted against their wishes, by reason of the practice. When the wrong is flagrant, and its influence diffusive, it is sufficient that it renders the result doubtful. There is no division, I think, in the authorities upon that proposition. As was said by the court in *Patton v. Coates*, 41 Ark. supra: "There is a distinction, in the nature of things, between particular illegal votes which may be proven and exactly computed, and which certainly ought to be excluded wherever cast, and the effects of fraudulent combinations, coercion, and intimidation. It can never be precisely estimated how far the latter extend. Fraud is secret, and timidity shrinks from observation. Their effects depend on moral perversions, nervous organizations, and constitutional idiosyncracies. They cannot be arithmetically computed. Awe is silent and undemonstrative. Peace may be abject as well as the result of satisfaction. Yet it cannot be said that elections are 'free and equal' where * * * fear deters from the exercise of free will, although there may be no turbulence. It would be to encourage such things as the ordinary machinery of political contests to hold that they shall only avoid to the extent their influence can be computed. It seems clear that courts must abrogate the power of preserving the freedom of elections, and abandon the polls to the violent and unscrupulous, or must take the ground that wherever such practices or influences are

shown to have prevailed, not slightly, and in individual cases, but generally, and to the extent of rendering the result uncertain, the whole poll must be held for naught. The evils of an occasional success of a minority, if that should sometimes happen in the effort to sustain the fundamental principle of our government, would be but temporary, and in any case would be but slight, in comparison with the subversion of free government, which would surely follow the continued practice of rendering the freedom of elections a mockery." It is a serious thing to cast out the votes of innocent electors for acts done by others, and it is the province of the courts to see that every legal vote cast is counted when the possibility exists. *Dixon v. Orr*, supra. But the rule obtains in elections, as in other affairs, that a man shall not profit by his own wrong, nor by that of others done to allow him to reap the benefit. The only means by which approximate justice may be reached when the illegal acts render the result doubtful is to require the party to whose benefit they inure to purge the poll of their effect, or suffer the penalty of having its majority excluded from the count of his votes. The circuit judge has found that a state of facts existed which, upon the application of these rules, avoids the election of the contestant. He has not specified the townships by name, but the effect which the law gives to his general finding is to exclude all to which the evidence shows the state of facts applies. Turning to the testimony, we find evidence from which the court was warranted in applying the rule, at least to the precincts of Eagle, Eastman, and Young. A like ruling might have applied to Ashley township, but the result in that precinct was not proved nor counted. Discarding these townships, and counting the others, it leaves the contestant without a majority of the legal votes. It is urged that the practice of casting open ballots was resorted to only for the purpose of preventing the repetition of frauds upon the ballot, which had been perpetrated by the officers of election on former occasions. The trial judge found that that was not the only object, but that it was designed also to serve the illegal purpose of coercing voters. The judges of election seem to have been of different politics, and that is some guaranty of fairness; but, whatever the reasonableness of the apprehension may have been, it is not for the courts to say that one violation of the rights of the voter justifies another. No course which in itself violates the law, and tends to prevent a free election, can be justified.

It was proved that the ballot-boxes and the election returns were deposited in the county clerk's safe, and that before there could be a canvass by the board the safe was blown open by burglars, and a part of the returns, showing a majority for the contestant, were carried away, leaving an apparent majority for Glidewell, upon which he obtained the certificate of office. It is argued that if the con-

testant must bear the burden of the wrong done by his constituents, the contestee should not be allowed to derive an advantage from the burglary. It is sufficient for us to answer that the only question we can settle in this case is the right of the contestant to the office. The burglary gives him no title. He can recover the office only upon the strength of his right, not upon the weakness of his adversary's. What the legal attitude of the latter would be if he (although personally innocent) invoked the aid of a court to put him into office upon a *prima facie* title, based only upon a crime, the perpetration of which shames the manhood and shocks the decency of every honest citizen, and will stand as a stain upon the name of the community until the perpetrators are brought to justice, will be decided without delay when the case arises. The circuit court did not permit the burglary to injure the contestant upon the trial, for he easily proved by secondary evidence the contents of the election returns, and thereby established his cause as surely as though the returns had been present in their integrity. Thereafter the contestee assumed the burden of showing that the returns were in fact false, in that they did not voice the sentiment of a free election.

It is said in argument that the circuit judge erred as to the burden of proof, but how, or in what regard, counsel have not pointed out. He tried the case with the decision of *Patton v. Coates* before him, and the rule is there so clearly laid down it is difficult to understand how any misapprehension could arise as to its application in this case. We take it there was none, or counsel would have brought it to our attention.

The appellant contends that he was deprived of a fair trial because when he was compelled to close his case "he offered to introduce other witnesses who were in attendance." During the progress of the trial it became necessary for the court to adjourn in order to hold a special adjourned term in another county in the circuit, which would be closely followed by the regular term in still another county, which would have legally ended the proceedings already had, and required the parties to retrace their steps at a subsequent term of the court where the cause was pending. To avoid this the court permitted the parties to agree that the cause should be taken up at the point where it was left off at a special adjourned term after the lapse of the regular term. At the time of making this arrangement, the court gave notice that the special term could legally last only two weeks, and notified counsel that if they desired a decision of the case at the special term, the time for the further examination of witnesses must be limited to one week. "Counsel for the contestant," says the record, "expressed a decided opinion for having the case decided during the proposed adjourned session, and remarked that he thought they could finish their testimony in two days after the contestee closed, if, he

added, the other side does not take up too much of the time in cross-examination." The court thereupon gave notice that the contestee would be allowed four days, and the contestant two, in the first week of the adjourned term. When the time arrived the contestee was accorded his allotted time, and on the second day of the contestant's allotted time, which was Saturday, the court adjourned at 1 P. M., but, to compensate him for the loss of the remaining judicial hours of that day, gave him the entire day until 6:30 P. M. on the following Monday, when, in accordance with his previous notice, the trial was closed. This course of conduct does not indicate abuse of judicial discretion in the regulation of the trial. The time was limited in accordance with the wish of the contestant, and was extended beyond the limit for his benefit. There is no effort to show that unnecessary time was consumed in the cross-examination of his witnesses, and no surprise by the court's action is claimed. Moreover, it is not shown to what points the testimony of the witnesses was to be directed. Whether it was material, or would have tended to affect the result, counsel have made no effort to establish. Limiting the time for the examination of witnesses, the number of witnesses to a given point, stopping repetitions and irrelevant examinations, are matters necessarily confided to a trial judge. Business could not well be dispatched without it. *Thomp. Trials*, §§ 352, 353. It is only when the complaining party shows that this discretion has been abused that we interfere. It is not shown in this case. Finding no error in the record, the judgment is affirmed.

BATTLE, SANDELS, and HEMINGWAY, JJ., concur. HUGHES, J., having been of counsel for parties claiming under the same election, did not participate.

FOREHAND v. STATE.

(*Supreme Court of Arkansas. March 15, 1890.*)

JUDICIAL NOTICE.

The situation of a city with reference to the boundary lines of the county in which it is situated is a matter of public notoriety, of which the courts will take judicial notice.

Appeal from circuit court, Pope county; J. E. CRAVENS, Judge.

C. W. Forehand was convicted of manslaughter, and appeals. For report of the case on a former appeal, see 11 S. W. Rep. 766.

E. B. Henry and J. G. Wallace, for appellant. Atty. Gen. Atkinson and T. D. Crawford, for the State.

PER CURIAM. The charge of the court is not open to the objections made by the appellant. The appellant's rejected prayers for instructions were either covered by the charge, or not accurate statements of the law applicable to the facts; and the court did not err

in that regard. If any of the rejected testimony offered by the appellant was admissible at all, it could only have been to aid in reducing his offense to manslaughter; but, as he was convicted only of that offense, he was not prejudiced by the exclusion.

The testimony about the gold and silver watches was irrelevant, and proved nothing. The appellant's guilt of the crime of which he stands convicted is clearly established by the proof, and ought not to be disturbed for an error which could not have led to prejudice with a jury of ordinary intelligence.

It is insisted that the proof fails to show that the offense was committed in Pope county. This fact was not proved in those words, but there was testimony that it occurred at a point three miles south-west of Dover. Courts cannot, generally, take judicial notice of matters of fact; but there are many facts, particularly with reference to geographical positions, of such common knowledge that the courts may judicially notice them. That the court would take judicial notice that Richmond was in Little River county, though formerly in Sevier, was ruled in *Wilder v. State*, 29 Ark. 293. This notice includes the two facts that Richmond was once in Sevier county, and also that it was in that portion annexed to Little River. In the case of *Peyroux v. Howard*, 7 Pet. 324-343, the supreme court of the United States ruled that it would take notice not only that New Orleans was on the Mississippi river, but also that it was at a point within the ebb and flow of the tide. The general situation of Dover, which was for years the seat of justice for the county, with reference to the county lines, was a matter of public notoriety, of which the court had notice without proof. That the county line could not be reached within three miles was common knowledge; and, if the jury found, as it might have done, on the evidence, that the homicide occurred within three miles of Dover, that fixed it in Pope county. Affirmed.

WOLF et al. v. DUVALL et ux.

(*Supreme Court of Arkansas. April 26, 1890.*)

MARRIED WOMEN—CARRYING ON BUSINESS.

Where a married woman, through her husband as agent, purchases goods for the benefit of her separate property, she is liable therefor, under *Manst. Dig. Ark. §§ 4625, 4626, 4630*, which authorize a married woman to carry on any business on her separate account, and provide that judgments against her may be enforced against her separate property the same as against a *feme sole*. Following *Hickey v. Thompson*, 12 S. W. Rep. 475.

Appeal from circuit court, Nevada county; O. E. MITCHELL, Judge.

Action by Wolf & Bro. against J. J. Duvall, and Sallie J. Duvall, his wife, on notes given by Sallie J. Duvall, and signed by John J. Duvall as surety. The notes were given for goods used in running a mill purchased in the name of Sallie J. Duvall, and were purchased by John J. Duvall as her agent. The trial court found the facts and declared the

law as follows: "That said mill business was the sole and separate business of Sallie Duvall, and that she was at the time of creation of the liability sued on, the wife of John J. Duvall; that the goods were purchased by John J. Duvall, her agent, and were used in prosecuting and carrying on her sole and separate business; and that said purchases were the same as if made by her for her own use and benefit,—for the sole use of her sole and separate business. And the court declares the law to be that, Mrs. Sallie Duvall being a *feme covert*, and said goods being purchased during coverture, she was not liable therefor, by reason of her coverture, and finds for the defendant Mrs. Sallie Duvall." Plaintiffs appeal. Mansf. Dig. §§ 4625, 4626, and 4630, authorize a married woman to sue alone in respect to her separate business, and provide that judgments recovered against her may be enforced against her sole and separate estate and property to the same extent and in the same manner as if she were a *feme sole*.

Atkinson, Thompkins & Gresson, for appellants.

PER CURIAM. This case is controlled by the decision in the case of *Hickey v. Thompson*, 12 S. W. Rep. 475. Reverse the judgment and remand the cause, with instructions to enter judgment for the plaintiffs for the amount claimed in the complaint in accordance with the special finding of facts.

WAGGONER v. FOGLEMAN.

(*Supreme Court of Arkansas. April 26, 1890.*)

WARNING ORDER—PROOF OF DEFENDANT'S NON-RESIDENCE.

1. A petition alleging defendant's non-residence, the affidavit to which only states that petitioner "believes" the statements contained therein to be true, does not warrant the issuing of a warning order under Mansf. Dig. Ark. § 4990, which provides that the court may make a warning order upon the requisite facts being satisfactorily shown by affidavit or other proof.

2. An order published on such an affidavit may be avoided on appeal.

3. Where a non-resident defendant appeals on the ground that the warning order against her was void, and the judgment is reversed, no further service on her is necessary, since her appearance by appeal brings her into court.

Appeal from circuit court, Crittenden county; *J. E. RIDDECK*, Judge.

Suit in equity for partition. The petition alleged that defendant was a non-resident, and asked that a warning order might issue, but the affidavit to the petition was only that the petitioner believed the statements contained therein to be true. Mansf. Dig. Ark. § 4990, provides that the court may make a warning order upon the requisite facts being satisfactorily shown by affidavit or other proof. Section 4889 provides that a warning order may issue in case defendant is a non-resident of the state.

W. M. Randolph, for appellant. *O. P. Syles*, for appellee.

PER CURIAM. An affidavit for a warning order upon the ground of non-residence, like an affidavit for attachment, must state the fact of the defendant's non-residence, and not the belief of the fact only. *Hellman v. Fowler*, 24 Ark. 235. An order published on such affidavit may be avoided on appeal. *Sannoner v. Jacobson*, 47 Ark. 44, 45.

The affidavit in this case was made upon belief only. The judgment will, therefore, be reversed. The appellant, having entered her appearance by the appeal, is now in court, and no further service is required. Reverse.

METCALF v. LITTLE ROCK ST. RY. CO.

(*Supreme Court of Arkansas. April 26, 1890.*)

INSTRUCTIONS.

Where the court modifies an instruction requested by striking out a sentence, but supplies the sentence in different language in other parts of the charge, an objection that the instruction was not given as requested is untenable.

Appeal from circuit court, Pulaski county; *J. W. MARTIN*, Judge.

Action by Mrs. A. C. Metcalf against the Little Rock Street Railway Company for personal injuries. Judgment for defendant, and plaintiff appeals.

T. J. Oliphint and W. G. Whipple, for appellant. *J. M. Moore*, for appellee.

PER CURIAM. There is no difference of opinion between counsel upon the two sides of this case as to the law governing it. The appellant's complaint seems to be only that an instruction was not given in the form requested. It was modified by the court by striking out a sentence, but the part which was stricken out on the modification was supplied in different language in other parts of the charge. There is no error in the charge, and it covers the case. The jury could not have failed to understand that, if the negligence of the railway was the cause of the injury, they should find for the plaintiff, unless she was cut off by contributory negligence. They have found that the injury was not caused by the negligent conduct of the railway, and the judgment must be affirmed.

BROWN v. PETERS.

(*Supreme Court of Arkansas. April 26, 1890.*)

EXECUTION—HOMESTEAD EXEMPTION—HOW CLAIMED.

1. Mansf. Dig. Ark. § 8006, providing for the issuing of a *supersedeas* to stay a sale of land, under execution, which is claimed by defendant as his homestead, declares that, if any party entitled to exemptions shall desire to claim them, he shall prepare a schedule, verified by affidavit, of all his property, specifying that which he claims as exempt, and file the same with the clerk or justice issuing the execution. *Held*, that a schedule and affidavit claiming real estate levied on as exempt, and alleging that it is all of defendant's real estate, but averring nothing as to any other property, is insufficient to warrant the issuing of a *supersedeas*.

2. It should appear by the affidavit, in such case, that the debtor is a resident of the state.

Appeal from circuit court, Crawford county; J. S. LITTLE, Judge.

O. P. Brown and L. P. Sandels, for appellant.

HEMINGWAY, J. The appellant recovered a money judgment against the appellee, in the Crawford circuit court, on the 12th day of April, 1883. On the 14th day of May, 1888, an execution was issued upon said judgment, and levied upon a tract of land. Before sale under the execution the appellee claimed the land as exempt to him as a homestead, and the clerk of the court issued a *supersedeas* staying the sale. The appellant presented his application to the circuit court to quash the *supersedeas*, alleging that "the affidavit was fatally defective." The application was denied, and the appellant has appealed.

The schedule upon which the *supersedeas* issued, and the accompanying affidavit, are as follows: "George Peters, the defendant, states that he is a resident of the state of Arkansas, and the head of a family; that he is the owner of the following described real estate: The east half of the north-east quarter, and the north-west quarter of north-east quarter, all in section 6, township 10 north, range 29 west, and the south-west quarter of south-west quarter of section 32, township 11 north, range 29 west; that an execution had been issued by the clerk of Crawford circuit court on a judgment rendered against him by the Crawford circuit court in favor of said plaintiff; and that he claims as exempt from sale on said process the said described homestead. GEORGE PETERS."

"I, George Peters, do solemnly swear that the above schedule embraces all my real estate, and that the same is that which I claim as my homestead, and upon which I reside; that it does not exceed one hundred and sixty acres, and does not exceed in value the sum of twenty-five hundred dollars. GEORGE PETERS. Subscribed and sworn to before me June 23, 1888. BEN DECHARD, Clerk."

The defects alleged are (1) that the schedule does not purport to set out all of the defendant's property; and (2) that the affidavit does not show that the defendant is a resident of the state.

The law regulating the issuance of a *supersedeas* in such cases provides that, if any party entitled to the benefit of exemptions shall desire to claim them, he shall prepare a schedule, verified by affidavit, of all his property, including moneys, rights, credits, and choses in action, specifying the particular property which he claims as exempt, and file the same with the justice or clerk issuing the execution. This provision, by its terms, is not restricted to the claim of either kind of property, real or personal, but embraces all exemptions provided for in article 9 of the constitution. Mansf. Dig. § 3006. That article provides for exemptions of personality as well as of realty, and the court has held that the law referred to regulates the manner

of claiming exemptions in lands and chattels. Chambers v. Perry, 47 Ark. 400, 1 S. W. Rep. 700. As the law stood prior to the act of March 18, 1887, a debtor lost his right of homestead if he failed to claim it, and procure a *supersedeas* staying its sale. That act provides that in certain enumerated cases the right shall not be lost by such failure; but it does not provide that any *supersedeas* shall issue to stay a sale, and leaves the debtor's right to a *supersedeas* as it existed before. If, in any of the cases enumerated in the act, the homestead is sold, the debtor may subsequently claim it, and set up his right of homestead in a suit brought against him for its possession; but, if he permits it to go to sale, he takes the chances of defeat in a trial upon that issue. If he would avoid these chances, and protect the homestead from sale, he may procure a *supersedeas* to stay it; but, to do that, he must follow the law which gives that right. There is no right to a *supersedeas* except that contained in the statute first cited, and it prescribes the terms upon which the right may be enjoyed. If the debtor would not only save the property exempted to him from sale, but also avoid the clouding of his title, and the hazards and expense of litigation, it is but right and fair that he should uncover and disclose what property he has that is subject to the demands of his creditors. That the law exacts. As the schedule fails to set out all of the appellee's property, no *supersedeas* should have issued.

It should appear by the affidavit of the debtor claiming exemptions that he is a resident of the state. Guise v. State, 41 Ark. 249. The judgment will be reversed, and a judgment rendered here that the *supersedeas* be quashed. This will not prejudice appellee's right to file a schedule according to law.

SHERRER v. HARRIS.

(Supreme Court of Arkansas. April 26, 1890.)

MORTGAGES—DEED ABSOLUTE IN FORM.

The land of one B. was about to be sold under a judgment. His brother-in-law paid the debt, taking a deed from B., and by a conveyance gave B.'s wife the use of the land for life. At the same time, he executed to B. an agreement to reconvey on payment to him during his life-time of the amount of the judgment and interest. The brother-in-law died, leaving the land by will to C. The wife of B. died three years later. B. had made several payments on the debt. Held, that the conveyance to the brother-in-law was a mortgage, and C. was not entitled to a judgment for possession, but to a decree for the balance due on the judgment.

Appeal from circuit court, Ashley county; J. M. BRADLEY, Judge.

M. S. Hawkins and J. W. Van Gilder, for appellant. G. W. Norman, for appellee.

HUGHES, J. John A. Barringer, the ancestor of the appellant, in August, 1855, purchased of John Loughrain the lands in controversy in this suit, and, being unable to pay the purchase money, Loughrain sued him, and obtained judgment for the same; and the

lands were levied on, and about to be sold to satisfy said judgment. Charles F. Harris, the brother of John A. Barringer's wife, to secure a home for her, at her instance, paid the debt, \$2,100, and took a deed for the land, absolute in form, from John A. Barringer to himself. He then, by an instrument in writing which he called a "lease," gave his sister, Mrs. Barringer, the use of the lands, which were partially improved, for and during his or her life, and at the same time executed to John A. Barringer an obligation, in writing, to reconvey to him the lands in controversy if the said Barringer, within five years or in the life-time of said Harris, should refund to him the \$2,100 with 10 per cent. per annum interest from the date of said deed, and return to him the deed of gift to his sister for the use of the lands indorsed by her. All these instruments bore date March 20, 1856. Charles F. Harris died in 1874, leaving a will by which he devised to his brother, Henry J. Harris, the appellee, the lands in controversy. Christiana H. Barringer, who is the mother of appellee, and through whom he claims, died in 1877. In several deeds of conveyances for the lands, there were misdescriptions; and H. J. Harris, appellee, brought this suit, in equity, to correct these misdescriptions, and to obtain possession of the lands. No controversy existed as to the proper numbers of the lands or as to the misdescriptions in the conveyances, as mentioned in the complaint. Appellant, in his answer, denies the lease to Christiana H. Barringer, and that she held as tenant to Charles F. Harris, and avers that Charles F. conveyed the lands to his sister without the knowledge of John A. Barringer, her husband, who was thriftless and improvident, and that the conveyance by Charles F. to Mrs. Christiana Barringer was for her natural life, remainder to her children; and pleaded the statute of limitation of seven years. They charge that H. J. Harris, the appellee, surreptitiously got possession of those papers before Mrs. Christiana H. Barringer's death, and carried them away. The circuit court found for appellee, decreed that he was the owner, and entitled to possession, of the lands, and to rents therefor from the date of Mrs. Barringer's death, and awarded him a writ of possession. An appeal was taken to this court.

Without going into the mass of testimony offered to support the theory of appellee, we are content to say that, having examined and considered it, we find that it does not sustain his contention. The findings of the court and its decree are without evidence to support them. The deed of John A. Barringer to Charles F. Harris, though absolute in form, was given to secure the repayment of the \$2,100 Harris had paid for him, and was, in equity, a mortgage. It had been so treated and acted upon by Harris in his life-time, by his receiving money which was accepted in part payment of the debt secured thereby, and by his demanding the residue of the

debt thereafter. "Tell me," says Chief Justice COCKRILL, quoting Lord Chancellor SUGDEN, in *Gauss v. Orr*, 46 Ark. 129, "what you have done under a deed, and I will tell you what that deed means."

There was evidence which showed that there was only \$1,400 due on the mortgage. The right of action accrued to appellee in 1877, upon the death of Mrs. Barringer. This suit was brought in 1878. Therefore appellee's right of action was not barred when the suit was brought. The decree of the circuit court is reversed, and this cause is remanded with directions to the court below to give judgment for appellee in the sum of \$1,400, with interest at 6 per cent. per annum from the — day of —, 1877, the date of Mrs. Barringer's death, and to enter a decree correcting misdescriptions of lands in the conveyances, as prayed for in the complaint, and that the lands be sold to satisfy said judgment.

HOPE LUMBER CO. v. FOSTER & LOGAN HARDWARE CO.

(*Supreme Court of Arkansas*. April 26, 1890.)

SALE—DELIVERY—ESTOPPEL.

1. Defendant in attachment, under a contract with the H. L. Co. that it would take lumber of specified dimensions "free on board" the cars at P., and would allow defendant one dollar on each car for loading, loaded three cars, which he consigned to the H. L. Co. Defendant was authorized to draw on the H. L. Co. for what money he might need, and at the time of the consignment was indebted to it for money advanced. The laborers who loaded the lumber, under agreement with defendant, retained the bills of lading to secure their wages. The lumber had been received at the consignee's lumber yard, and was partly unloaded, when the attachment was levied. *Held*, that the loading of the lumber on the cars at P. was a delivery to the H. L. Co. as purchaser.

2. After the levy was made, the agent of the H. L. Co. told plaintiff's agent that the company did not claim the lumber, and would settle for it if plaintiff would be responsible to defendant. The H. L. Co. on the next day gave bond and retained the lumber, of which plaintiff was notified. The levy was not released in consequence of this statement, nor did plaintiff in any way act upon it. *Held*, that the H. L. Co. was not estopped by the declaration of its agent to claim the lumber.

Appeal from circuit court, Nevada county;
C. E. MITCHELL, Judge.

Smoot, McRae & Arnold, for appellant.
Atkinson, Tompkins & Greeson, for appellee.

HUGHES, J. On the 6th day of August, 1888, the appellee sued John J. and Sallie Duvall on account for \$400, and had an attachment levied on three car-loads of lumber, which was sustained against defendants, and from which they have not appealed. The appellant filed its interplea, claiming the property attached; and the court, sitting as a jury, found that the property did not belong to appellant, but to John J. and Sallie Duvall, and dismissed the interplea. Appellant excepted, filed a motion for a new trial, which was overruled, and interpleader excepted, and appealed. The motion for new trial is, substantially, that the circuit court erred in its

findings of the facts and the application of the law.

The facts are that, in response to a letter from J. J. Duvall, asking the Hope Lumber Company if it could take the "whole cut" of his mill, the Hope Lumber Company sent Duvall an order for lumber, specifying therein the dimensions of lumber it would take, and the price it would pay for the same, "f. o. b.," which meant "free on board," of cars at Prescott,—Duvall to pay for the loading of the lumber on the cars at Prescott, and the Hope Lumber Company to pay the freight, and, when order was filled, to pay Duvall one dollar on each car for loading; Duvall being authorized to draw on Hope Lumber Company for what money he might need. The bills of lading for the three car-loads of lumber were made in name of J. J. Duvall, and the cars were consigned to the Hope Lumber Company. The three car-loads of lumber were consigned to the Hope Lumber Company to fill, in part, the order above mentioned. Duvall was at the time indebted to the Hope Lumber Company for money advanced him on lumber. He had arranged with the laborers who loaded his lumber on cars that they could retain the bills of lading until their wages were paid. The agent of the appellee, learning that the laborers had possession of three bills of lading, paid them \$20, which they said Duvall owed them; and they delivered the bills of lading to him, which he took, with the writs of attachment in the case, and immediately went to Hope and to the lumber yard of the Hope Lumber Company, where he found the three car-loads of lumber, one of which had been unloaded, and the other two of which were being unloaded, and by his direction the sheriff levied the writs of attachment on the lumber. This was on the 6th day of August, 1888. Mr. White, the book-keeper of the Hope Lumber Company, and authorized to represent the company, after learning what had been done, told the agent of appellee that he did not want any trouble, and afterwards said that they did not claim the lumber, and that, if appellee would be responsible to Duvall, they would settle for it as soon as checked up, which would be the next day. The next day the Hope Lumber Company gave bond and retained the lumber. The agent of appellee was notified by the sheriff on the same day of the giving of this bond.

Appellee's counsel contends that the Hope Lumber Company was not the purchaser of the lumber, but a factor, and that, the laborers having possession of the bills of lading, the delivery of them to appellee for value carried the property in the goods covered thereby. In our opinion, the facts do not sustain this view of the case, but show, on the contrary, that the Hope Lumber Company was the purchaser of the lumber. The laborers had no title to the lumber; and, if they might, in any event, have had a lien upon it, that question is not involved here. The evidence shows that before the levy of

the attachments the lumber had been delivered to the Hope Lumber Company in its lumber yard at Hope, and one car of it unloaded, and the others were being unloaded. The delivery of the lumber on board the cars at Prescott upon the previous order of the Hope Lumber Company, and the consignment of the cars to it at Hope, was a delivery to that company. *Burton v. Baird*, 44 Ark. 556; *State v. Carl*, 43 Ark. 353; *Benj. Sales*, §§ 181, 698; *Herron v. State*, 51 Ark. 133, 10 S. W. Rep. 25.

It is also contended by counsel for appellee that appellant was estopped to claim the lumber, as against it, by the declaration of Mr. White, the secretary and representative of the Hope Lumber Company, that it did not claim the lumber, and would pay the sheriff or appellee for it if appellee would be responsible to Duvall. It is quite probable that White thought, when he made this statement, that the lumber belonged to Duvall; but when he had learned, soon after, his mistake, the appellant determined to interplead and assert its title. It does not appear that this declaration influenced the sheriff not to levy on the lumber, for it was levied on before he saw White, it seems; nor to release it, for it was released upon the bond of appellant, given under section 390, *Mansf. Dig.* Nor does it appear that, by reason of this declaration, appellee gave up any right, suffered any loss or disadvantage, or ceased or relaxed any effort to secure its debt. A representation, to create an estoppel, must, of course, have been acted upon. *Farrall v. Higley, Hill & D.* 89; *Thorn v. Bell*, Id. 430; *Railway Co. v. Gordon*, 70 Tex. 80, 7 S. W. Rep. 695. The primary ground of this doctrine is that it would be a fraud in a party to assert what his previous conduct had denied, when, on the faith of that denial, others have acted. The element of fraud is essential either in the intention of the party estopped, or in the effects of the evidence which he attempts to set up; and it would seem that to the enforcement of an estoppel of this character, with respect to the title to property, such as will prevent a party from asserting his legal rights, and the effect of which will be to transfer the enjoyment of the property to another, the intention to deceive and mislead, or negligence so gross as to be culpable, should be clearly established. *Wilson v. Roots*, 10 N. E. Rep. 205; *Earl v. Stevens*, 57 Vt. 474; *Guffey v. O'Reilly*, 88 Mo. 418; and note to same in 57 Amer. Rep. 429-433. See, also, *Conkey v. Hawthorne*, 33 N. W. Rep. 435; *Henderson v. McMahlill*, 39 N. W. Rep. 276; *Almy v. Thurber*, 99 N. Y. 407, 2 N. E. Rep. 49; *Sturtevant v. Orser*, 82 Amer. Dec. 321. In *Howard v. Hudson*, 2 El. & Bl. 1, Lord CAMPBELL said: "Like the ancient estoppel, this conclusion [estoppel *in pais*] shuts out the truth, and is odious, and must be strictly made out. The party setting up such a bar to the reception of the truth must show, both that there was a willful intent to make him act on the faith

of the representation, and that he did so act." Here, the appellee fails in both. For the want of testimony to support the finding of the circuit court, the judgment in this case is reversed, and the cause remanded.

BEASLY v. STATE.

(Supreme Court of Arkansas. March 22, 1890.)

BAIL—SURETY—CHANGE OF VENUE.

A surety on a bail-bond conditioned that defendant shall render himself amenable to all orders and process of the court in the prosecution of the charge is not released by a change of venue; Mansf. Dig. Ark. § 2199, providing that, on a change of venue in a criminal case, defendant shall enter into recognizance, with security, to appear in the court to which the cause is removed, being merely directory.

Appeal from circuit court, Ouachita county; B. F. ASKEW, Judge.

Appellant, Beasly, was surety on a bail-bond for one Grant Copehart, in Columbia circuit court, upon a charge of perjury. A change of venue, on application of Copehart, was ordered to the Ouachita circuit court; the court directing that the said Grant Copehart be held upon his present recognizance for his appearance before said court. Upon the trial Copehart absconded. To a *scire facias* issued on the recognizance appellant answered, setting up the above fact as a defense. The court gave final judgment of forfeiture against Beasly, and he appealed. Mansf. Dig. Ark. § 2199, relating to change of venue in criminal cases, provides that, "when such order shall be made, the defendant, if not in custody, and the offense charged be bailable, shall enter into recognizance, with sufficient security, for his appearance to answer the charges in the court to which the cause is to be removed on the first day of the next term thereof, and not depart such court without leave."

B. W. Johnson, for appellant. W. E. Atkinson, Atty. Gen., and T. D. Crawford, for the State.

PER CURIAM. The bond of Copehart stipulated that he should render himself amenable to all orders and process of the court, in the prosecution of the charge. On his petition the court ordered him to Ouachita county for trial. His surety, under the terms of his contract, was bound to see to his attendance. Section 2199, Mansf. Dig., is directory merely. The allegation in the answer that the defendant was acquitted was refuted by other allegations in the answer and the record, which show that the court refused to receive the verdict in the absence of the defendant. Affirmed.

GRIFFITH v. LANGSDALE.

(Supreme Court of Arkansas. March 22, 1890.)

CONFLICT OF LAWS—EXEMPTIONS—NON-RESIDENT DEBTORS.

1. Where a debtor and creditor are domiciled in different states, and the creditor proceeds by at-

tachment in the courts of the state of his domicile against the property of his debtor, the courts of the debtor's domicile will not interfere by injunction, on the ground that the property is exempt by the law of the debtor's domicile, though the creditor be temporarily found within their jurisdiction.

2. The collection by the creditor, under the attachment in his state, of a debt due the debtor, after the latter has filed his complaint in his state asking an injunction, and a temporary restraining order has been improvidently granted, is no ground for a personal judgment against the creditor for the amount so collected.

Appeal from circuit court, Miller county; O. E. MITCHELL, Judge.

This was a proceeding instituted by James Griffith, a resident of Arkansas, against George H. Langsdale, a resident of Texas, to restrain the latter from prosecuting an attachment against plaintiff's property in Texas. An injunction was refused, and plaintiff appeals.

Arnold & Cogh, for appellant. J. D. Cook, for appellee.

COCKRILL, O. J. A creditor who attempts to evade the exemption laws of his state by resort to attachment proceedings in the court of another state, against the property of a debtor who is a resident of the state of the creditor's domicile, may be enjoined, by the courts of the latter state, from prosecuting his suit in the foreign jurisdiction. *Cole v. Cunningham*, 10 Sup. Ct. Rep. 269; *Keyser v. Rice*, 47 Md. 203; *Snook v. Snetzer*, 25 Ohio St. 516; *Wilson v. Joseph*, 107 Ind. 490; 8 N. E. Rep. 616; *Hager v. Adams*, 70 Iowa, 746, 30 N. W. Rep. 36. In restraining the proceeding the court acts, not upon the court of foreign jurisdiction, but upon the person of the creditor. *Pickett v. Ferguson*, 45 Ark. 177. The equitable jurisdiction in this class of cases arises from the creditor's effort to evade the law of the state of his domicile. When, therefore, the debtor and creditor are domiciled in different states, and the creditor proceeds by attachment in the courts of the state of his domicile against the property of his debtor, there is no cause for the interference by injunction on the part of the courts of the debtor's domicile, even though the creditor be temporarily found within their jurisdiction. That was the state of the case presented by the appellant in this cause. There was no error, therefore, in refusing the injunction. But the creditor collected through his Texas attachment a debt due the appellant after the complaint in this cause was filed. That fact was set up in an amendment to the complaint, and it is argued that the court erred in not rendering judgment *in personam* against him for the amount so collected. If it had been collected in disobedience of a rightful injunction, the plaintiff might have been entitled to that relief. *Hager v. Adams*, supra. But he was not entitled to that measure of relief for the disobedience of the provisional restraining order which had been improvidently issued. Nor does he show any other cause for the recovery from the appellee of the money collected by

him under the Texas judgment. The effort of the Texas court to render a binding judgment *in personam* against the appellant upon service of process had in Arkansas was futile, but a writ of garnishment was sued out at the institution of the suit, and served upon the appellant's debtor, who paid the amount in suit to the appellee under the order of the Texas court. The appellant's complaint contained no allegation that the Texas court was without jurisdiction to attach and condemn the debt. It admits the jurisdiction of the court, and seeks to avoid the effect of the judgment upon other grounds. But, the jurisdiction to seize and condemn the debt being admitted, no ground for recovery is shown. Affirmed.

BEDDINGER et al. v. SMITH et al.

(Supreme Court of Arkansas. March 22, 1890.)

EXECUTORS AND ADMINISTRATORS — INFANCY —
GUARDIAN AD LITEM.

1. Where the record of a cause shows that a guardian *ad litem* was appointed for minor defendants, and that he accepted the appointment and filed their answer, the recital in the decree that the cause was heard upon their answer is conclusive as to the service of legal notice on the minors.

2. The consent of minor heirs is not necessary to the appointment of an administrator of an estate, and where there are no relatives of decedent living in the state the appointment is within the discretion of the probate court.

3. The consent of minors is not necessary to the appointment of a guardian *ad litem* for them.

Appeal from circuit court, Conway county; W. D. JACOWAY, Judge.

W. S. Terry, E. B. Henry, and Carroll Armstrong, for appellants. Caruth & Erb, for appellees.

BELL, J. This was a bill filed by appellants, heirs of one Solomon S. Beddinger, to vacate and set aside a decree of the Conway circuit court, in chancery, rendered on the 5th of December, 1873, in a case wherein appellee J. W. Smith was plaintiff and the appellants were defendants. The bill charges fraud on the part of the plaintiff in the prosecution of that suit, and a want of service on appellants as minor defendants in that suit. This suit was commenced in January, 1878; and, after a large mass of testimony and much record evidence was filed, much of which is irrelevant, a hearing was had on the 3d of November, 1882, and the bill was dismissed for want of equity. An appeal was prayed for and granted by the clerk of this court on the 2d day of November, 1885.

A history of the case as disclosed by the record will aid the court in understanding the points at issue. It may be stated that the only controversy is as to the title to about 370 acres of land. Solomon S. Beddinger, appellants' father, was a resident of Missouri until about 1865. He was in the southern army. When the civil war commenced, he was in comfortable circumstances,—owned a farm of about 600 acres, not all paid for, and

some stock of mules and cattle. During the war, his buildings and fences were all burned, and his stock carried off, and he left penniless, except the land. In October, 1865, judgments were rendered against him for \$5,566.97 and costs, which he was wholly unable to pay. In the latter part of 1865 or 1866, J. W. Smith, the appellee, paid off these judgments, and took a transfer of them to himself, and removed Beddinger and his family to Arkansas, paying all the expenses. Beddinger was Smith's brother-in-law. A mule speculation was entered into between Smith, Beddinger, and others; Beddinger putting in no money, but only his services. In this transaction, Beddinger made \$2,475.55, which Smith placed to his credit on account. In 1866 they cultivated a plantation in what is now Lincoln county, and lost money; Beddinger's loss being \$2,900, which Smith never charged to him. Smith had taken Beddinger's note to cover cash advanced in paying off the judgments and other items, and the farm was sold in Missouri to pay off these judgments; and Smith got the money, which is all accounted for. In Exhibits A and B to his deposition, Smith gives an itemized statement of the whole transaction. Smith had purchased the Carroll farm, in Conway county, which figures in this suit; and he and Beddinger cultivated it in 1867, 1868, and 1869, and made nothing. In December, 1869, they entered into articles of agreement of partnership, which was the beginning of all their troubles, resulting in this suit. Smith's capital then invested in the farm and stock was \$30,000. He sold Beddinger one-third of the land and stock for \$10,000, payable in one and two years with 10 per cent. interest, made him a deed, and held lien on the property to secure the notes. By the articles of partnership, Beddinger was to have exclusive control of the farm and partnership business for three years, to have his family supported, and two servants to wait on them, and was to have one-half of the profits. The proof shows that Beddinger did not put a dollar in the partnership business, his farm in Missouri having been sold to pay off the judgments against him, and that he was indebted to Smith at the time the partnership was formed. The farming operations were disastrous. No money was made. On the contrary, heavy losses resulted. This is conclusively shown by the testimony of the appellee, the admissions of Beddinger, and the report of G. S. Cunningham, the master appointed by the court to make a report of the matters between the parties, and by the record of the United States court in the case of Black & Co. v. Smith et al., exhibited in this case. In January, 1873, the terms of the partnership having expired, and the firm being largely indebted, Smith proposed a settlement, being anxious to get clear title to the original tract of land known as the "Carroll Place;" and it was agreed that Beddinger should convey to Smith his one-third interest in the Carroll place, and

Smith should assume all the partnership liabilities, amounting, according to the master's report, to over \$15,000. But Smith, with his usual liberality to his brother-in-law, agreed to sell to Beddinger his two-thirds interest in the 370 acres of land in controversy in consideration of whatever sum Beddinger might owe him on settlement, the amount to be ascertained by the 1st of July, 1873; and this agreement was reduced to writing, and is the "bond for the title" which is the foundation for this suit. This paper is not so much a bond for title as an executory agreement to make title when a settlement could be made, and the amount of the indebtedness of Beddinger to Smith could be ascertained. Smith had the 370 acres of land surveyed for him, and Beddinger was in possession of it. His residence was on the 80-acre tract called the "Homestead Tract." Beddinger died suddenly, and the settlement between him and Smith was never made. Smith took out letters of administration upon the estate of Beddinger; and, being surviving partner of the firm, which was largely involved, and Beddinger being largely indebted unto him for the one-third interest in the land, he filed his bill in chancery against the heirs of Beddinger and the creditors of the firm to settle up all these complicated matters,—the partnership as well as the individual liabilities. Maj. C. B. Moore was appointed by the court as guardian *ad litem* for the minor defendants, accepted, and filed his answer as such guardian. G. S. Cunningham was appointed master in chancery to state the accounts of the partnership matters, and the liability of Beddinger to Smith. He made his report, showing Beddinger's liability to the firm to be \$1,048.77, and his liability to J. W. Smith \$13,698.56; making in all \$14,747.33, which amount was a lien upon his one-third interest in all the lands embraced in the partnership. A decree was rendered in accordance with said report. The land was sold and purchased by F. H. Smith, who held one of Beddinger's notes. The sale was approved at the April term, 1875.

To review and correct this decree, and set aside the sale, is the object of the suit in this case. Many charges of fraud are made against J. W. Smith in his conduct as administrator in settling up the estate which would probably not deserve notice but for the earnest, eloquent, and apparently serious manner in which they are urged by learned counsel for appellants.

1. It is charged and urged with some earnestness that the minors were not served with legal notice in the original suit. The record shows that a guardian *ad litem* was appointed for them, who accepted the appointment and filed their answer; and the decree recites that the cause was heard upon their answer. The case of *Boyd v. Roane*, 49 Ark. 397, 5 S. W. Rep. 704, is conclusive upon this point.

2. It is charged that Smith used fraud in procuring the written consent of the heirs

for his appointment as administrator. This is not sustained by the proof. There seems to be no widow or other relatives living in the state, and Smith was, clearly, a proper party to be appointed administrator; and the consent of the minor heirs was unnecessary. It was a matter of judicial discretion in the probate court.

3. It is charged that the consent of the heirs was fraudulently procured to the appointment of C. B. Moore as guardian *ad litem*, and G. S. Cunningham as master, for fraudulent purposes. Their consent was not necessary, and the testimony of Moore and Cunningham show an extraordinary amount of care and zeal in protecting the rights of appellants. Said charge is denied, and wholly unsupported by the proof.

4. It is charged that the bond for title for the 370 acres of land was sent to Beddinger in fraud of the agreement to give him a deed; and Mrs. Humphlet says that, "when the bond came, Beddinger did not like it," and H. C. Beddinger says that "his father was mad because he did not get a deed." But Col. Ben S. Johnson, who drew up the deed and bond for title for Smith and Beddinger, says that they were both present, and he drew up the papers according to their joint instructions, and that Beddinger thoroughly understood the whole contract.

5. The main effort of appellants seems to be to show, by a mass of testimony, that J. W. Smith had the 370 acres of land surveyed off, and that Beddinger took possession of it, and prepared to cultivate it, with the knowledge of Smith. All this is admitted by Smith, and is perfectly consistent with the written agreement or "bond for title," which was to sell him (Beddinger) his (Smith's) two-thirds interest in the 370 acres of land on the 1st day of July, 1873, when the amount due him by Beddinger could have been ascertained, so he could give his notes at one, two, and three years for the purchase money. Beddinger seemed to think that he could do this, and pay the place out. There is nothing in all this to contradict or impeach the terms of the written agreement except Mrs. Humphlet's statement that Smith was to pay Beddinger \$10,000 for his one-third interest in the land. This is absurd; for Beddinger already owed him nearly \$14,000 on the one-third interest, and to pay him \$10,000 would make the one-third interest cost him \$24,000. This is in keeping with much of the other testimony.

6. It is charged that Smith was guilty of fraud in redeeming 40 acres of land which had been forfeited for taxes in the name of his wife, G. A. Smith. In response to this, Smith testifies that this 40-acre tract was not embraced in any of the deeds to the place, although it lay in the middle of the plantation; and it was redeemed by his wife, with her own money. At most, it would only be held in trust for the creditors of the partnership; but the records of the United States court show that this 40-acre tract of

land was sold with the other land belonging to the partnership, and the same was purchased by Zeb Ward as a part of the assets of the firm, and Mrs. Smith filed her interplea in the case of Black & Co. v. Smith et al., and claimed the value of this tract of land, which was awarded to her by the court, and the master fixed the value at \$775. But Zeb Ward, the purchaser, released the land to her, and the court allowed Ward a rebate of \$400 on his bid. So this matter is *res adjudicata*, as appellants had made themselves parties to the suit.

We discover no error in the finding of the court below, although there were many questions of practice raised, and motions to strike out pleadings, which we deem it unnecessary to notice. The record in this case shows that the original decree was the proper decree to make, and fully sustains it. One general state of facts seems to be the result of the pleadings and proof: Smith put into the partnership \$30,000; Beddinger put in nothing, and had the management and control of the establishment three years,—had his family supported, and two servants to wait upon him,—and died leaving his heirs 80 acres of land, with a residence on it, costing \$4,000, built with the partnership funds; and Smith has lost everything, and comes out largely indebted to the creditors of the firm, which he cannot pay. The decree of the court below, in finding no equity in the bill and dismissing the same, is affirmed.

COCKRILL, C. J., did not sit in this case.

PENZEL GROOER Co. et al. v. WILLIAMS et al.

(Supreme Court of Arkansas. March 22, 1890.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—RECEIVERS.

1. A court of chancery has no authority, on petition of the preferred creditors, with consent of the debtor and the assignee, to put an estate which has been assigned for the benefit of creditors into the hands of a receiver to be sold, on mere allegations that a large part of the assigned goods is perishable, and that the assignee, in administering the trust, will be trammelled by the statute.

2. A receiver cannot, before sale of the goods of the receivership, take an interest therein with one who intends to purchase them.

3. An assignment for the benefit of creditors, purporting to convey all the property of the assignors, real and personal, individual and partnership, except that which is exempt, is void, where there is an intentional withholding of any property not exempt.

Appeal from Pulaski chancery court; D. W. CARROLL, Chancellor.

Intervention by attachment creditors to set aside an assignment for the benefit of creditors, and have their claims paid out of the fund in the hands of a receiver of the assigned estate. The intervention was dismissed, and the intervenors appeal.

Sanders & Watkins and Cohn & Cohn, for appellants. Ratcliffe & Fletcher, for appellees.

SANDELS, J. On July 1, 1887, Williams & Martin began a general grocery business at Little Rock, and continued together until about December 20, 1887, when Martin, who had put no money in the firm, withdrew. After that the firm was B. R. Williams & Co. J. R. Williams became a member about March 1, 1888. On April 19, 1888, B. R. Williams & Co. made a general assignment of all partnership and individual property (except that exempt from levy and sale under execution) to J. K. Brodie, preferring, among others, Parker & Worthen for \$1,000, and J. K. Brodie for \$3,440. On the same day Parker & Worthen filed a bill in the Pulaski chancery court, alleging the execution of said deed; that the property assigned had been "turned over" to the assignee; that plaintiffs were creditors; that there was a large quantity of perishable assets in the stock assigned; that said assignee, in administering the trust, "would be trammelled by the statute;" and prayed that a receiver be appointed to administer the trust, under orders of court. The assignors and assignee also personally appeared, waived issuance of process, and consented that the receiver be appointed. Accordingly, Brodie was appointed receiver, and gave bond in the sum of \$12,000. Four days later the receiver filed his inventory of the estate, and the court ordered him to receive bids, for five days, for the sale of the stock and fixtures. On April 28, 1888, the court accepted the bid of L. W. Mason, it being \$4,383.63. On May 5th the receiver filed his settlement with the court. On May 7th various creditors of B. R. Williams & Co. filed petitions in the chancery court, alleging that they had brought suits at law, and caused attachments to be issued, which could not be levied because of the appointment of a receiver; that said assignment was executed with the fraudulent intent to cheat, hinder, and delay the creditors. They asked to levy their attachments, and have their claims paid out of the fund in court. Intervenor afterwards filed an amendment, stating the grounds of the charge of fraud: (1) That Brodie was a partner of B. R. Williams & Co., and that the preferred debt to him was his capital in the business; (2) that assignors willfully withheld assets; (3) that the purpose of said assignment was to secure control of their business to Brodie for the interest of assignors, and for the purpose of cheating, hindering, and delaying creditors. Upon the trial, evidence was introduced to show the partnership of Brodie, and the withholding of property, viz., a note of Martin for \$174.95, and an equitable interest in some lands paid for by check of firm shortly before the assignment. The chancery court, on June 9, 1888, decreed that Brodie was not a partner; that the intervenors be dismissed; and that the parties preferred in the assignment have distribution of the fund in court.

In the argument here appellants take broader ground than in the court below. It is insisted that the allegations of the bill filed

by Parker & Worthen, showing the goods "turned over" to the assignee; the circumstances indicating that the assignee never took an inventory or gave bond to justify such possession; together with the simultaneous execution of the deed, filing of the bill, appearance of all the parties, consent to the appointment of a receiver,—show that it was the purpose of assignors to thwart the law relating to assignments, and to conserve their own interests. Neither the allegations of the petitions, nor proof of matters prior to or contemporaneous with the execution of the deed, are such as warrant a decision of the question argued. But the practice which the cause discloses, and which is alleged to be prevalent, is not one to be commended. The power of the chancery court, in the absence of statutory regulations, to supervise the execution of trusts, as also the power of chancery, notwithstanding the statute, to interfere upon proper allegations of irreparable loss, mismanagement, incompetency of trustee, etc., has never been questioned. But to nullify the statute upon general allegations of benefits to be derived therefrom is not sanctioned by law or the principles of equity jurisprudence. In this case, while the price obtained for the stock was what might have been fairly obtained, the proceedings illustrate the possibility of abuses. The bill alleged that the property was in the hands of the trustee; in argument, it is conceded that this was untrue. It was alleged that a large portion of the stock was perishable. A careful examination of the inventory shows that, in a stock of \$5,412.88, articles of the total value of \$12.65 could be considered perishable. The court accepted the bid of L. W. Mason for the goods and fixtures. The receiver paid to himself cash, and became surety on notes for the other two-thirds, executed to himself as receiver, and immediately after was announced as a partner of the purchaser in the stock purchased. Brodie swears that he made the arrangement to take an interest with Mason after the latter bought, while B. R. Williams shows that, on the day before Mason became the purchaser of the goods, Brodie, in his own handwriting, opened the accounts of Brodie & Mason on page 28 of the old journal of B. R. Williams & Co. Such privileges have wisely been forbidden to officers of the courts.

The fact of the partnership of J. K. Brodie with B. R. Williams & Co. is not proved to the satisfaction of a majority of the court. The evidence might make him liable to any one who had given credit on the faith of his declarations. Possibly this influenced him to buy the claim of Whittemore & Gordon, after the assignment for 60 cents on the dollar.

The remaining questions relate to the withholding of the note of Martin, and the interest in the lands sold after the assignment. Williams claims that the note, although payable to B. R. Williams & Co., was his individual property, and that he forgot its exist-

ence, and that the land was not intended to be conveyed by the assignment. The granting clause conveyed everything, individual and partnership, real and personal, except his exemptions. Just after the receiver took charge, Williams asked Martin if he could not take up the note, which was not yet due, and offered it to him at a specified price. Martin paid it to him within a month after the assignment. Just before the assignment, Williams said to L. W. Cherry, who was interested in the land with him: "I transfer that land to you." Cherry answered: "That does not amount to anything." Just after the assignment he began negotiations which resulted in an early sale, and, after trying in vain to get Cherry to convey the land for him, he made the deed himself. The total nominal assets were \$93,333.65. The total liabilities were \$12,648.19. The deficit was \$3,314.54, besides all capital put in by B. R. and J. R. Williams, and all profits on sales. They were in business, altogether, 9 months and 19 days. When asked how he accounted for this, Williams testified: "Well, if you tell me, I will give you \$500. So far as I know, there has been a loss of \$5,000, loss in merchandise. What has become of the money is more than I can tell you or know of." On page 62, transcript, Williams says this land was not put into the assignment. The property was never delivered to the assignee, and was never intended to be. Upon this condition of things it would appear impossible to reach a conclusion other than that of this court in *Probst v. Weldon*. The assignment purported to convey all the property of the assignors, real and personal, individual and partnership, except that exempt, and the law pronounces fraudulent the intentional withholding of any part of it. *Probst v. Weldon*, 46 Ark. 405; *Shultz v. Hoagland*, 85 N. Y. 464; *Craft v. Bloom*, 59 Miss. 69. The deed of assignment was therefore void, and the chancellor erred in failing to so find. The decree is reversed, and the cause remanded, in conformity with this opinion; and requiring the receiver, out of funds which have come to his hands from sale of stock and collections, to pay the several intervenors, upon the proper establishment of their demands, in the order in which their petitions were filed, the amount of their several claims.

WELLS v. STATE.

(*Supreme Court of Arkansas. May 3, 1890.*)

CRIMINAL LAW—CHANGE OF VENUE—LOCAL PREJUDICE.

1. Mansf. Dig. § 2195, provides that any criminal cause pending in a circuit court may be removed to the circuit court of another county whenever it shall appear that the inhabitants of the county in which the cause is pending are so prejudiced against defendant that an impartial trial cannot be had. Act Dec. 15, 1875, which establishes separate courts in the county of Yell, provides that they "may change the venue of cases from one district to another, or to any other county in the judicial circuit, in like manner as changes of venue are granted in this state." Held that, where an application

for a change of venue states that the inhabitants of Yell county are prejudiced against defendant, the cause should be removed to another county, and not to another district of Yell county.

2. In such an application, an averment that a similar prejudice exists in another county is surplusage.

Appeal from circuit court, Yell county; J. E. CRAVENS, Special Judge.

S. W. Williams and *J. P. Byers*, for appellant. *W. E. Atkinson*, Atty. Gen., and *T. D. Crawford*, for the State.

HUGHES, J. The appellant was indicted for murder in the first degree by the grand jury in the Dardanelle district of Yell county. Ark., was arraigned, and pleaded not guilty, and then filed a motion for a change of venue on the ground that the minds of the inhabitants of Yell county, where the cause was pending, were so prejudiced against him that he could not obtain a fair and impartial trial therein, and concluded the motion by saying: "This applies also to Pope county." The motion was sworn to by defendant and three other persons. The court decided to overrule the motion unless so amended as to apply to the Dardanelle district of Yell county alone, and that if so amended a change of venue would be ordered. The defendant and his counsel refused to amend said motion, and the court overruled it, to which the defendant at the time excepted. He was tried and convicted of murder in the first degree. He filed a motion for a new trial, which was overruled, to which an exception was saved. He then filed a motion in arrest of judgment on the ground that the court, after the motion for change of venue had been filed, had no jurisdiction to try the cause, and should have made the order for the removal of it to some other county of that judicial district for trial. The motion in arrest was overruled, and the defendant excepted, tendered his bill of exceptions, and appealed.

The first ground of the motion for a new trial was that the court erred in not granting the change of venue. There were other grounds, which we do not deem it necessary to notice further than to say that the instructions appear to have been fair to the defendant. Section 10, art. 2, of the constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed: provided, that the venue may be changed to any other county of the judicial district in which the indictment is found, upon the application of the accused, in such manner as now is, or may be, prescribed by law." Section 2195, Mansf. Dig., provides that any criminal cause pending in any circuit court may be removed by the order of such court, or by the judge thereof in vacation, to the circuit court of another county, whenever it shall appear in the manner hereinafter

provided that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair and impartial trial cannot be had therein. The sixth section of the act of December 15, 1875, entitled "An act to establish separate courts in the county of Yell," provides "that the circuit courts hereby established in the respective districts of Yell county shall be as distinct from each other, and shall have the same relation to each other, as if they were circuit courts of different counties, and may change the venue of cases from one district to the other, or to any other county in the judicial circuit, in like manner as changes of venue are granted in this state." Page 190, § 6. In *Walker v. State*, 35 Ark. 386, it was held that this act was constitutional, and that "the provision limiting the selection of the grand and petit juries in the Dardanelle district to the territory comprised within the district is not in conflict with the tenth section of the declaration of rights. While it is competent for the circuit court, under this act, to change the venue in a criminal case from one of these districts to the other, where the application for a change of venue states only that the minds of the inhabitants of the district from which the change is sought are so prejudiced against the defendant that a fair and impartial trial could not be had therein, we do not think it competent for the court to refuse to grant the change of venue to another county in the same judicial district when the cause or ground of the application is made to extend to the whole county, as in this case, and is otherwise in accordance with the statute.

The words in the motion, "this applies also to Pope county," were mere surplusage. Another county than the one in which a criminal cause is pending cannot properly be included in a motion for change of venue, but in a civil cause the statute permits it. When a motion for a change of venue in a civil cause, supported by proper affidavits, is made in due time, in accordance with the statute, upon the ground that the minds of the inhabitants of the county where the cause is pending are so prejudiced against the defendant that he cannot obtain a fair and impartial trial therein, it becomes the imperative duty of the court to order the removal of the cause, and the defendant cannot be restricted to another district for holding court in the same county, but is entitled to have the cause removed for trial to another county in the same judicial district, in accordance with the constitution and statutes. There was error in the judgment of the circuit court, in refusing to order a change of venue in the cause, upon the application of the defendant, unless he would so amend his motion as to make it apply alone to the Dardanelle district of Yell county, for which the cause is reversed and remanded.

WOOD *et al.* v. HOLLAND *et al.*

(Supreme Court of Arkansas. March 22, 1890.)

MORTGAGES—REDEMPTION—PURCHASE MONEY.

1. Act Ark. March 17, 1879, § 1, provides that at all mortgage sales the "property shall not sell for less than two-thirds of the appraised value thereof: provided, that this act shall not apply to sales of property for the purchase money thereof," etc. It also provides that, in cases of sales of real estate, it shall bring two-thirds of its appraised value; and, if not sold for that amount, then at the end of twelve months it may be sold without reference to its appraisement, and that real property may be redeemed by the mortgagor at any time within 12 months. *Held*, that the mortgagor, in case of sale of real property, had the right to redeem in one year, whether the debt be for the purchase money or not.

2. But the mortgagor must offer to pay the whole purchase money due, and not merely the amount for which the land sold, with interest and costs.

Appeal from White chancery court; D. W. CARROLL, Chancellor.

On the 16th day of May, 1888, J. F. Wood and C. W. Wood filed their complaint, in which they alleged that in November, 1882, they purchased of John G. Holland and A. P. Sanders certain described land, for which they agreed to pay \$600, and that they executed their notes, and to secure them on the same day executed a mortgage on the land; that on the 14th day of May, 1887, the trustee in said mortgage, on default in payment of the notes, offered said lands for sale, and that John G. Holland became the purchaser at the price of \$250, and received a deed; that on the 7th day of May, 1888, appellants, claiming the right to redeem said lands, tendered the amount bid thereon, with 10 per cent. interest and the cost of said sale, which tender was refused. To this complaint appellees demurred, the demurrer was sustained, and complainants appeal. The questions involved were whether appellants had the right to redeem at all, and whether, if they had the right to redeem, they would be required to tender the amount for which the land was sold under the trust-deed, with interest and cost, or the amount of the original purchase price of the land, with interest and cost of sale. The questions involved the construction of section 1 of an act of the general assembly of this state approved March 17, 1879, p. 94. This section provides "that, at all sales of personal or real property under mortgages and deeds of trust in this state, such property shall not sell for less than two-thirds of the appraised value thereof: provided, that this act shall not apply to sales of property for the purchase money thereof," etc. The same section further on provides that, in cases of sales of real estate, it shall bring two-thirds of its appraised value. If not sold for that amount, then, at the end of 12 months, it may be sold without reference to its appraisement, and that real property may be redeemed by the mortgagor at any time within 12 months. It was contended by appellants that this act did not apply to sales made under mortgages or trust-deeds, so far as the same required an appraisement,

and that the property should bring two-thirds of its appraised value; but that it applied to such sales so far as it relates to redemptions. Appellees contended, on the other hand, that the provisions of the act had no application whatever, where the sale was made by the trustee to pay the purchase money, as was done in this case.

J. F. Wood and C. W. Wood, *pro se.* J. W. House, for appellees.

PER CURIAM. The act of March 17, 1879, regulating sales of property under mortgages and deeds of trust, gives to the mortgagor, in case of sale of real property, the right to redeem within one year, whether the debt be for the purchase money or not.

In offers to redeem, under the provision, the act prescribes the amount to be tendered. The tender in this case was sufficient. But when the party goes into a court of equity to redeem, he must offer to pay the whole purchase money due, and the absence of any tender to this end in the bill of appellants makes the action of the court correct. This will not prejudice any future action by appellants. *Affirm.*

THORNTON v. SIMON *et al.*

(Supreme Court of Arkansas. April 12, 1890.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—
VALIDITY.

A deed of assignment for the benefit of creditors, which makes preferences, and provides that after the preferred creditors are paid all other creditors shall be paid *pari passu*, and directs the assignee to wind up the estate as the law directs, is not void for failure to specify the time within which the creditors are to accept its provisions and surrender their debts.

Appeal from circuit court, Ouachita county; C. W. SMITH, Judge.

In attachment proceedings by H. T. Simon, Gregory & Co. against William Hilton, T. I. Thornton interpleaded, claiming the attached property as assignee under a deed of assignment made by defendant for the benefit of his creditors. The deed set out the names of various creditors; and made a preference of a few of them, but made no conditions that they should or should not accept the same, nor did it require them to surrender their demands. It declared that after they were paid all the other creditors should be paid *pari passu*; that the debtor could not pay his debts; and that the assignee was to wind up the estate as the law directs. The court declared the deed void on the ground that it failed to specify any time within which the creditors were to accept the provisions made for them and surrender their debts. From the judgment sustaining the attachment, the assignee appeals.

B. W. Johnson and John R. Thornton, for appellant. J. M. Barker and H. G. Bunn, for appellees.

PER CURIAM. The deed of assignment contains none of the provisions which con-

demned the deed in *Collier v. Davis*, 47 Ark. 367, 1 S. W. Rep. 684.—the case relied upon by the appellees. See *Wolf v. Gray*, ante, 512. The deed is good on its face, and the court erred in holding it void. Reverse the judgment, and remand the cause for farther proceedings.

ST. LOUIS, I. M. & S. RY. CO. v. GAINES.
(*Supreme Court of Arkansas*. April 26, 1890.)
MASTER AND SERVANT—DEFECTIVE APPLIANCES—EVIDENCE.

In an action by a brakeman against a railroad company for personal injuries, caused by defective appliances on defendant's cars, evidence that a sufficient force of car inspectors was not employed by defendant, where it is also shown that this particular car was inspected, and that one of the car inspectors got drunk sometimes when not on duty, is not sufficient to show that defendant failed to use reasonable care in seeing that its cars were in a safe condition.

Appeal from circuit court, La Fayette county; C. E. MITCHELL, Judge.

Action for personal injuries by John Gaines against the St. Louis, Iron Mountain & Southern Railway Company. The complaint alleged that "on December 29, 1882, plaintiff, John Gaines, was in the employ of defendant railway company as a brakeman, and while at work uncoupling cars on a through freight train, at the town of Malvern, Ark., on said day, by reason of a defective draw-head, he had the middle finger of his left hand so badly mashed that it had to be amputated; to his damage five thousand dollars." The answer denied specifically all negligence on defendant's part, and charged contributory negligence on the part of the plaintiff. Evidence was introduced, both by plaintiff and defendant, bearing on the question whether the draw-head by reason of which plaintiff was injured was defective, and as to the care defendant exercised in keeping its cars in good and safe condition. A verdict was rendered for defendant for \$3,500. Defendant moved for a new trial, which was refused. On appeal the judgment was set aside, and a new trial ordered. 46 Ark. 566. The decision of the appellate court was based on the ground that it was not shown by plaintiff that the company knew, or by the use of reasonable diligence could have known, of the defective condition of the draw-head. Another ground for the decision was the refusal of the court to instruct the jury that the brakeman (plaintiff) and the car inspector were fellow-servants. A new trial was had, which again resulted in a verdict for plaintiff, and defendant again appeals.

Dodge & Johnson, for appellant. *Williams & Shinn* and *James M. Montgomery*, for appellee.

PER CURIAM. The law of this case is unalterably fixed by the judgment on the former appeal. 46 Ark. 566. The facts, as measured by the legal standard then established, were declared to be insufficient to sus-

tain a judgment for the plaintiff. The additional facts adduced at the second trial are few, and do not change the legal aspect. They were an attempt to show that a sufficient force of inspectors to perform the duties, when several trains arrived at once, was not employed, and that one of the inspectors was inefficient. As to the first point, it was not shown that the emergency in which the force might have proved inefficient had arisen to contribute to the injury in this case, but, on the contrary, it was shown that the plaintiff's train was inspected; and on the second point the proof was only that one of the inspectors sometimes got drunk when not on duty,—nothing more. That was insufficient to take the case out of the rule of the former decision. Reverse the judgment.

LANIGAN et al. v. SWEANY et al.

(*Supreme Court of Arkansas*. April 26, 1890.)

MORTGAGES—POWER OF SALE—EXECUTION.

A mortgage contained a power in the mortgagee or her assigns, on default, to sell the premises at public or private sale, and convey the same to the purchaser in fee-simple absolute. On default the mortgagee's assignee executed an absolute deed of the land, unambiguous in its terms, to defendant. The deed did not refer to the mortgage or the power of sale, and the note secured by the mortgage was not assigned to defendant. Held, that the conveyance was an execution of the power, and not an assignment of the mortgage.

Appeal from circuit court, Sebastian county; G. A. GRACE, Special Judge.

J. M. Moore, for appellants. *Jos. M. Hill*, for appellees.

HEMINGWAY, J. This is a bill on the part of the plaintiffs, as the heirs at law of Pat Sweany, to redeem lands mortgaged by him in his life-time, and which, it is alleged, the appellees hold as assignees of the mortgage. The appellees contend that they acquired the land by purchase under the power of sale contained in the mortgage, and deny that they hold as mortgagees. The mortgage was executed to Harriet A. Cabell as security for a note payable to her order eight months after date thereof; and it contained the provisions that, if default should be made in the payment of the note, "the said Harriet A. Cabell, her executors, administrators, or assigns, should have power to sell the premises either at public or at private sale, and convey the same to the purchaser in fee-simple absolute." The mortgagor died, and the note was not paid. Subsequently Harriet Cabell assigned the mortgage and note to one V. Dell, entering the assignment of the mortgage, on the copy of it, in the office of the recorder of deeds. Dell held the mortgage and note until October 4, 1879. On that day he executed a deed of conveyance in usual form, with covenants of seisin and warranty of title, purporting to convey the land to the defendant Ed Lanigan for the consideration of \$100. This deed contained no reference to the mortgage, or the power

of sale therein contained, and it does not appear that the note was assigned or delivered to Lanigan.

The effect of that deed is the only question for our consideration. The plaintiff contends that its only effect was to convey Dell's interest as a mortgagee, while the appellee contends that it was an execution of the power of sale in the mortgage, and passed the title formerly held by Pat Sweany. The question must be determined by the intent of the parties, to be ascertained from the contents of the deed, and the relations of the grantor to the property affected. 1 Sugd. Powers, *421. The instrument is itself unambiguous, and manifests an intent on the part of the grantor to convey a perfect estate in fee-simple absolute. Now, in view of the relation of the grantor to the land conveyed, is the deed consistent with any other intent? It is not the usual, direct, or simple means of assigning a note secured by mortgage. That such an instrument, executed by one who had a lien but not an estate in the land, might be construed as transferring the lien, is true; but this effect would be given because it could not operate to convey an estate, and it would be presumed that the grantor intended his act to be effective. Still this is a result reached by construction, and not by the usual and natural significance of the thing done. If it be said that the grantor intended to convey his legal estate as mortgagee, the difficulty is met that the legal estate was not in the grantor. It had been conveyed by deed to Harriet Cabell, and there rested; but that instrument vested the power in Harriet Cabell, her executors, administrators, or assigns, to convey the land in fee-simple. So, if Dell intended to pass the legal estate, he could do so under the power in the mortgage; but could he do so by virtue of his interest as the assignee of the mortgage? Although it is well settled that the assignment carried to the assignee the right to the security, which he might enforce, it is equally well settled that he cannot convey a legal title in the lands simply by virtue of his interest, for the reason that he had none to convey. The assignment contained no words of grant, and was lacking in the essential elements of a conveyance to pass legal title. *Cottrell v. Adams*, 2 Biss. 351; *Edgerton v. Young*, 43 Ill. 464; *Jordon v. Cheney*, 74 Me. 359; *Williams v. Teachey*, 85 N. C. 402; *Worden v. Adams*, 15 Mass. 233; *Adams v. Parker*, 12 Gray, 53; 1 Jones, *Mortg.* § 787. Whether a conveyance containing no reference to a power should be construed as an execution of the power, or as a conveyance of the grantor's estate, has been often submitted to the courts in this country and in England. The rule which controls courts in such cases is now well established and clearly defined, and there is exceptional unanimity and harmony in judicial utterance upon the subject. The rule as first announced in England was that,

if such a conveyance would have no effect at all without reference to the power, it would be referred to the power; but if it would have some effect, though not all expressed on its face, it should be referred to the grantor's interest. But the rule is much more liberal under subsequent adjudications; and it is now generally, if not universally, held that, if such a conveyance would have some effect if referred to an interest, but would not have full effect without reference to a power, it should have effect by virtue of the power. This seems reasonable and right, for the grantor is understood in equity to engage with his grantee to make his conveyance as effectual as he has power to make it; and it should be assumed that he acted by virtue of whatsoever right enabled him to discharge his full undertaking, and his act will be so referred.

We deem an examination and review of the authorities in this opinion unnecessary. Sir Edward Sugden, after a review of the cases, announces a conclusion which we believe correct. He says an intent apparent upon the face of an instrument to dispose of all the estate would be deemed a sufficient reference to the power to make the instrument operate as an execution of it, inasmuch as the words of the instrument cannot otherwise be satisfied. If any would investigate the subject further, we would refer to the discussion of the question by Sir Edward Sugden, and the cases below: 1 Sugd. Powers, *412-*422; *Campbell v. Johnson*, 65 Mo. 439; *Warner v. Insurance Co.*, 109 U. S. 357, 3 Sup. Ct. Rep. 221; *Funk v. Eggleston*, 92 Ill. 515; *Blagge v. Miles*, 1 Story, 445-450.

The attorney for appellant cites us to the case of *Pease v. Iron Co.*, 49 Mo. 124, as sustaining a different view in a case very similar to this. The conclusion reached in that case is favorable to his contention; but, in our judgment, the opinion fails to support it. It rests upon no reason which would entitle it to much persuasive force with us; and it loses what it might possess because the court that delivered it has since then overruled its former opinions, and approved the rule above stated. *Campbell v. Johnson*, *supra*.

If the deed from Dell is given effect by reference to his interest, the grantee therein acquires a chose in action, with a mortgage on the land to secure it. That materially curtails the effect of the deed. If it be referred to the power, the grantee acquires an estate in fee-simple. It has effect according to its terms and tenor, and we must conclude that such was the intent of the parties. That it was sold at a great sacrifice may be true, but it does not appear that it was attended by bad faith or willful misconduct. As Lanigan acquired title by the conveyance from Dell, it is unnecessary for us to consider the other questions raised upon the argument. The judgment will be reversed, and the cause dismissed.

ST. LOUIS, I. M. & S. RY. CO. v. BENNET.

(Supreme Court of Arkansas. May 3, 1890.)

PRINCIPAL AND AGENT—CONTRACTS OF AGENT.

In an action against a railroad company for board furnished to its employes, under contract with its road-master, though it appears that the road-master "had made contracts to board section-men all along the line," and that "it was the custom of railroads in that section of country for road-masters to hire boarding bosses," the company is not liable, in the absence of proof of authority to the road-master to make such a contract, or of its ratification of similar contracts.

Appeal from circuit court, Craighead county; J. E. RIDDICK, Judge.

Dodge & Johnson, for appellant.

COCKRILL, C. J. The appellee furnished board to employes of the railway, and, failing to receive his pay, sued the railway therefor; claiming that the road-master of the company had employed him to board the men for the company. There was a jury trial, and a verdict and judgment for the plaintiff. The railway insists that the proof fails to show that the road-master was authorized to charge it by contract for the purpose. We quote all the proof upon that point. It was that the company's road-master had "made contracts to board sectionmen all along the road," and that "it was the custom of railroads in that section of country for road-masters to hire boarding bosses." Now, it is not incident to the operation of a railroad that it should pay the board of its employes. It is not within the apparent scope of the authority of a road-master to bind the company to do so; and his contract to pay for board does not bind the company, unless he was expressly authorized, or the facts justify the inference that he had the implied authority. There is no reason to contend that there was express authority, and the question is, can the proof be said to justify the jury in the conclusion that he had implied authority? Whether the contract which the road-masters were in the habit of making was of a character to bind the company to pay the board of its employes, or to see that the employes settled their own accounts, or what the nature of the contract was, is not disclosed. But, conceding that the usage of the road-masters on other roads would, in any event, be competent proof to throw liability upon the defendant for unauthorized action of its road-master, it could only be when it was shown that there was a well-defined and publicly known usage for road-masters to bind the company to pay the board of its employes unconditionally. The nature of the contracts which the defendant's own road-master had frequently made is not clearly defined; but, whatever it was, the proof fails to show that knowledge of the fact that he had made contracts was ever brought home to the company, or that it ever ratified or assented to the road-master's action in any form. The employes may have paid their own board without the road-master's contracts being made known to the company, or the company may have repudiated all the other

contracts made by him, just as it does this one. When one has frequently authorized his agent to do acts outside the line of his ordinary employment, and beyond the scope of his apparent authority, or has commonly ratified such acts when done, other persons, with knowledge of the facts, who deal with him in reference to similar matters, are justified in presuming that he is empowered by his principal to bind him in reference thereto. But the authority is not established by proof that the agent has frequently so acted, unless it is also proved, or the circumstances justify the inference, that the person to be charged as principal assented to such acts. The authority of an agent is never proved by the bare fact that the person claiming the power has exercised it. That alone proves nothing against the supposed principal, yet that is all that was proved in this case. The verdict is not sustained by the evidence, and the judgment must be reversed, and the cause remanded for a new trial.

COTULLA *et al.* v. GOGGAN *et al.*

(Supreme Court of Texas. April 18, 1890.)

APPEAL—REVIEW—BOND.

1. Where the district court, on appeal from a justice's court, overrules a plea to the jurisdiction of the justice, it cannot be reviewed if the record fails to show any evidence offered in support of the plea, or action taken on the question of jurisdiction.

2. Though on appeal from a justice of the peace to the district court, in an action on a contract and to foreclose a chattel mortgage, defendants are successful to the extent of the mortgage, the sureties on their appeal-bond are liable on the judgment, under Rev. St. Tex. art. 1639, which requires the appeal-bond to be conditioned that the appellant shall prosecute the appeal to effect, "and" shall satisfy the judgment rendered against him.

3. The refusal of the court to file conclusions of law and fact, on written request, will not be considered on appeal, unless there is a bill of exceptions to the court's action.

Appeal from district court, Bexar county.
Elias Edmonds, for appellants.

GAINES, J. This suit was instituted in a justice's court by appellees to recover of appellant Cotulla a balance of \$155.11 due upon a written contract, and to foreclose a mortgage upon a piano. In the justice's court a plea to the jurisdiction was filed, in which it was alleged that the piano exceeded in value the sum of \$200. The plaintiffs having obtained judgment in the justice's court for their debt, and enforcing their lien upon the piano, the defendant appealed, and gave an appeal-bond, with his co-appellants in this court as his sureties. In the district court plaintiffs again recovered a judgment for their debt, which was entered against all the obligors on the appeal-bond, but which made no mention of the piano. A motion for a new trial was made and overruled, but there is neither a statement of facts nor bill of exceptions in the record.

It is first claimed that the court erred in overruling the defendant's motion for a cer-

tiorari to the justice to send up a more complete transcript of the proceedings in his court. We find no such motion in the record, nor do we find any ruling upon such a motion.

It is also insisted that the court erred in overruling the plea to the jurisdiction. It is well settled in this court that, in suits to enforce a lien upon personal property, the value of the property determines the jurisdiction of the court. *Marshall v. Taylor*, 7 Tex. 235; *Lane v. Howard*, 22 Tex. 7; *Smith v. Giles*, 65 Tex. 341. It is also clear that, if the justice's court did not have jurisdiction of the case, the district court acquired none by the appeal. *Wise v. O'Malley*, 60 Tex. 588; *Neil v. State*, 43 Tex. 91. Also we are of opinion that, if the justice's court did not have jurisdiction by reason of the value of the property upon which the lien was sought to be enforced, the want of jurisdiction could not be cured in the district court by an abandonment of the claim of lien, and that, although plaintiffs may have dismissed in the district court so much of their action as sought to enforce the mortgage, yet it was the right of the defendant to insist upon their dilatory plea, and prove that the value of the piano exceeded \$200, and thereby to defeat the jurisdiction, and secure a dismissal of the suit. But appellants' difficulty is that the record does not show that any evidence was introduced, or even offered, in support of the plea. It does not appear that any action was taken upon the question of jurisdiction.

It is also claimed that the court erred in rendering judgment in favor of plaintiffs without proof of the cause of action. Without a statement of facts, we must presume that the proper evidence was introduced to warrant the judgment.

The appellants also complain that the court erred in rendering judgment against the sureties on the bond given for the appeal from the justice's court. In so far as the plaintiffs failed in the district court to enforce the lien claimed upon the piano, the defendant prosecuted his appeal to effect, and the question is whether, in such a case, the sureties on his appeal-bond are bound to pay the judgment rendered against him. We are of opinion that the sureties on the bond were liable to pay the judgment. The condition of a bond for an appeal from a justice's court prescribed by the act of August 17, 1876, was "that the party appealing shall prosecute his appeal to effect, or shall pay and satisfy the judgment or decree that may be rendered against the obligors on such bond." Section 21, p. 163, Laws 15th Leg. This was changed by the Revised Statutes. Article 1639 provides that the bond shall be "conditioned that the appellant shall prosecute his appeal to effect, and shall pay off and satisfy the judgment which may be rendered against him on such appeal." The change from the disjunctive to the copulative conjunction, in the condition of the bond which was required

to be given, shows, we think, that it was the intention to alter the rule, and to render the sureties on the bond liable for any judgment that might be rendered against the appellant, although the appeal may have been not wholly without effect.

It is also complained that the court erred in failing to file its conclusions of law and fact upon the written request of appellant. The application is found in the record, but there is no bill of exceptions to the action of the court upon it. We are of opinion that this is a matter which must be brought before this court by an exception. It may frequently occur that a party who has filed his application for findings of law and fact may waive or withdraw it. Without a bill of exceptions, when the findings do not appear, we cannot know that this has not been done. We find no error in the judgment, and it is affirmed.

WITHERS *et al.* v. O'CONNOR *et al.*

(Supreme Court for Texas. Jan. 28, 1890.)

BOUNDARIES—EVIDENCE—OLD MONUMENTS.

In trespass to try title the contention between the parties depended on the proper quantity of land in the original grant under which defendants claimed. The official maps of the county, and the testimony of those who had been the county surveyors for many years, and others who had made surveys of the grant, showed that it cornered at a stone, and at a tree marked with the grantee's initials, which were, according to testimony, established by the colonial surveyor, and had been for 50 years recognized as the true monuments. According to this evidence the grant was as claimed by defendants. Plaintiffs' evidence consisted of old surveys, maps, and field-notes purporting to have been made by the colonial surveyor, giving courses and distances, and monuments not easily distinguishable, showing the grant as claimed by plaintiffs. *Held*, that defendants' evidence should prevail.

Commissioners' decision. Appeal from district court, Refugio county.

Stayton, Kleberg & Dabney and *Stockdale & Proctor*, for appellants. *Glass, Callender & Proctor* and *Fly & Davidson*, for appellees.

COLLARD, J. This is an action of trespass to try title brought by Anita Withers and her husband, the appellants, on the 21st day of January, 1886, to recover of appellees and other defendants the lower or eastern league of the two leagues granted to Manuel Hernandez and his brothers. The two leagues are described in the petition and the grant as 3,333½ *varas* front, on the San Antonio river, on its right bank, in depth on the lower line 15,600 *varas*, and on the upper line 15,500 *varas*, bounded on the north by the river, on the west by the citizen William Robertson, south by vacant land, and on the east by the citizen Joshua Davis. It was admitted that plaintiff Anita Withers owned the Hernandez title. The Davis 5½-leagues grant was surveyed August 28, 1834; the Peter Hynes, September 9, 1834; the Hernandez, November 28, 1834; the Westover or lower Hernandez league, September 22, 1834; and the Rob-

ertson before the Hernandez. The calls of the Hernandez place it between the Davis $5\frac{1}{2}$ leagues on the east, and the Robertson on the west. The Hynes survey of one league lies next east of the Davis, and calls for the Davis. The Davis $5\frac{1}{2}$ leagues are numbered from one to five from the east, or up the river, the quarter league being the western survey of the grant. Each league fronts on the river, and calls to be 1,666 $\frac{1}{2}$ *varas* wide, and the one-fourth league 416 $\frac{1}{2}$ *varas* wide, the length of the line being 14,250 to 15,000 *varas* and more. The entire distance in a right line and at right angles from the side lines, that is, running east and west, including the quarter league, is 8,747 4-5 *varas*. League No. 1 of this grant begins on the San Antonio river, on the south side, two miles below the Mesquite landing, at a stake, calling for two pecan trees as bearings, at stated corners and distances; thence it runs S. 5 W., 14,060 *varas*, a stake and mound; thence N. 85 W., 1,666 $\frac{1}{2}$ *varas*, a stake; thence N. 5 E., 15,940 *varas*, corner on the river, a stake with a pecan and mulberry for bearings, and thence with the meanderings of the river to the beginning. League No. 2 is next above and adjoining league No. 1, and so on to the west boundary of the one-fourth league. There is no dispute about the position of the Robertson league. The Davis 5-league grant was invalid, but the one-fourth of a league valid. Defendants claim that the Hernandez grant only contained one league; plaintiffs claimed that it contained one league, and some 2,700 acres more. The question was, was there room between the Davis one-fourth of a league, and the Robertson, for the Hernandez league and the 2,700 acres, as claimed by the plaintiffs? To determine this question, the place of the Robertson being fixed and known, it is apparent that the space covered by the Davis $5\frac{1}{2}$ leagues from the east to the west must be ascertained. Plaintiffs' evidence showed that Mesquite landing was a fixed point on the river; and that to begin two English miles down the river in a straight line from the landing, and measuring thence N. 76 W. across the leagues and the fourth of a league, the distance called for, there was a space left for the upper Hernandez league and 998 *varas* width for a part of the lower Hernandez between the Davis and the Robertson; and that to give the Davis this position the side lines of the Davis leagues very nearly fitted the shape of the river. None of the corners or lines were found of the Davis. The Hernandez called for no marked lines or corners, but is placed by the grant between the Davis and the Robertson. There is a large bend in the river known as "Bickford Bend." Plaintiffs introduced a plat of the Davis grant with the original field-notes made by S. H. White, the colonial surveyor who made these surveys, on file in the general land-office, which places the west or upper line of the Davis quarter league below the bend, and far enough down the river to admit the upper Hernandez and the 2,700 acres of the low-

er as claimed by plaintiffs. Plaintiffs also exhibited in evidence another certified copy, from the general land-office, of a map made by White, showing the two Hernandez leagues, the lower line of the lower league falling below the bend, where the other map fixed the upper line of the Davis quarter league. Plaintiffs also exhibited a sketch made in the general land-office, with an explanatory letter from Commissioner Hall of date September 6, 1888. The letter says: "Up to 1847 all sketches returned to this office were not filed in the manner they are at present, but were scattered about in the office, and had accumulated considerably, when Thomas W. Ward, then commissioner of this office, employed a book-binder to prepare what are now called 'Atlases A, B, C,' in which the sketches hitherto filed were pasted promiscuously. Few of the sketches are dated, nor do they show when they were filed. The sketch referred to in Atlas A, page 1, has the following indorsement in pencil: 'Map by S. A. White, by testimony of Fd'd Linn.' This indorsement is in the handwriting of Robert Crewzbaur, who was a draftsman in the general land-office from 1846 to about 1853." The parties admitted the facts stated in the letter to be true. The map shows the position of both the Hernandez leagues, —the lower line of the lower league below the bend in the river, and where plaintiffs claim it is. Plaintiffs' witness, F. S. Windsor, surveyor, made a survey of the Davis $5\frac{1}{2}$ leagues, and other surveys to ascertain the quantity of land in the Hernandez grant. He says he began 3,801 *varas*, or two English miles, below the Mesquite landing, and "I then ran N. 76 W., 1,017 *varas* to the west line of the Peter Hynes, as established by W. Richardson, surveyor." The survey so made by Windsor, and the map he made of the work, put the land where the old maps did,—the calls fitting the river except two lines,—and it was shown that at the termination of the lines on the river there was the kind of timber called for in the original field-notes.

On the other hand it was proved that the county map of 1872, and at the time of the trial, placed the land where defendants claim it to be; that it was so located and recognized in the land-office; and that the public work made on the old Davis grant of five leagues gave it that position. H. Ward, a witness for defendants, who had been surveying in Refugio and adjoining counties since 1862, and county surveyor of Refugio from 1870 to 1882, testified: "I have made several surveys for locations on the land covered by the Joshua Davis 5 leagues, which were declared invalid. In making these locations I was governed by the upper line of the Peter Hynes league, as marked by a stone at the head of Hynes' bay, which was always recognized as the true upper line of the Hynes league. John Hynes, now dead, and the grantee of the John Hynes one-fourth of a league under Power & Hewitson's colony,

below, told me that the stone was placed there by S. A. White, the colonial surveyor. W. H. Jones, who was county surveyor of Refugio county as far back as 1850, made some of the surveys for location on the Davis 5 leagues. * * * I followed him, and found that he recognized the Hynes league upper line as marked by the stone before referred to, and the Davis one-fourth of a league in the position claimed by the defendants. I have several times run across with connecting lines made by Jones from the upper Hynes line marked by the stone to the lower line of the Davis one-fourth of a league, as claimed by defendants, and have always found the distance to be 8,333 $\frac{1}{3}$ varas, or each league 1,666 $\frac{2}{3}$ varas in breadth. This measurement puts the Joshua Davis one-fourth of a league where it has always been shown by the official maps of Refugio county, and as claimed by defendants. * * * All locations made by me on the Joshua Davis 5 leagues were made with reference to the Hynes upper line marked by the stone." This witness says that to follow the meanders of the river two miles below Mesquite landing would, in his opinion, put the line where the stone marks it. On a straight line at right angles from the north and south lines the stone would be reached in about 2,000 varas, or two Spanish miles. (made so by decree of March 26, 1834, before these surveys were made.) Pasch. Dig. art. 709. Moses Simpson, a witness for the defendants, says: "In 1848 or 1849 I went with W. H. Jones, now dead, the county surveyor, to survey a tract way up the San Antonio river and above the Hernandez bend. I was a chain carrier. For a starting point, we went to the upper corner on the river of the Hynes league in the position claimed by defendants, which Jones said was the original corner of the Hynes. This corner was marked with the letters 'P. H.', cut on a large cottonwood tree very plain and distinct. These letters seem to have been made some ten or fifteen years before. There was also a rock on said line near the head of Hynes' bay. From this line we measured up the river, and passed a point. Here at this point we found then standing a large ash tree, marked, which Jones said was the upper line of the Davis one-fourth of a league."

According to this testimony the land is as claimed by the defendants. The testimony showed that the surveyors and the land-office recognized the upper line of the Davis one-fourth of a league where defendants say it is, as far back as 1850. The court so found, holding that the stone corner on the Hynes was established by tradition, and that the Davis should be located by the Hynes. It is true the Hynes was junior to the Davis by a few weeks, but that is immaterial where the evidence shows that the surveys were made about the same time, and by the same surveyor. Taking the stone corner on the Hynes as its north-west corner, and giving distance to the Davis leagues as called for in

the field-notes, the conclusion of the court cannot be questioned. It seems to us that the evidence controlling the opinion of the court is more satisfactory than that against it. Some one, and it is shown by hearsay that it was the surveyor who made these original surveys, made the stone corner for the Hynes. This is the corner as shown by reputation; it is so recognized by the official maps and public surveyors, whose acts are in conformity with it, and we think there is better ground to say this is the corner than that it is elsewhere. The old maps of the White giving the locality of the Davis leagues by the shape of the river are not without force, but it is weakened by the fact that there is no evidence to show that any line was ever actually run out. The Davis grant, on plaintiffs' hypothesis, must be located by course and distance from Mesquite landing, not by a found corner or a monument. It begins two miles down the river from Mesquite landing. It is not stated whether these are Spanish miles or English miles; if Spanish miles, it would be only 2,000 varas, and the land would lie nearly as defendants claim it. There being a decree at the time defining a mile as 1,000 varas, at least leaves the matter in doubt as to what the surveyor meant by two miles. Decree March 26, 1834, (Pasch. Dig. art. 709.) Witness trees are called for on the river, but, while such timber is to be found on the river, it is not shown that they are in place as stated in the field-notes, nor does it appear that such trees are not to be found at other points on the river where defendants say these corners should be. It may be safely assumed that none of these lines were ever run, and that but one monument was ever put on the ground to designate a corner, to-wit, the north-west corner of the Hynes, which is the north-east corner of the Davis, grant. Reputation fixes this corner, and we think more reliably than the old maps, or the partial agreement of the length of the lines, as shown by a survey giving to some extent the shape of the river. Had the river been meandered so as to outline its shape, and if the actual survey corresponded to the calls, there would be more force in the position that we must be governed by the river as a natural boundary. It is true the cottonwood tree is not called for in the Davis field-notes, nor in the Hynes; but the fact remains that the tree is there, marked for the Hynes league, "P. H.," which marks were seen in 1849, by a witness who says they then looked to be 10 or 15 years old, which would make them as old as the grant. The stone corner was then there, and the public surveyor then declared this to be the corner of the Hynes, and it was so understood to be. Stroud v. Springfield, 28 Tex. 669. We are authorized to look to the maps made by the surveyor as indicating the place of these surveys, but at last the question is one of fact depending upon the force of the testimony, and we know of no rule that would require a court to prefer a map

description, though contemporaneously made with the grant, to the testimony of a more direct character as to the existence of a corner. *Welder v. Carroll*, 29 Tex. 333. That conclusion which is most reasonable and satisfactory under all the evidence is the one to be adopted. We do not think there is any specific rule of law to direct the mind to such a case. If we take plaintiffs' evidence and the old maps as our guide we can easily reach the conclusion that the Hernandez grant is correctly located by plaintiffs' witness, Windsor; but when we look to the facts adduced in evidence by defendants we see grounds for the opinion of the court that they had properly located the land.

We have not treated every assignment of error in detail, but have indicated our views of all of them. We cannot say the court erred in establishing the Hynes survey by the stone corner, and then by this constructing the Davis $5\frac{1}{2}$ leagues. The Hernandez grant could only lie between the Davis one-fourth of a league and the Robertson league, and we do not see but that the court below followed the most reliable evidence in locating it. We conclude the judgment of the lower court should be affirmed.

GAINES, J. Report of commission of appeals examined, their opinion adopted, and judgment affirmed.

STAYTON, C. J., not sitting.

In re FOULK.

(Court of Appeals of Texas. Feb. 12, 1890.)

HOMICIDE—BAIL—EVIDENCE.

On application for *habeas corpus* by one committed on the charge of murder, a witness who had been looking up evidence against defendant testified that he found a horse's track near where deceased was found, which appeared to have been made by a notched hoof; that defendant's horse had a notched hoof; and that a measurement of it taken by him agreed with the size of the track, but the measurement was thrown away. Witness stated in the presence of several persons that the track was made by a large horse, but defendant rode a small pony. He also stated, on applying a 32-caliber ball to the hole in deceased's hat, that it fitted tightly, but defendant's pistol was a 44-caliber. A witness for the state, whom defendant was prosecuting for a felony, testified that defendant had made threats against deceased. The only motive shown was that defendant and deceased had had trouble over a horse, in which, on arbitration, the former was successful. On the night of the killing, defendant stated that he would probably be arrested for the crime. The relatives of deceased, and many witnesses for the state, were bitter against defendant. Defendant had loaned deceased money, and helped him in various ways. Held, that defendant was entitled to bail.

Appeal from district court, Wood county; **F. J. McCORD**, Judge.

Application for a writ of *habeas corpus* by P. L. Foulk, who was committed for the murder of one Burgin. The district judge refused bail, and, as a record of the evidence, certified the brief of the applicant's counsel, which is as follows:

"We submit to the court that, under the evidence in this case, the defendant is entitled to bail. While an applicant charged with murder may, under the law, be refused bail as well under circumstantial evidence as direct evidence, yet the circumstantial evidence must be so strong, connecting, and conclusive as to make the proof evident, beyond a reasonable doubt, that the accused, and no one else, committed the crime charged against him. The main prosecuting witness, Constable Frank Anderson, says he followed a horse track leading from where the deceased was found, in the public road, to near the town of Hawkins. Saw the track occasionally as he came along the road. That he discovered an impression in the track evidently made by a notch in the hoof of the right fore foot. That he measured the track in one place, some distance from where deceased was found. That he discovered a similar track going towards the body of the deceased in one place, but never measured it, not considering it important enough. This was on Sunday morning. He applied this measure to the hoof of the defendant's horse on the following Tuesday, and it seemed to fit, as well as he could tell. This measurement of the hoof was made in the town of Hawkins. No one was called to witness this measurement, and as soon as made the measure was thrown away, and the witness did not know where it was. This witness swore that he was hunting up testimony to convict the guilty party at the time. This witness also swore that he borrowed the defendant's pistol from Joe Sasser on Sunday morning, hunting up evidence against applicant, and that he found one barrel of the pistol had been shot off; but he made no examination whatever to see whether or not it had been recently shot. He took the pistol out in the town of Hawkins and shot it off, and returned it, thereby changing the condition and appearance of the pistol from what it was when he received it. The same witness stated on Sunday, in Hawkins, and in presence of a number of persons, that the person who did the killing rode a horse that made a large track, while the evidence shows that the defendant's animal was a pony mare, with an ordinary foot. Same witness stated on Sunday, upon trying a 32-caliber cartridge in the hole in deceased's hat, in the presence of others, which ball fitted tightly, that the deceased was killed with a 32-caliber ball, but this was never disclosed on the trial until drawn out of him on second examination by applicant. The applicant's pistol was a large one,—a 44-caliber. Justice Mabry swore that P. M. Foulk called his attention to the break in the hoof or the horse track near the deceased; that P. M. Foulk and Snider followed the track about a quarter or a half mile on foot,—neither of whom were ever put upon the stand by the state. P. M. Foulk was the father-in-law of the deceased. The state, in order to show a motive, proved that there had been some trouble between de-

ceased and the applicant about a horse; that the applicant gained the horse, and was satisfied with the result of the arbitration. The state also proved, or attempted to prove, threats made by Foulk that night against the deceased, when told that Burgin had said that he had sworn a lie. This testimony was elicited from one Dick Blackwood, who was being prosecuted by Foulk for a felony in the district court of Upshur county, Tex., Foulk being the principal witness against him; also by J. D. Giles, who was drinking around that night with Burgin. This constitutes the principal evidence of the state's case.

"We submit to the court that, to stop here, the evidence is not of that strong and convincing character upon which bail should be refused the applicant. The measure taken of the track and of the defendant's horse's hoof was destroyed or thrown away, instead of being preserved to give the defendant an opportunity to have it applied to the horse's foot, and show whether or not it fitted. In this connection, we call the court's attention to the testimony of Setliff, an impartial, cool, and calm man, who, in the darkness of the night, stood over the dead body of Burgin, trying to aid and assist him, felt of him until he found that he was dead and cold, and then warned the neighbors, and came back to the body after daylight that morning. This man examined the tracks around the body, where deceased was shot; saw where a horse had wheeled around; tracked it for 25 or 30 yards in the road towards Hawkins; noticed the track carefully; was in the presence of others at the time, and saw no impression in the sand of a broken hoof. This witness was not introduced by the state. This witness was with those at the body, and examined the tracks during the whole time that the body remained at the place, but he heard no one mention the fact that the horse track leading back in the direction of Hawkins had a broken place in it. But he did see a fresh mule track leading up to and near the body. He saw P. M. Foulk and Snider following and examining the track, but never heard them mention the broken hoof. The witness Frank Anderson saw that track on the road back to Hawkins only occasionally. The evidence shows that defendant rode on his pony over that same road, on Saturday morning, to Hawkins. The evidence of Lester corroborates the testimony of defendant and others that Sasser had closed his saloon, and gone to bed, long before Foulk left the town. Burgin had had difficulties on that evening in town with Stapler, Wells, and others, the arbitrators; had declared himself out of the Masonic lodge on account of Stapler; had said he had no money to hire men to swear lies for him, like Foulk; had prosecuted old man Mooney to conviction in two cases during that day, and was drinking and quarreling generally over town that day. The testimony also shows that nearly all the parties and witnesses who testified on the examining trial, and

were in town that evening and night, were drunk, except the defendant, Foulk, who was sober, and was cautioning and telling others not to notice Burgin,—that he was drunk, and not responsible for what he was doing. The evidence further shows that the defendant had been kind to deceased and his brothers during the year; that he had assisted them, by advances, to make the crop; and that deceased was owing him at the time he was killed. We therefore submit to the court that the evidence is not sufficient to make the proof evident, as defined by our court of appeals; that the motive of the applicant to take the life of Burgin, taken in connection with all the testimony, is not sufficient. Again, admitting, for argument's sake, that Foulk did kill Burgin, the evidence would tend strongly to show that they were on the road, going home, together; that there was a difficulty—an altercation—between them at the time; that Burgin had his knife out and open, which was found by his saddle, and his coat partially off. This shows the killing unexplained, and therefore could not be more than murder in the second degree. The state's witness Joe Mooney was out that night; got home about 10 o'clock; was shot at that night; says he was at Joe Minchew's. Joe Mooney owned a 32-caliber pistol, but said Foulk, the applicant, never had it. Minchew was not at home, and did not know that Mooney was at his house Saturday night, but that he was there Sunday morning. The applicant, in his testimony, explains all of his movements on Saturday, Saturday night, Sunday, and on Monday, up to time of his arrest. He makes no attempt to conceal anything, and gives his reasons why he stated that he would probably be accused of the crime,—being on account of prejudice existing against him with Burgin's relatives, and their former attempts to indict him, etc. He told Anderson and others where he went to on the road Saturday night, and when, where, and why he turned back. The evidence of Minchew corroborates Foulk in his statement that he started off just ahead of Burgin. We now submit to the court that the judgment of the honorable district judge should be reversed, and the applicant should be admitted to bail in such sum as the evidence shows that he is able to give. He having never attempted or desired to escape after Burgin was killed, reasonable bail would no doubt insure his attendance at court. Moreover, the evidence is insufficient to demand heavy bail, which would be virtually denying bail."

W. M. Giles and W. B. Teagarden, for relator. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. Appellant having been arrested for murder, and remanded to jail by the examining court, sued out a writ of *habeas corpus* before the Honorable FELIX J. McCORD, judge of the seventh judicial district, in order that he might be admitted to

bail. At the hearing of said writ, he was refused bail, and remanded to custody. From that judgment he has appealed to this court. After a careful consideration of the record, it is our opinion that appellant is entitled to bail, and we have fixed the amount of his bail at the sum of \$5,000. The judgment will be set aside, and appellant will be admitted to bail, and released from custody, upon the execution by him of a bond in the sum of \$5,000, with good and sufficient sureties, conditioned as the law directs. Ordered accordingly.

WICKS *et al.* v. STATE.

(Court of Appeals of Texas. Jan. 18, 1890.)

MURDER—EVIDENCE—CONSPIRACY—ACCOMPLICE.

1. On the trial of certain negroes for the murder of certain whites killed in a fight between whites and negroes at the trial of one L., before a negro justice of the peace, the theory of the state was that the negroes started the difficulty in pursuance of a previously formed conspiracy, and there was testimony tending to sustain this theory, as well as that of defendants, that the whites started the trouble pursuant to a previous plan to interfere with the court. Held that, for the purpose of showing that the whites went there with innocent motives, which would tend to show that they were not the assailants, it was a proper question for the state to ask one of them, why he went there armed, and that his answer, "we went there to see that no harm came to L.," was competent.

2. In answer to said question, witness further said that one of the whites had told him that he heard one of the negroes say that they were going to kill off the whites. Held incompetent, as hearsay, and prejudicial to defendants.

3. In such case, testimony as to statements made by some of the negroes, not on trial, in the absence of defendants, was hearsay as to defendants, and incompetent, in the absence of proof of a conspiracy to murder between defendants and those who made the statements, and that the statements were made pending the conspiracy, in furtherance of the common design.

4. Where a state's witness, by his own testimony, shows himself to be an accomplice in the killing, and his testimony is prejudicial to defendants, it is error to refuse an instruction as to the weight to be given the testimony of an accomplice.

Appeal from district court, Bastrop county; H. TEICHMULLER, Judge.

On the 19th day of October, 1889, an indictment was preferred and returned by the grand jury of Bastrop county against Ike Wilson, Runnels Williams, Bob Thompson, Jesse Johnson, O. W. Wicks, York Aldridge, Fountain Moore, Ben Clark, George Jones, and Milton Nobles, for the murder of George Schoeff and Alex. Nolan, in said county, on the 13th day of June, 1889. On the 6th day of November, 1889, defendants were duly arraigned, and, plea of not guilty being entered, a severance was had upon motion of defendants, and the defendants O. W. Wicks, George Jones, and Milton Nobles, appellants herein, were placed upon trial together, but separately from their co-defendants. Being convicted of murder in the second degree, the punishment of appellant O. W. Wicks was fixed at 20 years' confinement in the penitentiary, and that of appellants George Jones and Milton Nobles at confinement in the pen-

itentiary for 17 years each. Wicks, a negro, was justice of the peace, before whom the case of State v. Addie Lytton, for assault and battery, was set for hearing on June 13, 1889. The white people, fearing that Lytton would not be accorded a fair trial, went armed to the place of trial. When the case was given to the jury, Lytton walked out of the house, and it was then that the firing commenced. The material part of the testimony of West Craft, for the state, was as follows: "I was at Cedar Creek on the day of the shooting. I got there about 2 or 2:30 o'clock. I got down off my horse, and was talking with Jesse Johnson and some boys. While sitting there, Cuffie Williams came up, beckoned, and called me. I got on my horse, started towards him, and we met. As we started off, O. W. Wicks, defendant, called me, and told me he wanted to see me. Wicks was getting out one of the windows on the side of the courthouse next to Dick Lemuel's. I went to him, and he came up to me, and asked me where I was going; I still being on my horse. He whispered to me, and told me not to go away, and then made some remarks about the white people being there. In the conversation, Wicks said for me not to go away; that he had me deputized to help protect the court; that we would bring the thing off directly, and that he wanted me to stay there, and wanted the negroes to hang together, and 'kill as many of the devilish white folks as they do of us.' Cuffie Williams and I then started off towards Givensville. I heard Ike Wilson halloo: 'Halt,' or 'Come back.' About that time, I looked back, and saw Ike throw up his gun; and a fire was made, but I cannot say who made it. The shooting then all began, and I shot, too. I shot in every direction. On the first Saturday after the difficulty, I was arrested at Bastrop, and Wicks was at the court-house when I was brought down there. Mr. Fowler was acting for the state, and fixed up the papers against me. When first arrested, I requested to have a private talk with Mr. Fowler; and Wicks was there, or came in there shortly afterwards. While in the sheriff's office talking with Mr. Fowler, Wicks came in, leaned over the table, and whispered to me, and told me not to give him away, or tell anything on him; and I told him I did not know anything to tell. When he left, Mr. Fowler asked me what he said, and I told Mr. Fowler." The theory of the defense was that the whites had threatened to interfere with the officers of the court in the discharge of their duties, to rescue Addie Lytton, whose trial for assault was pending before the defendant Wicks, to accomplish their purpose by force, and to kill Ike Wilson if necessary, etc.; that they congregated in large numbers, several of them being armed, and took possession under a mesquite tree a short distance from the front of the house; that, when the jury in Lytton's case retired to deliberate on the verdict, Lytton left the house; that Wilson, the constable, followed, and called to him to await the ver-

dict of the jury; that the whites then rose in mass at the cedar tree, handed Lytton a gun, and opened fire on Wilson; and that Wilson did not return the fire until he had been fired upon at least twice.

G. N. Jones and H. M. Garwood, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. O. W. Wicks, George Jones, and Milton Nobles, and several others, were jointly indicted for the murder of George Schoeff and Alex. Nolan. The three above-named defendants severed from their co-defendants, and were tried jointly. All three of them were convicted of murder in the second degree, and from that conviction jointly prosecute this appeal, assigning several errors.

The first assignment of error is that the court erred in admitting the testimony of the witness W. R. De Bardeleben, as per bill of exceptions No. 1, which bill of exception recites as follows: "W. R. De Bardeleben, a witness for the state, was asked the question by the prosecuting attorney, 'What was the reason you went down to the trial of Addie Lytton, the scene of the difficulty, with a gun?' To which the witness replied: 'We went there to see that no harm came to Addie Lytton, and because, several days before the difficulty, Alex. Nolan, now deceased, had told me that he (Alex. Nolan) had heard Ike Willson tell Robert Thompson that he was going to summon a lot of men to the court, and kill off white men, and that he was going to arrest Addie Lytton this time, and carry him to Bastrop.' This witness further stated that Addie Lytton told him (the witness) that he (Lytton) had heard that Ike Wilson had threatened to kill him, and that he was afraid that Wilson would mistreat him at the trial; and that he (De Bardeleben) had heard that Ike Wilson had arrested an old white man down on the river, and tied him, refused him bail, and walked him to Bastrop. To which question and answer defendants then and there objected for the reasons: (1) Same was hearsay; (2) irrelevant; (3) the declarations of Ike Wilson or Robert Thompson were not admissible against these defendants, or either of them, because the declarations were not made in pursuance of a common design, and no conspiracy had been proved between these defendants, or either of them, and Ike Wilson and Robert Thompson, or either of them. These objections were then and there overruled by the court, whereupon defendants, by counsel, excepted, and now here present their bill of exceptions, and pray that same be signed, sealed, and made a part of the record." In approving said bill of exception, the trial judge adds thereto an explanation that said testimony was offered and admitted for the sole purpose of showing the motive of said witness in going armed to the scene of the difficulty. It is sometimes relevant and material to show the motive actuating the conduct of a

witness; and, in the case now under consideration, there can be no question but that it was material for the prosecution to show, if it could, that the witness, and other white men who went armed to the scene of the tragedy, went for a legitimate, innocent purpose, and not for the illegal purpose of interfering with the court or its proceedings, or with the execution of the law. There was much conflict in the testimony as to which side, the whites or the blacks, began the difficulty which resulted so fatally. On the part of the prosecution, it was and is contended that the blacks brought on the fight in pursuance of a previously formed conspiracy. On the part of the defendants, it was and is contended that the whites brought on the difficulty in pursuance of a previously formed conspiracy. There is evidence tending to sustain both these theories. In this state of case, it was relevant and material for the prosecution to show that the whites, in going armed to the place of the difficulty, were influenced by innocent motives. Proof of innocent motives on their part would be a circumstance tending to support the theory that they did not bring on the difficulty, but were the assaulted party. We are of the opinion, therefore, that the question propounded to the witness De Bardeleben was legitimate and proper. A portion of said witness' answer to said question, to-wit: "We went there to see that no harm came to Addie Lytton," was admissible. But the remainder of his answer to said question was purely hearsay, and was not admissible for any purpose. When viewed in connection with the facts of the case, this illegal testimony must have operated prejudicially to the defendants; and its admission was therefore material error. Proof of motive, like proof of any other fact, must be made by legal testimony.

The second and third assignments of error call in question the correctness of the rulings admitting certain testimony of the witnesses Gus Randel and Joe Jackson as to statements made by Robert Thompson and Runnels Williams, co-defendants in this prosecution. These statements were not made in the presence of the defendants on trial, and were hearsay as to them, and inadmissible against them, unless a conspiracy to commit murder existed between said Thompson, Williams, and these defendants, and unless said statements were made pending such conspiracy, and in furtherance of the common design. As we view the evidence before us, the testimony of said witnesses Randel and Jackson as to the statements made by Thompson and Williams should not have been admitted, and its admission was material error.

There are several assignments of error relating to supposed defects in the charge of the court. No exceptions were saved to the charge; and, upon a careful examination of the same in the light of the objections urged against it, we think it is an able, clear, and correct exposition of the law applicable to

the facts of the case, and free from any material error except in one particular, which is, that it does not instruct the jury as to the rules governing accomplice testimony. Such instruction was demanded, we think, by the testimony of the state's witness West Craft. Said witness, by his own testimony, showed himself to be an accomplice in the killing of the white men; and his testimony was prejudicial to the defendants, and especially so to defendant Wicks. Defendants requested a proper instruction as to accomplice testimony, which the court refused to give; and in this, we think, material error was committed.

We deem it unnecessary to discuss other assignments of error, as some of the matters complained of may not occur on another trial, and we find no material errors except those we have mentioned; and because of which material errors the judgment is reversed, and the cause is remanded.

FULCHER v. STATE.

(Court of Appeals of Texas. March 12, 1890.)

MURDER—EVIDENCE—*RES GESTÆ*—DYING DECLARATIONS.

1. On trial for murder, B. testified for the state that, during the summer before the killing, deceased asked witness to carry a letter to defendant, and to tell him that, if he did not bring deceased's things back, they would be taken by law. Another witness for the state testified that, when B. delivered the letter to defendant's wife, defendant not being present, he told her that, if the property was not returned, deceased would have them arrested for theft. *Held*, that the admission of this testimony was, at most, harmless error, as other evidence showed that defendant knew all about the letter, that it was read in his presence, and that the whole subject about the return of the property was discussed between witness and defendant and defendant's wife.

2. Under the rule that, "when the opinion is the mere short-hand rendering of the facts, then the opinion can be given subject to cross-examination as to the facts upon which it is based," evidence that, after the shooting, deceased spoke to and "identified" defendant as the man who shot him, is competent, and not a mere expression of opinion.

3. Deceased was shot in the neck, and his articulation was affected by blood collecting in his throat. About 15 minutes after he was shot brandy and camphor were administered, and about 15 minutes afterwards, when able to talk, he made certain statements as to the circumstances of the shooting, and who shot him. *Held*, that the declarations were admissible as part of the *res gestæ*.

4. Several days after deceased was shot he made a statement, which was reduced to writing by witness, and sworn to before him as a notary by deceased. At the time deceased made the statement he felt conscious of approaching death, and believed there was no hope of recovery; and, although he lived a month and a half thereafter, there was nothing to show that his mind ever changed as to his condition. *Held* sufficient to warrant the admission of the statement as a dying declaration.

5. Under the rule in *Nolen v. State*, 14 Tex. App. 474, that "where the confessions of a defendant under arrest are inadmissible against him, because made while he was uncautioned, his acts, if tantamount to such a confession, and done under similar circumstances, are likewise inadmissible," it was error to allow state's witness to testify that when the parties who had arrested defendant, and who had him in custody, said to him, "We have

arrested you for killing B. [deceased] last night," "he seemed agitated, and turned pale.

6. It is not error to refuse to charge as to assault with intent to kill, where the evidence shows that death resulted directly from the wound, and not from any improper treatment or neglect of it.

7. Under Gen. Laws Tex. 1889, p. 87, providing that a defendant in a criminal case may testify in his own behalf, "but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause," it is not prejudicial error to charge that "the law allows the defendant to testify in his own behalf, but a failure to do so is not even a circumstance against him, and no presumption of guilt can be indulged in by the jury on account of such failure on his part." It is in the court's discretion to refer to defendant's rights, and it will not be presumed that he was injured by a correct statement of the law.

Appeal from district court, Jones county; J. V. COCKRELL, Judge.

F. G. Thurmond, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. Appellant was convicted of murder of the first degree, his punishment being assessed at death. Several bills of exception saved to the ruling of the court present the principal matters complained of as error.

1. The defendant's first and third bills of exception relate to the same subject-matter. The witness Brock, over objections of the defendant, was permitted to testify as to a letter written by the deceased to the defendant the summer before the killing, and which deceased asked the witness to convey to the defendant, and at the same time requested witness to "tell defendant, Fulcher, that if he did not bring his things back to him that he would get them by law; that he had been to Estacado, and found out what the law was." The witness Askins was also permitted to testify, over objections of defendant, what was said by the witness Brock to defendant's wife at the time Brock delivered to her the letter written by deceased to her husband, demanding the return of his property, and threatening, in case the property was not returned, that he (deceased) would have both defendant and his wife arrested for theft. The objection urged to the admissibility of this testimony was that defendant was not present on either of the occasions. It is amply established by other evidence in the case that defendant knew all about the letter deceased had written him concerning the return of his property,—in fact, the letter was read in Fulcher's presence; and Askins says in his testimony that the whole subject of the return of the property was discussed in conversation between himself, the defendant, and defendant's wife. Under the circumstances, if the evidence had been illegal and inadmissible, its admission would have been harmless error, of which defendant could not complain.

2. Another exception was to the admission of the testimony of the witness Campbell to the effect that on the second night after the shooting defendant, after having been arrested, was brought back to the Matador

ranche, and carried into the presence of the wounded man, and that "they spoke to each other, and Beemer identified Fulcher as the man who had shot him." Objection urged to this testimony is that it only shows the opinion of the witness. We think the evidence was admissible. "When the opinion is the mere short-hand rendering of the facts, then the opinion can be given, subject to cross-examination as to the facts upon which it is based." Whart. Crim. Ev. (9th Ed.) § 458; Willson, Crim. St. § 2502, p. 239; Powers v. State, 23 Tex. App. 43, 5 S. W. Rep. 153; Irvine v. State, 26 Tex. App. 37, 9 S. W. Rep. 55.

3. Bill of exception No. 5 complains of the admission of the statements of the wounded man made to the witness Campbell about 30 minutes after he was shot, as to the circumstances of the shooting and who shot him. Deceased was shot in the neck, and his articulation was affected by the blood collecting in his throat. About 15 minutes after he was shot Campbell administered to him some brandy and camphor to clear up his throat, and about 15 minutes afterwards, when he was able to talk, deceased made the statements complained of. Under the circumstances shown we are of opinion the declarations were admissible as *res gesta*. Willson, Crim. St. § 1046; Stagner v. State, 9 Tex. App. 441; Warren v. State, Id. 619; Washington v. State, 19 Tex. App. 521; Pierson v. State, 21 Tex. App. 15; Smith v. State, Id. 277; Irby v. State, 25 Tex. App. 203, 7 S. W. Rep. 705.

4. The witness Campbell was also permitted to testify as to the making of a dying declaration by deceased a few days after the shooting, which declaration was reduced to writing by witness, and sworn to by deceased before the witness as a notary public; and in connection with this testimony said written declaration was also offered and read in evidence. In our opinion, a proper predicate for the admission of the dying declarations was laid, and the evidence was properly admitted. Willson, Crim. St. § 1045; Miller v. State, 27 Tex. App. 63, 10 S. W. Rep. 445. Deceased was shot on the night of the 14th of September. A few days thereafter the dying declarations were made and reduced to writing, but deceased lived until the 4th day of November following. At the time he made the declarations we think it is clear that he then felt conscious of approaching death, and believed there was no hope of his recovery. There is no testimony showing that subsequent to making the declarations, and before his death, his mind ever changed, as to his condition, or as to his "immediate apprehension of death." Edmondson v. State, 41 Tex. 497.

5. Defendant's second bill of exceptions shows that the state's witness Wells, on his examination in chief, was permitted, over defendant's objections, to testify that "the day after Beemer was killed, as I afterwards ascertained, I returned to my home about the

middle of the afternoon. I found there Jeff Boon and Tom Stewart and [defendant] T. J. Fulcher. Stewart and Boon had arrested Fulcher, and had him in custody when I arrived. I afterwards heard Stewart say to Fulcher, 'We have arrested you for killing Beemer last night;' whereupon Fulcher seemed agitated, and turned pale." This testimony was objected to because the defendant was under arrest at the time. The court in explaining this bill states that he limited the witness' testimony to the fact as to whether or not any visible impression was made on defendant when he was charged with the murder. Had defendant not been under arrest, there is no question but that his acts and conduct, as well as appearance when charged with the murder, would have been admissible as evidence against him. Noftsinger v. State, 7 Tex. App. 302. And even after arrest it was formerly held, in the cases of Cordova v. State, 6 Tex. App. 208, and Handline v. State, Id. 348, that "the acts and conduct of a defendant in arrest, either before or after being accused of the crime, may, though not *res gesta*, be competent evidence against him as indicative of a guilty mind." These decisions were based upon the rule announced in Rosc. Crim. Ev. 17-19; and the same rule is held in Brownell v. People, 38 Mich. 782, (which is a case directly in point,) and in Greenfield v. People, 85 N. Y. 75. It is also the rule announced in a late case in Kansas, (State v. Baldwin,) reported in full in 12 Pac. Rep. 318. But a different rule was announced by this court in Nolen's Case, 14 Tex. App. 474, and it was there held that "where the confessions of a defendant under arrest are inadmissible against him because made while he was uncautioned, his acts, if tantamount to such a confession and done under similar circumstances, are likewise inadmissible." This decision, which practically overruled the Cordova and Handline Cases, since its announcement has been followed and recognized as the rule in this state. Carter v. State, 23 Tex. App. 508, 5 S. W. Rep. 128. Under the rule as it now obtains the evidence complained of was illegal and inadmissible. This error will necessitate a reversal of the case. McWilliams v. State, 44 Tex. 116. In view of another trial, we will notice one or more of the other errors complained of.

6. It is insisted that the court should have charged upon assault with intent to murder, and that the special requested instructions asked for defendant should have been given. As to the requested instructions, we think they were properly refused. The evidence shows that the death was caused by the wound inflicted by defendant, and that there was no neglect or improper treatment of deceased. The charge of the court in relation to such an issue was not excepted to, and is more favorable to the accused than he would have been entitled to had there been such an issue in the case.

7. It is claimed that the court committed a fundamental error in instructing the jury in

the fourth paragraph of the charge as follows, viz.: "The law allows the defendant to testify in his own behalf; but a failure to do so is not even a circumstance against him, and no presumption of guilt can be indulged in by the jury on account of such failure on his part." The act of our last legislature, providing that a defendant in a criminal case may testify in his own behalf, expressly provides as follows: "But the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause." Gen. Laws 1889, 21st Leg. 37. The instruction was substantially in the spirit of the statute. But it is insisted that the court should not have alluded to the matter, as it was calculated to call the attention of the jury to the failure of defendant to testify, and that that of itself would necessarily be prejudicial to defendant. We are cited to Hunt's Case, 12 S. W. Rep. 737, wherein, in quoting from an Illinois case, the language used is, "and in such case court and counsel should studiously avoid all allusions to the subject." Baker v. People, 105 Ill. 452. Our statute does not prohibit the court from alluding to the subject; it is counsel who are expressly inhibited from alluding to or commenting upon defendant's failure to testify. The court is not inhibited from alluding to and explaining defendant's rights in the matter. It may or may not prove injurious or prejudicial for the court to allude to the matter; it is impossible for us to tell. In another murder case, pending at this time before us, it is complained that the court erred in refusing a special requested instruction defining the law with regard to the evidence of a defendant who had testified. We think it a matter entirely discretionary with the court whether it will instruct the jury at all as to a defendant's rights as a witness in his own case. In Vermont it seems that the court is bound to instruct the jury that they could not consider defendant's omission to testify in his own behalf against him. State v. Cameron, 40 Vt. 556. In this instance the charge complained of was unquestionably in conformity with the statute, and we cannot see that it was calculated to prejudice the defendant. Being a correct enunciation of the law, we will not presume that the court in giving it abused its discretion, nor that it was in any manner injurious to defendant. We have discussed all the questions raised in the case. For error in the admission of evidence as above pointed out, the judgment is reversed, and cause remanded. Reversed and remanded.

SPRINGFIELD v. STATE.

(Court of Appeals of Texas. April 12, 1890.)

GAMING IN SALOON.

On indictment for playing cards "in a house for retailing spirituous liquors," in violation of Pen. Code Tex. art. 355, proof that defendant played cards in a "saloon" does not sustain the allegation.

Appeal from Dallas county court; E. G. BOWER, Judge.

Pen. Code Tex. art. 355, prohibits card-playing in, among other places, "any house for retailing spirituous liquors."

Russell & Fowler, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. It is charged in the indictment that defendant "did unlawfully play at a game with cards in a house for retailing spirituous liquors." This charge is not supported by the evidence before us. It was not proved that the house in which defendant played cards was a house for retailing spirituous liquors. The proof was that he played in a "saloon." A "saloon" does not necessarily mean "a house for retailing spirituous liquors." Early's Case, 23 Tex. App. 364, 5 S. W. Rep. 122. We deem it unnecessary to pass upon other questions presented in the record, as they are of a character which are not likely to arise on another trial. Because the conviction is unwarranted by the evidence the judgment is reversed, and the cause remanded.

SPRINGFIELD v. STATE.

(Court of Appeals of Texas. April 12, 1890.)

Appeal from Dallas county court; E. G. BOWER, Judge.

Russell & Fowler, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. This case is substantially the same in all respects as Springfield v. State, *ubi supra*, and the opinion in that case is adopted as the opinion in this case. The judgment is reversed, and the cause remanded.

CURRY v. STATE.

(Court of Appeals of Texas. April 19, 1890.)

LOCAL OPTION—ELECTIONS—VALIDITY.

1. Sayles, Civil St. Tex. art. 3229, requires that the commissioners' court shall order elections on local option on days not less than 15 nor more than 30 days from the date of such order. Article 3233 provides that, after an election resulting in favor of prohibition, such court shall make an order forbidding the sale of intoxicating liquors, which shall be "prima facie evidence that all the provisions of the law have been complied with in giving notice of and holding such election." Held, that such order is not *prima facie* evidence of the validity of an election ordered and held more than 30 days from the date of ordering it, and such election is void.

2. Article 3239a, which gives to any voter of the local option district a right to contest the validity of such election within 30 days, does not prevent one accused of violating the order of prohibition from showing at a later time that it is void.

Appeal from county court, Dallas county; E. G. BOWER, Judge.

Kearby, McCoy & Hayter, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. This appeal is from a conviction for a violation of the local option law. It is insisted that the pretended local option law under which he has been convicted is absolutely void, because the election at which

it was purported to be adopted was held at a time when such an election could not only not be held, but was actually prohibited by our law. In other words, that said pretended election was ordered to be held, and was held, more than 30 days from the date of the order of the commissioners' court ordering the holding of the same. The evidence shows that the order for the election was made and entered by the commissioners' court on the 14th day of May, 1889, and the said order required the election to be held on the 15th day of June, 1889, which was more than 30 days after the date of said order, and that said election was held on said 15th day of June, 1889.

Our present statute is the one which was in force at the date said order was made, and it expressly fixes and regulates the time of ordering such election as follows, viz.: "Art. 3229. When the commissioners' court, of their own motion, or upon the petition provided for in article 3227, shall order the election as herein provided for, it shall be the duty of said court to order such election to be held at the regular voting place or places within the proposed limits upon a day not less than fifteen nor more than thirty days from the date of said order; and the order thus made shall express the object of such election, and shall be held to be *prima facie* evidence that all the provisions of law necessary to give it validity, or to clothe the court with jurisdiction to make it, have been fully complied with." Acts 20th Leg. 96; Sayles, Civil St. art. 3229; Willson, Crim. St. § 630, art. 3229. Article 3233 provides for the special session of the commissioners' court for opening the polls, counting the votes, and making an order of court declaring the result, and absolutely prohibiting the sale of intoxicating liquors, etc.; and it is further provided in said article that "the order thus made shall be held to be *prima facie* evidence that all the provisions of law have been complied with in giving notice of and holding said election, and in counting and returning the votes, and declaring the result thereof." Article 3239a provides for a contest of said election at any time within 30 days by any qualified voter of the locality in which it was held. We have referred to these statutes for the purpose of showing how far the legislature has gone in obviating proofs of a strict compliance with the prerequisites of the statutes in cases where the validity of such elections is contested or brought in question. Certain orders are made *prima facie* evidence that antecedent statutory prerequisites have been complied with; and their introduction by the state would devolve upon a defendant, or party attacking the validity of the election, the burden of disproving such *prima facie* evidence. But we do not understand that the legislature ever intended more than this. We do not understand that they could or did intend that such subsequent orders could cure direct and positive violations of the law, in its most essential particulars,

with reference to the holding of such elections; in other words, that the mere entry of certain orders by the commissioners could nullify the plain letter of law, and make that a valid and binding law which was void *ab initio*. We can see many and good and sufficient reasons why our statute has provided that such election shall be ordered "upon a day not less than fifteen nor more than thirty days from the date of said order." But, if there were no such reasons apparent, the rule *ita lex scripta* unquestionably applies where such power of special legislation is delegated to other authority than the legislative department. In such cases there must be strict conformity to the requirements of the law in the exercise of such delegated authority, or the action will be void. *Boone v. State*, 10 Tex. App. 418; Willson, Crim. St. § 632. Under the facts shown by the record, we are constrained to hold that the election for local option in the town of Lancaster, Dallas county, Tex., held on the 15th day of June, 1889, is void because held more than 30 days after the date of the order of the commissioners' court ordering the holding of the same.

The fact that article 3239a gives to any qualified voter of the local option district the right to contest the validity of such election within 30 days does not in any manner affect the rights, or deprive any one at any time of the right to show that the law is void, when it is sought by prosecution to hold him amenable for its violation. A citizen can never be legally punished for a violation of a law which is itself void. Because appellant has been convicted for the violation of a law which was never legally adopted or enacted, the judgment is reversed, and the prosecution is dismissed. Reversed and dismissed.

COTTRILL v. CRUM.

(Supreme Court of Missouri. May 19, 1890.)

DECEIT—DUTY OF INQUIRY—WAIVER.

1. In a suit for damages for false representations by the business manager of a panorama company to plaintiff, a stranger to the enterprise, whereby he was induced to trade valuable property for stock of the company at an exorbitant valuation, it was error to charge that, if plaintiff might by diligent inquiry have ascertained the falsity of such representations, and did not inquire, he could not recover. It was not plaintiff's duty to make diligent inquiry.

2. The words "diligent inquiry" were used in their ordinary meaning, and required no explanation from the court.

3. Where there has been a misdirection, but for which the jury might have reached a different conclusion, the reviewing court cannot say that judgment was rightfully rendered for defendant.

4. The fact that plaintiff offered to sell such stock at the price falsely represented by defendant to be its value, constituted no waiver of his right to sue the latter for damages.

5. Nor does the lapse of five months between the purchase of the stock and the bringing of the action operate as such waiver.

Appeal from St. Louis circuit court; AMOS M. THAYER, Judge.

Chester H. Krum, for appellant. John C. Orrick, for respondent.

BRACE, J. The plaintiff in this action seeks to recover damages for false representations alleged to have been made by the defendant in a trade in which the plaintiff, in exchange for 50 shares of paid-up stock in the Globe Panorama Company, sold and conveyed to the defendant a certain lot of ground in the city of St. Louis. The verdict was for the defendant, and from the judgment thereon in his favor the plaintiff appeals. Many grounds are assigned in the motion for a new trial, but the only one urged here why the court should have granted a new trial is the alleged error of the court in giving the seventh instruction for the plaintiff, which is as follows: "(7) If you find from the evidence that plaintiff, by diligent inquiry, might have ascertained the truth or falsity of the alleged representation, and failed to make such investigation, then the court instructs you that he cannot recover in this action."

1. It is urged against this instruction that it is merely an abstract proposition of law, and does not define or explain to the jury what meaning the law gives to the expression "diligent inquiry," and is therefore erroneous; and in support of this contention we are cited to many cases in which instructions were held to be erroneous because legal propositions, and the meaning of technical legal phrases or words, were therein submitted to the jury, *e. g.*, *Fugate v. Carter*, 6 Mo. 267, and *Anderson v. McPike*, 86 Mo. 298, in which the jury were called upon to determine what was "a material averment;" *Morgan v. Durfee*, 69 Mo. 469, to define "malice;" *Boogher v. Neece*, 75 Mo. 383, in which the question of what was "adverse possession" and "color of title" was left to the jury; *Wiser v. Chesley*, 53 Mo. 547, what was "gross negligence;" and *Atteberry v. Powell*, 29 Mo. 429, in which it was left to the jury to determine the meaning to be applied to the words "in substance," in an action of slander. In all these cases, it will be observed, either a question of law, or the meaning of certain words and terms to which a special and peculiar meaning had by law been applied, was left to the jury; and it was properly held that this was error. It is possible that cases might arise in which the words "diligent inquiry" might become the proper subject of judicial interpretation, but in this case it is evident they were used by the court, and could have been understood by the jury, in no other than in their usual, ordinary, and conventional sense; and such sense is presumed to be as well comprehended by the jury as the court, and needs no definition. It is not necessary that the meaning of ordinary words and phrases, used in their usual and conventional sense, should be explained in instructions.

2. It is further argued against said instruction that it asserts an incorrect legal proposition, and ignores the difference between the situations of the parties in regard to the property concerning which the representations are alleged to have been made. The

facts upon which the court in its first instruction to the jury authorized a finding for the plaintiff were "that if, at the time when the defendant traded to plaintiff the panorama stock in the petition described, defendant was, and from the opening of the enterprise had been, business manager of the Globe Panorama Company, and in charge of the business in St. Louis, and that, with a view to the trade of the stock aforesaid to plaintiff, and as an inducement thereto, he stated to plaintiff, in substance, that the intrinsic and actual value of said panorama stock was \$100 per share, and that none of said stock had been sold or could be bought for less than par, or \$100 per share, and if he further stated at the time, and with the purpose aforesaid, that the actual cost price of the panorama property in St. Louis was seventy-five to eighty thousand dollars, and that from the opening of the business the company had been, and was still, doing a profitable business, and that from the time the business opened the company had been earning and paying a dividend of 2 per cent., or \$2 per share, per month; and if you further find that said statements were untrue,—that they were made for the purpose of deceiving and misleading plaintiff as to the true character or value of said stock; and if you find that plaintiff traded the Pine-Street lot for said stock on the faith of said representations, and that he would not have made the trade but for those statements and representations; and if you further find that defendant, in making said representations, knew they were untrue, or if he made them as of his own knowledge, without knowing whether they were true or false, and with the intent of deceiving and misleading plaintiff,—then the court instructs the jury that your verdict must be for the plaintiff." The other instructions given, except the one under consideration, were in harmony with this one. There was evidence to support this instruction, and with the legal propositions it asserts no fault has been found. Nevertheless the jury were told in the seventh instruction, that although they should find all these facts to exist, yet if the plaintiff, by diligent inquiry, might have discovered that defendant's said representations were false, then he could not recover. In other words, the jury were told in this instruction that, although the defendant made false representations as to material, existent facts, calculated to affect the plaintiff's estimate of the value of the property, for the purpose of inducing him to trade therefor, upon which the plaintiff relied, and by which he was induced to make the trade, yet if, by diligent inquiry, he might have discovered that such representations were false, then he could not recover. We do not understand this to be the law. "It has indeed been laid down as a broad proposition of law that if the means of knowledge be at hand, and equally available to both parties, and the subject of the transaction be open to the inspection of both alike, the injured party must avail him-

self of such means, if he would be heard to say that he was deceived by the representations of the other party, unless there was a warranty of the facts." Bigelow, *Frauds*, 522. This instruction cannot be maintained even upon the broad terms of this proposition; for by it the plaintiff is precluded from recovery if he could have discovered the truth by diligent inquiry, whether the means of knowledge were at hand, or whether they were equally available to him as to the defendant or not. It may be well, however, to note the continuing remarks of Mr. Bigelow on the general proposition. He says, (page 523 et seq.): "But there is serious ground for doubting the correctness of this proposition in its broad form. It will be seen upon reflection that the situation of the person to whom the misrepresentation was made is quite different in regard to means of knowledge from that of the person who made it. The latter may well be held to the duty to know the facts. * * * The former has been put off his guard and misled by the very representation which has been made. Indeed a representation may as well mislead even where the means of knowledge are directly at hand as where they are not. The supposed rule in regard to means of knowledge came to be applied in this country before this distinction had been pointed out. * * * Recent authority has, however, gone far towards setting the matter right in principle. The proposition has now become very widely accepted at law as well as in equity, at least as general doctrine, that a man may act upon a positive representation of fact notwithstanding the fact that the means of knowledge were specially open to him. * * * It may be improbable that a man with the truth in reach should accept a representation made in regard to it, but the improbability can be no more than matter of fact. If the representation were of a character to induce action, and did induce it, that is enough. It matters not, it has well been declared, that a person misled may be said, in some loose sense, to have been negligent; for it is not just that a man who has deceived another should be permitted to say to him, 'You ought not to have believed or trusted me,' or 'You were yourself guilty of negligence.'" After citing many cases illustrative of the principle here stated, the learned author sums up thus, (page 528:) "The result appears to be, not only in principle, but by the weight of authority, that the party to whom the representation is made is affected by means of knowledge or by notice only where the language or conduct was not of a kind to withdraw his attention from what otherwise he would be bound to know, i. e., only where the representation was not calculated to put him off his guard, as in cases of representations of value or opinion." To use the language of another author: "The doctrine of notice has no application where a distinct representation has been made. A

man to whom a particular and distinct representation has been made is entitled to rely on the representation, and need not make any further inquiry, although there are circumstances in the case from which an inference inconsistent with the representation might be drawn." Kerr, *Fraud & M.* 80. "No man can complain that another has relied too implicitly on the truth of what he himself stated." *Id.* 81. The same general principle has been expressed by this court in the following terms: "It is no excuse for, nor does it lie in the mouth of the defendant to aver that plaintiff might have discovered the wrong, and prevented its accomplishment, had he exercised watchfulness, because this is but equivalent to saying 'You trusted me; therefore I had the right to betray you.'" *Pomeroy v. Benton*, 57 Mo. 531. The same idea is expressed in another opinion thus: "We doubt if it is equity to allow a sharper to insist on a fulfillment of his bargain on the ground that his victim was so destitute of sagacity as to make no further inquiries." *Wannell v. Kem*, *Id.* 478. It is not seen how instruction No. 7 can be maintained without doing violence to the just and equitable principles announced in these authorities, even conceding that the parties at the time were upon an equal footing, and therefore to be treated as dealing at arms-length; but, when it is considered that the defendant was the originator and promoter of the enterprise, its business manager, fully conversant with every fact of its past history and present condition, having actual knowledge of the cost of the plant, the amount of the stock, and the dividend it was actually yielding, and that the plaintiff was a stranger to the enterprise, it becomes at once apparent that the means of knowledge were not in fact equally available to the plaintiff as to the defendant, and the instruction has nothing to stand upon, for "where the parties do not stand upon an equal footing the objection to a plea or claim of false representations, that the party to whom they were made was 'negligent' in not making inquiry or examination, has still less force, and would nowhere be allowed." Bigelow, *Frauds*, 534. *Wannell v. Kem*, *supra*. So that in any view of the case this instruction must be condemned.

3. There is nothing in the contention that the plaintiff waived his right to sue for damages for false representations by reason of the fact that after the purchase of the stock, and before suit, he may have offered the stock for sale at par, or that four or five months elapsed between the time when he acquired the stock and the institution of his suit. Nor is it within the power of this court to say the judgment is for the right party, and ought to be affirmed, when there has been a substantial misdirection of the jury upon a question of law bearing upon the issues of fact to be tried by the jury, but for which they might have reached a different conclusion. For the

error of the court in giving the seventh instruction the judgment is reversed, and cause remanded for new trial. All concur.

EBERSOLE et al. v. RANKIN.

(Supreme Court of Missouri. May 19, 1890.)

APPEAL—DISMISSAL.

An appeal will be dismissed where neither party has made out, or furnished the supreme court with, a statement of the case, as required by Rev. St. Mo. 1879, § 3773.

Appeal from circuit court, Atchison county; H. D. KELLEY, Judge.

Keeley, Craig & Kelley, for appellants. *A. M. Hough, M. McKillop, and John D. Campbell*, for respondent.

SHERWOOD, J. Our statute (section 3773, Rev. St. 1879) requires that "each party shall * * * make out and furnish the court with a clear and concise statement of the case," etc. There is not the semblance of a statement in this cause by either party. We do not propose to go through this record, or the abstracts thereof, and prepare a statement of the facts. *Long v. Long*, 96 Mo. 180, 8 S. W. Rep. 766; *Craig v. Scudder*, 98 Mo. 664, 12 S. W. Rep. 341; *Jayne v. Wine*, 98 Mo. 404, 11 S. W. Rep. 969; *Manufacturers' Sav. Bank v. Big Muddy Iron Co.*, 97 Mo. 38, 10 S. W. Rep. 865. As the statute has not been complied with, we shall dismiss the appeal. All concur.

MURPHY v. DE FRANCE et al.

(Supreme Court of Missouri. May 19, 1890.)

JUDGMENT—EQUITABLE RELIEF—RES ADJUDICATA.

1. On an administrator's sale of land the widow of decedent became the purchaser; but, his debts not having been paid, the estate was subsequently ordered into the hands of the public administrator. On the representations of a creditor that he would make the land pay \$1,000 of decedent's debts, the probate court ordered a resale, and the creditor bid it in for only \$100. He subsequently instituted proceedings to have the widow's dower assigned, wherein he was adjudged the owner of the land, subject to her dower right. Held that, these proceedings having been pending for four years, and having been defended by the widow, she could not afterwards sue to have the judgment therein set aside on the ground of collusion and fraud between the public administrator and the creditor at the resale of the land, as that was a matter of defense to be interposed in the dower proceedings.

2. The widow's answer having set up the collusion and fraud between the public administrator and the creditor, and the validity of the two administrators' deeds having been passed on in the dower proceedings, the judgment in the creditor's favor is conclusive on these questions, as between the parties and their privies, though these proceedings may not have been the proper method of testing the validity of the deeds.

Appeal from circuit court, Adair county; ANDREW ELLISON, Judge.

Blair & Marchand, for appellants. *O. D. Jones*, for respondent.

BLACK, J. Nancy Murphy, the plaintiff, is the widow of Benjamin Murphy, who died in 1865 the owner of the 16 acres of land now

in suit. Letters of administration were issued to the plaintiff upon the estate of her deceased husband, and she procured an order to sell real estate to pay debts, and then resigned. Ringo was appointed administrator *de bonis non*, and by virtue of the order of sale sold the 16 acres of land; and the plaintiff became the purchaser at the price of \$400, and she received a deed dated 4th February, 1868. Ringo resigned in 1869, and thereupon the probate court ordered the estate into the hands of Chandler, the public administrator. Chandler made two applications to the probate court for an order to sell the same real estate to pay debts of the estate, both of which were refused; but an order was made upon a third petition, filed in 1874. The 16 acres, and also an 80-acre tract, were sold under this order, and the defendant De France became the purchaser at the price of \$100, and received a deed dated 1st February, 1875. In 1876 the defendant De France commenced a suit in the circuit court against the plaintiff in the present suit to have dower assigned to her in the 16 acres and the 80 acres. That suit was tried in 1880, the trial resulting in the appointment of commissioners, who set off to her 5½ acres of the 16 acres as her dower in the 96 acres. The report of the commissioners was approved, and a writ of restitution awarded De France, by which he was put into possession of the property not set off to the widow. De France then conveyed 44-100 of the land to defendant Dodson. The plaintiff, claiming to own the 16 acres both as a homestead and by virtue of the administrator's sale to her, commenced this suit in equity in 1885, praying that the public administrator's deed to De France, the judgment in the case of De France against her, and the deed to defendant Dodson, be set aside and for naught held. The court found the issues for plaintiff, and entered a decree according to the prayer of the petition, to reverse which defendant sues out this appeal.

The theory of the plaintiff's petition is that De France and Dodson procured the order of sale, the sale, and the approval thereof, by a fraudulent combination with Guy Chandler, the public administrator, and that all of these proceedings to and including the judgment in the dower case were parts of one scheme to defraud the plaintiff out of her property. The petition then makes a general charge that the judgment in the suit of De France against Nancy Murphy for assignment of dower is void because collusively and fraudulently obtained. The answer sets up that judgment as a bar to this suit, and states that Mrs. Murphy filed answer in that case setting up as a defense thereto all of the matters stated in her petition in this case, and claiming the 16 acres both as a homestead and by virtue of the administrator's sale to her. The reply concedes that Mrs. Murphy defended that suit, but says none of the issues to be tried in this case were tried in that

one; that her attorney told her the case would not be tried at the April adjourned term, 1880; that it was tried at that time; that no witnesses were called; and that her attorney betrayed his trust, and colluded with De France.

From the evidence adduced on the trial, it appears the debts of the Murphy estate had not been paid at the time it was ordered into the hands of Chandler, the public administrator, which was in 1869. The defendant Dodson owned one of these debts, and De France, as an attorney, represented the others, and afterwards became the owner of them. These debts amounted to \$2,000 or over, and the evidence is to the effect that the estate was insolvent. De France and Dodson were of the opinion that the prior administrator's sale of the 16 acres to Mrs. Murphy was void, for reasons not necessary to be stated. Acting upon the suggestions made in *Bank v. White*, 23 Mo. 342, they asked, and eventually procured, the resale on the third petition of the public administrator. At the time of procuring this order, De France represented to the probate court that he would bid \$1,000 for the 96 acres, but he only bid \$100; and Chandler declined to report the sale until De France agreed to and did allow him his commissions on \$1,000. The claims held by De France and Dodson were not all of the same class, and they agreed in writing that, as between themselves, their claims should stand on the same footing, and that one of them would bid upon the property, and buy it for all, unless some other person should bid enough to pay the debts. Under this arrangement, De France became the purchaser, and prosecuted the suit for the assignment of dower. There is not a particle of evidence showing, or tending to show, any misconduct of the attorney who represented Mrs. Murphy on that trial. She called him to the witness stand on the trial of this case, and he stated that he sent for her when the dower case was called for trial, and that she came to the court-house when the documentary evidence had been introduced; that, the administrator's deed to her being excluded, and the one to De France admitted by the court, he spoke to Chandler, who was present, but that he declined to testify that he would not report the sale until he was paid \$50 commission; and that Chandler was not called as a witness on that trial. One other circumstance may be noticed, and that is this: The judgment confirming the report of the commissioners in the dower suit was not written up by the clerk until the vacation of the court; and after it had been written up, and at the suggestion of De France, the clerk inserted the words awarding a writ of restitution. A motion was made by Mrs. Murphy at a subsequent term to correct the judgment, but the motion was overruled by the court.

A judgment procured by fraud may, of course, be set aside in equity; but the fraud because of which such relief is granted is one

in procuring the judgment. As has been said by this court, courts of equity will not vacate or enjoin a judgment merely because based upon a cause of action which may be vitiated by fraud; for this is a valid and meritorious defense which may be interposed, and, unless its interposition is prevented by fraud of an adversary, it cannot be asserted against a judgment, foreign or domestic. *Payne v. O'Shea*, 84 Mo. 180. "The fraud," says Freeman, "for which a judgment may be vacated or enjoined in equity, must be in the procurement of the judgment. If the cause of action be vitiated by fraud, this is a defense which must be interposed; and, unless its interposition be prevented by fraud, it cannot be asserted against the judgment." *Freem. Judgm.* (3d Ed.) § 489. Courts of equity do not grant such relief for the purpose of giving a defeated party a second opportunity to be heard on the merits of his defense; and the relief is confined to those cases where the judgment is procured by fraud, or through excusable mistake or unavoidable accident. *Id.* § 486. Applying the foregoing principles of law to this case, there is not a shadow of a ground for setting aside the judgment in the case of De France against Nancy Murphy. The great bulk of the evidence does not touch the question whether that judgment was procured by fraud, but goes to the merits of that controversy. That suit was commenced in 1876, and was pending until 1880, so that the defendant therein had abundant time and opportunity to prepare for trial. The fact that Chandler stated to the attorney that he would not say that he received the \$50 commission before he reported the sale amounts to nothing. He could have been called, or made to testify. Nor is any reason assigned why the probate judge could not have been called. The charge of collusion between the attorney who represented Mrs. Murphy and De France is unproved, and rests in the imagination of the pleader. This suit was not commenced until five years after that one had been determined, and it is perfectly apparent that this is but an effort to review that judgment on the merits. This a court of equity has no right to do. That case may have been decided for the wrong party, and there is ground for the claim that the deed to Mrs. Murphy was valid. The remedy, however, was the same in that case as in others, namely, an appeal or writ of error.

The next inquiry is, what was adjudicated in that case? The pleadings in that case are not in evidence in this one. They appear to have been lost. We have discovered no secondary evidence of their contents save that of the attorney who represented Mrs. Murphy, and who testified at her instance. He says: "I set up in that answer, as a defense, De France's statement, made in the probate court, that he would make the land pay \$1,000 of the debts of the Murphy estate; also, that the order of sale and sale were procured by fraud practiced by De France on the probate court, and by collusion and fraud be-

tween him and Chandler. I objected to the introduction of the deed from Chandler to De France, but the court overruled the objection; and, after he had made his proof, I offered the deed made by Ringo as administrator to Nancy Murphy, but the court excluded it." The judgment, which is in evidence, says: "The plaintiff claimed to hold the land herein described in fee, subject to defendant's dower, in trust for the creditors of the estate of Benjamin Murphy, deceased; and defendant claims to own said land in her own right, and denied that plaintiff was entitled to have seisin of said land, or to have dower set off to defendant." And it then goes on to find and adjudge that plaintiff is the owner of the land subject to the widow's dower, and commissioners are appointed to assign dower. There can be no doubt but the plaintiff in that case put in issue the validity of the defendant's deed, and the defendant assailed the public administrator's deed on the same grounds that are now set up in the present case. The judgment was for the plaintiff in that case, the defendant in this one. It is final and conclusive as between the parties and their privies. Whether that was the proper kind of a suit in which to try the validity of these administrator's deeds is a question which we need not determine. The issues were made, and the court had jurisdiction of the parties and subject-matter, and neither party appealed.

It results from what has been said that the judgment must be reversed, and the petition dismissed. So far as we can see from this record, the right of plaintiff to a homestead exemption under the act of March 23, 1863, was not brought in question in the dower suit. It may be that she is still entitled to have a homestead assigned to her under that act, and the rulings in *Gragg v. Gragg*, 65 Mo. 344, and *Seek v. Haynes*, 68 Mo. 17. As the main object of this suit must fail, proper proceedings for assignment of homestead must be instituted. At all events, the dismissal of this petition will be without prejudice to any suit she may institute for the purpose of having a homestead assigned to her. Numerous other questions have been made on the one side and the other, which do not affect the merits of this controversy, and they are therefore not spread out in this opinion. The judgment is reversed, and the petition dismissed without prejudice, to the extent before indicated. All concur.

STATE v. MCGONIGLE *et al.*

(*Supreme Court of Missouri.* May 19, 1890.)

PRINCIPAL AND SURETY—DISCHARGE OF SURETY—ESTOPPEL—PAROL EVIDENCE.

1. An acceptance of the bond of a tax collector by the county court, knowing that the name of a responsible surety has been erased therefrom, and that of another substituted, without the knowledge or consent of the other sureties, will discharge them from their obligation.

2. The fact that the sureties left the bond with the principal to procure other sureties, and to present it to the county court for approval and accept-

ance, does not give him the implied power to discharge one who thereafter becomes a party to the instrument; nor does knowledge by the sureties of its approval give rise to an inference that they authorized the alteration.

3. The substituted surety having signed the bond without knowledge of its alteration, and under the supposition that the other signers were his co-sureties, the bond is also void as to him, as he never undertook to become the sole surety.

4. Though the erasure may have been at the instance of the county court, a stranger to the bond, the doctrine that an alteration of a written instrument by a stranger will not affect the liability of any of the parties can have no application, as the erasure was made before the acceptance of the bond, and as the surety whose name was erased consequently never became liable thereon.

5. The fact that the sureties on the bond as finally approved knew of the approval, and made no objection to the principal's performing the duties of his office for two years thereafter, does not estop them from setting up the alteration, of which they had no knowledge, as a defense in an action on the bond.

6. In approving official bonds the county court acts in a ministerial capacity; and, though it is required to keep a record of its proceedings, parol evidence of what was said and done when it approved the bond is admissible to show that it had knowledge of the fact that the name of one of the sureties had been erased therefrom without the knowledge or consent of his co-sureties.

SHERWOOD and BARCLAY, JJ., dissenting.

Appeal from circuit court, Knox county; BEN E. TURNER, Judge.

Action by the state against William P. McGonigle, administrator of Peter H. Early, deceased, Patrick Flemming, Jefferson D. McPike, Thomas Bresnen, John Cain, and Thomas Kearnes, as sureties on the official bond of Peter J. Reid, tax collector. There was a judgment for defendants, and the state appeals.

John M. Wood, Atty. Gen., *O. D. Jones*, and *L. F. Cottey*, for appellant. *Blair & Marchand* and *G. R. Bathrope*, for respondents.

BLACK, J. The state, as plaintiff, brought this suit against the sureties on the official bond of Peter J. Reid, who was elected collector of Knox county in November, 1884. Reid seems to have paid over the county revenues collected by him, but he made default to the state in the amount of \$14,092, and hence this suit. The case was tried by the court without a jury; the trial resulting in a judgment for the defendants, to reverse which the state prosecutes this appeal. Many matters of defense were set up in the answer filed by the defendants, and evidence was received in support of them; but the court at the close of the trial excluded the evidence bearing upon these defenses, except that offered in support of that part of the answer which, in effect, states that the bond sued upon is not the obligation of the defendants. This is, therefore, the only defense before us on this appeal.

In August, 1885, Reid presented to the county court of Knox county a bond, in the penal sum of \$30,000, for approval, signed by himself and the following sureties, in the following order: P. H. Early, Patrick Flemming, I. D. McPike, Thomas Bresnen, George

Dailing, and Thomas Kearnes. At the same time, Dailing, one of the sureties, appeared before the court, which was then in session, and asked that his name be taken off the bond, assigning as a reason therefor that he signed upon the understanding that James Kelly would also sign, and that Kelly's name had not been procured. The matter was talked over in the presence of the court, and the name of Dailing was erased by the clerk in the presence of all of the judges, and of Dailing and of Reid, but in the absence of, and without the knowledge or consent of, any of the other sureties. Some of the evidence is to the effect that the erasure was made by the clerk at the instance of the court, the other parties present consenting. The presiding justice then told Reid he must procure other sureties. Thereupon Reid took the bond, and in one or two days again presented it to the court, with the name of John Cain signed on the line, and at the place from which Dailing's name had been erased. The court then approved the bond by an order dated the 4th August, 1885. Cain, who signed by making his mark, did not know that Dailing had ever been a party to the instrument. The other sureties signed at different dates, and at the office of Reid. Nothing is said about any erasure in the body of the bond, and the inference is that the names of the sureties had not been inserted at that place when the bond was first presented for approval. Dailing was a substantial property owner, while Cain appears to have been in debt to the amount of the full value of all of his property. The defendants asked no instructions. The state asked one only on this branch of the case, to the effect that the evidence concerning the erasure of the name of Dailing constituted no defense, which the court refused. The plaintiff is, therefore, here standing on a demurrer to the evidence of the defendants.

1. The state places much reliance upon the proposition that the circuit court should have excluded all of the parol evidence of what was said and done in the presence of the judges of the county court. This contention is based upon the ground that the acts of the county court can be shown alone by the record. These courts are required to keep a just and faithful record of their proceedings, and must speak by and through the record. The county courts, however, in approving these official bonds, act in a ministerial, and not a judicial, capacity. *State v. County Court*, 41 Mo. 221; *State v. County Court*, Id. 248; *In re Thompson*, 45 Mo. 55. They are made the agents of the state and counties for the purpose of accepting such bonds. The parol evidence was not offered in this case for the purpose of showing any order or judgment of the court, but for the purpose of showing that the court had full notice and knowledge of the fact that the name of one of the sureties had been erased, and that, too, without the knowledge or consent of the other sureties. For this purpose the evidence was properly

received. Notice to the court, when thus acting in a ministerial capacity, may be shown by evidence which would be sufficient in case of other agents. It is not to be expected that all the information which the court may have while transacting such business will be spread upon the record. The law does not require it.

2. The plaintiff cites, and with confidence relies upon, a line of authorities, of which *State v. Potter*, 63 Mo. 212, is the leading one in this court. That was a suit on the bond of Turley, as guardian of certain minors, with Potter and another as sureties. Potter's defense was that he signed the bond on the condition that it would be signed by one Bothrick as surety, and that it was filed by Turley without having procured the signature of Bothrick. Says the court: "Here the surety who defends this action had invested the principal with an apparent authority to deliver the bond; and there was nothing on the face of the bond, or in any of the attending circumstances, to apprise the official who accepted it that there was any secret agreement which should preclude the acceptance of the bond." The defense was accordingly overruled, and the doctrine of that case overruling former cases has been followed in subsequent cases. *State v. Baker*, 64 Mo. 167; *State v. Modrel*, 69 Mo. 152; *State v. Hewitt*, 72 Mo. 604; *Wolff v. Schaeffer*, 74 Mo. 154. It is now well established law in this and other jurisdictions that, where a surety signs a bond, and leaves it in the hands of the principal to be delivered only upon the condition that it is signed by another person, and the principal delivers the bond to the obligee without complying with the condition, and the obligee takes it without notice of the conditional agreement, the surety will be bound. *Dair v. U. S.*, 16 Wall. 1; *State v. Peck*, 53 Me. 284; *Taylor Co. v. King*, 73 Iowa, 153, 84 N. W. Rep. 774; *State v. Pepper*, 81 Ind. 76; *Millett v. Parker*, 2 Metc. (Ky.) 608. The same rule applies where the surety signs a bond leaving a blank space for the penalty, and the principal fills it with a larger amount than that agreed upon by the principal and surety. *Butler v. U. S.*, 21 Wall. 274. In these cases of conditional agreements, it is the surety who puts trust and confidence in the principal, and not the obligee, and, if any one is to be the loser, it should be the surety, for he puts it in the power of the principal to create the mischief complained of. The bond having been accepted and acted upon, the surety is estopped from setting up an unperformed and undisclosed condition. The cases before cited all proceed upon the ground that there is nothing upon the face of the bond, as disclosed by the attending circumstances, to apprise the obligee or accepting officer of a state of facts which should prevent its acceptance. When the county court accepted the bond in question, it had full knowledge of the fact that the name of Dailing as one of the sureties had been erased, and the name of Cain substituted therefor. The circumstances all tend to show that the court knew

this had been done without the knowledge or consent of the other sureties. The court was in no manner misled or deceived, and there is no room or ground for the application of any principle of estoppel as against the sureties. The cases before cited, and the principles of law upon which they are ruled, do not meet the question which we are bound to decide in this case.

3. The surety has the right to stand upon the very terms of his contract; and it is well-settled law that any material variation or alteration in the obligation or contract upon which he is bound will discharge him, unless he consents to the alteration before made, or by some subsequent act ratifies it. *Burge, Sur. 214; Baylies, Sur. 260.* The principle of law just stated is not controverted by the plaintiff, but its application to the case in hand is denied. It is, therefore, deemed best to make a concise statement of the facts of some of the cases relied upon by the defendants. *Martin v. Thomas, 24 How. 315*, was a suit upon a delivery bond executed to a marshal in a replevin suit. After the bond had been executed by the principal and three sureties, the principal with the consent of the marshal, and without the consent of the sureties, erased his name. This erasure, it was held, constituted a variation of the contract of the sureties, and discharged them from all liability on the bond. *Smith v. U. S., 2 Wall. 219*, was a suit upon a bond given by Pine as marshal; the bond having been approved by the district judge. Smith, one of the sureties, defended on the ground that the bond was not his deed. The evidence showed that Smith, Hoyne, and others had signed the bond as co-sureties for Pine. Hoyne became dissatisfied, and requested Pine to erase his name, which was done, but by whom did not appear. The name of Hoyne was erased when the bond was presented to the judge for approval, and the judge had been told by Hoyne that he wanted his name erased. The remaining sureties, except Smith, appeared before the judge, and acknowledged the execution of the bond. Smith did not acknowledge it, and did not know that Hoyne's name had been erased. It was held that the sureties who acknowledged the bond after the erasure were estopped from interposing the alteration as a defense; but, as to Smith, it was held that the erasure was a material alteration of the obligation to which he became a party, and that he was therefore discharged. The suit in *State v. Craig, 58 Iowa, 238, 12 N. W. Rep. 301*, was upon the bond of the warden of the penitentiary. There were some 11 sureties as the bond stood when produced in evidence, and the defense was material alteration. The evidence showed that one Smith signed it as a surety after the first seven signatures had been obtained, and the other sureties signed after Smith. Before the names of the sureties had been inserted in the body of the bond, and before approval, Smith's name was erased without the consent of any of the other sureties. The persons signing before Smith did not

know that he had signed until after the suit had been commenced. It was held that though Craig, the principal, had been intrusted with the bond to procure signatures, and present it for approval, yet, as to the sureties signing subsequent to Smith, Craig was not authorized to deliver the bond after it had been altered to their prejudice, and that those sureties were discharged because the instrument sued upon was not their contract. The sureties who signed before Smith were also discharged on the ground that it would be presumed that they signed with the understanding that other sureties would be procured in such a way that all would be held and bound as co-sureties. In the case of *Commissioners v. Daum, 80 Ky. 388*, the suit was based upon a sheriff's bond, and the defense was *non est factum*. Ten persons signed a power of attorney authorizing the county clerk to sign their names to the bond. At least two of the names were erased before the power of attorney was delivered to the clerk. It was held that, if the names were erased without the knowledge or consent of the other sureties, and with the knowledge or by the direction of the county judge, whose duty it was to take and approve the bond, then the plaintiff could not recover. The court said, in substance, that it was the duty of officers intrusted with authority to take and approve official bonds to use ordinary care and prudence to protect the sureties, as well as to protect the public. Here the bond, when first presented to the county court for its approval, was a completed bond. As then presented, it expressed the contract of the sureties. They agreed to be jointly and severally bound, but they did not agree that the name of Cain should be substituted for Dailing. The alteration in the obligation was a material one, and was made in the presence of the county court, and without the knowledge or consent of the sureties; and the bond as approved is not the obligation of the defendants. The authorities cited are in point, and all lead to the conclusion just stated. Some of them, and others which we have not cited, go further in favor of the discharge of sureties than we are disposed to go. If the name of Dailing had been erased, and that of Cain substituted, without the knowledge of the county court, then we have no hesitancy in saying that the sureties should not be discharged, because, by intrusting the bond to Reid, they put it in his power to mislead and deceive the court, and they should suffer the consequences. Here the court was not misled, but accepted the bond knowing that it had been altered without the knowledge or consent of the other sureties. Under these circumstances the court had no right to disregard the rights of the other sureties.

The argument is made that when these sureties signed the bond, and left it with Reid, the principal, to procure other signatures, and present it to the county court, they thereby made him their agent, and are bound by his acts. It is to be remembered that the county court had full knowledge of

all of the facts. So that the argument, to have any bearing on this case, must go to the extent of saying that Reid had invested in him the right to discharge at pleasure any one or more of the persons who became parties to the bond; that for this purpose he could of right represent the sureties as well as himself. This is carrying the doctrine of implied powers entirely too far. Each of the sureties, when signing the bond and leaving it with Reid, did doubtless make him their agent for the purpose of procuring other sureties, and for the purpose of presenting the bond for acceptance and approval. But it cannot be said they thereby gave him authority to discharge any one who had, or might thereafter, become a party to the obligation. As said in *State v. Craig*, supra, the principal was not authorized to deliver the instrument after it had been altered to the prejudice of the sureties. Nor does the fact that the sureties knew the bond had to be approved furnish any ground for the inference that they authorized the alteration. *Smith v. U. S.*, supra.

It is true the defendant Cain signed the bond after the alteration had been made, but the evidence is to the effect that he was wholly ignorant of the fact that Dalling had ever been a party to the bond. As to him the bond is void, because he signed it upon the supposition that the other parties were in fact co-sureties, and he never undertook to become the sole surety. *Howe v. Peabody*, 2 Gray, 556.

But it is further argued that the erasure of Dalling's name was spoliation only, and did not affect the liability of any one on the bond. If the bond had been delivered, and the erasure thereafter made by county officials, then *Medlin v. Platte Co.*, 8 Mo. 235, would be an authority for the position thus taken by plaintiff. It is, in effect, said in that case that the term "alteration" is usually applied to the act of a party entitled under the instrument, and imports an improper design; but spoliation is the act of a stranger, without the participation of a party interested. It is also held that county officials who have the custody of instruments in writing are strangers, within the meaning of the rule, so that, if these officials deface such instruments, their acts are but spoliation. To the same effect is *State v. Berg*, 50 Ind. 496. Here there never was a time when the state or county held Dalling as a surety, for the evidence is all to the effect that his name was erased before the bond was delivered or accepted. The question in this case is whether the bond sued upon is the deed of the sureties, and we do not see that the doctrine of spoliation has anything to do with this controversy.

4. The plaintiff insists that the court erred in refusing an instruction to the effect that, if the bond was approved by the court on 4th August, 1885, and the defendants knew that Reid occupied the office of collector, and collected the revenues, for the years 1885 and

1886, and made no objection thereto, then they are estopped from making the defense that the bond was altered by the erasure of Dalling's name. There is an abundance of evidence tending to establish all the facts stated in this refused instruction, but there is not a word of evidence tending to show that the defendants during this time knew that Dalling's name had been erased. The only evidence to which our attention is called is that they knew nothing about the erasure. An estoppel cannot arise until it is shown that they knew of the alteration, and thereafter made no objection to the performance by Reid of official duties by virtue of having given the bond in question. No such state of facts is shown, or hypothetically stated, in the instruction; and it was therefore properly refused.

It is useless to notice the other minor suggestions made by the plaintiff. They do not meet the real and only question in this case. The case has been twice argued, and we can come to no other conclusion than that before indicated. We have endeavored to lay it down as the better law that sureties on these official bonds ought not to be discharged until they show knowledge on the part of the accepting officers of a state of facts which should have precluded the acceptance of the bond, be it a conditional contract between principal and surety, or an alteration of the bond as executed by the surety. That has been done in this case. Common information, without any special knowledge of the law, ought to have told these county judges that it was an improper thing to strike off the name of one of the sureties without the consent of the other sureties. The judgment is affirmed.

SHERWOOD and BARCLAY, JJ., dissent.
The other judges concur.

MCGONIGLE v. STATE. (No. 5,211.) BRENNEN v. SAME. (No. 5,207.) CAIN v. SAME. (No. 5,208.) KEARNES v. SAME. (No. 5,210.) FLEMING v. SAME. (No. 5,209.)

(Supreme Court of Missouri. May 12, 1890.)

Appeal from circuit court, Knox county; BEN E. TURNER, Judge.

John M. Wood, Atty. Gen., L. F. Cottey, and O. D. Jones, for the State. Blair & Marchand and G. R. Bathrope, for respondents.

PER CURIAM. Cases numbered 5,207, 5,208, 5,209, 5,210, and 5,211 are affirmed on the authority of *State v. McGonigle*, ante, 753.

CALDWELL et al. v. MESHEW.

(Supreme Court of Arkansas. May 10, 1890.)

REVIEW—WEIGHT OF EVIDENCE—VARIANCE—AMENDMENT.

1. On a contest as to the ownership of certain mortgages, it appeared that defendant was engaged in getting staves to be delivered to merchants in New Orleans at a fixed price; that he contracted with the mortgagor to build boats for that purpose, but, the latter being impecunious, it became necessary to advance money beyond the

agreed price thereof, and for this one mortgage was given, while another was executed to a third person for supplies furnished, and was bought from him by defendant; that all the money so used was furnished to defendant by the agent of said merchants; and that before it was furnished they had already exacted from defendant all the securities he could give for moneys previously advanced. Plaintiff's testimony was that defendant delivered the mortgages to said merchants as collateral security for the additional advances, but he claimed that they were abstracted from his safe by the merchant's agent, and by him delivered. *Held*, that the evidence was sufficient to establish plaintiff's claim.

2. Plaintiff, having averred that the mortgages were executed to defendant as agent for said merchants, asked leave, a year after the cause was submitted, to strike out the allegation of ownership, and amend to correspond with the proof recited. *Held*, that the ground of his claim would not thereby have been substantially changed, and the amendment should have been allowed.

Appeal from circuit court, Randolph county; J. W. BUTLER, Judge.

S. W. Williams, for appellant. *W. R. Coody*, for appellees.

HEMINGWAY, J. This is a controversy between George M. Caldwell and Thomas J. Meshew, each claiming to own two certain notes made by defendant Brown, and two mortgages given as security therefor. One note and mortgage was executed to Thomas J. Meshew, while the other was executed to Hecht, Bros & Co., and by them indorsed to him. Neither note or mortgage bears evidence of any indorsement by Meshew. Caldwell alleged in his complaint that Meshew was the agent of Avandana Bros., merchants in New Orleans, and as such obtained all the instruments, and that he afterwards delivered them to his principals; that they (Avandana Bros.) had transferred them, without writing, to Henderson, and he had transferred them for value to Caldwell. The complaint further stated that Meshew had, at his own expense, redeemed the lands from tax-sale, and paid the taxes for several subsequent years. It sought to fix the amount due Meshew for taxes, and to foreclose the mortgages subject thereto. Meshew denied that he was the agent of Avandana Bros., and that he obtained the notes as such. He alleged that he took the notes in the ordinary course of business, as his own property; that they were abstracted from a safe in which he kept his papers by one Blanco, who delivered them to Avandana Bros., that he had never parted with his right to the instruments; and he asked a lien for taxes as set out above, and a foreclosure of the mortgage. Other parties answered, whose pleading it is not essential to notice.

A great deal of evidence was taken, and the cause was submitted. After its submission, Caldwell asked leave of the court to amend his complaint by striking out that part of it which alleged that Meshew was the agent of Avandana Bros., and as such obtained the notes and mortgages; and to substitute in lieu thereof the allegation that Blanco, as agent of Avandana Bros., advanced to Meshew the money by means of

which he obtained them, and that Meshew sold, transferred, and delivered them to Avandana Bros., for the money so advanced by their agent. The motion to amend was resisted by Meshew for the reasons (1) that it came one year after the cause had been submitted; (2) that the amendment was inconsistent with the original complaint; (3) that it substituted a new issue after all the proof had been taken, and some of the witnesses had died; and (4) that it was supported by no affidavit for its necessity. The court refused to permit the amendment to be made, and found in favor of Meshew as to the ownership of the instruments in controversy.

If there was no error in refusing to allow the appellant to amend his complaint, there was none in the final determination of the other matters. Meshew was not the agent of Avandana Bros., and there was no proof tending to establish such a relation. He was engaged in getting staves which they had agreed to purchase from him; the terms of sale were stipulated; and they agreed to advance him money to carry on his business. He engaged to deliver the staves in New Orleans, and it thereby became necessary for him to obtain boats for their transportation. He contracted with Brown, the maker of the notes, for the boats needed, Brown agreeing to furnish them at a stipulated price. While the boats were in process of construction, Brown was taken sick, and lacked the pecuniary means needed to complete them. Avandana Bros. had then made large advances to Meshew, which they expected to be paid by shipment of staves; but the staves could not be shipped without boats, and so they were induced to advance Meshew the money which he advanced Brown, to enable him to complete the boats. When the boats were completed, Meshew had advanced Brown the amount of one note in money, beyond the price he had agreed to pay. Brown had obtained from Hecht, Bros. & Co. the amount of the other note in supplies. The two notes and mortgages were executed to secure the amounts above, and Blanco, the agent of Avandana Bros., furnished Meshew the money to take up the Hecht note. The amount already advanced to Meshew was largely in excess of that originally contemplated, and the advance was then made in order to collect those that preceded it. The appellant contends, and the evidence on his part tends to prove, that the notes were immediately delivered to Blanco, as agent, to secure the advances made by his principals, to whom he afterwards delivered them. But Meshew contends that the notes were delivered to and held by him until they were taken from among his papers, without his knowledge, by Blanco; that, although Avandana Bros. advanced the money with which he procured them, it was a loan to him, and that the instruments were in no manner pledges for the loan. The parties directed their evidence to the elucidation of the difference, as above set out. The testimony of every person who ap-

peared to know anything of the matter was taken, and the decided preponderance of the evidence favors the contention of the appellant. The circumstances of the parties support the same theory. Avandana Bros. had exacted all the security that Meshew could give for the original advance, and when they had exceeded it, and were required to advance a further sum, it is unreasonable to suppose that they would have waived any security that was obtainable. Besides, Meshew's conduct in permitting Avandana Bros. to hold the notes for a considerable time was not consistent with his contention. That was the state of the case when leave to amend was asked. The amendment asked did not change the plaintiff's claim, for in either event he claimed the notes and mortgages, and the statute provides that the court may at any time, in furtherance of justice, and on such terms as may be proper, amend any pleadings when the amendment does not change substantially the claim or defense by conforming the pleadings to the facts proved. The amendment may be made at any time in furtherance of justice, and the fact that the cause has been submitted for a year is not sufficient ground to justify the court in refusing to direct it made. It shall not change substantially the claim or defense, but may change the issues. The right is not limited to the introduction of matters consistent with all the allegations of the original pleadings, provided they be consistent with the original claim or defense. No affidavit is necessary to authorize the amendment, when it appears from the case, as then before the court, that it is material and in furtherance of justice. It should never be permitted to the defeat of justice. Although a fact may appear by the evidence, still if it was not in issue, and the proof was not directed to it, the pleadings should not be amended to conform to it after the submission of the cause. To permit this would be to take as proved a matter which the parties had not considered in taking proof, and which might appear differently if they had directed the proof to it; but no such injustice can be done, when the parties have contested the matter, and directed the proof to it. *Radcliffe v. Scruggs*, 46 Ark. 96.

In this case it was obvious that the ends of justice required the amendment. Both parties directed their proof to the matter set out in the amendment, and Meshew took the depositions of three witnesses pertinent to no other issue. So far as could be ascertained from the evidence, it embraced, on that point, the testimony of every person who had any cognizance of the matter, and it was not suggested that any person knew anything material to it whose testimony had not been taken. The evidence was pertinent to the issues, with the amendment made, and was not pertinent otherwise. We think the amendment should have been made conforming the complaint to the proof, and we will treat the cause as if it had been done. The court, having refused

to direct the amendment, made no findings upon the facts pertinent to it. We are satisfied that Meshew transferred and delivered the notes and mortgages to Avandana Bros. as collateral security for advances made to him, and it does not appear that the debt for advances has been paid. Although they might not be able to sell the collateral so as to bar the pledgeor's right of redemption, they could assign it, and the assignee would acquire their right to bring suit on it. Caldwell, having acquired it by assignment from them, is entitled to judgment on the notes, and to a foreclosure of the mortgages against Brown, subject to the paramount lien of Meshew for the taxes. He was not a volunteer in the payment of taxes, for he had an equitable interest in the notes and mortgages. The judgment will be reversed, and the cause remanded, with instructions to the circuit court to charge a first lien on the land in favor of Meshew, for the amount paid by him in redeeming the land and for the taxes, in accordance with the prior judgment, and to render judgment in favor of Caldwell on the notes and mortgages, and for proceedings thereunder according to law.

HALPERN v. BURGESS.

(*Supreme Court of Arkansas*. April 19, 1890.)

JURISDICTION OF JUSTICE OF THE PEACE—TRESPASS.

A justice of the peace has no jurisdiction to try a suit for trespass on real estate.

Appeal from circuit court, Monroe county; M. T. SANDERS, Judge.

Action by John Burgess, in the court of a justice of the peace, against Isaac Halpern, for damage to his crop from a trespass by defendant's cattle. Judgment was rendered for plaintiff, and defendant appealed. Judgment for plaintiff was rendered in the circuit court, and defendant again appealed.

Price & Green, for appellant.

PER CURIAM. A justice of the peace has no jurisdiction to try a suit for trespass on real estate. Reverse the judgment, and dismiss the cause.

BUFFINGTON v. SIPE.

(*Supreme Court of Arkansas*. May 10, 1890.)

JURISDICTION OF JUSTICE—EFFECT OF APPEARANCE.

Where plaintiff filed with a justice a note indorsed "Paid," upon which he appeared as a co-maker with defendant, and an entry was made on the docket that plaintiff claimed he was surety for defendant, and had paid the note for him, and afterwards defendant obtained a change of venue, filed this record before a second justice, and entered his appearance, he cannot question the jurisdiction of the second justice.

Appeal from circuit court, Logan county; JOHN S. LITTLE, Judge.

J. H. Evans, for appellant.

COCKRILL, C. J. It is unnecessary to inquire whether the action was legally begun by causing a summons to issue for the de-

fendant upon filing with the justice only a note indorsed "Paid," upon which the plaintiff appeared as co-maker with the defendant. The justice, before or after issuing the summons, entered a written statement upon his docket to the effect that the plaintiff claimed that he was surety for the defendant on the note filed; that he had paid the sum of \$31 for him, and brought the suit to recover that amount. Thereafter the defendant obtained a change of venue, filed this record before a second justice, and entered his appearance to the cause. There is no room to contend that the second justice, who rendered the judgment, had not jurisdiction of a cause, plainly stated in writing, which was cognizable by him, as well as of the person of the defendant. The appellant's contention, therefore, fails, and the judgment is affirmed.

PEYTON v. HOT SPRING CO.

(*Supreme Court of Arkansas.* May 10, 1890.)

ANNULLED LIQUOR LICENSE—VOLUNTARY PAYMENT—RECOVERY.

The sum paid for a liquor license for one year cannot be recovered from the state because an order prohibiting the sale of liquor in the territory covered by the license is made immediately after it was granted, on the application of a majority of the inhabitants, under Mansf. Dig. Ark. § 4524, providing that the sale of any liquor within three miles of a church may be prohibited on such application.

Appeal from circuit court, Hot Spring county; J. B. WOOD, Judge.

Cohn & Cohn, for appellant.

HUGHES, J. On the 2d day of January, 1888, a license was granted appellant by the county court of Hot Spring county to sell liquors in less quantities than a quart. On the same day a majority of the adult inhabitants living within three miles of the M. E. Church South, at Donaldson, in said county, presented a petition to the county court of said county, asking that the sale or giving away of liquors within three miles of said church be prohibited by order of said court, as contemplated by the "three-mile law." The prayer of the petitioners was denied, and upon appeal to the circuit court, taken on the 3d January, 1888, the prayer of the petition for prohibition was sustained; and it was adjudged by the circuit court that it should thereafter be unlawful for any one to sell or give away any liquor, or compounds thereof, within the territory covered by appellant's license, and the county court was required to enter such judgment as the judgment of that court. Appellant and one Wilson, who had resisted the petition for prohibition, were adjudged to pay the costs. They prayed, but did not prosecute, an appeal from said judgment. After said order was entered by the county court, appellant abandoned the sale of liquor under the license, and made application by petition to the county court to recover the sum paid by him for his license; and, this being denied, he appealed to the circuit

court, which also refused his petition, whereupon, after the motion for new trial was overruled, he appealed to this court.

The payment of the license tax was legal when made by appellant, and was voluntary on his part. If the effect of the judgment of the circuit court upon the petition for prohibition did not annul and revoke his license, he was not injured, and could not recover the amount paid therefor. If his license were annulled and revoked by said judgment, there is no authority in the statute for apportioning the amount of the license tax according to the time that appellant sold under the license. When the license was granted and accepted by him the law authorized the county court, upon proper petition, to do what was afterwards done; and he is presumed to have known this, and to have taken the risk of this being done. Under the provisions of the statute, license may be obtained to sell liquors for a period less than a year, but the licensee must pay the license tax for the full year. Sections 4508, 4510, 4514, Mansf. Dig. The judgment of the circuit court is affirmed.

GREER v. CRITZ.

(*Supreme Court of Arkansas.* May 10, 1890.)

CONVICT LABOR—VOID CONTRACT—QUANTUM MERUIT.

A contract made by the county judge in vacation for the hire of a county convict is void under Act March 22, 1881, (Mansf. Dig. Ark. § 1226,) which gives such power to the county court only; and the convict can recover of the hirer the value of his services.

Appeal from circuit court, Prairie county; M. T. SANDERS, Judge.

W. R. Coody, for appellant.

HUGHES, J. On the 3d of January, 1888, the appellee sued appellant in the White county circuit court for \$163.75, for work and labor done by appellee for appellant. Appellant answered, denied his indebtedness to appellee, and the cause, upon the application of appellant, was removed to Prairie county. September 5, 1888, appellee amended his complaint, claiming \$469.57 for his work and labor. Appellant answered the amended complaint, and denied any indebtedness to appellee, and alleged that appellee was convicted by a justice of the peace of White county of the crime of petit larceny, and that, under a contract with the county judge of said county, appellee was delivered to him to work out his fine and imprisonment at 50 cents per day; that said convict worked for appellant till the 3d of August, 1887, when they had a full settlement, and appellee was paid for the time he worked after he had worked out his fine and imprisonment as a convict, and that he gave a receipt in full therefor. He exhibited the contract with the county judge, and his bond for the performance thereof. Appellee demurred to appellant's answer, and the demurrer was overruled. The cause was submitted to a jury

upon the evidence, and a verdict was returned for the plaintiff in the sum of \$190, and judgment was rendered thereon for that amount. Appellant moved for a new trial on the grounds (1) that the court erred in excluding as evidence the contract of the appellant with the county judge for the hire of the plaintiff; (2) because the court erred in permitting plaintiff to testify as a witness; (3) because the court erred in its instructions to the jury; (4) because the verdict and judgment were contrary to the law and the evidence. The motion was overruled, and the cause is here on appeal. The instructions to the jury were: (1) That, if the plaintiff worked for defendant under the directions of himself or agent, he is entitled to pay for his services; (2) that, although convicted of petit larceny, and adjudged to fine and imprisonment in the jail at the time, the county judge had no authority to make a contract with the defendant for the service of the plaintiff, or to hire him to work for the defendant as a convict; (3) that the receipt given by the plaintiff is open to explanation, and binding on the plaintiff only so far as he understood it at the time; (4) that, if the jury find for the plaintiff, they may deduct the amount of clothing furnished." To these instructions the defendant at the time excepted.

The contention of appellee is that the county judge, in vacation of the county court, had no power to make the contract of hiring out the county convicts. It is provided by the act of March 22, 1881, (Mansf. Dig. Ark. § 1226,) that the county court shall let the contract to keep and work the county convicts to some suitable person or persons, and shall have full and plenary powers to carry out the provisions of the act. The subsequent provisions of this act, with the amendments of the act of March 13, 1883, place the management and control and the hiring of county convicts under the jurisdiction of the county courts; and there is no power or authority given by it to the judge of the county court, in vacation of said court, to make contracts for that purpose, which can be done alone by the order of the court itself. If the judge of the county court, in vacation, had the power to make such contracts under the act of March 10, 1877, as contended by appellant, the latter act, which seems to cover the whole subject-matter of the management, control, and hiring of county convicts, must prevail. Finding no error, the judgment is affirmed.

MARTIN v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Arkansas. May 10, 1890.)

BILL OF EXCEPTIONS—AMENDMENT—CERTIORARI.

1. A bill of exceptions, when signed and filed, becomes part of the record, and may be amended like any other record; and where a bill showed on its face that the judge intended to cause certain written charges given, and others refused, to be inserted therein, and this, through mistake, was not done, it was error, on petition to amend the bill, to exclude parol evidence to identify such written

charges, on the ground that the time for filing a bill of exceptions had elapsed.

2. A writ of *certiorari* to bring up a bill of exceptions will not be quashed for delay in suing it out, when the return thereto shows that the bill certified does not conform to that originally filed.

Appeal from circuit court, Pulaski county; J. W. MARTIN, Judge.

The material parts of the bill of exceptions upon which this question was tried were as follows: "Be it remembered that on this day the hearing of the petition for amending the bill of exceptions herein came on, and, upon presentation of the same, said petitioner presented to the court sundry written instructions, which purport to have been given by the court on the trial of this cause, said written instructions being signed for the purpose of identification by the judge of this court at the time said bill was submitted to him and signed, this being during the vacation of the Pulaski circuit court. Said petitioner also offered parol evidence to prove to the court that the said instructions were the same as were written out and used on the trial of this cause; that they had been deposited with the clerk of this court at the time that the bill of exceptions was given him to be filed; but that they were not marked, 'Filed,' but had been kept with the papers in the case ever since. (The judge of the court announced from the bench that he was satisfied that the written instructions thus produced were those which were used on the trial of this cause, and were the same which were referred to in the bill of exceptions.) But the court, having heard arguments of counsel, was of the opinion that it had no power to permit the said amendment to be made after the lapse of the time during which, by law, the said bill of exceptions alone could be filed. And the court, therefore, refused to hear said testimony and rejected said petition; to which rulings the petitioner at the time excepted, and time was given during the present term during which said petitioner may file a bill of exceptions.

U. M. & G. B. Rose, for appellant. Dodge & Johnson, for appellee.

COCKRILL, C. J. A bill of exceptions, when signed by the judge and filed by the clerk, becomes a part of the record of the cause in which it is taken, and, like any other part of the record, may at a subsequent term be amended by the court on petition and notice to the adverse party, but cannot be legally altered in any manner by the judge. The right to amend is governed by the same rules which obtain in the amendment of any other record. In those states where the rule exists of allowing no amendment of a record, save where there is a record or a memorial to amend by, the bill of exceptions cannot be amended on any other proof. *Dougherty v. People*, 118 Ill. 160, 8 N. E. Rep. 673; 4 Chit. Pr. 13. But all the authorities seem to concur in holding that the court in which the record is made has the same power to amend the bill of exceptions, by a *nunc pro tunc* order to cause it to speak the truth, that it has over any oth-

er part of the record. Chit. Pr., supra; Heinzen v. Lamb, 117 Ill. 552, 553, 7 N. E. Rep. 75; State v. Clark, 67 Wis. 229, 30 N. W. Rep. 122. The power was exercised by this court in the case of Freil v. State, 21 Ark. 226. In that case the bill of exceptions, as allowed by the trial judge, showed that the offense of which the appellant was convicted had been committed after the indictment was found. At a subsequent term of the court in which the cause was tried, the error was corrected by causing the bill of exceptions to recite the true date of the offense, which was prior to the return of the indictment. The opinion informs us only that the error occurred in drafting the bill of exceptions. The right to amend does not mean the power to allow a new bill of exceptions; for when the term has elapsed, and the time given for its preparation passed, no bill can be allowed, and the party who relies upon his exceptions is without remedy unless he is in position to invoke the aid of a court of chancery to grant him a new trial upon the ground of fraud, accident, or mistake in the loss of his appeal. It is not the office of an amendment to create or to originate something new, but only to perfect that which is imperfectly done. Cox v. Gress, 51 Ark. 231, 11 S. W. Rep. 416. This case does not call for a determination of the question whether matter which has been wholly omitted from a bill of exceptions can, under any circumstances, be inserted therein by amendment at a subsequent term, without showing that the judge allowing the bill had specifically directed that it be inserted in it; for it appears here that it was the intention of the judge, in allowing the bill, to cause the charge which he had given, as well as the plaintiff's rejected prayers for a charge, to be made a part of it. The reference to the charge and the rejected prayers shows that they were in writing, but the call for them is too indefinite to identify them. This, then, is a case of an ineffectual effort to carry out an expressed intent, apparent upon the face of the record itself, and it is the province of an amendment to make certain what the record now leaves uncertain, if that can be done by clear and satisfactory proof. It is not a question of power, as the trial court seems to have supposed, but only a question of the sufficiency of the proof as to what charge and rejected prayers for a charge the bill calls for. If the court, upon a trial of that issue, is convinced that the charge and rejected prayers which the bill of exceptions shows the judge intended should be inserted in it can now be identified with certainty, a *nunc pro tunc* order should be made correcting the call for them in the bill of exceptions in order that they may be certified to this court in response to a writ of *certiorari*. The practice of suing out the writ of *certiorari* for the purpose of bringing up the skeleton bill of exceptions upon which the clerk has acted in making up the record is not to be commended, except in cases where there are reasons to doubt the accuracy of the certified bill. Even in that case

it should be applied for without unreasonable delay; otherwise injustice might ensue to the adverse party by the loss of memorials, the death of the judge, or by other means. The writ may be quashed after the return, when it is made to appear that it will not serve the ends of justice. A motion has been made by the appellant in this case to quash the writ because of delay in suing it out, but the return to the *certiorari* shows that the bill as certified does not conform to that which was originally filed, and the motion should be refused for that, if for no other, reason. The court erred in refusing to hear evidence to amend the bill of exceptions, and the cause will be remanded for further proceedings.

WRENN v. GIBSON.

(Court of Appeals of Kentucky. May 10, 1890.)

PARTITION, HOW MADE.

Under Gen. St. Ky. c. 63, art. 5, § 6, providing that, when land held jointly or in common cannot be divided without materially impairing its value, the court may, on petition of one of the parties in interest, order a sale and a division of the proceeds, the court cannot order a partition by which one of the joint owners would be obliged to take less than his share of the land, with compensation from the other in money. If there cannot be a proper partition, the land must be sold, and the proceeds distributed.

Appeal from circuit court, Kenton county.

"To be officially reported."

A. C. Ellis, for appellant. W. H. Mackay, for appellee.

PRYOR, J. The appellant and the appellee owned in fee-simple a tract of land in the county of Kenton containing about 68 acres, and known as the "Latonia Springs Property." The appellee, by her petition in equity instituted in the Kenton chancery court, asked to have her interest in the land set apart or severed from the interest of the appellant. The appellant owned a greater interest than the appellee, the former owning two-thirds, and the latter one-third, of the entire tract. The appellant by his answer alleged that the land could not be divided without impairing its value, and wanted the whole land sold, and the proceeds divided. The report of the commissioner to whom the case was referred, as well as other testimony, conduced to show that the land was susceptible of division, and, while the proof is conflicting on the question, it is apparent from the testimony that a division could have been made without affecting materially the rights of the parties by lessening the value of the land. If the land cannot be divided without materially impairing its value, or the value of the plaintiff's interest therein, or the interest of others, parties to the proceeding, then the chancellor should order a sale; and, on the other hand, if the division can be had, and the parties interested desire it, a division should be directed. In this case the judgment or order of partition was proper, but the division being unequal, and the appellee receiving more than one-third of the land in

value, it was error to require the appellant to recover in money a sum sufficient to equalize the respective interests; and, if the division cannot be made without requiring a pecuniary compensation to produce this equality, the land should be sold, and not partitioned. It is true that courts of equity in the partition of land between coparceners sometimes permitted the payment of money to equalize the allotment, and this practice would now be tolerated, when it was to the interest of the heirs at law, and the money could be paid out of the fund to be distributed from the common estate; but under our statute,¹ when one tenant in common or joint tenant seeks a division, the other joint tenant may ask for a sale of the whole, on the ground that a division cannot be made without materially impairing the value of his interest, and he cannot be required either to pay or to accept money as a compensation for any part of the tract in order that a division may be had. If money will compensate for the inequality, then a division may be had in every instance, and the chancellor permitted to exercise the power of fixing the price, and passing the title from one joint owner to the other, without the consent of the parties in interest. If one joint tenant can be compelled to accept the money and part with his land, he may be compelled to pay his money, and obtain that he does not wish to own, in order that partition may be made. Under our practice, with the Code regulating the manner in which partition may be made, there is no necessity for requiring one joint tenant to pay, or the other to accept, money in lieu of land, in order to a partition. The chancellor, therefore, erred in requiring the appellant to receive less land than he was entitled to, and accept as an equivalent its value in money as fixed by the commissioner or by the terms of the judgment. For this reason the judgment is reversed and remanded, with directions to partition the land, if it can be done without materially lessening the value of the interest of the joint tenants, or either of them; and, if this cannot be done, the entire tract should be sold. As the record now stands, we see no reason why the division cannot be made.

ALLEN et al. v. PETERS et al.

(Supreme Court of Texas. April 22, 1890.)

TENANTS IN COMMON—ADVERSE POSSESSION.

Tenants in common cannot recover an entire tract of land in which they claim a certain undivided interest, where defendant shows adverse possession as to part of it against some of them.

Appeal from district court, Hood county.
Thos. T. Ewell, for appellants. Montrose, Grubbs & Heffner, for appellees.

STAYTON, C. J. This action was brought by appellees on July 27, 1886, to recover a tract of land granted to John S. and Richard Peters, in which they assert ownership of a

named undivided interest. They claim as heirs of both grantees, and Eliza Peters claims a community interest in the share of Richard Peters, who was her husband. Appellants show no title, unless by limitation; but it is urged that appellees were not entitled to recover the entire tract, even if their defense of limitation was not sustained at all. It is well settled that one tenant in common may recover an entire tract of land, as against one who shows no title, although he has alleged an undivided ownership or interest in the whole. In the course of the trial Mrs. Peters testified to the relationship between appellees and the grantees of the land, which showed community interest, and that the other appellees were heirs of both of the grantees, being children of herself and Richard Peters, who was a brother of the other grantee, who died without children. In the course of her examination, she stated that her husband made a verbal will during his last illness, in which he directed what should be done with his property; the certificate under which the land was granted being then unlocated. Her evidence was objected to on the ground that the will was evidence of the rights of the parties, and that this could not be shown by proof of heirship. There was no evidence that a valid nuncupative will was made or probated, and, in the absence of such evidence, it was proper to admit evidence to show who were the heirs of the original grantees. John S. Peters died in 1845, and Richard Peters in 1864. Each of them had six brothers and three sisters, of whom there seems to be only one brother alive. It is impossible to ascertain from the record before us that there was any impediment to the running of the statutes of limitation against any of the heirs of John S. Peters, except some of appellees, who take from him through their father. Richard Peters left three sons and three daughters. Two of the daughters married before adverse possession began, and have continued covert, and the other daughter reached majority after adverse possession began, and was single until October 28, 1879. One son became of age before adverse possession began, another at a period too recently to be affected by adverse possession, and the other died without issue before any adverse possession began; hence the operation of the statute as to his interest depends on the condition of his brothers and sisters and mother, who inherited from him. Mrs. Peters did not marry after the death of her husband, in 1864. The widow and three of the children and two grandchildren are plaintiffs, and no adverse possession affects two of these children, though all the others may be thus affected to some extent. The possession through which defendants claim commenced in 1873, and as to some parts of the land has been continuous. Appellants pleaded the statutes of limitation of ten and five years, their claim under a recorded deed beginning on July 14, 1881. The case was tried without a jury, and judgment rendered

¹ Gen. St. Ky. c. 63, art. 5, § 6.

for the plaintiffs, but we have not the conclusions of fact and law found by the court. The uncontroverted evidence shows that William Allen had been in adverse possession for more than 10 years when this action was brought, and under limitation of 10 years may be entitled to recovery 160 acres of land, as against those affected by limitation, if by conveyances made by him to other defendants he did not sever his actual possession from so much of the tract. Under the evidence he was, at least, entitled to recover to the extent of his actual possession against such of appellees as were subject to the statutes of limitation. Whether he is entitled to recover anything more under limitation based on adverse possession for five years than under the longer possession we are unable to determine. The deed under which he claims was recorded more than five years before this action was brought, but we are unable to ascertain whether by sales of parts of the land to other defendants he has not cut off the possession of part, which he otherwise would have had. The evidence offered by the other defendants is not such as to enable us to ascertain whether their possession has been such, and under such circumstances, as to entitle them to recover under adverse possession of 5 years, and they have no rights under adverse possession through Allen for 10 years, other than such as they may have through or with him, and this, as to all, cannot exceed 160 acres. The evidence showing that appellees were not entitled to recover all the land sued for, and being unable to ascertain, from the record before us, what they are entitled to recover, the judgment will be reversed, and the cause remanded. It is so ordered.

AYERS v. HARRIS et al.

(Supreme Court of Texas. April 18, 1890.)

BOUNDARIES—EVIDENCE—TRIAL—INSTRUCTIONS.

1. In trespass to try title the disputed question was as to the location of one line of the M. grant. The order for the survey was made in September, 1833, and the title was issued to M. in October, 1833. The surveyor to whom the order was directed testified that he made the survey "in 1833," that he kept a field-book of the lines then run, and that he was never on the land afterwards. The commissioner of the land-office testified that the original field-notes of the surveyor were in the archives of the land-office, and that the original field-notes of the M. survey were attached to his deposition, marked "Exhibit A." Exhibit A showed a survey made in April, 1833, for one S., and the description in the survey was the same as the description in the grant to M., except with regard to the number and distances of some of the objects called for. *Held*, that the survey mentioned in the field-notes as made for S. was a survey of the same land as that granted to M., and that the surveyor, having made the survey for S. but a few months before, adopted it when ordered to make a survey for M., without making a resurvey.

2. A photographic copy of the field-notes of a survey is admissible as bearing on the question whether a certain line was actually measured.

3. Error cannot be predicated on the improper admission of a deposition, where another deposi-

tion of the same witness states all the material facts contained in the deposition objected to.

4. There is no error in refusing to charge as requested where the same proposition has already been substantially charged.

5. It is not prejudicial error to charge that, if the jury can fix the lines of the survey in harmony with its calls and known corners, then the fact that the lines would include more than the area called for in the grant becomes immaterial, and the extent of the area should not be considered "further than as a circumstance to aid you, in connection with all the evidence in the case, in following the footsteps of the original surveyor, and fixing the true boundaries of said grant," where the lines as claimed by plaintiff include more than was intended to be conveyed by the grant.

6. Where both parties in trespass to try title have introduced their testimony and closed evidence on behalf of plaintiff that trees were marked on a certain line of the survey beyond the point claimed by defendants as a corner, and that the marked line extended to the point claimed by plaintiff as the corner, is not in rebuttal, within Rev. St. Tex. art. 1297, subd. 9, providing that, after the parties have introduced their evidence, they "shall then be confined to rebutting testimony on each side."

Appeal from district court, Bell county.

C. L. Cleveland, for appellant. Goodrich & Clarkson and A. J. Harris, for appellees.

HENRY, J. This suit was brought by the appellant to recover of the defendants the land described in his petition, originally granted by the Mexican government to Maximo Moreno as 11 leagues, situated in Bell county, of which appellant alleges he is the owner. The appellees claimed title in hostility to the boundaries of the Moreno grant, as alleged by the appellant; and, in addition to their pleas of not guilty, they set forth specifically the several tracts by them claimed, respectively, by virtue of locations, surveys, and patents junior to the Moreno grant, and asked affirmative relief respectively. Before the trial of the cause in the court below, an agreement was made by the appellant and appellees which eliminated from the controversy all questions regarding the validity of the title or titles relied upon on both sides, and it was stipulated that the appellant had a complete chain of title to the Moreno grant, and that the several appellees had title to the several tracts of land claimed by them, respectively; and it was agreed by the parties that the question between the plaintiff (appellant) and the defendants (appellees) was as to the position and locality of the north boundary line of the Moreno grant. Upon the verdict of a jury, judgment was rendered for the defendants.

The description of the land in the title is as follows: "The land surveyed by me for the citizen Maximo Moreno is situated on the left margin of the river San Andreas, below the point where the creek called 'Lampasas' enters said river, on its opposite margin; and it has the lines, limits, boundaries; and landmarks as follows, to-wit: Beginning the survey at a pecan fronting the mouth of said creek, which pecan served as a landmark for the first corner, and from which, 14 *varas* to the north, 59 west, there is a hackberry 24 inches in diameter; and 15 *varas* to the

S., 84 west, there is an elm 12 inches in diameter. A line was run to the north, 22 east, 22,960 *varas*; planted a stake in the prairie for the second [N. W.] corner; thence another line was run to the south, 70 east; at 8,000 *varas*, crossed a branch of the creek called 'Cow Creek;' at 10,600 *varas* crossed the principal branch of said creek; at 12,580 *varas*, two small hackberries serve as landmarks for the third [N. E.] corner; thence another line was run to the south, 20 west; at 3,520 *varas*, crossed the said Cow creek, at 26,400 *varas*, to a tree on the aforesaid margin of the river San Andreas, which tree is called 'box alder,' from which, 7 *varas* to the south, 28 west, there is a cottonwood with two trunks, and 16 *varas* to the south, 11 east, there is an elm 15 inches in diameter; thence following the river up by its meanders to the beginning, and comprising a plain area of eleven leagues of land, or 275,000,000 square *varas*." The order for the survey of the Maximo Moreno grant was made at San Felipe de Austin on the 28th day of September, 1833. It was directed to F. W. Johnson as surveyor. The date of the survey does not appear in Johnson's report of the survey. The title was issued at San Felipe de Austin on the 8th day of October, 1833.

The deposition of F. W. Johnson was taken and read by plaintiff. He testified that he made the survey in 1833, but did not state at what period of the year he made it; that he was never on the land subsequent to the date of his survey except when he was traveling through the county; and that he kept a field-book of the lines he ran for the Moreno survey, and noted in it the creeks crossed, and other prominent objects, and that it was then in the general land-office at Austin. William Duty testified that he assisted Johnson in making the survey, and that it was made in April, 1833. W. C. Walsh, commissioner, testified that "there is in the archives of the general land-office a book known as 'Book C of Original English Field-Notes of Surveys Made in the State of Coahuila and Texas,' among which are the surveys of large tracts on the San Andreas or Little river. This book is also known as 'Johnson's Field-Book.' I know it from official tradition. The original field-notes of the survey of Maximo Moreno's eleven-league tract exist in the archives of the general land-office, and are under my custody. They are contained in Book C, above described, but I have had no opportunity of identifying them as Johnson's work. I do not personally know when the field-notes known as 'Johnson's Work,' and contained in Book C, were deposited in the general land-office, nor is there any official statement establishing the date of that deposit; but I understand that the deposit was made at the same time as that of the titles issued by the alcalde of San Felipe de Austin,—that is, at the opening of the general land-office. They

were bound in book form in 1846. The original field-notes of the Maximo Moreno tract are hereto attached, marked 'Exhibit A.' A photographic copy of pages 172 and 178 of Book C is hereto attached. I believe that the words, 'N. 22, E. 22, 960,' found in the first call, were written by the same hand that wrote the body of the field-notes. They cover a blank left vacant when the body of the field-notes was written, and appear to have been written with a finer pen than that used for writing the body of the field-notes." X. B. De Bray, clerk and translator of the general land-office, gave substantially the same testimony as that of the witness Walsh, and also stated that he knew F. W. Johnson, and had heard him designate Book C as his official field-book, and say that the field-notes contained in it were in his own handwriting. This witness also testified that the original English field-notes of the Maximo Moreno 11-league tract were in his custody, under the commissioner, contained in Book C, and referred to as Exhibit A, and the photographic copies of them attached to the deposition of Walsh, as correct.

Exhibit A, attached to the depositions, reads as follows:

Sunday, 21st April, 1833, surveyed for Samuel Sawyer 11 leagues of land on the N. side of San Andreas, opposite the mouth of Lampasas..... 173
 Sunday, 21st April, 1833. At a pecan 18 in. diam., bearing N., 59 W., 14.8 *vs.* from a hackberry 24 in., and S., 84 W., 153 *vs.*, from an elm 12 in.; thence N., 23 E., 23,960 *vs.*, to the corner of a stake in the prairie; thence S., 70 E., 1,690 *vs.*, to a branch of Cow creek, 4,600 *vs.*, to 2nd branch, 8,000 *vs.*, to 3d branch, 11,000 *vs.*, to Cow creek, 12,580 *vs.*, to the corner, two small hackberries; thence S., 20 W., 3,520 *vs.*, to Cow creek, 7,500, N. W. corner of 2nd tract, a stake, bearing N. 77,293.8 *vs.*, from a hackberry 8 in., to Spring branch, 23,640 *vs.*, 23,700 to bottom prairie, 24,960 crossed same branch to the corner, a box..... 174
 Box elder, 21st April, 1833, 2,640 *vs.*, bearing S., 48 W., 7.2 *vs.*, from a forked cottonwood 48 in., and S., 11 E., 16.4 *vs.*, from an elm 15 in..... —

A photographic copy of the same instrument was attached as an exhibit to the depositions.

The first assignment of error is as follows: "The court erred in permitting to be read in evidence by defendants the photograph copy of field-notes made for Samuel Sawyer." The second error assigned is: "The court erred in permitting to be read in evidence, over the objections of the plaintiff, the documents [purporting] to be a certified copy of field-notes, from Book C, of an eleven-league survey made for Samuel Sawyer." The eighth error assigned is as follows: "The court erred in refusing to give charge No. 4, as asked for by the plaintiff, reading as follows: 'The jury are charged that the field-notes which entered into and form part of the title originally made to Maximo Moreno by the Mexican government in 1833 are those which are to control them in their findings in

respect to the work of the original surveyor in the field; that they will not consider any field-notes of a survey purporting to have been made for one Sawyer unless the evidence should show that the field-notes last mentioned entered into, and were incorporated in, the grant made and issued to Moreno on the application of his attorney, T. J. Harrel. And, unless the proof shows that the Sawyer field-notes formed part of the title issued to Moreno, in evidence, then they will disregard them, and look only to the field-notes contained in the grant issued to Moreno upon the application of his attorney, T. J. Harrel."

The evidence, we think, places it beyond doubt that the survey mentioned in the field-book as made for Samuel Sawyer was a survey of the same land that was titled to Maximo Moreno, and the only survey that was ever made of it. It cannot be doubted, upon this evidence, that Johnson, having made the survey for Sawyer a few months before, adopted it when ordered to make a survey for Moreno, without making a resurvey. The memorandum made by him at the time of the survey, and deposited in the general land-office at the same time that the title itself was deposited there, and carefully preserved ever since, is spoken of by its custodians, and produced, as an archive. In the case of *Cook v. Dennis*, 61 Tex. 248, a similar document was spoken of by this court as an archive, and held to be admissible in evidence. Even if it cannot strictly be held an archive of the general land-office and admissible as such, it was clearly proved in this case to be a memorandum of the survey made by the surveyor at the time the work was done; and as such, we think, it was clearly admissible to aid in proving the actual footsteps of the surveyor when making the survey. Very great difficulty existed in ascertaining where the lines of the survey were actually run. Aided by all the evidence that could be secured, and guided by all the rules recognized as being proper to be observed in such cases, repeated trials of the question have been had, with conflicting results. It is a well-recognized rule that the declarations of the surveyor may be proved under the circumstances existing at the time of the trial of this cause. Such evidence can certainly rank no higher, and cannot be so safe or satisfactory as evidence written down by the surveyor at the time. The only difference that we can see between the field-notes taken from the field-book and those contained in the title is with regard to the number and distances of some of the objects called for, and we think the notes contained in the field-book could not have had any other tendency than to aid in showing where the north line of the Moreno survey was actually placed by the surveyor.

The photographic copy was admissible for what it was worth on the question as to whether the west line of the survey was actually measured. The charge requested and

refused would have tended to destroy the effect of the evidence. We conclude that the court did not err either in admitting the evidence or in refusing the charge.

The surveyor, F. W. Johnson, testified in his deposition that the north and west lines of the survey were actually measured. On cross-examination he testified as follows: "I testified by deposition in the case of *David Ayers v. Thomas Lancaster*, then pending in the district court of Bell county, as to the order in which the Maximo Moreno survey was originally run by me in making said survey; and I then testified in said cause that I commenced the survey in the S. E. or lower river corner, and first run the east boundary line northwardly from this S. E. corner, and measured and marked it, and established the N. E. corner, and that I next ran the northern boundary line westwardly from the N. E. corner, and that the western boundary line was then run southwardly, if run at all, from the N. W. corner to the river, but that I was under the impression that the north boundary line was never run, but left open; but I then testified under a misapprehension." Subsequently the defendants, over the objection of plaintiff, read in evidence the deposition of Johnson taken in the case of *Ayers v. Lancaster*, and which was as follows: "I know the survey on the San Andreas, the south-west corner of which is called for in the field-notes, opposite the Lampasas or 'Three Forks,' as they were then called. The grant, as I understood, was made to Maximo Moreno. I made the survey in the year 1838, under the authority of Williams & Austin, *empresarios*. The survey was made from the south-east corner, and thence northerly. The second or north line was run westward. The third, if run at all, was run southerly to the river, and thence with the meanderings of the river to the beginning. I am of the opinion that the upper line was not run and measured, but left open. Two of the lines, viz., the first and second, were measured, marked, and corners established. I know not what change was made by the translator of the field-notes. The survey was made as above stated, viz., beginning on the margin of the river at the S. E. C. The beginning or south-east corner, as well as the north-east corner, was marked by bearing trees; what kind of trees, I do not recollect. The north-west corner may be marked by a bearing tree or trees, or only stake. I do not recollect whether it is in the prairie or timber. If in timber, there are bearing trees. The end or north boundary line was run from the north-east corner. The north boundary line is at right angles with the first line of the survey. Why the upper line was not run at the same degree as the lower, I cannot at this time tell, unless it was left open, and subsequently found that it would cross the Leon." The court permitted the deposition to be read on the ground that it was the declaration of a deceased surveyor.

If it be conceded that, under the circumstances of this case, the evidence was inadmissible, yet, owing to the fact that the witness had stated in another deposition all of the material facts contained in the deposition objected to, we think that it must be held that no prejudice could have resulted to the plaintiff, and the error should be treated as immaterial.

The court instructed the jury that the boundaries of the grant "must be ascertained and fixed upon the ground by the description of said boundaries as contained in the title," and also that it was "the duty of the jury, in ascertaining the land surveyed, to follow the tracks of the surveyor, if possible to do so by any marks left by him, or called for in the grant, and identified by the proof; and, if these tracks cannot be found, then you should follow the course and distance called for in the field-notes." The court also gave to the jury full instructions as to the relative value of different calls in grants, and gave the following charges, which are objected to by appellant: "You are further instructed that, if the evidence does not satisfy your minds that the two hackberries said to have been found are the ones called for and marked as corner by the original surveyors as the N. E. corner of the Moreno grant, then you will, from the whole proof, under the rules of law given you in a former part of this charge, so fix the unmarked or disputed lines called for in the grant, if you should find that there are such unmarked lines, as, in your judgment, under the rules of law given you in this charge, most nearly harmonizes the calls with the known corners and marked lines; and if, from the evidence, you fix these lines so that the land claimed by the defendants is within the boundaries of the Moreno grant, then you will find for the plaintiff; otherwise, you will find for the defendants. In order to elucidate the calls of a survey, in seeking to trace it on the ground, the corner called for in the grant as the beginning corner does not control more than any other corner actually and equally ascertained. Nor are you, under such a state of facts, compelled to follow the calls of the grant in the order said calls stand in the field-notes; but you are permitted to reverse the calls, and trace the lines the other way, and you should do so whenever, by so doing, the land embraced would most nearly harmonize all the calls and objects of the grants, always bearing in mind that, whether following the calls of the grant in the order in which they stand in the field-notes, or reversing the lines, that you must follow the lines made by the footprints of the original surveyor, because it is a matter of no consequence which corner of the line or survey was first made; but the real question is, did the surveyor mark the boundaries or corners defining the land to be conveyed?" It is insisted that in lieu of said charges the court should have given the following, which were requested by plaintiff, but refused by the court: "If the testimony

does not satisfy you that the two hackberries said to have been found by Bigham in 1853 have been identified as the same which were marked by the original surveyor for the north-east corner of the Moreno survey, then, if you believe from the evidence that the western and the northern lines or back lines were run according to the field-notes, you will find for the plaintiff. If the testimony is not sufficient to identify the two hackberries mentioned in the testimony as the same called for in the grant as the true N. E. corner, as fixed and established on the ground by the original surveyor, Johnson, in 1833, and if the jury cannot fix the N. E. corner, nor the back line, by any other marks or monuments, then they will fix it by the courses and distances of the first and second lines of the survey, except that the second line should be extended so as to meet the recognized east line as marked and extended beyond the two hackberries, if the evidence should show that the eastern line was originally marked above and beyond the said hackberries." We can see no objection to the charges given by the court; and, in so far as the charges requested and refused contain correct propositions, we think their substance had been sufficiently given, and that giving them would have tended to confuse, rather than enlighten or aid, the jury. The rules of law applicable to boundaries generally, and to this grant in particular, have been expounded not less than five times by this court, and once by the supreme court of the United States,¹ and have been correspondingly charged in the trial courts. The evidence of the same witnesses, as well as of different witnesses, has been found contradictory; and the true positions of the boundaries of the grant, with all the light that can be cast upon them by the law or the evidence, remain obscure. The facts were such that the law did not permit the result to be controlled by a charge of the court. Beyond giving the jury to intelligently understand that it was their duty to ascertain the boundaries by following the footsteps of the surveyor, we think the result of the trial tends to demonstrate that the jury could not be materially aided by the charge of the court. That much and more was correctly done in this case, and we think the charges asked were correctly refused.

Appellant objects to the following charge given by the court: "If, from the proof before you, and the instructions herein given, you can fix the lines of this survey, in harmony with its calls and the known corners, then the fact, if you find such to be the fact, that said lines would include more than eleven leagues, becomes immaterial; and you will in such case not consider the extent of the area further than as a circumstance to aid you, in connection with all the evidence

¹See *Ayers v. Watson*, 5 Sup. Ct. Rep. 641; *Phillips v. Ayres*, 45 Tex. 601; *Ayers v. Harris*, 64 Tex. 290; *Ayers v. Lancaster*, Id. 805; *Scott v. Pettigrew*, 12 S. W. Rep. 161; *Lancaster v. Ayers*, Id. 168.

in the case, in following the footsteps of the original surveyor, and fixing the true boundaries of said grant." This charge is identically the same as a charge given upon a trial of this same controversy between other parties, and held by this court to be prejudicial to the party occupying the position now held by appellees. See the case of *Scott v. Pettigrew*, 72 Tex. 328, 12 S. W. Rep. 161. The opinion in that case contains this language: "We think the jury should not be instructed to fix the unmarked and undefined boundaries regardless of the fact of excess." In this case the lines of the survey as claimed by plaintiff, and even as they are left by the judgment, include a much greater area than the 11 leagues intended to be granted. The charge that the existence of such excess was "immaterial," and not to be considered further than as a "circumstance" to aid, in connection with all the evidence in the case, in following the footsteps of the original surveyor, was not prejudicial to appellant. The charge is, we think, somewhat obscure, if not contradictory. We think, however, that the jury, when taking it by itself, or in connection with other charges given them, could not have failed to understand it to mean that, if the boundaries of the survey could be ascertained, then its including more than 11 leagues would be immaterial, and not to be considered, and that the only use they could make of the area would be as a circumstance to aid them in finding the true boundaries, and not as evidence authorizing them to vary from or disregard the boundaries as shown by other proper evidence.

The remaining assignments of error, and statements to support them, are as follows: "The court erred in excluding evidence offered by the plaintiff to show that there were trees marked with old blazes on the east line of the Maximo Moreno survey, above and beyond the point claimed by the defendants as the north-east corner of the grant, and that said blazed and marked line extended on its course to the point as claimed by the plaintiff as the north-east corner of said Moreno grant, as will appear in plaintiff's bill of exceptions on that subject, No. 8. The bill of exceptions shows that on the trial of the cause, after the plaintiff had introduced his testimony in chief, and the defendants had introduced their evidence, consisting of depositions, documents, and the oral testimony of S. W. Bigham and John Marshall, and closed, the plaintiff in rebuttal then offered to prove, by the witnesses David Moore, L. Moore, Webb Moore, Pat Bigham, F. H. Ayres, and J. W. Turner, a practical surveyor, that in 1881 they were on the east line of the Maximo Moreno grant, for the purpose of an examination thereof; that they found the said line marked with old blazes, extending from the south-east corner thereof, on its right course, up to where S. W. Bigham and John Marshall said the two hackberries stood, as mentioned in their testimony, and that the blazes were found extending above and beyond the two

hackberries for a distance of about 4,000 *varas*, on the right course of the line, to the point of its intersection with the north or back line, as that line would be fixed if run S., 70 E., from the north-west corner, as the north-west corner would be fixed by its course and distance, according to the field-notes of the grant; that the blazes along the east line, which extended above and beyond the two hackberries, were apparently as old as those found below the said hackberries. At the point of intersection was found fallen and decayed hackberry timbers and hackberry stumps. And plaintiff further offered to prove by witness Stephens that he knew the location of the east line of the Maximo Moreno grant; that he was on it in 1859, and traced it to a point about three-fourths of a mile above the point where it was said S. W. Bigham had found the two small hackberries; that said line, for said distance above said point, was marked by blazes, and had the appearance then of being an old line. Plaintiff further offered to prove by witness Lemley that in 1867 he saw, on the course of the east line of the Moreno grant, about three-fourths of a mile above the corner known as the 'Bigham Hackberry Corner,' a large ash tree, having on it a blaze which then had the appearance of an old blaze, the stump of which tree is now (1886) standing on the east line of the Moreno grant, extended beyond said Bigham corner. To the introduction of which evidence the defendants objected that, under the pleadings in this cause, this is evidence in chief, is not in rebuttal of any new issue presented by the testimony of defendants, and because (2) it proposes a reopening of the entire [case,] and defendants would have a right to again go into the testimony at large; which objections were sustained by the court, and the testimony excluded. The court erred in refusing to set aside the verdict, and should have sustained the motion of the plaintiff for a new trial; the verdict being contrary to the evidence, in this: that the evidence of Duty showed * * * that in the year 1881, in tracing the eastern line on its course, from its point of intersection with the north or back line, as claimed by plaintiff, he saw several trees marked with old blazes, above or north of the hackberries, along the course of said eastern line, extending from the hackberries, sometimes called the 'Bigham' or 'McMillan' corner, being the same hackberries mentioned by the witnesses Bigham and Marshall, and there was no evidence countervailing the effect which should have been given to the testimony of said Duty, who also testified that the survey was made by the original surveyor by beginning at the S. W. corner, and actually running the lines according to the calls for courses as contained in the field-notes, as did also Johnson testify as to the same way of making the Moreno survey; and there was no evidence to the contrary."

We think that the last assignment sufficiently answers the preceding one. In the

case of *Markham v. Carothers*, 47 Tex. 27, this court quoted with approbation the following extract from Greenleaf: "In some of the states the party is only required to make a *prima facie* case in the opening, and may reserve confirmatory proof in support of the very points made in the opening till he finds on what points his opening case is attacked, and then fortify it upon those points." See *Mahan v. Wolf*, 61 Tex. 489. The case of *Markham v. Carothers* was decided in 1877. Since then the following provisions have been incorporated into the law: Rev. St. art. 1297, subd. 5: "Such party [the one upon whom rests the burden of proof on the whole case under the pleadings] shall then introduce his evidence. * * * (7) He [the adverse party] shall then introduce his evidence. * * * (9) The parties shall then be confined to rebutting testimony on each side." Under this statute, we think that, if the defendants had offered any evidence disputing the testimony of Duty, or negating the existence of the blazed line beyond the hackberry corner, the excluded evidence, notwithstanding it was of the same character as that first introduced by plaintiff, and proper to be introduced in support of the issues made by his own pleadings, ought to have been admitted, and its exclusion would have required a reversal of the case. But when plaintiff had, as he now contends, made the desired proof by one witness, and there being, as we find and he contends, no evidence to the contrary, there was nothing for him to rebut, and this evidence, if admitted, would have been but cumulative; and, as such, it was not only within the discretion of the court to refuse it, but it was its duty to do so. We find no error in the proceedings, and the judgment is affirmed.

CURRY v. STATE.

(Court of Appeals of Texas. April 19, 1890.)

INTOXICATING LIQUORS—SALES WITHOUT LICENSE.

Pen. Code Tex. art. 110, provides that "any person who shall pursue or follow any occupation, calling, or profession, or do any act taxed by law, without first obtaining a license therefor, shall be fined," etc. Held that, in a district where local option had been declared, but was void for defect in the proceedings, one who tendered the amount of the tax due for selling liquors and demanded a license, which was refused, was punishable for selling liquors without a license.

Appeal from county court, Dallas county; E. G. BOWER, Judge.

Kearby, McCoy & Hater, for appellant.
Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. In this case, appellant was convicted for engaging in the occupation of selling spirituous liquors in quantities less than a quart without first having obtained a license therefor. The prosecution was under article 110 of the Penal Code, which provides that "any person who shall pursue or follow any occupation, calling, or profession, or do any act, taxed by law, without first obtaining

a license therefor, shall be fined in any sum not less than the amount of the taxes so due, and not more than double that sum." The obtaining the license is an absolute prerequisite to the pursuit of the occupation. There can be no excuse or justification in law where the occupation is pursued without first obtaining such license. He is liable to prosecution, and to conviction, who without the license pursues the occupation, unless, after prosecution is instituted and before conviction, he pays the tax and costs of prosecution, and procures the license, and thereby bars the conviction. Pen. Code, art. 112.

This is a companion case to that of *Curry v. State*, ante, 752, (just decided.) The people of Lancaster precinct, Dallas county, had attempted, as we have seen, to adopt local option. The commissioners' court had declared its adoption. Appellant sold spirituous liquors within the prohibited district after local option was declared adopted, and without having obtained a license to pursue such occupation. After local option had been declared adopted by the commissioners' court, he endeavored to procure a license from the collector of taxes to pursue the occupation of a retail liquor dealer in said district, and tendered to said collector the amount of taxes due on said occupation, but said collector refused to receive said taxes, and refused him his license, because local option had been declared adopted, and was in force in said district. We have seen in the other case that local option had not been legally adopted, and was not legally in operation, in the district. This being the case, the general laws had never been suspended, but were in force, and the defendant could have legally pursued the occupation if he could have obtained a license to do so. He contends that it was no fault of his that he did not obtain his license, but the fault of the collector, and that, having done all he could do to obtain said license, and having failed, he should not be punished for his failure. His position has some plausibility, but no real soundness. He could in no state of case pursue the occupation legally without license. An error of judgment, or even a refusal to issue the license on the part of the officer from mere willful caprice, or arbitrarily, or without any reason whatsoever, could not justify or excuse him for violating the plain letter of the law, which required the license as a prerequisite to the pursuit of the occupation, and denounced a penalty upon the pursuit without the license. We have found no reversible error in the record, and the judgment is affirmed.

FISHER v. STATE.

(Court of Appeals of Texas. April 23, 1890.)

MURDER—EVIDENCE—REMARKS OF COUNSEL.

Defendant had a slight quarrel with her supposed husband, after which she got into bed with another woman. Her husband told her to get up and make his bed, and, upon her refusal, tried to

pull her out, whereupon she stabbed him, from the effects of which he died. *Held* sufficient evidence to support a conviction of murder in the second degree.

Appeal from district court, Waller county; W. H. BURKHART, Judge.

John Stewart testified for the state that he and Paralee and Ida Harris and Dick Taylor were at the house of Sam and Milly Fisher on the night of the day alleged in the indictment. Sam and Milly (this defendant) got into a play, in the course of which they bit each other. Presently the aunt of Milly entered, and remarked that Sam and Milly should be ashamed to fuss so much. The play—for it did not appear to witness to be a fight—subsided, and after a while Milly got into bed with Paralee Harris. Sam, in the course of a few minutes, told Milly to get up and make down his bed. She refused to do so, and told him that she was not going to sleep with him again. Thereupon Sam said, "I will show you," passed around the bed, seized the defendant, and attempted to draw her out of the bed. She instantly plunged a pocket-knife into his breast, from the effects of which he died within a few minutes. Paralee Harris, the only other witness who testified in the case, testified substantially as did Stewart.

Harvey & Brown, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. This conviction is for murder in the second degree. Counsel for defendant present some objections to the charge of the court; but no exceptions were reserved to the charge, nor were any additional instructions requested on the trial. While the charge may not, in all particulars, be complete and perfect, it is free, we think, from any material error,—from error calculated to operate prejudicially to the defendant.

There was no error in the remarks of the district attorney presented in defendant's bill of exceptions. He was fully warranted by the evidence in arguing that the defendant was the wife of deceased, although such relationship between them was not directly proved.

As presented to us in the statement of facts, the case was not as fully developed as it might and should have been, but still the evidence amply supports the conviction. The judgment is affirmed.

SECKER v. STATE.

(Court of Appeals of Texas. April 23, 1890.)

CRIMINAL LAW—WITNESS—HUSBAND AND WIFE.

Defendant and his wife were charged by separate informations, under Pen. Code Tex. art. 495a, with using violent, abusive language of and concerning one J. The language charged in the two informations was different, and there was nothing identifying the transactions as the same, except the date of the offenses, and the name of the injured person. *Held* that, though charged with the same statutory offense, they were not

charged with the same transaction, and it was therefore error to reject defendant's wife as an incompetent witness in his behalf.

Appeal from Dallas county court; E. G. BOWER, Judge.

W. T. Strange, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. Appellant was charged by information brought under article 495a, Pen. Code, with using violent, abusive language of and concerning one Mrs. F. C. Johnson, calculated to provoke a breach of the peace. He was charged to have used towards her the language, "You dirty bitch," and the offense was alleged to have been committed on the 4th day of May, 1889. A similar information was separately filed against Mrs. Henry Secker, wife of appellant, charging her with a like offense, also committed on the 4th day of May, 1889; but the language charged to have been used by Mrs. Henry Secker towards Mrs. F. C. Johnson was, "You dirty old slut." On the trial of this appellant he proposed to introduce his wife, Mrs. Henry Secker, as a witness in his behalf, when it was objected by the prosecution that she was an incompetent witness, because she was under prosecution for the same offense, though by a different information. This objection was sustained by the court, and the witness was not allowed to testify, to which ruling appellant duly saved a bill of exceptions. We are of opinion the court erred in the ruling. The offenses charged against the parties were not the same. The words charged against the parties were not identical, and there is nothing identifying the transactions as the same save the name of the injured party and the date of the alleged offenses. Though both parties are charged with the same statutory offense, they are not charged with the same transaction. Judgment is reversed, and cause remanded.

ARNOLD v. STATE.

(Court of Appeals of Texas. April 26, 1890.)

PROSTITUTION—EVIDENCE—REPUTATION.

1. Where the information, in general terms, charges defendant with being a vagrant, to-wit, a common prostitute, the offense must be proven by evidence of the particular facts showing it, and it is error to admit evidence of defendant's general reputation.

2. Evidence of the bad character of the women who lived near defendant's residence, and with whom she sometimes associated, is incompetent.

Appeal from Cooke county court; H. S. HOLMAN, Judge.

A. M. Thomason, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. This conviction is for being a vagrant, to-wit, a common prostitute, and the information charges the offense in general terms in the language of the statute. Over defendant's objections, the state was permitted to prove that the defendant's general reputation in the community in which she resided was that she was a common pro-

titude. It was material error to admit this testimony. Where an offense is laid generally in an indictment or information, evidence of general reputation to prove such offense is not admissible; the particular facts which constitute the offense must be proved. In this case it devolved upon the state to prove the particular facts showing that defendant was a common prostitute. This proof could not be made by evidence of her general reputation in that respect. *Whart. Crim. Ev.* (9th Ed.) § 260. It was also material error to permit the state to prove, over defendant's objections, the bad character of the women who resided in the vicinity of defendant's residence, and with whom the defendant sometimes associated. Such evidence was irrelevant and incompetent. *Holsey v. State*, 24 Tex. App. 35, 5 S. W. Rep. 523. There is no evidence in the record, except the illegal evidence above mentioned, proving, or even tending to prove, that the defendant was a common prostitute. The judgment is reversed, and the cause is remanded.

YARBROUGH v. STATE.

(Court of Appeals of Texas. April 26, 1890.)

CRIMINAL TRESPASS—EVIDENCE.

A conviction under Pen. Code Tex. art. 684, for "knowingly" causing cattle to go into the inclosed lands of another, without the latter's consent, cannot be had where it appears that defendant had permission from the former owner of the land to turn his cattle on the land, and did not know that it had recently been sold.

Appeal from Montague county court; H. HARDY, Judge.

The evidence showed that the inclosure was a pasture owned by the Eldridge family; that a small patch of growing cotton was contained in the said pasture, being located on the east side thereof; that Dr. Eldridge's step-son owned that patch of cotton until a few days before the day alleged in the indictment, when he sold the cotton to Stotts, and the Eldridge family moved away; that previous to that time, as often as he passed through the neighborhood with cattle, the defendant spent a night at the house of the Eldridges, and with the consent of the Eldridges turned his cattle into the pasture; that he reached the pasture with his cattle about dark on the day alleged in the indictment, and, having no knowledge that the Eldridges had sold the cotton growing in the patch or moved away, he turned his cattle into the pasture, as the permission accorded him allowed him to do at any time, and repaired to the house of Eldridge; that, finding the Eldridge house vacant, he went to the house of Collier to stay all night; that Collier then told him of the sale of the cotton to Stotts, and that early on the next morning he drove his stock out of the pasture. A few of the cattle were found in and driven out of the cotton.

R. D. Rugeley, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. Appellant was indicted, tried, and convicted under article 684 of the Penal Code for knowingly causing cattle to go within the inclosed land of one Sim Stotts, without the consent of the said Sim Stotts. We are of opinion that the evidence not only fails to support the conviction, but that the conviction is against the evidence. Defendant did not knowingly put his cattle in Sim Stotts' inclosure, but the evidence shows he put his cattle in the inclosure of the Eldridges, as he believed, and had every right to believe, and where he had been in the habit previously of putting his cattle with the consent and permission of the Eldridges. Under the law, to have made out a case against this appellant, it was necessary for the state to show that he knowingly turned the cattle into said inclosure without the consent of the owner. This was not shown. A party might be guilty under the statute if he knowingly turned cattle into an inclosure when he did not know who the owner was. But this is not such a case. Defendant had the consent of the Eldridges. He believed they were still the owners. He did not know until after he had turned in the cattle that the Eldridges had sold or transferred the inclosure to Stotts, or any one else. In this state of case we cannot see how it can in reason be said that he knowingly turned his stock into the inclosure of Stotts without Stotts' consent. The evidence fails to show that appellant knowingly intended to commit the offense denounced by the statute. Because the verdict and judgment are against the evidence the judgment is reversed and cause remanded.

ENGLISH v. STATE.

(Court of Appeals of Texas. May 3, 1890.)

CRIMINAL LAW—SEPARATION OF JURORS.

Code Crim. Proc. Tex. art. 687, provides that, "after the jury has been sworn and impaneled to try any case of felony, they shall not be permitted to separate until they have returned a verdict, unless by permission of the court, with the consent of the attorneys representing the state and defendant, and in charge of an officer." Article 28 provides that "the defendant to a criminal prosecution for any offense may waive any right secured to him by law, except the right of trial by jury in a felony case." Const. Tex. art. 1, § 15, provides that "the right of trial by jury shall remain inviolate. The legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency." *Held*, in a felony case, that defendant could not waive the provision that, when the jury separated, each juror should be accompanied by a court officer.

Appeal from district court, Jones county; J. V. COCKRELL, Judge.

Davis & Woodruff, Crans & Ketfer, and C. R. Breedlove, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. Of the several errors assigned and complained of on this appeal we only propose to notice those relating to a single matter, to-wit, the separation of the jury; the others being of a character not likely to

arise upon another trial. Defendant was indicted for and put upon his trial for horse theft,—a crime which is a felony under our Code. The fifteenth section of the bill of rights (article 1 of our state constitution) declares that “the right of trial by jury shall remain inviolate,” and that “the legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.” One of the provisions of our Code of Criminal Procedure is in these words: “After the jury has been sworn and impaneled to try any case of felony, they shall not be permitted to separate until they have returned a verdict, unless by permission of the court, with the consent of the attorneys representing the state and the defendant, and in charge of an officer.” Code Crim. Proc. art. 687. On the motion for a new trial, defendant complained of the action of the court in regard to two separations of the jury, which grounds of the motion were supported by the affidavits of jurors. With regard to the first separation, the statement made by appellant is that “six jurors were qualified and accepted in said cause. Thereupon, it appearing to the court that there were no other jurors in the box from which to select and complete the jury in this cause, it ordered the sheriff to summon talesmen from which to select and complete the jury herein; and without the consent of defendant, and on its own motion, the court discharged the said six jurors already then accepted and impaneled in this cause, and allowed them to separate and released them from the charge of an officer until the following day, about 9 o'clock A. M.; during which time said six jurors separated, and were not with nor in charge of an officer without the consent of the defendant, who was then and there in custody of an officer and in jail. That said six jurors, by permission of the court, were allowed to separate and go to different parts of the town and county without the consent of the defendant.” With regard to the second separation, the statement of the appellant is as follows: “This trial began in the afternoon of February 20, 1890, the impanelling of the jury was completed on the 21st day of February, 1890, and on same day the state introduced all of its evidence in chief, and defendant introduced nearly all of his evidence; and when the hour of adjournment had come, about 6 o'clock on same day, the court permitted the jury to separate and disperse for the night without either of them being in charge of or under the control of an officer; and said jury did separate and disperse whither they would for and during said night, they, nor neither of them, during said time being in charge or under control of an officer. They so remained separated and dispersed until about 8 o'clock A. M. of the following day, during all of which time the defendant was in custody of an officer, and in jail; but said jury were separated and mixing with the prosecuting witnesses at the hotels and around town, and the horse in

controversy was kept tied where said jurors could see same.” In answer to these grounds of the motion for new trial, the learned judge makes an affidavit in which he states that “the jury who tried the cause were not discharged by the court until after the state and the defendant, by attorney and in person, had agreed to their being discharged, under instructions of the court, but that in both instances the defendant agreed in person to said discharge.”

In construing article 687 of the Code of Criminal Procedure, our supreme court, in *Brown v. State*, 38 Tex. 483, say: “Had the prisoner consented to the separation of the jury contemplated by the statute, he would not be bound in this case, for the separation which took place was not such as is contemplated by the law. When a separation takes place by the consent of the accused, every juror should be under the protection and control of an officer, that no communication may be had with other persons in any wise touching the cause on trial.” Separation of the jury in a felony case is not allowable even by consent of the parties, unless the jurors are in charge of an officer. *Porter v. State*, 1 Tex. App. 394; *Grisson v. State*, 4 Tex. App. 374; *Defriend's Case*, 22 Tex. App. 570, 28 W. Rep. 641.

In *Sterling's Case*, 15 Tex. App. 249, in discussing another question, this court say, in passing: “True, the defendant might waive the provisions of the law requiring jurors impaneled to be kept together until the termination of the trial, etc., (Code Crim. Proc. art. 23;)” and this *dictum* is cited in support of the action of the court in this case. This is not really in conflict with the other cases cited, for it is not said in the language quoted that such separation may be without the custody of an officer. In effect, the position is that, inasmuch as defendant may waive any right secured to him by law except the right of trial by jury in a felony case, (article 23, *supra*,) he can waive the right of having the jury kept together, and consent that they may separate without being in the charge of an officer. So jealous are both our constitution and laws of the rights of the citizen that they will not permit him, when charged with a felony, to consent to be tried in any other mode than by a jury of his peers, and they have attempted to provide every means for the purity of and efficiency of the jury trial. In a felony case, to secure the efficiency and purity of the trial, it has been deemed necessary that the jury shall not be allowed to separate, and, if allowed by consent of parties, they must, during separation, each individual, be in charge of a trusted officer of the court, who will see to it that their purity and efficiency are preserved. A defendant can no more by his own act do anything which would likely destroy that purity and efficiency than he could waive the right of trial by jury. To permit him to do so would be tantamount to his waiving a trial by such a jury as the constitution contem-

plates, to-wit, "an impartial jury." Section 10, Bill of Rights. It seems to us that the reason, as well as the policy, of such statutory safeguards, are too apparent to admit of question. If a defendant were allowed to agree to a separation without the jurors being kept in custody of an officer, when called upon to do so, he would rarely ever refuse, for fear his refusal would injure him, and prejudice his cause with the jury. Rather than incur their ill will by refusing, he would more than likely consent, and take the chances of subjecting them to influences which would prove most direful in their consequences to him. We believe the law intended to shield him absolutely against the chances of such a dilemma. Mr. Bishop says: "The better doctrine is that he is not in a position to give consent. It should not be asked, and permission to separate granted in pursuance of it is null." 1 Bish. Crim. Proc. (3d Ed.) § 998. As before stated, the other errors complained of may not and are not likely to occur on another trial, and they will not, therefore, be discussed. For the error discussed the judgment is reversed, and the cause remanded.

TIPPIE v. STATE.

(Court of Appeals of Texas. Feb. 8, 1890.)

THEFT—EVIDENCE.

1. Defendant, while riding on horseback in company with his employer, B., on the latter's horse, encountered C., and, at his employer's request, gave up to him the horse. B. and C. then rode off, stole and butchered a cow, and brought defendant some of the meat. B. testified that defendant was told before he gave up the horse of the intention to steal a beef, that he expressed approval, and knew he and C. were in the habit of stealing cattle together. *Held* not sufficient to sustain a conviction as an accomplice.

2. Under such circumstances, it was not error to admit testimony that accused knew the principals were in the habit of stealing cattle together.

Appeal from district court, Hamilton county; C. K. BELL, Judge.

Appellant was tried as an accomplice with Hambricht and Carter in the theft of a cow. The evidence bearing upon the immediate transaction is contained in the testimony of Hambricht. He testified, in substance, that Lee, Carter, and defendant, the defendant riding Carter's horse, came to where witness and his brother were loading wood. Carter called witness off, and proposed to go and steal a beef. Witness consented, and Carter then called defendant to them, and told him to let witness have the horse he was riding, and for defendant to return on the wagon. Carter also told defendant that he and witness were going to kill a beef, and would bring him some of the meat. Defendant said he hoped they would, as he was in need of meat. He then delivered Carter's horse to witness, and witness and Carter rode off, and after a while found and killed the cow described in the indictment. They butchered it, and that night took some of the meat to defendant. Defendant had worked

for witness and Carter, and knew they had long acted together in stealing cattle. Both witness and Carter had often told him about cattle they had stolen. This witness' brother testified that when Carter and Hambricht started off, at which time defendant was with the witness, the latter called to Carter, and asked him where he and Hambricht were going. Carter replied: "To hunt a horse."

J. C. George, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. We think the testimony objected to was admissible as a circumstance tending to show that defendant had knowledge that Carter and Hambricht intended to commit theft of a beef. This knowledge that they had theretofore been in the habit of acting together in the theft of cattle tends to support the view that he knew of their intent to commit the theft in question. But, considering this testimony in connection with the other evidence in the case, we do not think the conviction is warranted. There is no evidence that the defendant advised, commanded, or encouraged the commission of the theft. He aided in its commission, it is true, by furnishing Hambricht a horse to ride; but he furnished the horse by direction of Carter, in whose employ he was at the time, and the horse belonged to Carter. There is no satisfactory evidence that, at the time he turned over the horse to Hambricht, he knew that Carter and Hambricht intended to commit a theft. If he delivered the horse to Hambricht without such knowledge, certainly he committed no offense. There are slight circumstances established which perhaps justify a suspicion that he knew the criminal intention of Carter and Hambricht. But convictions must not be based on mere suspicion; there must be evidence proving guilt beyond reasonable doubt, and, in our opinion, there is not such evidence in this case. The judgment is reversed, and the cause remanded.

HUGHES et al. v. STATE.

(Court of Appeals of Texas. May 8, 1890.)

BAIL-BOND—SURETIES—SURRENDER OF ACCUSED.

Under Code Crim. Proc. Tex. art. 297, providing that sureties "may at any time relieve themselves of their undertaking by surrendering the accused into the custody of the sheriff of the county where he is prosecuted," a plea of surrender to the sheriff, prior to the forfeiture of the bail-bond, with notification that they desired to be released, is a good defense in an action on the bond.

Appeal from Dallas county court; E. G. BOWER, Judge.

W. Thompson, for appellants. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. This appeal is from a judgment final upon a forfeited bail-bond. Appellants, who are the sureties upon said bail-bond, in answer to the citation to show cause why the judgment *nisi* rendered against them should not be made final, among other de-

fenses pleaded that, prior to the forfeiture of said bail-bond, they surrendered their principal into the custody of the sheriff of Dallas county, and notified said sheriff that they desired to be released from further liability on said bond. A general exception to said plea was sustained, and this action of the court is assigned as error. It is provided that "those who have become bail for the accused, or either of them, may at any time relieve themselves of their undertaking by surrendering the accused into the custody of the sheriff of the county where he is prosecuted." Code Crim. Proc. art. 297. Appellants' plea of the surrender of their principal was a valid defense, and should have been entertained. If the allegations therein relating to the surrender are sustained by evidence, appellants, under the statute quoted, must be relieved from liability upon the bail-bond. As to other assignments of error, they are not maintainable. The judgment is reversed, and the cause remanded.

COREY v. STATE.

(Court of Appeals of Texas. May 3, 1890.)

COURTS—JURISDICTION—CONSTITUTIONAL LAW.

1. The new city charter of Dallas, (Act Tex March 13, 1889, § 25,) as amended by act March 27, 1889, creates the city court of Dallas, and provides that it shall "have exclusive jurisdiction over disorderly houses and female vagrants." *Held* that, there being no saving clause, and no provision for cases of that nature then pending in the county court, the jurisdiction of the latter was ousted when the amendment went into effect.

2. Under Const. Tex. art. 5, § 23, providing that "the legislature shall have power by local or general law to increase, diminish, or change the civil and criminal jurisdiction of county courts; and in cases of any such changes of jurisdiction the legislature shall also conform the jurisdiction of the other courts to such change," it was not necessary that the act should directly provide that the county court should no longer have jurisdiction of such offenses. It was sufficient that it gave the city court exclusive jurisdiction.

3. Const. Tex. art. 5, § 1, provides that the judicial power of the state shall be vested in certain courts, and "such other courts as may be established by law." *Held*, that the judicial power of the state could be vested in a city court as distinguished from state courts with jurisdiction of offenses against the Penal Code.

Appeal from Dallas county court; E. G. BOWER, Judge.

R. E. Cowart, for appellant. Asst. Atty. Gen. Davidson, for the State.

HURT, J. This is a conviction for keeping a disorderly house. Before the trial was had the charter of the city of Dallas was amended by act of the legislature. The amendment is as follows: "Sec. 25. The judicial power of the city of Dallas shall be, and the same is hereby, vested in a court to be known as the 'Dallas City Court,' to be presided over by a judge to be known as the 'city judge,' which court is hereby created and established with a criminal jurisdiction as follows: *First*. To try, hear, determine, and punish all misdemeanors over which the

recorder's court of Dallas now has jurisdiction. *Second*. To try, hear, determine, and punish all misdemeanors arising under the provisions of this charter, to have concurrent jurisdiction with state courts over all misdemeanors against the state laws committed within the city limits, except theft, swindling, aggravated assaults and battery, keepers or exhibitors of such games as are prohibited by law, and those involving official misconduct; and to have exclusive jurisdiction over disorderly houses and female vagrants." It is admitted by the state that the section of the statute above quoted passed under the emergency clause on the 27th day of March, 1889, and was approved by the governor on the same day, and was in full force and effect from and after said date, and on the day and date of the trial of this cause in the county court. It is further admitted by the state that the new charter of the city of Dallas, passed and approved March 13, 1889, and the section as amended, heretofore quoted in full, contained no saving clause, and that no provision was made in either the new charter, approved March 13, 1889, or in the act above quoted, in regard to prosecutions then pending for the offense of keeping a disorderly house in the county court of Dallas county, or in any other state court, and that both the act of March 13, 1889, and the act amendatory thereof, were in full force and effect from and after their approval, respectively. It is further admitted that at the date of the filing of the indictment in this case, to-wit, on January 16, 1889, and the time covered by said indictment, the county court had jurisdiction of this case, as it was not until after that time that the city was given exclusive jurisdiction, on, to-wit, the 27th day of March, 1889. The county court having jurisdiction of this offense when the indictment was presented, and at the time covered by the allegations of the indictment, and the amendment being in force at the time of the trial, was the jurisdiction of the county court ousted by the amendment? This is the first question presented. As neither the new charter of the city, nor the amendment to section 25, contains a saving clause, or any provision in regard to pending prosecutions for keeping disorderly houses, counsel for appellant contends that the jurisdiction of the county court, by virtue of that provision of section 25 which confers "exclusive jurisdiction over disorderly houses and female vagrants" within the city upon the city court of the city of Dallas, is taken away; that this is so whether there be provision for transferring such cases to the city court or not; that, when the amendment of the charter took effect, jurisdiction of the county court was *ipso facto* ousted. We think these propositions of appellant are sound; and hence the county court was without jurisdiction to try this case, if the change in the jurisdiction was made constitutionally.

The assistant attorney general contends that this was not done, citing article 5, § 22,

of the constitution, which reads: "The legislature shall have power by local or general law to increase, diminish, or change the civil and criminal jurisdiction of county courts; and in cases of any such changes of jurisdiction the legislature shall also conform the jurisdiction of the other courts to such change." It is contended that the act does not conform the jurisdiction of the county court to the change; that it should have been provided, not inferentially, but directly, that the county court should no longer have jurisdiction of such offenses. The charter gives to the city court exclusive jurisdiction of this offense. Under the form of this act, it is unnecessary to deprive the county court of jurisdiction directly or in terms, because the act vesting exclusive jurisdiction in the city court evidently divests the county court of jurisdiction. If an act should directly divest the county court of a certain county of its civil or criminal jurisdiction, then it would be necessary to pass an act vesting such jurisdiction in the district court or some other court. Why? Simply for the reason that without such an act the district court would not have such jurisdiction, and in the absence of such an act the act depriving the county court of such jurisdiction would be void because of the requirement of section 22 of article 5 of the constitution.

The assistant attorney general contends that the act creating the city court of Dallas is without authority in the constitution; that it is in fact in violation thereof, in this: that section 1 of article 5 of the constitution provides that the judicial power of this state shall be vested in certain named courts; that the judicial power referred to means the judicial power of the state, and not the judicial power of a city; that, while the legislature may create other courts, they must be state, and not city, courts. To this we cannot agree. The terms of the constitution are broad and comprehensive. "Such other courts as may be established by law" is the language used. Now, whether these courts be established for counties or cities, they would be tribunals vested with judicial powers of the state. If the position assumed by counsel for the state be correct, then it follows that mayors, recorders, and city judges could not have jurisdiction to try and punish any misdemeanor which would be an offense against the Penal Code, and that all acts vesting jurisdiction in such courts over such offenses are unconstitutional; in other words, that no city court has jurisdiction over any offense known to the Penal Code, because the judicial power of the state is vested, and can be vested only, in state tribunals, as distinguished from town and city tribunals. We are of the opinion that the judicial power of the state can be conferred upon district, county, precinct, or city tribunals, and that the city tribunal or court in trying a case would be exercising judicial power of the state. The judgment is reversed, and the prosecution in the county court is dismissed. Ordered accordingly.

In re GARZA.

(Court of Appeals of Texas. Feb. 26, 1890.)

DISORDERLY HOUSES—LICENSES—CONSTRUCTION OF STATUTES.

1. Pen. Code Tex. arts. 839-841, prohibit houses of prostitution in the state. The special charter of the city of San Antonio, (Act Tex. Aug. 18, 1870,) by sections 72, 78, and 98, confers on the city power "to suppress and restrain" disorderly houses and houses of prostitution, and authorizes the city council, by ordinance, to "restrain and punish" prostitutes, to "prevent and punish" the keeping of houses of prostitution, and to adopt summary measures for "the removal or suppression, or regulation and inspection, of all such establishments." By these and other sections, which also confer the power to regulate, the power to license other occupations is expressly conferred. *Held*, that the charter does not confer on the city power to license houses of prostitution.

2. Act Tex. April 4, 1889, (amending Pen. Code Tex. art. 841, and adding article 841a thereto,) provides in article 841 a punishment for any owner, lessee, or tenant of a building who shall keep, or allow to be kept, therein, a disorderly house, and prescribes as the penalty a fine of \$200, for each day the house is kept. Article 841a provides that every owner of a theater, dance-house, or house where liquors are kept for sale, who shall knowingly employ in such theater, etc., "any prostitute, * * * or who shall permit any prostitute * * * to conduct herself therein in a lewd, lascivious, or indecent manner, shall be deemed guilty of keeping a disorderly house," and prescribes a fine therefor, of not less than \$100 nor more than \$200, for each day the offense is committed. *Held* that, while the offense prohibited in each article is the same, in contemplation of law, the acts constituting it in each case, and the persons by whom the acts are committed, are different, and the act is not void for uncertainty in that it prescribes different penalties for the same offense.

Appeal from district court, Bexar county; W. W. KING, Judge.

Act Tex. April 4, 1889, amends Pen. Code Tex. art 841, and adds article 841a thereto, to read as follows:

"Art. 841. Any owner, lessee, or tenant who shall keep, or be concerned in keeping, or knowingly permit the keeping of, a disorderly house, in any house, building, edifice, or tenement owned, leased, or occupied by him, shall be deemed guilty of keeping, or being concerned in keeping, or knowingly permitting to be kept, as the case may be, a disorderly house, and shall be punished by a fine of two hundred dollars for each day. * * * Art. 841a. Every owner, lessee, tenant, or manager of any theater, dance-house, play-house, or house where spirituous, vinous, or malt liquors are kept for sale, who shall knowingly employ or have in service, in any capacity, in such theater, play-house, or house where spirituous, vinous, or malt liquors are kept for sale, any prostitute, lewd woman, or woman of bad reputation for chastity, or who shall permit any prostitute, lewd woman, or woman of bad reputation for chastity, to display or conduct herself therein in a lewd, lascivious, or indecent manner, shall be deemed guilty of keeping a disorderly house, and shall be punished by a fine not less than one hundred dollars nor more than five hundred dollars, each day that such person is kept in service, or employed or permitted to display or conduct

themselves as hereinbefore provided, shall be deemed a separate offense."

L. W. Wallihall and Rapson & Bergstrom, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. Appellant, Emelia Garza, applied to the judge of the district court of the forty-fifth judicial district of Texas for a writ of *habeas corpus*, praying to be discharged from custody in which she is held by Jacob Rips, a policeman of the city of San Antonio, under a warrant issued out of the recorder's court of said city, for the violation of an ordinance "to suppress and restrain bawdy-houses within the limits of the city of San Antonio." The writ was issued as prayed for, and upon a hearing the writ was dismissed, and appellant remanded to the custody of the respondent, from which order the applicant prosecutes an appeal to this court, and assigns the following error: "His honor, the judge, erred in dismissing the writ of *habeas corpus*, and in remanding the applicant for the writ to the custody of the respondent, in this: There is no valid or legal ordinance which authorized the issue of the warrant under and by virtue of which the applicant was arrested, and is held in custody." The ordinance in question is entitled "An ordinance to suppress and restrain bawdy-houses within the limits of the city of San Antonio." It was passed and approved December 16, 1889, and was duly published. It provides for licensing bawdy-houses within the limits of said city upon the payment of an annual license to the said city of \$500; and also provides for the licensing of bawds. It also provides for the inspection of bawds, and prescribes penalties for violations of any of the provisions of the ordinance. It is admitted that appellant violated the ordinance by keeping a bawdy-house without obtaining a license to do so, and that she has been duly charged and arrested, and is now in custody for said violation. It is further admitted that the license of \$500 annually imposed by said ordinance is reasonable, and does not amount to a tax on the occupation. Appellant attacks the validity of said ordinance, contending (1) that the city was not and is not authorized by its charter to enact it; and (2) that said ordinance is contrary to the general laws of the state, and is therefore void.

By act of August 13, 1870, the city of San Antonio, having a population of more than 10,000 inhabitants, was incorporated by special act of the legislature, under authority of section 5 of article 11 of the constitution. There are three sections in the said act of incorporation under which it is claimed by the city that it had the power to enact the ordinance in question. They are as follows: "Sec. 72. To license, tax, and regulate billiard tables, pin alleys, ball alleys; to suppress and restrain disorderly houses, tippling shops and groceries, bawdy-houses, houses of prostitution or assignation, gambling and

gambling houses, lotteries, and all fraudulent devices and practices, and all kinds of indecencies." "Sec. 78. The city council shall have the right to enact all necessary ordinances to restrain and punish vagrants, mendicants, street beggars, and prostitutes; to restrain and control all gambling, and punish the keepers of all games, and gambling devices with as great a penalty as the same is punished by the statutes of the state. The recorder's court of the city of San Antonio shall have the concurrent jurisdiction of all such misdemeanors when committed in the corporate limits of the city of San Antonio." Amendment of March 4, 1885. "Sec. 98. To prevent and punish the keeping of houses of prostitution within the city, or within such limits therein as may be defined by ordinance, and to adopt summary measures for the removal or suppression, or regulation and inspection, of all such establishments." It is a settled rule that municipal corporations can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association. The charter of a municipal corporation is its organic act, and furnishes the measure of its powers. It can exercise no power which the charter does not grant in express words, or which is not necessarily or fairly implied in or incident to the powers expressly granted, or which are not essential to the declared objects and purposes of the corporation. 1 Dill. Mun. Corp. § 89; Cooley Const. Lim., (4th Ed.) 231, 235.

Such being the extent and limit of the power of a municipal corporation, did the municipality of the city of San Antonio have the power to enact the ordinance in question? Such power is certainly not conferred, in express words, in its charter. In the sections of the charter which we have quoted, no express power to license houses of prostitution is granted, and there are no other provisions of the charter bearing upon the subject. In *Davis v. State*, 1 Tex. App. 425, which case has been cited, and is relied upon by the city to sustain the validity of said ordinance, the power to license houses of prostitution was granted the city of Waco in express words; and, while we adhere to the correctness of that decision, we do not consider it applicable to this case. It is claimed by the city, however, that, although its charter does not in express words confer the power to license houses of prostitution, it does by necessary implication confer such power, by granting expressly the power to restrain, regulate, and inspect such establishments. Judge Dillon, in his work on Municipal Corporations, says: "The presumption is not lightly to be indulged that the legislature has by implication repealed, as respects a particular municipality, or as respects all municipalities, laws of a general nature elsewhere in force throughout the state; yet a charter or special act

passed subsequent to the general law, and plainly irreconcilable with it, will, to the extent of the conflict, operate a repeal of the latter by implication. But, by a well-known rule, founded on solid reasons, such repeals are not favored; and the principle of implied repeals ought to be applied with extreme caution." 1 Dill. Mun. Corp. § 88. Again he says: "The right to license must be plainly conferred, or it will not be held to exist." Id. § 361. And again, he says: "Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." Id. § 89. In determining the power of a municipal corporation to enact a particular ordinance, the charter by which it is claimed such power is conferred should receive a reasonable construction,—that is, a construction which accords with the intention of the legislature; and all reasonable intendments in support of the validity of the ordinance will be indulged. *Ex parte Gregory*, 20 Tex. App. 210. Was it the intention of the legislature to confer upon the city of San Antonio the power to license houses of prostitution? At the time of granting the charter of incorporation to said city, houses of prostitution were prohibited by a general law of the state. Pen. Code, arts. 339-341. If it was the intention of the legislature to repeal this general law within the corporate limits of said city, it is reasonable to presume that such intention would have been plainly and expressly declared, and not left to be implied, merely. It is reasonable to presume that, if it had been intended to grant the power to license such houses, the legislature would, as it did in the charter of the city of Waco, have expressly granted such power. That such was not the legislative intent is also, and to our minds very cogently, shown by the fact that the power to license other occupations, etc., was expressly conferred upon the city. In section 72 of the charter, one of the sections hereinbefore quoted, the power to license billiard tables, pin alleys, and ball alleys is expressly granted, but as to bawdy-houses, etc., named in the same section, the power to license is not expressly granted. Section 73 confers expressly the power to license hackmen, draymen, etc. Section 75, to license hawkers, peddlers, etc. Section 76, to license merchants, hotels, etc. Section 77, to license public balls, etc. And in the sections cited the power to regulate is also expressly conferred, showing that license and regulation were not considered by the legislature as equivalent terms, or that the power to regulate included the power to license. We are of the opinion that by no reasonable interpretation or intendment can it be concluded that the legislature intended to grant to the city of San Antonio the power to enact the ordinance in question. Such a power is not necessarily or fairly implied, nor essential to the declared objects and purposes of the corporation. Houses of prostitution may be restrained, regulated, and inspected without being licensed. Thus the city might by ordi-

nance require the keepers of such establishments to close them against visitors during specified hours, or might limit the number of prostitutes inhabiting such houses, or might require that such houses be designated by some sign whereby their character might be known to the public. Various other modes of restraint and regulation might be mentioned which could be adopted and made effectual without licensing such houses.

Counsel for respondent has referred us to some decisions of other states which we confess support the proposition that the words "regulate" and "restrain" imply the power to license. *State v. Clarke*, 54 Mo. 17, holds that the word "regulate," as used in an ordinance of the city of St. Louis, with reference to bawdy-houses, by necessary implication, conferred upon that city the power to license such houses. Two of the five judges deciding the case dissented from that view; and one of the dissenting judges delivered an opinion which to our minds advances very strong, if not conclusive, arguments against the correctness of the conclusions of a majority of the court. It is to be observed, however, with reference to the opinion of the majority of the court in that case, that the opinion was largely influenced by the fact that several previous charters of said city did not grant the power to the city to regulate such houses, but only granted the power to suppress them. Judge Dillon, in referring to the opinion of the majority of the court, remarks that, "in view of the legislation recited in it, the opinion seems to be sound." 1 Dill. Mun. Corp. § 88, note 2. Now, while previous legislation—that is, previous charters—may in that case uphold the construction of the majority of the court, there is no room or basis for such argument or intendment in this case; but, on the contrary, as we have heretofore stated, the same charter under which it is claimed the power to license houses of prostitution exist by implication, in express words grants the power to license numerous other trades and occupations, thus, it seems to us, excluding the conclusion that the power to license such houses was intended to be granted. *Smith v. Madison*, 7 Ind. 86, and *Burlington v. Lawrence*, 42 Iowa, 681, cited and relied upon by counsel for respondent, are, we concede, authorities supporting the proposition that the power to restrain and regulate includes the power to license. We cannot, however, concur in those decisions, nor admit the soundness of the reasons upon which they are grounded, especially in the case under consideration, where it so plainly appears, we think, that the legislature did not intend to grant the power which the city has assumed in enacting the ordinance in question.

It is further claimed by respondent that said ordinance is not in conflict with any general law of the state; that there is no valid general law of the state prohibiting houses of prostitution. It is contended by counsel for respondent that the Act of April 4, 1889, (Acts 21st Leg. 33, 34,) is void for uncertain-

ty, because it prescribes different penalties for the same offense; that is, that, for the offense of keeping a disorderly house, article 341 prescribes a fine of \$200 for each day the house is kept, while for the same offense, article 341a prescribes a fine of not less than \$100 nor more than \$200 for each day the house is kept. As we understand and construe articles 341 and 341a, they have reference to different and distinct matters, and to different classes of offenders. Article 341 prescribes punishment for those who keep disorderly houses, while article 341a punishes those who employ, or have in service, in theaters, dance-houses, etc., prostitutes, etc. While the class of offenders named in article 341a are keepers of disorderly houses, as such houses are defined in article 339, and are to be deemed guilty as such, as provided in article 341a, still the punishment prescribed for them is not the same as is prescribed for that other class of offenders who keep houses of prostitution or opium resorts. While the offense is, in legal contemplation, the same, the acts constituting it are different; and that different punishments are prescribed for different acts constituting the same offense in a different degree, or by different classes of persons, is not objectionable legislation.

Our conclusion is that the ordinance in question is without authority of law, is repugnant to a valid general law of the state, and is void; and the judgment of the court below is reversed, and the appellant is discharged from custody, at the cost of respondent. Ordered accordingly.

SEARCY v. STATE.

(Court of Appeals of Texas. May 14, 1890.)

CRIMINAL LAW—EVIDENCE—CONFESSION.

Defendant, while in jail under arrest for murder, told the sheriff that he wanted to tell him all about the case. The sheriff informed defendant that "whatever he said would be used in evidence against him, [defendant,] but if he would tell him all about it, so that he could get all the parties, he would do all he could for him in his case." Held, that the confession was not admissible, under Code Crim. Proc. Tex. art. 749, because of the positive and persuasive promise of the sheriff, which was calculated to make defendant believe that his condition would be bettered by making the confession.

Appeal from district court, Brazos county; J. N. HENDERSON, Judge.

Ford & Doremus, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. But a single question is necessary to be determined on this appeal, and that is as to the admissibility of the defendant's confessions to the witness Dawson. Dawson was the sheriff of Brazos county, and as such arrested the defendant. Defendant made two confessions to Dawson; the first just after his arrest, and when the sheriff was taking him to jail. Dawson told the defendant "that there was no doubt but that he was one of the guilty parties, and if he would

tell all about it, so that he [Dawson] could get all the guilty parties, he [Dawson] would do what he could for him in his case; it may be of interest to you, and to me, too." But he also told defendant that whatever he told him about it would be used as evidence against him. Defendant then confessed his guilt. A second confession was made by defendant after he was in jail. He sent for Dawson, and told him that he wanted to tell him all about the case. Dawson informed the defendant that "whatever he said would be used in evidence against him, [defendant,] but if he would tell him all about it, so that he could get all the parties, he would do what he could for him in his case." Defendant then confessed his connection with the crime. The first confession was excluded as evidence from the jury; the second was permitted to be introduced as evidence, over objections by the defendant. A confession, to be admissible at all, must be freely made, and without compulsion or persuasion, and, if the party is in jail, it must be made voluntarily, after having first been cautioned that it may be used against him. Code Crim. Proc. arts. 749, 750. The confession is not admissible, unless it was voluntarily and freely made, uninfluenced by persuasion or compulsion, not induced by any promise creating hope of benefit, or any threats creating fear of punishment. Mr. Wharton says: "It has been generally held that any advice to a prisoner by a person in authority, telling him it would be better for him if he confesses, vitiates a confession induced by it. Lately, however, this has been greatly qualified, and it is now held that there must be a positive promise, made or sanctioned by a person in authority, to justify the exclusion of the confession." Whart. Crim. Ev. (8th Ed.) § 651. He further says: "In conclusion, we may hold that a confession is only to be excluded on the grounds of undue influence when it is elicited by temporal inducement, *e. g.*, by threat, promise, or hope of favor, held out to the party in respect to his escape from the charge against him by a person in authority, under circumstances likely to lead to a false statement, or where there is reason to presume that such person appeared to the party to sanction such a threat or promise. If the influence applied was such as to make the defendant believe his condition would be bettered by making a confession, true or false, this excludes; but if not, the confession is admissible." Id. § 673; *Thompson v. State*, 19 Tex. App. 595; *Neeley's Case*, 27 Tex. App. 324, 11 S. W. Rep. 376; *Willson, Crim. St.* § 2472. Here the sheriff told the defendant "if he would tell him all about it, so that he could get all the parties, he would do what he could for him in his case." This was not only a promise, but a persuasive and a positive one, by an officer high in authority, and one in every way calculated to make the defendant believe that his condition would be bettered by making the confession. We are of opinion that the confession was inadmissible, and for

error in its admission the judgment is reversed, and the cause remanded. Reversed and remanded.

BARTON v. STATE.

(Court of Appeals of Texas. April 30, 1890.)

OBSTRUCTING RAILROAD TRACK — INDICTMENT — EVIDENCE.

1. An indictment following the language of Pen. Code Tex. art. 678, and charging that defendant did willfully place an obstruction upon the track of a railroad, "whereby the lives of persons were endangered," is sufficient, without specifying the persons whose lives were endangered.

2. Testimony was admitted that defendant placed another obstruction on the track, about three-fourths of a mile from the one charged in the indictment, and very soon after the first. Held that, though they were separate and distinct offenses, still, having been contemporaneous, the commission of the second was admissible to show the motive or intent of the first, and also as a part of the *res gesta*.

3. Failure of the court to instruct the jury as to the purpose for which such evidence was admitted, and to restrict their consideration of it to that purpose, was fundamental error, which, even if there had been no exception, would require a reversal.

Appeal from district court, Colorado county; GEORGE McCORMICK, Judge.

Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. It is charged in the indictment that the defendant "did willfully place an obstruction, to-wit, a large piece of timber and rocks, upon the track of a railroad there situated, to-wit, the track of the Galveston, Harrisburg & San Antonio Railroad, whereby the lives of persons were endangered." We think the indictment is sufficient. It was not necessary to specify therein the persons whose lives were endangered. It follows the language of the statute defining the offense. Pen. Code, art. 678. Upon the trial, over objections made by defendant, the state was permitted to prove another obstruction in addition to the one charged in the indictment, which other obstruction was made on the same night, and very soon after the first one, but at a point on the railroad some three-fourths of a mile distant from the place of the first obstruction. It was proved that the defendant assisted in placing both obstructions upon the track. There was no error in admitting the testimony as to the second obstruction. Although the second obstruction constituted a separate and distinct transaction from that charged in the indictment, still the two offenses were committed contemporaneously, and the commission of the second was admissible for the purpose of showing the motive or intent with which the first was committed, and also for the purpose of developing the *res gesta* of the first offense. Willson, Crim. St. §§ 2496, 1295. But, while said testimony was admissible, it devolved upon the court to instruct the jury as to the purpose for which it was admitted, and to restrict their consideration of it to that purpose only. This the court failed to do, and the defendant reserved a bill of exception

to the charge because of such omission. Even if an exception had not been reserved to the charge, the omission specified is fundamental error, and leaves this court with no discretion as to the disposition to be made of the case. Willson, Crim. St. §§ 2344, 2368; Reno v. State, 25 Tex. App. 102, 7 S. W. Rep. 532; Gentry v. State, 25 Tex. App. 614, 8 S. W. Rep. 925; Rogers v. State, 26 Tex. App. 404, 9 S. W. Rep. 762. The judgment is reversed, and the cause is remanded, because of said error of omission in the charge.

In re JUNEMAN et al.

(Court of Appeals of Texas. May 3, 1890.)

COURTS—TERMS—HABEAS CORPUS.

1. Rev. St. Tex. art. 1502, provides that terms of the criminal district court shall be held in Galveston on the first Monday in January, March, May, July, and November. "The terms of said courts may continue four weeks." Held, that the terms expire at 12 o'clock Saturday night of the fourth week, and that a verdict and judgment rendered on the next day were void.

2. Where a judgment is rendered when the court is not in session, it is not the act of the court, and consequently is not appealable. *Habeas corpus* is the proper remedy to avoid the judgment.

On application for *habeas corpus*.

Stubbs & Stubbs and Waul & Walker, for relators. Asst. Atty. Gen. Davidson, for the State.

HURT, J. The terms of the criminal district court for Galveston county are limited, as to time of commencing and ending, by article 1502 of the Revised Statutes. That article provides that "said judge shall hold a term of said court in the city of Galveston, county of Galveston, on the first Mondays in the months of January, March, May, July, and November. * * * The terms of said courts may continue four weeks, unless the business be sooner disposed of." The first Monday of March, 1890, is made the first day, or the beginning day, for the March term. Applicants, being indicted in the criminal district court of the city and county of Galveston, were placed on trial on the 24th day of March, 1890. The trial continued, without verdict of the jury, until Sunday morning, March 30, 1890, between the hours of 7 and 8 o'clock A. M., when the jury returned a verdict finding the applicants W. T. Allen, Henry Weyer, and Fred Koehler guilty of murder in the second degree, and Charles Juneman guilty of manslaughter. On the same day, March 30, 1890, applicants moved in arrest of judgment, upon the ground that no legal judgment could be entered, because the verdict was returned into court on Sunday, March 30, after the term had expired. On the 31st day of March the motion was overruled, and judgment entered, and sentence pronounced. Until placed on trial, applicants were under bonds, which appear among the papers in this case. Believing the verdict and judgment thereon to be void, and believing that they have no appeal to this court, the applicants have present-

ed to this court their application for the writ of *habeas corpus*, seeking to have said verdict and judgment declared void, and to be released upon their bonds.

If these applicants have or had the right to appeal their case to this court, the writ will not be awarded. Does an appeal lie, under the above facts? Is the first question. Preliminary to this, another question arises, which is, when did the term of the court expire? This question arose in *Harper v. State*, 43 Tex. 431. GOULD, J., says: "We are of the opinion that the 'two weeks' during which the term might continue ended at 12 o'clock on the night of Saturday, March 20th. The rule of the common law forbids any judicial act on the Sabbath. Citing *Nabors v. State*, 6 Ala. 203; *Baxter v. People*, 3 Gilman, 368; * * * *Story v. Elliot*, 8 Cow. 27. The well-established usages of the people and courts of this and the other states of the Union require that the word 'weeks' be construed as embracing only the six judicial days of the final week of the term. * * * If, however, we look to our statute alone, it is evidently intended that the court should end on Saturday night. Article 3150, Pasch. Dig., is: 'If at the time a verdict is returned into court there be less than six hours remaining before the court must by law adjourn, it shall be lawful, and shall be the duty of the district judge to sit during the whole of Saturday night and Sunday for the purpose of enabling the defendant to move for a new trial, or in arrest of judgment, and prepare his cause for the supreme court.' In thus providing for a particular case in which the court may continue for certain purposes beyond the time it must otherwise adjourn, it is plain that an adjournment on Saturday night is intended." This opinion, and the authorities therein cited, would seem to settle conclusively that the term ended at 12 o'clock on the night of Saturday, March 30th. The verdict and judgment then being returned and entered after the expiration of the term of the court, could applicants appeal therefrom?

The authorities are not in harmony upon this subject,—that is, there is an apparent conflict. In *Harper's Case* the appeal was entertained, but the question was not raised. In the *Fuller and Wimberly Case*, 19 Tex. App. 241, the verdict and judgment were returned and entered by a court in term-time. So with the *Lott Case*, 18 Tex. App. 627; *McNeese's Case*, 19 Tex. App. 48; *Smith's Case*, Id. 95. In *Doss v. Waggoner*, 3 Tex. 515, the judgment was rendered by the district court at a time when by law that court had no power to hear and determine cases. Upon this state of case, Chief Justice HEMPHILL observes: "The court had no jurisdiction to try and determine causes at the time these judgments purport to have been rendered. There was in fact no court in session, and no judgments could by law have been pronounced, and consequently they are not only absolute nullities in the ordinary signifi-

cation of the term, when applied to judgments of courts having no jurisdiction over the subject-matter of the parties, but they are not even the acts of a court, and are therefore not susceptible of appeal or the subject of revision in an appellate tribunal. This distinction has been recognized in the cases of *Hodges v. Ward*, 1 Tex. 244, * * * and *vide* [*Osgood v. Thurston*,] 23 Pick. [110.]" These cases are directly in point,—the distinction resting here: If the judgment be rendered by a court, though absolutely void, an appeal will lie. But if the purported judgment was rendered when the court was not in session, the term having expired, such judgment would not be the act of a court, and consequently not the subject of appeal or revision. These propositions are evidently correct. Let us notice the last proposition briefly. The term expired at 12 o'clock of Saturday night, March 30, 1890. From that time there was no court; hence no order, ruling, judgment, or sentence would be the act of a court, and could constitute no part of the record on an appeal. The motions in arrest and for new trial and notice of appeal would be void, and could constitute no part of the record. Unless an order had been made in term-time for that purpose, a statement of facts could not be approved by the judge. This court would not hesitate to dismiss an appeal in the absence of verdict, judgment, or notice of appeal given in term-time. We are of the opinion that the writ should be granted. Ordered accordingly.

GREEN v. STATE.

(Court of Appeals of Texas. May 3, 1890.)

THEFT FROM THE PERSON—INDICTMENT—EVIDENCE.

1. An indictment for the theft of "one five-dollar bill in money, of the value of five dollars," sufficiently describes the stolen property, under Code Crim. Proc. Tex. art. 427, providing that, whenever it becomes necessary to describe property of any kind in an indictment, a general description of the same by name, kind, quantity, number, and ownership, if known, shall be sufficient.

2. On indictment for theft from the person the court need not instruct the jury on the question of value, since under Pen. Code Tex. art. 744, providing that one convicted of such crime shall be punished "by confinement in the penitentiary not less than two, nor more than seven, years," such offense is *per se* a felony, and it is not necessary to allege or prove the value of the stolen property.

3. Evidence that the owner of stolen money felt some one touch his pocket containing his purse, and that on looking around quickly he saw defendant's hand holding the purse pass from his to defendant's pocket, is sufficient to prove theft from the person, under Pen. Code Tex. art. 745, which provides that "the theft must be committed without the knowledge of the person from whom the property is taken, or so suddenly as not to allow time to make resistance before the property is carried away."

Appeal from district court, Houston county; F. A. WILLIAMS, Judge.

Indictment of John Green for larceny of money. Zach Tolliver, the alleged injured party, testified, in substance, that he and six

or seven others, including the defendant, spent the greater part of Christmas Eve night, 1889, playing cards in an apartment in the rear of a saloon in Crockett, Tex. When defendant had lost all of his money, he asked the witness to lend him 25 cents, which amount the witness agreed to give him, but for some reason he failed to do so. Soon afterwards the defendant knelt down near where the witness was kneeling. Presently the witness felt a touch on his hip pocket, in which he had his purse of money. Looking around instantly, he saw the defendant's hand, in which he held the witness' purse of money, passing from witness' to his own pocket. Witness was winning at the time, and said nothing to defendant, believing and hoping that defendant was in jest, and would soon return the purse and money. When, however, the defendant started off towards the alley, a few minutes later, witness called upon him to stop and return the purse and money. Defendant stopped in the dark, about 20 feet from where he took the money, and denied that he had it. A light was then procured, and the purse was found on the ground where the witness stopped the defendant. When taken, the purse contained \$20, consisting of one \$5 bill, two \$2 bills, two \$2.50 gold pieces, and the rest in silver. When recovered the purse contained only one of the gold pieces, one of the \$2 bills, and some small change in silver. Witness then demanded the return of his money, which defendant denied having. The witness then induced the defendant to re-enter the apartment to await daylight, for the purpose of being searched by the sheriff. He managed to keep defendant in the room for some time, but finally the defendant left, and witness never recovered his money. Others of the parties present, testifying for the state and defendant, narrated the transaction substantially as did the witness Tolliver, except that none of them saw the defendant remove the purse from Tolliver's pocket, or have it in his hand. It was shown by two or more witnesses that on the morning of the next day the defendant was seen in possession of \$12 or \$15 in silver and currency. A witness for the defense testified that he loaned the defendant \$15, \$20, or \$25 on the morning after the alleged theft, and that the money thus loaned him was in currency and silver.

Adams & Adams, for appellant. *W. L. Davidson*, Asst. Atty. Gen., for the State.

WHITE, P. J. This appeal is from a judgment of conviction for the crime of theft from the person. Pen. Code, arts. 744, 745. The two modes by which this offense may be committed, as laid down in article 745, subd. 2, were separately charged, two counts being used in the indictment for that purpose. The property alleged to have been stolen is described as "one five-dollar bill in money, of the value of five dollars." A motion was made in arrest of judgment upon the ground,

mainly, that the property was insufficiently described, if, indeed, it was described at all. It is insisted that it should have been described as "bank-bills" or "paper currency money of the United States;" that simply to allege "one five-dollar bill in money" describes nothing. Our statute provides the rule with regard to the description of property whenever it becomes necessary to give it in an indictment, as follows, viz.: "When it becomes necessary to describe property of any kind in an indictment, a general description of the same by name, kind, quantity, number, and ownership, if known, shall be sufficient," etc. Code Crim. Proc. art. 427. This article is a new provision added by the revisers to our Code of Criminal Procedure, and dispenses with the great particularity required prior thereto in the description of property, especially money. Willson, Crim. St. § 1256. A particular description of the property stolen is not necessary; if it be described specially by the name usually applied to it, that will be sufficient. *Dignowitty v. State*, 17 Tex. 521. A bank-bill or currency-bill, when spoken of as money, is usually called "a bill," without adding the words "bank-bill" or "United States currency-bill." When the words, "one five-dollar bill in money," are used to designate it, we understand that a paper bill, of the denomination and value of five dollars,—a circulating medium which passes as money,—is meant. In *Bryant v. State*, 16 Tex. App. 144, the stolen property was described as "one twenty-dollar gold piece, of the value of twenty dollars, and one five-dollar bill in money, of the value of five dollars," etc. It was held, on motion in arrest of judgment in that case, that the description was sufficient, under the provisions of article 732 of the Penal Code, which declares "money" to be property, when taken in connection with article 427 of the Code of Criminal Procedure. We are of opinion that the indictment sufficiently described the money, and that the court did not err in overruling the motion in arrest of judgment.

As to the supposed error of omission in the charge of the court, it is well settled by repeated decisions in this state that in offenses of this character (theft from the person) the punishment is not graded by the value of the property taken as in ordinary theft, but the offense is *per se* a felony if the article taken be of any value, and that, therefore, it is neither necessary to allege or prove the value of the property taken. Pen. Code, art. 744; *Bennett v. State*, 16 Tex. App. 236; *Shaw v. State*, 23 Tex. App. 493, 5 S. W. Rep. 317; *Willson*, Crim. St. § 1312.

But it is insisted that the evidence does not support the conviction. Our statute provides that "to constitute the offense it is necessary that the following circumstances concur: (1) The theft must be from the person; it is not sufficient that the property be merely in the presence of the person from whom it is taken. (2) The theft must be committed without the

knowledge of the person from whom the property is taken, or so suddenly as not to allow time to make resistance before the property is carried away. (3) It is only necessary that the property stolen should have gone into the possession of the thief; it need not be carried away in order to complete the offense." Pen. Code, art. 745.

Tolliver, the owner of the stolen money, in his testimony as to the transaction, says: "I felt some one touch my pocket which contained the purse, and this attracted my attention. Looking around quickly, I saw John Green's [defendant's] hand passing from my pocket to his, and saw in his hand my purse containing the money, etc. I said nothing to defendant, hoping and believing he was in jest, and would soon return my purse and money." Defendant did not return the money, but shortly after started to leave the place, when Tolliver accused him of having taken it, which charge he denied. The purse was found lying upon the ground at the place defendant was standing when Tolliver stopped him and charged him with having taken it. When found and recovered by Tolliver, a \$5 bill had been taken out of the purse. The contention is that Tolliver knew that defendant had taken the purse, and by resistance could have prevented him from carrying it away, and that, this being so, the crime was not theft from the person, under the latter clause of subdivision 2 of the statute. But it is to be noted that at the time Tolliver saw him he had already taken the purse without Tolliver's knowledge, and suddenly. He had it already in his possession; and under subdivision 3 of the statute the offense was complete,—it was not necessary that it should be carried away. This case is not like the case of *Kerry v. State*, 17 Tex. App. 178, where the money was forcibly taken from the hands of Brewer, and with his knowledge, but so suddenly as not to allow time to make resistance before it was carried away. In that case the taking was in the presence of Brewer; the property was taken suddenly and forcibly from his person, and when he knew of the taking at the very time it was being done. In such a case the act must be so sudden as not to admit of resistance to the taking and carrying away,—that is, before the taking is complete. In *Flynn v. State*, 42 Tex. 301, the pocket-book in the pocket of the owner was seized by the accused, who inserted his hand into the pocket without the knowledge or consent of the owner. He had drawn the book half way out of the pocket, when, upon being detected in the act, the accused relinquished his hold upon it, and it was held that these facts constituted theft from the person under our statute. In *Dukes' Case*, 22 Tex. App. 192, 2 S. W. Rep. 590, it is said that "in theft from the person, as in other thefts, the offense is complete when the property has gone into the possession of the thief. It is not essential to the completion of the offense that the property be carried away by the thief.

* * * A taking of the property includes a carrying away thereof, within the meaning of the statute. If the property was taken so suddenly as not to allow time to make resistance, it was also carried away so suddenly as not to allow time to make resistance. Such we hold to be the meaning and intent of the statute, construing its several provisions together." The fact that Tolliver knew defendant had taken the purse after it had already gone into defendant's possession, suddenly, and without his [Tolliver's] knowledge when it was being taken, and that after Tolliver knew of it he might or could by resistance have prevented defendant from then carrying it away, does not alter or affect the case. Defendant's offense was complete, because before Tolliver knew it the property had been taken, and was in the defendant's possession. There is no error in the conviction, and the judgment is affirmed.

In re ROBINSON.

(Court of Appeals of Texas. May 14, 1890.)

INSPECTION—OILS—STATUTORY CONSTRUCTION.

Act Tex. April 5, 1889, (Gen. Laws, 122,) entitled "An act to provide for the inspection of refined oils which are the product of petroleum, and which may be used for illuminating purposes within this state, and to regulate the sale and use thereof, and to provide penalties for violations of the same," in section 8 contains a proviso: "Provided, it shall not be necessary to inspect one which has been inspected under a law of another state." Held that, notwithstanding the use of the word "one" instead of "oil," the intention of the legislature to exempt from inspection in the state oils that had been inspected under the laws of another state was manifest.

On *habeas corpus*.

E. P. Turner, for relator. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. This is an application for an original writ of *habeas corpus*. The writ was issued by this court on a former day of the present term, and has been served, and proper return made. The case was submitted on an agreed statement of facts, from which it appears that the applicant did, in the city of Houston, Harris county, Tex., in April of the present year, sell one barrel of petroleum, containing 40 gallons of said oil, for illuminating purposes; that the same was sold by him before being inspected and branded by the state inspector of oils under the provisions of the act of 1889, (Gen. Laws, 122;) that the laws of the state of Louisiana provide for the inspection of oils such as are embraced in the law of Texas, and that the 40 gallons of oil sold by the applicant had been inspected by the state inspector of oils of Louisiana, and had been branded as approved, all in the manner required by the law of that state; that the applicant is in custody under a warrant issued by a justice of the peace of Harris county upon complaint charging him with selling said barrel of oil before the same was inspected and branded by an officer of Texas.

The prosecution is based upon section 6 of the act of April 5, 1889. The title of that act is: "An act to provide for the inspection of refined oils which are the product of petroleum, and which may be used for illuminating purposes within this state, and to regulate the sale and use thereof, and to provide penalties for violations of the same." The latter clause of the third section of the act reads: "Provided, it shall not be necessary to inspect one which has been inspected under a law of another state." As the oil sold by the applicant had been inspected under the law of another state, (Louisiana,) the applicant contends that it was not subject to inspection in this state unless its inspection was requested by him. Counsel for the state contends that, though inspected under the law of another state, still it is necessary that it be inspected in this state, as required by said act of April 5, 1889; that the proviso above quoted is absolutely void because unintelligible and without meaning.

If we can arrive at the intention of the legislature, then we should enforce that intention. What did the legislature mean or intend by that proviso? This intention is absolutely certain, though the proviso does contain the word "one" instead of "oil." It is evident that the intention was to exempt from inspection in this state, oil which had been inspected under the law of another state. A consideration of the entire act demonstrates this intention. The context of the proviso renders this certain. Take the word "one" from the sentence, and the subject-matter of the act, and the context of the proviso, would force "oil" to occupy the blank thus left. The object of the law was to have certain oil inspected, the ultimate object being the protection of the people; the inspection of said oil being the means prescribed to prevent probable danger to the lives and property of the people of this state by the use of uninspected oil. Now, in thus exercising precaution for the protection of the people of this state, manifested in said act, the legislature had the right to, and it did, substitute an inspection under the law of another state for that required in this state. The proviso says that it shall not be necessary to inspect. Inspect what? The subject-matter of the act being the inspection of oil, it (the proviso) alludes to oil. It cannot possibly mean anything else. What character of oil? That required by the act to be inspected in this state. If it meant any other oil, the proviso would be the essence of foolishness. What interest has this people in the inspection or non-inspection of oils in other states, unless the oils inspected in other states are required to be inspected in this state? The object of the act of April 5, 1889, is to have inspected refined oils which are the product of petroleum, and which may be used for illuminating purposes. The proviso exempts from inspection just such oils, and no other, because other oils are not required to be inspected, and as to them there was no necessity for the proviso.

But we are told that the inspection in another state may not be as thorough a test as that required by this act, and that therefore said act may be rendered ineffectual. This may be so; but the legislature of this state is willing to risk the inspection of other states, and the courts must follow the law-making power. The observation might have been useful if made to the legislature while the act was pending before that body. We are of opinion that the applicant should be discharged, and it is so ordered:

MAYS v. STATE.

(Court of Appeals of Texas. May 8, 1890.)

FALSE PRETENSES—SWINDLING—INDICTMENT.

An indictment for swindling, which fails to allege the ownership of the property acquired by the swindle, is fatally defective.

Appeal from district court, Harrison county; F. A. WILLIAMS, Judge.

Wilson & Lane, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. This conviction is for the offense of swindling, and the indictment is, we think, fatally defective, because it does not allege the ownership of the instrument in writing averred to be the property acquired by the swindle. It might be inferred from the allegations in the indictment that the person who executed said instrument, and who delivered the same to the defendant, was at the time the owner of it. But inferences cannot be indulged in passing upon the sufficiency of an indictment. In the offense of swindling, as in that of theft, the indictment must clearly and directly allege the ownership of the property fraudulently acquired by the defendant. May v. State, 15 Tex. App. 430. Without discussing the defendant's plea of former jeopardy, we will say that, in our opinion, it did not state facts which constituted that defense, and the exceptions to the plea were promptly sustained. Because the indictment is substantially defective, the judgment is reversed, and the prosecution is dismissed.

BOWEN v. STATE.

(Court of Appeals of Texas. May 8, 1890.)

INFORMATION—AMENDMENT—VERDICT.

1. Code Crim. Proc. Tex. art. 430, subd. 2, requires that an information "shall appear to have been presented in a court having competent jurisdiction of the offense set forth." Held an exception to an information, which did not show by affirmative allegation that it was presented in any court, should have been sustained.

2. Such defect is one of form, and the judgment should therefore be reversed, with leave to amend the information.

3. Where, on a charge of aggravated assault, the jury determined on a conviction for simple assault, the verdict should have so specified.

Appeal from Guadalupe county court; J. GREENWOOD, Judge.

W. R. Neal, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. One of the statutory requisites of an information is "that it shall appear to have been presented in a court having competent jurisdiction of the offense set forth." Code Crim. Proc. art. 430, subd. 2. It does not appear from the information in this case, except inferentially, in what court the same was presented, or that it was presented in any court. This requisite, like all others, must be made to appear by direct affirmative allegation. Code Crim. Proc. art. 432; *State v. Thomas*, 18 Tex. App. 213. This defect in the information, having been pointed out by exception, should have been cured by amendment, or the exception should have been sustained. Other exceptions made to the information are not maintainable, because not supported by the record. It is charged in the information that both an assault and battery were committed by the defendant in the house of a private family. We will not determine the question as to the sufficiency of the verdict, further than to say that, if it was the intention of the jury to find the defendant guilty of a simple assault only, the verdict should have so specified. Because of the defect in the information above stated, the judgment is reversed; but, said defect being one of form, and amendable, the prosecution will not be dismissed, but the cause is remanded.

DOSS v. STATE.

(Court of Appeals of Texas. May 14, 1890.)

THEFT—EVIDENCE—VARIANCE—INSTRUCTIONS— GRAND JURY.

1. The indictment for the theft of a bale of cotton laid the possession in the owner. The proof showed that the owner took the cotton to a gin to be ginned and baled, and that after this was done it was put in the gin-yard with other cotton; that the owner took it from there, and removed it some 50 yards from the gin-house. *Held*, that there was no variance between the allegation and the proof.

2. Defendant testified that he got the cotton from one S. at another place, and proposed to give a conversation with S. at that time to the effect that S. said the cotton was his, but that he owed people in W., and was afraid, if he took the cotton to the cotton yard himself, it would be attached, and that he hired defendant to take it for him. *Held*, that it should have been admitted as *res gesta*,—a part of the transaction by which he claimed to have obtained innocent possession.

3. The owner of the cotton-gin was unable to identify the bale of cotton which defendant had as prosecutor's property. *Held* error to refuse to charge that, in order to convict, the jury must believe beyond a reasonable doubt that it was the identical bale taken from prosecutor.

4. The court charged: "If any person other than the defendant took the cotton originally without the aid or encouragement of the defendant, and if afterwards the cotton came into the possession of the defendant, even with the knowledge then that it had been stolen, this would not constitute theft on the part of defendant; and in such case the jury must acquit."—and refused to charge: "In order to convict the defendant in this case, you must believe from the evidence, beyond a reasonable doubt, that the defendant took the bale of cotton in question from the possession of K. [prosecutor.] If any person other than the defendant took the cotton, and the said bale of cotton came into the possession of the defendant after the original taking, then you should acquit defendant, regard-

less of whether defendant acted in good faith or not, and regardless of whether he knew or not as to whether said bale of cotton had been stolen by another; and, if you have a reasonable doubt upon this point, you will acquit." *Held*, that the charge given was in some essentials inaccurate, and calculated to mislead, and that the charge refused should have been given.

5. Code Crim. Proc. Tex. art. 377, provides that an objection to a grand juror shall be heard in no other way than by challenge. *Held*, on motion to set aside indictment on the ground that one of the grand jurors was not qualified to serve, that article 523, subd. 2, providing, as a ground for motion to set aside an indictment, "that some person not authorized by law was present when the grand jury were deliberating upon the accusation against the defendant, or were voting upon the same," referred only to persons other than grand jurors. *Woods v. State*, 10 S. W. Rep. 103, explained.

Appeal from district court, Ellis county;
A. A. KEMBLE, Special Judge.

The indictment laid the possession of the stolen cotton in King, the owner. The evidence showed that King delivered to Shaffer, at his, (Shaffer's) gin, a quantity of cotton in the seed to be ginned and baled; that Shaffer ginned and baled said cotton, and put the bales with other bales of cotton in the gin-yard; that about December 1st, a few days before the alleged theft, King, as a precaution against fire, caused his said bales of cotton to be removed from where placed by Shaffer, to a point across a creek about 50 yards from the gin; that one of the said bales disappeared about the time alleged in the indictment. Bass Williams, an employe in the Waxahatchie cotton yard, testified, in substance, that defendant brought a bale of cotton to the yard on the morning of the first Monday in December, 1883. Witness helped him dump the bale from the wagon to the platform, and in doing so observed that a piece of baling had been cut from one end, where the number of the bale should have been marked. He told defendant that something was wrong about the cotton. Defendant replied that the cotton was all right; that cows had hooked the hole in the end. Witness gave defendant a ticket for the cotton, and defendant left. Witness, upon reflection, concluded that he did wrong in giving out a ticket, under the circumstances, and went to the public square to find defendant. On finding defendant he demanded the ticket, and told defendant that he was going to have him arrested about the cotton. Defendant delivered the ticket to witness, and told witness that he could have the ticket if he would say nothing about the transaction. During the preceding term of this court the defendant asked the witness to be easy on him in his testimony. The witness delivered the bale of cotton to Shaffer and John King a day or two after he received it from defendant. Shaffer declined to testify that the bale of cotton received by him and John King from Williams was King's missing bale. The number had been removed, and there was no other mark on the bale by which it could be identified. Defendant lived within two miles of Shaffer's gin.

In his own behalf, defendant testified that

he reached Waxahatchie early on the morning of the first Monday in December, 1883. He stepped into a saloon to get a drink, and in that saloon met a shabby-looking man who said his name was Shelton. He gave Shelton a drink, and the two left the saloon together. Shelton then told witness that he had a bale of cotton which belonged to him, (Shelton.) Witness took that bale to the cotton yard, and did not discover that the number was cut out until he and Williams dumped it on the platform. Williams gave witness a ticket for the cotton, but afterwards demanded the return of the ticket, and threatened the arrest of witness. Witness had no recollection of telling Williams that a cow hooked the hole in the cotton. After returning the ticket to Williams, witness, being afraid of arrest, went to the house of a relative in Ellis county; thence, after a few days, he went to Alabama, where he remained about three years. He then returned to Texas, and settled near Abilene, where he was living when arrested. This witness proposed, but was not permitted, to testify that, when Shelton delivered to him the bale of cotton, he told witness that he had raised the cotton; that he owed several of the Waxahatchie merchants, and was afraid that, if he took the cotton to the yard himself, the said merchants would attach it,—and offered witness a dollar to take the cotton to the yard, deliver it, and get a ticket for it; that, believing Shelton told the truth, he took the cotton to the yard as stated.

The refused requested charges read as follows: "No. 2. In order to convict the defendant in this case, you must believe from the evidence, beyond a reasonable doubt, that the defendant took the bale of cotton in question from the possession of P. R. King. If any person other than the defendant took the cotton, and the said bale of cotton came into the possession of the defendant after the original taking, then you should acquit defendant, regardless of whether defendant acted in good faith or not, and regardless of whether he knew or not as to whether said bale of cotton had been stolen by another; and, if you have a reasonable doubt upon this point, you will acquit. No. 3. In order to convict in this case, you should believe from the evidence, beyond a reasonable doubt, that the bale of cotton which defendant had in Waxahatchie was the same identical bale of cotton which belonged to witness P. R. King; and, if you have a reasonable doubt on this point, you will acquit." The charge as given by the court, and to correct which special charge No. 2, as above set out, was asked, reads as follows: "If any person other than the defendant took the cotton originally, without the aid or encouragement of the defendant, and if afterwards the cotton came into the possession of the defendant, even with the knowledge then that it had been stolen, this would not constitute theft on the part of defendant; and in such case the jury must acquit."

M. B. Templeton, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. It was not error to overrule defendant's motion to set aside the indictment. It was the real purpose of the motion to have the indictment set aside because one of the members of the grand jury that found and presented it was not qualified to serve as a grand juror. An objection to the qualifications of a person whom it is proposed to impanel as a grand juror may be made by challenge, but in no other way shall such an objection be heard. Code Crim. Proc. 377; Willson's Crim. St. §§ 1901, 1902; Owens' Case, 25 Tex. App. 552, 8 S. W. Rep. 658. In *Woods v. State*, 26 Tex. App. 490, 10 S. W. Rep. 108, there is an intimation that such an objection may be made and considered, under article 523 of the Code of Criminal Procedure, by motion to set aside the indictment, as was attempted in this case. That intimation, however, is a mere *dictum*; the question not being directly involved in the case, or its consideration and decision necessary. Our conclusion now is, after mature consideration, that subdivision 2 of article 523 of the Code of Crim. Procedure refers and applies only to persons who were not impaneled as grand jurors, and that it cannot be invoked for the purpose of presenting an objection to the qualification of a grand juror. If we were to hold otherwise, the manifest purpose of article 377, Code Crim. Proc., in providing that such objection might be made by challenge, but in no other manner, would be defeated. That purpose was to make the impaneling of the grand jury, when no challenge had been interposed, conclusive of the qualifications of the members of that body, and of its legality.

With respect to the possession of the cotton, we think the charge of the court was correct, and that there was no variance between allegation and proof. We think the evidence shows that the possession of the cotton at the time of the alleged theft was in the owner, King. If it had been destroyed after having been removed by King from the gin to a place of his own selection, the loss would have fallen upon him. It was under his care, management, and control after being removed from the gin.

We are of opinion that the conversation to which the defendant proposed to testify, between Shelton and himself, was *res gesta*,—a part of the transaction of the defendant's coming into possession of the cotton innocently, as he claims,—and that the court erred in refusing to permit him to detail said conversation. As to the credibility of the defendant's testimony, or the weight to be accorded it, that was a matter for the consideration of the jury. *Ward v. State*, 41 Tex. 612.

Special charge No. 2, requested by defendant, states the law applicable to the facts upon the issue as to the manner of the defendant's acquisition of the possession of the

cotton, and should have been given instead of the charge upon that issue which was given, because the charge as given is in some essentials inaccurate, and calculated to mislead unprofessional minds.

It would have been very proper for the court to have given special instruction No. 3, requested by defendant, as to the identity of the alleged stolen cotton with the cotton traced to the defendant's possession. It devolved upon the prosecution to establish such identity beyond a reasonable doubt; and, considering the uncertainty of the evidence upon this very material point, we think the court should have given said special instruction.

No exceptions were reserved to the charge of the court, nor to the refusal of the court to give the special instructions above mentioned; and, if no other errors than those relating to the charge were apparent, we might not disturb the conviction. But, considering the case as a whole, we think the errors we have discussed require that the judgment should be reversed, that the defendant may have another trial, in which all his legal rights will doubtless be awarded him. Reversed and remanded.

PERKINS v. STATE.

(Court of Appeals of Texas. April 26, 1890.)

CARRYING WEAPONS—INSTRUCTIONS.

1. On a trial for carrying a pistol about the person, it is error to charge that, if defendant did, on or about September 16, 1888, or on any day within two years prior to that time, carry a pistol about his person, he must be fined and imprisoned within the limits fixed by law, since, prior to the act of February 24, 1887, the penalty was by fine only, and the offense might have been committed prior to that time, and yet within the two years.

2. Where an order allowed 10 days from the end of the term for filing a statement of facts, a statement filed after the expiration of that time cannot be considered.

Appeal from county court, Cooke county; H. S. HOLMAN, Judge.

Davis & Harris, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. This is a conviction for unlawfully carrying a pistol on or about the person. The term of the court at which the conviction was had adjourned April 21, 1889. There was an order entered allowing 10 days in which to file a statement of facts. What purports to be a statement of facts found in the record was filed May 2d. This was not within the 10 days, and therefore the statement cannot be considered. The court instructed the jury as follows: "If you believe from the evidence that defendant did, on or about September 16, 1888, or within two years prior to September 26, 1888, carry on and about his person a pistol, you will find him guilty, and assess his punishment at a fine of not less than \$25, nor more than \$200, and by confinement in the county jail not less than 20, nor more than 60, days." This charge fixes the penalty at both fine and im-

prisonment. It told the jury that they might convict if the offense was committed on any day within two years prior to September 26, 1888. Before the act of February 24, 1887, took effect, the penalty was by fine alone; and hence the charge is erroneous in that the jury were told that, though the offense might have been committed prior to February 24, 1887, still they must punish by both fine and imprisonment. The error is fundamental, and requires a reversal of the judgment. Reversed and remanded.

NANCE v. STATE.

(Court of Appeals of Texas. May 17, 1890.)

Appeal from county court, Burnet county; R. W. CATES, Judge.

J. G. Cook, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. From the statement of facts, it appears that no venue was proved on the trial in the court below, wherefore the judgment is reversed and the cause remanded.

SCOTT v. PROCTOR.

(Court of Appeals of Kentucky. May 15, 1890.)

ESTATES—OUTSTANDING CLAIM BOUGHT BY LIFE-TENANT.

Testator left all his property to his wife for life, remainder to his children. There was an adverse claim to part of the land in testator's possession, on which his dwelling was located, which after his death his wife compromised, taking a deed in her own name, and paying for it with money obtained from her father's estate, though she had money left by testator. Plaintiff, one of the children, after selling and conveying all her interest in the land and personally left by her father, brought action for the land deeded to her mother, claiming it under a deed from her. Held, that the mother did not obtain title against the estate, and that plaintiff's conveyance had passed all her interest in the land.

Appeal from circuit court, Union county.

"Not to be officially reported."

H. D. Allen, for appellant.

PRYOR, J. Lewis Greenwell died in the county of Union in the year 1842, the owner, or, at least, in the possession, claiming to be the owner, of a tract of about 300 acres of land lying in that county. He left surviving him several children by his last wife, and two children by his first wife. By his will he gave to his wife the control of his estate for life, including the land, a number of slaves, and considerable personalty. His widow survived him for many years, dying in the year 1888. After her death, Martha A. Scott, one of Greenwell's children by her, brought this action against Proctor, the appellee, for an interest in 126 acres of the land left by her father. Her claim rests upon the fact that she obtained this interest by conveyance from her mother, and that her father never owned it. Before the death of Lewis Greenwell the heirs of one Belmain set up claim to that part

of the tract now in controversy, but no adjustment of the matter was made during the life of Greenwell. He had lived on that part of the land, erected his dwelling upon it, and regarded it as a part of the main farm. When he died, his widow compromised with the heirs of Belmain, paying them \$250, and took a deed passing to her the fee in so far as they could pass it. She then (the widow) made a deed to her children, passing to them the fee after her death, and this is the land that Mrs. Scott claims an interest in.

In the year 1859, and about 26 years before this suit was instituted, Mrs. Scott sold all of her interest in the land and personalty owned and left by her father to one Buckman, who had married one of the children of Greenwell by his first wife, and made him, in conjunction with her husband, a deed therefor. The entire tract of land was regarded as belonging to the estate, was owned and claimed by Greenwell, who was in the actual possession at his death, and must have been considered and regarded as a part of the purchase by Buckman; and the conveyance to the widow, while it passed the title of the adverse claimants, was simply a holding by her in trust for the children. There is proof conducing to show that she paid for it out of her father's estate or out of her interest in that estate; still she held in her hands the money and personalty of her husband, and could not convert the estate to her own use by compromising with adverse claimants, and taking a deed in her own right. Besides, it is apparent that since the death of Greenwell the whole tract was regarded as belonging to the estate, and the sweeping conveyance made by Mrs. Scott and her husband shows a purpose to pass all of her interest of every kind and description. The judgment below is therefore affirmed.

FITCH et al. v. POPLAR FLAT, I. R. & S. L. TURNPIKE CO.

(*Court of Appeals of Kentucky.* May 17, 1890.)

TURNPIKE COMPANY—ORGANIZATION.

A charter of a turnpike company which authorizes an organization when "\$200 to any one mile" are subscribed, is substantially complied with by a subscription of \$200, without designating any particular mile of road to which it shall be applied.

Appeal from circuit court, Lewis county.
"Not to be officially reported."

Cochran & Son, for appellants. *Geo. T. Halbert*, for appellee.

PRYOR, J. This case presents only a question of fact, and we see no reason for disturbing the judgment below. By the terms of the original charter of the turnpike company, the organization of the company was authorized when as much as \$1,800 of stock had been subscribed. By an amendment the parties interested were permitted to organize when as much as \$200 to any one mile was subscribed. The county aided in the con-

struction of the roads by paying \$1,000 to the mile, and the length of this turnpike was less than three miles. When \$250 had been subscribed (certainly \$200) the parties organized by electing its president and directors, and then proceeded to carry out the purpose of the corporation. They are met with the objection by the tax-payer that the \$200 had not been subscribed to the construction of any one mile, and therefore the organization is void, because the mile on which the money was to be expended should have been designated by the subscription. There is nothing in such a defense. The money had been subscribed, and the directors had the right to apply it to any one mile of the road. It was a substantial compliance with the charter, even if there had been no testimony on the subject. It was understood by the directors, and those subscribing, that the money should be expended on the second mile; and, if that had not been the case, the defense is without merit, as the subscription authorized the organization. Judgment affirmed.

APPERSON'S ADM'R v. TRIPLETT.

(*Court of Appeals of Kentucky.* May 20, 1890.)

SET-OFF—WHEN ALLOWED.

In an action by the vendor of land on the purchase-money notes, the vendee may set off damages accruing to him from the wrongful act of the grantor in tearing down a fence inclosing part of the land, and temporarily ejecting him therefrom.

Appeal from circuit court, Lawrence county.

"Not to be officially reported."

Alexander Lackey, for appellant. *Wm. M. Fulkerson*, for appellee.

BENNETT, J. The appellant sued the appellee on three promissory notes executed to the appellant as administrator with the will annexed, for the price of 30 acres of land. The appellee relied upon the defenses that the appellant, by a writ of possession, had wrongfully ejected him from the possession of 15 acres of this land, and had wrongfully torn down his fence, and stock had entered upon his land, and destroyed his crop. The proof is that only two acres and a fraction of an acre of land belonging to the appellee was included in said writ. For the tearing away the partition fence, and the damage done to the appellee in consequence thereof, the court allowed the appellee \$107. The writ of possession was executed, and the fence was torn down, on the 11th day of May, 1887. Shortly thereafter the appellee reset the fence, inferentially, by the permission of Auxier, who was in the possession of the land described in the writ. The resetting of the fence protected the appellee against trespass by stock. Thereafter, some one tore down the fence again, and exposed the appellee's crop, etc., to trespass by stock; and the principal damage was done the appellee by this second tearing down the fence. No

one intimates that the appellant had anything to do, by advice or otherwise, with this tearing down the fence. His connection with the writ of possession had long since ceased. It follows that he is not responsible for this second act. For the first act of tearing down the fence, under the allegations, he is responsible, for which the court assessed damages. We think that the damages thus assessed were reasonable. The striking from the rejoinder all matter in reference to the counter-claim was correct, as that matter should have been set up in the answer. There is no brief on file for the appellant. The judgment is affirmed; but, as the appellee is the real appellant, he should pay the cost of the appeal.

MCCARTHY'S ADM'R v. WOOD *et al.*

(Court of Appeals of Kentucky. May 17, 1890.)

SURVIVING PARTNERS—CONVERSION OF FIRM PROPERTY—ACCOUNTING.

1. Where all the members of a partnership agree to change it into a corporation, and articles are drawn up transferring to it all the firm property, the fact that the articles are not recorded until after the death of one of the partners, and that the others thereafter, in good faith, conduct the business of the corporation, using the partnership assets, does not render them guilty of a conversion of the partnership property.

2. A statement furnished by the surviving partners to the administrator of the deceased partner showing the amount of capital each had paid into the firm does not render them liable as on an account stated, where they have done nothing which prevents the ascertainment of the true condition of the assets of the firm at the time of the partner's death.

Appeal from Louisville chancery court.

"Not to be officially reported."

G. A. Winston and Barnett, Miller & Barnett, for appellants. Bullitt & Shield, for appellees.

PRYOR, J. The personal representative of John E. McCarthy instituted these actions in the court below to recover the balance due him as a partner of the firm of McCarthy & Wood. The real question in the two cases involves the settlement of the partnership, with a view of ascertaining the interest of each partner. McCarthy, Wood, and a son of the latter were engaged as partners in running a tannery in the city of Louisville, and were evidently, from the proof before us, losing money, prior to the death of McCarthy. A few days prior to the latter's death, the partners, for some reason, thought proper to change the partnership into a corporation by virtue of the statute, with the corporate name of D. M. Wood & Co.; and for that purpose articles were drawn up, and the property of the partnership transferred to the corporation. McCarthy's death took place before the articles of incorporation were recorded; and it is insisted, for that reason, the partnership remained to be wound up by the surviving partners, and ended the existence of the corporation. The articles of incorporation were recorded on the day of Mc-

Carthy's death, and the assets and control of all the firm property transferred to the new management. It is insisted that this was a conversion of the partnership effects by Wood and his son, who were alone interested as partners with McCarthy, and made them liable for the value of all the property belonging to the old firm, and fixed their liability at once to McCarthy's estate for his interest. Whether they exceeded their legal rights by assuming to control the property as belonging to the new corporation after McCarthy's death is a question not necessary to be determined. It clearly appears that the appellees acted in the best of faith, and proceeded to the conduct of the business of the new firm under the belief that this right was conferred by the articles of association.

They are willing, however, to stand by the original agreement of partnership, and to account as surviving partners to the personal representative of McCarthy. They had not converted the assets of the old firm so as to render it impossible or impracticable to ascertain what were the real assets on hand at the death of the partner. The testimony shows that the account presented to the appellant was not intended to be a statement of the amount due from the firm to the deceased partner, but merely to show the amount of capital each had paid into the concern; and this is confirmed by the subsequent settlement of the partnership, showing its insolvency. The books of the firm were exhibited, an appraisal had, and every opportunity afforded the parties in interest and the commissioner to ascertain the true condition of the partnership, and the liability, if any, of the one to the other. There is evidence conducing to show that the appellees, after McCarthy's death, purchased some hides, and expended other moneys in other ways in conducting the business, but not to such an extent as precluded or prevented the parties or the commissioner from ascertaining McCarthy's interest either at his death or when this action was filed. The character of the business required that the stock on hand should be worked up, and the surviving partners had the right to proceed with their business by virtue of the original articles of partnership; and, if it had been their duty to have ceased all operations because the firm had been changed, there was no such conversion as made them liable. The statute requires that the articles of incorporation shall be recorded before proceeding to conduct the business of the enterprise; but a failure to do so does not change the liability of the parties to the association, the one to the other; and it would be a harsh rule to require the appellees to account as if they had been strangers to the deceased partner, and with no interest in the property of the firm. It seems from the record before us that the appellees have acted in the best of faith, and are not liable either on a stated account, or by reason of their placing the assets of the

old into the new corporation. The venture resulted in loss to all the partners, and we perceive no reason for fixing any greater liability on the surviving partners than is found in the settlement made by the commissioner. The judgment is affirmed.

STAFFORD v. WILLIAMS.

(*Supreme Court of Tennessee*. May 18, 1889.)

SUPERSEDEAS — EXECUTED ORDER — CLERK AND MASTER—OUSTER FROM OFFICE.

Where the term of office of the clerk and master of a chancery court had not expired when his successor was appointed, and the latter procured a warrant directing the seizure of the official books and papers, on application for a writ of error from the judgment on which the warrant issued, a *supersedeas* will issue, though the warrant has been fully executed, with a direction to restore the books and papers; that being the only method for preserving the rights of the parties as they were before the making of the order.

Murray & Son, M. G. Butler, I. Halle, and T. W. Wade, for plaintiff. *E. L. Gardenhire and Cox & Anderson*, for defendant.

SNODGRASS, J. This is an application for writ of error, *supersedeas*, and restitution by defendant, Williams, the clerk and master of the chancery court of Jackson county. Notice was given, and the petition presented to me at chambers, accompanied by briefs of counsel on both sides. In accordance with the practice of the court when in session, the application has been considered on consultation by the court, and the result reached is one concurred in by all the members of the court. It is that the petitioner is entitled to the writs prayed for.

Petitioner was on the 9th day of January, 1889, the clerk and master of the chancery court of Jackson county. On that day the chancellor, assuming that the office was vacant by virtue of the expiration of the constitutional term, so declared, and appointed the petitioner, Stafford, thereto. Stafford then instituted proceedings to recover the books and papers, etc., of the office, under sections 993, 994, Code, (Mill. & V.,) before S. A. Smith, chairman of the county court of Jackson county. On the hearing, he adjudged Stafford entitled to the relief sought, and issued the warrant provided for in section 998 to the sheriff of Jackson county, "commanding him to search for the books, papers, and property belonging and appertaining to the office, and to seize and bring them before him." This warrant issued 8th of April, 1889. It was on same day returned with the following indorsement by the sheriff: "Came to hand same day issued. Executed as commanded, by searching the office of the clerk and master in the court-house in Gainesborough, Tennessee, and turning over the books and papers in said office as commanded. A list of the books is contained in a receipt given by I. W. Stafford to S. A. Smith. W. C. MORGAN, Sh'ff." The judgment on which this warrant issued was rendered two days preceding.

The defendant tendered a bill of exceptions at the time, which was signed, and now seeks to have this action of the court superseded, and to have the books and papers taken from him restored, and the judgment reversed, on writ of error.

The record shows that H. W. Williams was appointed several times,—the last time on the 5th of November, 1888; and this appointment was for six years. His term of office had not, therefore, expired when the appointment of Stafford was made, and would not expire before November 5, 1889. When there is a vacancy in the office of a clerk appointed under the constitution, this court has several times held, in cases reported and unreported, that the appointment was for the full term of six years from its date, (*Gold v. Fite*, 2 Baxt. 250; *Williams v. Cox*, unreported,) and in the matter of appointments of this court. But it is insisted that no *supersedeas* can be issued, because the judgment of the chairman of the county court has been executed, and that a *supersedeas* cannot affect it. Numerous cases are cited by counsel on this point, and others are to be found cited under sections 4701 and 5265 of the Code, (Mill. & V.) They all relate to *supersedeas* of interlocutory decrees, and not to a final decree. The court very early took a distinction respecting the practice in such cases, (*Kearney v. Jackson*, 1 Yerg. 294;) and it is not difficult to show the propriety of a different practice, if it were necessary. But in this case it is not necessary. The order which it is assumed is executed is not executed. It simply directs the issuance of a search-warrant commanding the sheriff to search such places as may hereafter be designated in the warrant for all the books, papers, records, property, furniture, etc., belonging to the office of clerk and master of Jackson county, Tenn., and to bring them before the chairman, for the purpose of delivering them over to James W. Stafford. The statute says that "he shall examine and inquire whether the same appertained to the office vacated, in which case he shall cause such books, papers, and property to be delivered to the complainant."² The order as made does not recite that an inquiry and examination will be had on return of the books, papers, records, property, furniture, etc., before S. A. Smith; but, of course, that is its meaning, and, if it were intended to mean anything else, it would be to that extent invalid. But it does, in accordance with the statute, and in terms, require that the thing shall be brought before him. The warrant issued under this order, commands a search of the clerk and master's office, and an old office near his residence, the residence itself, and that of the deputies, C. and M., and a seizure of "all the books, papers, records, property, furniture, and everything of and belonging to the office of clerk and master." The return shows only a search of the "office in the court-house, and

² Mill. & V. Code, § 999. Digitized by Google

a turning over of the books and papers in said office, as commanded within." It is not attempted to be executed beyond this, as to a seizure of anything other than such books and papers as were found there. Whatever effects or property, which appertained to the office, as may have been in the other places designated by the warrant to be searched, or whatever may have been in that office outside of the "books and papers," has not been seized or turned over to S. A. Smith according to the warrant and return of the officer, though it is still liable to seizure under the order superseded.

Then, too, the books and papers seized are, according to the return, in the hands of S. A. Smith, or should be; for this record shows no judicial examination, inquiry, and award of them to complainant after seizure. The recitation in conclusion of the return of the sheriff is ineffectual to show any such disposition of them, if such, as it probably is, is its purpose. So far as the record shows, the books and papers are in the hands of Smith, chairman, awaiting the examination and inquiry required by the statute, and such action is necessary to the final execution of the order made; and upon this ground a *supersedeas* will be effectual to reach their disposition, as well as to prevent the further execution of the order by additional seizure. So that there is really no technical difficulty, in this case, in affording ample remedy by *supersedeas*.

Independently of these considerations, however, we hold that in a case like this, in which, on writ of error, a *supersedeas* is the only remedy, with restitution where the order has been executed, we will order it to so operate, and thus preserve the rights of the parties as they were before judgment. This case most strikingly illustrates the propriety, as well as the necessity, of such construction, because, if the books and papers of the office could be detained from the defendant until this court meets, in December, his term would be out, and he would have no use for a judgment restoring them to his possession. The clerk will therefore issue writs of error and *supersedeas* to the order of the chairman of the county court of Jackson county, and directing the restoration of the books and papers taken from the office of the clerk and master to defendant Williams upon his giving bond, with good security, in the penalty of \$2,000, conditioned as required by law, to abide by and perform the judgment of this court in this case on final hearing, and usual cost-bond.

JOHNSON v. SUPREME LODGE OF KNIGHTS OF HONOR *et al.*

(Supreme Court of Arkansas. May 10, 1890.)

BENEFIT CERTIFICATE—"HEIRS"—DISTRIBUTION OF ESTATES.

1. Where a benefit certificate was payable to the "heirs" of deceased, who left a widow, but no children, the word "heirs" will be construed to mean those designated by the statute of distribution to take personal property, (Mansf. Dig. Ark.

§ 2632;) and, since the widow is thereunder entitled only after all the husband's kindred, she has no claim to the fund as against his brothers and sisters.

2. Under section 2592, which provides that, "if a husband die leaving a widow and no children, such widow shall be endowed of one-half the real estate of which such husband died seised, and one-half of the personal estate, absolutely and in her own right," she takes by way of dower, and not as a distributee; and this section does not bring said widow under the description, "heirs," in the certificate.

3. A provision of the society's constitution limiting the beneficiaries to the members of assured's family, or those dependent upon him, is for the society's benefit only; and where it paid the money into court the limitation cannot aid the widow's claim.

Appeal from circuit court, Prairie county; M. T. SANDERS, Judge.

U. M. & G. B. Ross and Geo. Stibly, for appellant. J. E. Gatewood, for appellee.

BATTLE, J. On the 4th day of September, 1883, the Supreme Lodge of the Knights of Honor issued to James W. Johnson, a member of Devall's Bluff Lodge, No. 2,172, a local lodge of the Knights of Honor located at Devall's Bluff, in this state, a benefit certificate for the sum of \$2,000, payable to his heirs at his death. At that time Johnson was unmarried, and the constitution of the Supreme Lodge authorized the issuing of a benefit certificate payable on the death of a member to his family, or as he might direct. In 1884 the constitution was changed so as to authorize the issuing of a certificate to a member, "payable to some member or members of his family, or person or persons dependent on him, as he may direct or designate by name, to be paid as provided by general law." After this, on the 7th of December, 1884, James W. Johnson and Laura A. Johnson, the plaintiff in this action, married; and on the 27th of February, 1886, a child was born to them, who died on the 10th of August of the same year. On the 24th of November following, James W. Johnson died without descendants, leaving Laura A., his widow, and S. W. Pate and O. T. Carr, sisters of the whole blood, and George W. Price and Salvina T. Hurt, half sister and brother, his nearest kindred, him surviving. The beneficiaries named in the certificate of the 4th of September, 1883, were never changed. The Supreme Lodge has paid the \$2,000 into court; and the sisters and half sister and brother, defendants in this action, claim; to be the heirs of Johnson and Laura A., litigate its disposition.

The first question presented for our consideration is, who are meant by the word "heirs" in the certificate in controversy? It is a technical word. When used in any legal instrument, and there is no context to explain it, as in this case, it should be understood in its legal and technical sense. Moody v. Walker, 3 Ark. 147; Myar v. Snow, 49 Ark. 129, 4 S. W. Rep. 381; Hascall v. Cox, 49 Mich. 440, 13 N. W. Rep. 807; Mounsey v. Blamire, 4 Russ. 384; De Beauvoir v. De Beauvoir, 3 H. L. Cas. 553, 557; Doody v.

Higgins, 2 Kay & J. 729; Holloway v. Holloway, 5 Ves. 401. At common law it was used to designate the persons on whom an inheritance in real estate was cast by the law on the death of the ancestor. Originally, it could not be used to designate those on whom the goods or chattel property were cast, because the law cast them upon no one. No one "was appointed by law to succeed to the deceased ancestor. On his death they became *bona vacantia*, and were seized by the king on that account, and by him, as grand almoner, applied to pious uses, now considered superstitious, for the good of the soul of their former owner." But, since the enactment of statutes of distribution, it has often been used in gifts and bequests of personal property to designate the donee or legatee. As to its meaning when used in this connection, courts are not in harmony, and there is much confusion and conflict in the decisions. No useful purpose can be served by a review of the cases upon the question in this opinion. Suffice it to say that the weight of authority holds that the word "heirs," when used in any instrument to designate the persons to whom personal property is thereby transferred, given, or bequeathed, and the context does not explain it, means those who would, under the statute of distributions, be entitled to the personal estate of the persons of whom they are mentioned as heirs, in the event of death and insolvency. *Doody v. Higgins*, 2 Kay & J. 729; *Gittings v. McDermott*, 7 Eng. Ch. 69; *Wingfield v. Wingfield*, 26 Moak, 422; *Sweet v. Dutton*, 109 Mass. 590; *Wright v. Trustees*, 1 Hoff. Ch. 211, 218; *McCabe v. Spruill*, 1 Dev. Eq. 190; *Evans v. Salt*, 6 Beav. 266; *Jacobs v. Jacobs*, 16 Beav. 557, 560; *White v. Stanfield*, (Mass.) 15 N. E. Rep. 924, 925; *Low v. Smith*, 2 Jur. (N. S.) pt. 1, p. 344; *Houghton v. Kendall*, 7 Allen, 77; 2 Jur. (N. S.) pt. 2, p. 211; *Croom v. Herring*, 4 Hawks, 393; *Eddings v. Long*, 10 Ala. 203; *Rawson v. Rawson*, 52 Ill. 62; *Richards v. Miller*, 62 Ill. 423; *Hascall v. Cox*, 49 Mich. 440, 441, 13 N. W. Rep. 807. See *Tillman v. Davis*, 95 N. Y. 17.

In many states where the widow is entitled to take under the statute of distribution, she is held to be an heir of her deceased husband as to his personal estate. But it is different in this state. Section 2522, Mansf. Dig., provides: "When any person shall die, having title to any real estate of inheritance or personal estate not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed in parcenary to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner: *First*. To children or their descendants, in equal parts. *Second*. If there be no children, then to the father; then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts," etc. The statutes provide that relations of the half blood shall inherit equally

with those of the whole blood in the same degree, unless the inheritance come to the intestate through an ancestor. In only one event does the widow take as an heir or distributee of her deceased husband, and that is when he died intestate, and leaves no children or their descendants, father, mother, nor their descendants, or any paternal or maternal kindred capable of inheriting. Our statutes virtually declare that she shall not take the real or personal property of her deceased husband as heir in any other event, if then. Mansf. Dig. § 2528. It is true that section 2592, Mansf. Dig., provides: "If a husband die, leaving a widow and no children, such widow shall be endowed of one-half of the real estate of which such husband died seised, and one-half of the personal estate, absolutely and in her own right." But she takes the one-half of the personal estate as dower, absolutely and independently of creditors, and not as a distributive share.

In *Hill's Adm'rs v. Mitchell*, 5 Ark. 618, this court said: "Distribution and dower are two separate and distinct things. One is a lien created by law on the property of the husband at the time of the marriage, which necessarily takes precedence over all other subsequent accruing rights, and attaches to the specific property, and is carved out of it. Distribution occurs after administration and the payment of debts, and the estate is then divided between the heirs and legatees. The widow is not entitled to any portion or distributive share after her dower has been allotted to her; for all that goes to the heirs or legatees after payment of debts, and the administrator is bound to distribute the residue in his hands. We have no statute giving her any portion of the personal estate as a distributive share, and that part of the common law which is in force here allows her no such interest in the personal effects of her husband."

In Illinois, a statute was enacted which provides: "When there is a widow or surviving husband, and also a child or children, or descendants of such child or children, of the intestate, the widow or surviving husband shall receive as his or her absolute personal estate one-third of all the personal estate of the intestate." Rev. St. c. 39, par. 4. In *Gauch v. Insurance Co.*, 88 Ill. 251, the court held that this statute was not intended to, and did not, make the widow an heir of her intestate husband, but defined what shall be taken as dower, and held that a policy of life insurance payable to the "legal heirs" of the person whose life was insured was payable to his children, if he left any, and that his widow was not included in the words "legal heirs."

We do not think that Laura A. was an heir of her husband, or included in the word "heirs" in the certificate in controversy. But it is contended that the brothers and sisters of Johnson are entitled to no part of the \$2 000, because the constitution of the Supreme Lodge of 1884 limits the right of a

member of any lodge of the Knights of Honor to name beneficiaries in a certificate issued to him to the members of his family, or those dependent on him, and they belong to neither of these classes. But this question can be raised by no one except the Supreme Lodge, and it does not. By paying the money into court, it has expressed its willingness to have it paid to Johnson's heirs. The money forms no part of his estate. The widow has no interest in it. The constitution of the Supreme Lodge of 1884 provides: "In the event of the death of all the beneficiaries designated by the member before the decease of such member, if he shall make no other disposition thereof, the benefit shall be paid to the heirs of the deceased member." The child having died before its father, Johnson left his brother and sisters his only heirs. As the Supreme Lodge by its certificate promised to pay them the \$2,000, and do not object to paying, and no other person can, lawfully, they are entitled to a judgment that it be paid to them.

Judgment affirmed.

NICHOLS v. TRIBLE.

(Supreme Court of Arkansas. May 10, 1890.)

USURIOUS CONTRACT—SUBROGATION.

1. Mansf. Dig. Ark. § 4732, makes a usurious loan absolutely void as to both principal and interest. Defendant executed a deed, absolute in form, to secure a loan. Afterwards he obtained a usurious loan from plaintiff, who at his request paid the original debt, and took a deed from the creditor as security. This deed being void because of the usury, the court below decreed that plaintiff should be subrogated to the rights of the original creditor, and ordered a foreclosure of the original mortgage. Held error, since equity will not aid one who is compelled to prove an illegal contract in order to establish his claim.

2. Under such circumstances, plaintiff is entitled to recover the taxes he paid on the land, with interest.

Appeal from circuit court, Hempstead county; W. S. EAKIN, Special Judge.

Mansf. Dig. Ark. § 4732, provides that "all contracts for a greater rate of interest than ten per centum per annum shall be void as to principal and interest."

A. B. & R. B. Williams, for appellant.
Atkinson & England, for appellee.

COCKRILL, C. J. Tribble borrowed money from Oglesby, and to secure the loan executed to him a deed, absolute in form, to the land in question. Subsequently, at Tribble's request, Oglesby executed a deed to the same land to Nichols. We think the chancellor was amply sustained by the proof in finding that the consideration for the deed from Oglesby to Nichols was a usurious loan of money from Nichols to Tribble, the deed being intended as security therefor. A part of the loan was applied by Nichols, at the request of Tribble, in paying off Tribble's debt to Oglesby. The residue was paid to Tribble. The chancellor held that Nichols should be subrogated to the rights that Oglesby had under his mortgage, and decreed a foreclosure of

the same for Nichol's benefit. The correctness of that ruling is the legal question presented by the appeal.

The general rule is well established that one who, at the request of another, pays off an incumbrance upon the latter's land, is entitled to be subrogated to the security; and it is also a settled rule that, when a valid security is canceled by means of a subsequent agreement and security which is void for usury, the original security is not invalidated, but equity will revive and enforce it. But Nichols cannot invoke the aid of either of these principles. One who seeks protection under the equitable doctrine of subrogation must come into court with clean hands. It is not applied to relieve one of the consequences of his own wrongful or illegal act. Where, therefore, the claim to subrogation grows out of an agreement which is void by reason of usury, it furnishes no basis for the equitable doctrine. *Sheld. Subr. §§ 42, 44; Perkins v. Hall*, 105 N. Y. 539, 12 N. E. Rep. 48. If Nichols had been the owner of the Oglesby mortgage, and subsequently entered into the usurious contract he actually made, and by means of it had canceled the first mortgage, the case would be like that of *Gerwig v. Sitterly*, 56 N. Y. 214, which he relies upon to sustain his contention. There it was not necessary to resort to the illegal contract to take the benefit of the binding security. And in *Patterson v. Birdsall*, 64 N. Y. 294, the other case relied upon by Nichols, it did not become necessary to resort to any dealings between the usurer and the debtor in order to establish the right to the first mortgage when the usurious security was annulled. But the position of Nichols is such that he is forced to resort to proof of his illegal contract to establish any claim whatever. The agreement to take the legal title from Oglesby, who held it in trust for Tribble, instead of from Tribble himself, and the payment of Oglesby's debt, are inseparable parts of the usurious agreement. But, as it is against the policy of the law to found any right upon an illegal contract, Nichols cannot have the benefit of the Oglesby mortgage. The two cases cited by Nichols are commented upon and distinguished from this class of cases in *Perkins v. Hall*, supra, and *Baldwin v. Moffett*, 94 N. Y. 82.

Reverse the judgment and remand the cause, with directions to enter judgment for Tribble. Nichols will be decreed the amount of taxes paid on the land as found by the court below, and interest.

ST. LOUIS & S. F. RY. CO. v. WILLIAMS, Sheriff.

(Supreme Court of Arkansas. March 1, 1890.)

RAILROADS—TAXATION—BRIDGE COMPANY.

A bridge built by a corporation organized for that purpose is not the property of a railway company, and assessable for taxes as such by the state board of railway commissioners, under Mansf. Dig. Ark. § 5647, though the stockholders of both companies are the same, and all of the

bridge company stock is pledged to the railway company, which by contract has the permanent use of the bridge. *Distinguishing State v. Depot Co.*, 48 N. W. Rep. 840.

Appeal from circuit court, Sebastian county; J. S. LITTLE, Judge.

The St. Louis and San Francisco Railway Company, (hereafter called the railway company,) during the years 1881 and 1882, constructed a line of railway from the Missouri state line through the counties of Benton, Washington, Crawford, and Sebastian to Fort Smith, its mileage in the state being about 102 miles. The continuity of said line of railway was broken by the Arkansas river. On July 3, 1882, congress granted to the railway company authority "to construct, or cause to be constructed, and maintain, a bridge, and approaches thereto, over the Arkansas river at Van Buren, Crawford county, Ark. Said bridge shall be constructed to provide for the passage of railway trains, and, at the option of the corporation by which it may be built, may be used for the passage of wagons," etc. During the year 1884, Caroline L. Scott conveyed to the railway company the land constituting the right of way to the bridge subsequently built. In March, 1885, the Fort Smith & Van Buren Bridge Company (hereafter called the bridge company) was incorporated under the laws of Arkansas; its object and purpose being to construct, maintain, and own a highway and railroad bridge for use in crossing railroad locomotives, cars, wagons, and teams, etc. On December 18, 1885, the railway company, by deed, conveyed to the bridge company the right of way for the approaches to the bridge; reciting in said deed that the bridge company was authorized to construct a bridge by the laws of Arkansas and act of congress. During the year 1885 the bridge was built; the bridge company contracting with the Union Bridge Company of New York to construct the bridge, and issuing first mortgage bonds for \$500,000, and securing the same by mortgage executed to the Mercantile Trust Company. On April 1, 1885, the bridge company entered into a contract with the railway company for 98 years, whereby it was agreed that the bridge company conveyed to the railway company, its assigns, etc., the bridge, right of way, land, abutments, etc., and all its rights, franchises, and privileges of every nature, except the franchise of the bridge company to exist as a corporation, and expressly reserving to the bridge company the right to contract with other parties for the use of the bridge; that the bridge company, during the existence of the lease, should maintain its separate existence, and that at the expiration thereof the railway company should surrender to the bridge company the possession and control of the property; that the railway company should have the right to reject all contracts made by the bridge company with others for the use of its bridge. The state board of railway commissioners, in assessing the railroads in the state for the year 1887,

valued this bridge at \$263,000, and assessed it as part and parcel of the railway company, adding its value to the assessed value of the road-way, and prorating the gross sum to the four counties of Benton, Washington, Crawford, and Sebastian, according to the mileage of the railway company in each county. The assessors of Crawford and Sebastian counties take the position that the bridge and its approaches are not part of the right of way, etc., of the railway company, but that the bridge and approaches are the property of the Fort Smith and Van Buren Bridge Company, a corporation organized under the laws of Arkansas, whose office is at Fort Smith, and whose property is entirely within the two counties. They, therefore, assessed the property as the property of the Fort Smith and Van Buren Bridge Company, valuing it at \$100,000 for each county. The railway company and the bridge company filed their bill in the Sebastian circuit court to restrain the sheriff from collecting tax on the assessment of the bridge by the county assessor. The circuit court decided that the bridge and its approaches were the property of the bridge company, and assessable by the county assessor under section 5645, Mansf. Dig. That the action of the state board in assessing said bridge property was without authority, and void. The court, therefore, perpetually enjoined the sheriff from collecting any taxes from the railway company, by reason of any assessment of the bridge by the state board. It denied the prayer of the railway company, praying an order enjoining the sheriff from collecting taxes from the bridge company by reason of the assessment by the county assessor.

Clayton, Brizzolari & Forrester, McDaniels & McGill, and *E. B. Wall*, for appellants. *Clendenning & Read* and *L. P. Sandels*, for appellees.

COCKRILL, C. J. It is argued that the bridge in question should be assessed for taxation to the appellant railway, because it is used by that railway as a railway bridge; but it is also used by the Little Rock & Ft. Smith Railway, and, if the use to which the structure is devoted is to control the question of its assessment, it could as well be assessed as a part of the latter railway as the former. That shows the fallacy of the contention. It is not the use that property is put to that determines to whom it is assessable. The ownership, or under some circumstances, the control, of the property is the statutory test. Only railways are to be assessed by the state board of railway commission. Bridge companies and corporations, other than railway and insurance companies, are to be assessed by the local assessors. The statute so enacts. Section 5647 et seq. Mansf. Dig., as amended by the act of March 28, 1887. The requirement as to railways is that every corporation or other person "owning or operating" a railway shall return its road to the state board for taxation; and, in estimating the

value, the board is required to take into consideration everything on the right of way and appurtenant to the railroad which adds value to it as an entire thing. Bridges which are on the line of the railway, and are railway property, are therefore to be assessed as an integral part of the railway. They fall within the exclusive jurisdiction of the state board, and the increased revenue which is derived from the road on account of them is apportioned to the several counties through which the road runs. This comes from the legislative policy of taxing each road as a unit. *Railway Co. v. Worthen*, ante, 254. But the policy is equally well defined to tax bridges, which are not railroad property, through the instrumentality of the local assessors. There is no attempt to classify bridges so as to make railroad toll-bridges, which are not the property or controlled by railroads, taxable by one agency, and other highway toll-bridges by another. If, therefore, the bridge in question belongs to a company other than a railway, and is operated by it as a toll-bridge for the convenience of all railways that meet at that point, it does not come within the letter or the reason of the statute for the assessment of railways. It is not contended that the bridge company is either the owner or operator of a railroad. The question is, does the railway own or operate the bridge as a part of its road, or is it owned or operated independently of the railway? It was built by the Fort Smith & Van Buren Bridge Company, which was incorporated under the laws of this state to operate a railway and other highway toll-bridge. It is argued that the bridge company is only an agency of the railway company, and that they are practically one. In proof of this we are referred to the fact that the stockholders of the bridge company are stockholders of the railway, and that the entire stock of the bridge company was pledged at its inception to the railway company. But the partial identity of stockholders does not merge two separate legal entities into one, and the pledge of the stock is shown to have been made as security for a loan of credit by the railway,—a transaction which the statute sanctions. The agreement may afford the railway company a ready means of acquiring the control or ownership of the bridge, but it did not in itself confer such rights. There is nothing to show that the railway company is the substantial owner of the bridge by reason of owning the stock, and the case is therefore unlike that of *State v. Depqt Co.*, 43 N. W. Rep. 840, which the appellants rely upon.

But the bridge company has entered into an agreement with the railway for the use of its bridge for the full period of its right to corporate existence; and it is argued that it has thus transferred all its rights and interest to the railway except the right to a naked and somewhat ambiguous existence, thereby giving the railway the ownership or absolute control of the property. But the contention is too broad. Neither the legal effect of the

language of the agreement, nor the practice of the parties under it, justifies the conclusion. It will be seen, from the terms of the agreement set forth in the statement of facts by the reporter, that the bridge company expressly reserved the right to contract with other parties for the use of the bridge. Without this reservation, the granting part of the instrument would have been sufficient to carry the exclusive control of the bridge, and so made it practically a part of the railway. But the intention of the parties is to be gathered from the whole instrument, and the comprehensive terms used in the granting part are narrowed and limited by the subsequent reservation. *Varner v. Rice*, 44 Ark. 236. The railway company stipulates for the right to reject contracts made by the bridge company with others for the use of its bridge, and it is argued that the power thus given it nullifies or puts it in the power of the railway to nullify the reservation of the bridge company's right to contract with others, and so leaves the railway with the same power under the contract as though it were written without it. It is not to be presumed that it was the intention of the parties to confer upon the railway the power arbitrarily, and without reason, to prevent the bridge company from entering into further contracts for the use of its bridge, for that would make the right to do so, which was reserved in the contract, utterly meaningless. But it is a rule of construction that none of the terms of a contract shall be rejected as meaningless, or as irreconcilable with others, when, from a fair intendment, effect can be given to all. Experience has taught that this is more consonant, as a rule, with the intention of contracting parties. It is not likely that they will deliberately insert terms into their agreement which are intended to be of no effect. The assent of the railway was doubtless thought necessary to put a check upon the regulations of the bridge company about the passage of trains, when a second company should come into the use of the bridge. It is more natural to suppose that it was given as a protection to the railway company against the encroachments of newcomers upon the bridge than as an arbitrary veto upon the company's right to make new contracts. Moreover, the act of congress authorizing the construction of the bridge provides that it may be used by any railway company, and we are to presume that the parties contracted with reference to the observance of the condition, rather than its violation. But to say that the meaning of the contract is to give the first railway the power to exclude all others would not be in keeping with that rule. That that was not the construction placed on the agreement by the parties is shown by the subsequent grant to the Fort Smith Railway of the right to use the bridge for 30 years. In this light, the meaning of the contract is that the railway company has acquired only the privilege of passing its trains over the bridge. That, as we have

seen, does not make the bridge railroad property; nor does it put the railroad in the attitude of operating the bridge as a part of its road. This is not a case of an attempt to escape taxation, but it is important to the parties and the counties on the line of the railway to ascertain by which of the two schemes devised by the state for assessment for taxation it is governed. As it falls within the class which the legislature has provided shall go to the local assessors, it is not the province of the courts to put it elsewhere. The decree should therefore be affirmed.

SPRATT v. NEW ORLEANS INS. ASS'N.

(Supreme Court of Arkansas. May 3, 1890.)

APPEAL—EXCEPTIONS—INSURANCE—APPLICATION.

1. When a bill of exceptions contains the request "the clerk will here copy plaintiff's instructions as asked, leaving off the amendments of the court," and recites that the court gave certain of the instructions after adding specified clauses, and the transcript contains a paper writing indorsed, "Instructions for Plaintiff," divided into paragraphs and amended as recited in the bill of exceptions, its identity with the instructions called for is sufficiently established.

2. Though an application for insurance recites that the solicitor acted as agent of the insured in writing out answers to questions in the application, and the policy contains a warranty that the diagram of the insured premises in the application is correct, the policy is not vitiated by the incorrectness of the diagram, if it was made by the solicitor.

3. A failure to comply with a warranty that insured would keep his books at night in a fire-proof safe, or in some place not exposed to a fire, which would destroy the building insured, does not vitiate the policy when insured informed the solicitor, in preparing the application, that he had no safe, and would keep the books in his dwelling, and to the question in the application, "Do you agree to keep your books in an iron safe at night?" he answered, "Keep them in dwelling at night."

Appeal from circuit court, Nevada county; C. E. MITCHELL, Judge.

Feazel & Rodgers and R. B. Williams, for appellant. *E. W. Kimball and T. E. Webber*, for appellee.

HEMINGWAY, J. All errors assigned upon this appeal relate to the charging of the jury; but the appellee contends that the questions argued by counsel for appellant are not presented by the record, because the charge was not preserved in the bill of exceptions. If that contention is correct, its decision relieves the necessity of considering any other question. A "skeleton bill of exceptions" was prepared, signed and filed, and is brought before us by *certiorari*. After setting out all the evidence in the cause, it continues: "And thereupon the plaintiff asked the court to instruct the jury as follows: (Clerk will here copy plaintiff's instructions as asked, leaving off the amendments of the court.)" It then recites that the court refused the first prayer of plaintiff in the form submitted, but gave it after adding a clause which is set out. It also recites that the court refused the third prayer as submitted by plaintiff, but gave it after adding a clause which is set out. The

transcript contains what purports to be the prayer for a charge as presented by plaintiff, but the appellee contends that it is not identified by the call in the bill of exceptions. It is indorsed, "Instructions for Plaintiff," and is divided into paragraphs, entitled instructions 1, 2, 3, and 4. It shows that amendments were made to the instructions as set out, in accordance with the recitals in the skeleton bill.

Is the identification sufficient? The bill calls for "instructions for plaintiff," and the transcript contains a series of instructions indorsed, "Instructions for Plaintiff." The bill discloses that the judge added certain clauses to instructions numbered 1 and 3, and the instructions thus numbered in the transcript contain the clauses so added. The identification might be more complete; but we think the call "to copy" fairly imports that the instructions asked were in writing, and in the custody of the clerk. The indorsement on the instructions, as transcribed, correspond with the call, and the amendment by the court recited in the skeleton bill corresponds with that shown upon the transcript. In the case of *Keith v. Optical Co.*, 48 Ark. 138, 2 S. W. Rep. 777, the bill of exceptions was as follows: "The defendant, to maintain the issue on his part, introduced in evidence the agreed statement of F. Moore, which is in words and figures as follows, to-wit: (Here copy Moore's statement.)" The statement had not been signed by counsel, or marked "Filed," but was indorsed, "F. Moore's Statement," and in this answered the call. The court held it was sufficiently identified. The instructions asked by the defendant were brought up on the bill of exceptions by the same call as those for the plaintiff. There is the same means of identification, except that they were not amended by the judge; but, under the decision above cited, we are constrained to hold the identification sufficient. If it were charged that the transcript did not, in fact, contain the instructions passed upon by the circuit court, we would find much difficulty in reaching this conclusion; but, as there is no denial of identity, marks of identification are less rigidly scrutinized.

The instructions asked by the plaintiff and those given on behalf of the defendant relate to two alleged breaches of warranty on the part of plaintiff,—the first, that the diagram of the premises insured, as set out in the application, was correct, whereas it was in fact incorrect; the second, that plaintiff agreed to keep his books of account and the last inventory of his stock in a fire-proof safe at night, or in some secure place not exposed to fire, which would destroy the house insured, whereas he kept them in the part of the house insured occupied by him as a dwelling, and not in a safe of the character indicated. We will consider the instructions in that order.

1. The diagram accompanying the application was made by the solicitor of the com-

pany, who was authorized to take and forward applications for insurance, deliver policies, and collect and remit premiums. He knew the situation of the property, and made a diagram which the plaintiff never saw. If it was false, he made it so, and it does not appear that plaintiff had any knowledge of that fact. Although the policy contained a warranty by plaintiff that the diagram was correct, there was nothing to apprise him that it was incorrect. Of this it seems that he and the general agent of the defendant were equally ignorant. The fault rests with the solicitor. To whom shall it be imputed? He acted in behalf of the company, and it accepted the fruits of his work; but it is said that he was a "solicitor," and not an "agent," of the company, and that the application recited that in writing out answers to questions in it, and in preparing a diagram, he acted as the agent of the insured. For convenience in the conduct of its business, the company may make the above classification of its agencies, but it cannot disown any one, by classifying them. Neither can its declaration override the facts, nor a fiction dissolve existing relations. Without inquiring into the scope of Van Dyke's agency, it is sufficient to say that, in the matter of procuring the application, he acted for, and was in law, the agent of the company. The insured had a right to expect that he would make a correct diagram, and to believe, in accepting the policy, that he had made it correctly. The knowledge that it was incorrect was chargeable to the company through its agent, while the insured knew nothing of it. It could not, having such knowledge, issue the policy, and afterwards defeat liability growing out of it, by inserting in it for him the warranty of a fact which it knew to be false. *Insurance Co. v. Brodie*, 11 S. W. Rep. 1016. The first instruction asked by the plaintiff should therefore have been given without the amendment, and the first, seventh, and fourteenth instructions asked by the defendant should have been refused.

2. The policy contains a warranty that the insured would keep the books of his business, and the last inventory of his stock, at night, in a fire-proof safe, or in some secure place not exposed to a fire, which would destroy the building insured. He kept them in the part of the building insured, which he occupied as a dwelling, and not in a safe. When preparing his application, he told the solicitor that he had no safe, and would keep the books in his dwelling; and the application which is made a part of the policy contained the following question and answer: "Question. Do you agree to keep your books in an iron safe at night? Answer. Keep them in dwelling at night." Although the question contained no reference to any other place in which the books might be kept other than an iron safe, the answer furnishes the information that they would not be kept in such a safe, but would be kept in a designated place. Its situation with reference to the

property insured was discoverable upon the application, and was known to the solicitor. The company, thus advised of the purpose of the insured, without objecting to it, issued the policy, and thereby acquiesced in the purpose expressed. It would be a reproach to the law if a recovery could be defeated on such a pretext. The sixth and tenth instructions, given at the request of the defendant, should have been refused. The second, eleventh, and ninth instructions, given at the request of the defendant, announce, correctly, legal principles. They should not have been given, unless the principles were pertinent to the case made by the proof. As to that, inquiry by us would involve a useless consumption of time, which we may properly give to other causes pressing upon our attention. For the errors indicated the judgment will be reversed, and the cause remanded for a new trial.

JENNINGS v. CARTER.

(Supreme Court of Arkansas. May 10, 1890.)

EXECUTION—SALE OF HOMESTEAD—NOTICE—FRAUD.

1. In ejectment it appeared that the land had been defendant's homestead, but that, at the time of its sale under execution, he was absent, and did not make the proper claim before the sale as required by *Manst. Dig. Ark. § 8006*. Under plaintiff's direction notice of sale was published as required by section 3049, but in a remote paper of small circulation, and posted in obscure places on the premises. Defendant set up these facts, and prayed the cancellation of plaintiff's deeds. *Held*, that the sale was collusive and fraudulent, and plaintiff's title should be canceled.

2. A quitclaim deed from another execution creditor who purchased through his attorney does not strengthen plaintiff's title, as notice of the fraud to the attorney who placed the proceedings of sale on foot is notice to the client.

Appeal from circuit court, Washington county; J. M. PITTMAN, Judge.

Action of ejectment. Plaintiff claimed under sheriff's deeds at execution sales in favor of himself and several other execution creditors whose titles he had purchased. Defendant's answer admitted all the judgments, and that they were unsatisfied, but denied that the advertisements and sales were according to law; averred that plaintiff did not pay Devin the sum stated in his deed, or any sum; averred that the land was his, and that he was the head of the family, and had resided on the lands 14 years, and claimed the same as a homestead. It further averred that he was "from home on business" when the several executions were issued and the sales made, and that plaintiff, the sheriff, and those under whom plaintiff holds, fraudulently colluded together, and had said lands advertised in an obscure paper, in a remote part of the county, and by such fraudulent collusion and conspiracy between the sheriff and all these judgment creditors they kept him in ignorance, and from being at the sale to claim his homestead, and therefore the sale was fraudulent, illegal, and void; and prayed that the sale be set aside and the deeds

canceled. Upon application of defendant the court transferred the cause to the equity docket for trial.

S. Gregg and *B. R. Davidson*, for appellant. *J. D. Walker*, for appellee.

HEMINGWAY, J. The land in controversy was sold under executions against the appellee in January, 1887, and comprised his homestead. He was entitled to hold it as exempt to him from sale under execution, but, as the law then stood, he was required to claim it before sale in the manner prescribed. Article 9, § 3, Const.; Mansf. Dig. 9006. He did not claim it before sale, and the question is, did he lose it thereby? The answer depends upon the effect which the law will give to certain conduct of the plaintiffs in the executions, in the proceedings relating to the sale. The law regulating the sale of lands under execution provides that notice of such sale shall be given for 20 days next before the day of the sale, by posting printed advertisements at the court-house door, and five other public places in the county in which the sale is to be made, one of which must be the premises to be sold, and by publishing the same in a newspaper published in the county. Mansf. Dig. § 8049. The notice is intended to inform the owner that his property will be sold, and to procure the attendance at the sale of persons desiring to purchase it. Personal notice to the owner of land is not required, and the only guaranty the law provides him that it will not be sold without his knowledge is in the advertisement before mentioned. The importance to him of a substantial compliance with the law in that regard is therefore apparent. It is the duty of the sheriff, in following the directions of the statute, to make his advertisement fulfill the purpose of the law. In posting notice on the premises to be sold he should select a place where it would most likely be seen, and not one where its discovery would be the least probable; and in publishing in a newspaper he should select a paper most likely to give the information to those for whom it is intended, and not one which they would probably never see. No intelligent officer desiring to discharge his duty would post the notice on a tree in a forest, or publish in a newspaper without circulation in the neighborhood, unless in the particular case no other means of notice was available. To do so would be to violate the spirit of the law, although complying with its letter. If such should be done by the procurement of the plaintiff in execution it would be a gross wrong, and, if it resulted in an injury to the defendant, a fraud upon his rights. To post a notice where it would never be seen, out of a regard for the feelings of the debtor's family, might be commendable, if it did not evidence a disregard of his constitutional right to hold a home for them.

Upon a careful reading of the evidence in this case, we are led to the conviction that the proceedings before the sale were conducted

under the directions of the plaintiffs in execution with the hope and to the end that the appellee would never learn of the pending sale, and thereby lose his homestead. In order to accomplish the wrong they attempted to defeat the purpose of the law, in providing for a notice of sale, while making a pretense of observing it. They could acquire no rights through such a proceeding. It is contended that title passed untainted with fraud to Devin, who was a stranger to the proceeding, and from him to appellant. To this it is sufficient answer that Devin purchased through West, his attorney, who placed the proceeding to sell upon foot, and consummated it after the relation was fixed. Devin is affected with the knowledge of West, and on the trial he testified that he "thought it looked like the notice had been published with the intent to prevent appellee and his friends from seeing it." We think the appearances justified that impression. Creditors cannot take advantage of the temporary absence of their debtors to obtain executions, give notice of sale which will never reach the debtors or their friends, and thereby deprive them of their constitutional exemptions. Such efforts should not be made, and can never receive the countenance of a court. As the land has not passed to a *bona fide* purchaser for value, the appellee was entitled to the relief asked.

The judgment will be affirmed.

DAVIS v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Arkansas. April 5, 1900.)

DEATH BY WRONGFUL ACT—MASTER AND SERVANT—INSTRUCTIONS.

1. Rev. St. Ark. 1838, (Mansf. Dig. § 5223,) provides that an action "for wrongs done to the person or property of another * * * may be brought by the person injured, or after his death by his executor or administrator." Act March 6, 1883, provides (Mansf. Dig. § 5225) that, whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, which would have entitled the person injured to sue for damages if death had not ensued, an action may be brought against the person who would have been liable if death had not ensued; and (Mansf. Dig. § 5226) that such action shall be brought by the personal representative of the deceased, and shall be for the benefit of the widow and next of kin. Held, that the administrator of a person whose death is caused by the wrongful act, neglect, or default of another may maintain two actions,—one under the act of 1838, for the benefit of the estate, and the other under the act of 1883, for the benefit of the next of kin.

2. Act Ark. Feb. 8, 1875, providing that when a minor is killed by a railroad train the father, if living, may sue, and that if the father be dead the mother or guardian may sue, is superseded by act March 6, 1883, (Mansf. Dig. §§ 5225, 5226,) which provides that every action for the death of a person by the wrongful act, neglect, or default of another shall be brought by the personal representative of the deceased, and shall be for the benefit of the widow and next of kin, and an action for loss of services accruing after a minor's death must be brought by the administrator.

3. In an action against a railroad company for the death of a brakeman, caused by having his foot caught between the rails while uncoupling cars, it is error to charge that decedent's knowledge of the fact that the space between the main

and guard rails was unblocked was knowledge of the attendant danger, as that is a question for the jury.

Appeal from circuit court, White county; M. T. SANDERS, Judge.

Action by John M. Davis, against the St. Louis, Iron Mountain & Southern Railway Company, to recover damages for the death of plaintiff's son, Clarence Davis. The father sues, as administrator of the deceased, to recover for the benefit of the estate, and also for the benefit of the next of kin, and also brings another action to recover for the loss of his son's services. Mansf. Dig. Ark. § 5223, provides that, "for wrongs done to the person or property of another, an action may be maintained against the wrong-doer, and such action may be brought by the person injured, or after his death by his executor or administrator." Section 5225 provides that, "whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages;" and section 5226 provides that every such action shall be brought by the personal representative of the deceased, and shall be for the benefit of the widow and next of kin.

Sanders & Watkins, for appellant. *Dodge & Johnson*, for appellee.

COOKRILL, C. J. These appeals involve three suits brought against the railway on account of an injury to a minor resulting in his death. Two are by the personal representatives of the minor,—one of them for the benefit of his estate, the other for the benefit of the next of kin. The third is an action by the father of the minor to recover for the loss of his son's services during his minority. The question presented at the threshold of the cases is, who can maintain an action against a railroad for an actionable injury resulting in the death of a minor? The answer involves a consideration of the common law and the statutes on the subject.

The cause of action which accrued to the injured party by the common law survives to his administrator after his death, by virtue of a provision of the Revised Statutes of 1838 which is carried into Mansfield's Digest as section 5223. The third section of the act of February 3, 1875, prescribed that when a wife was killed by a railway train the husband should sue; when a minor was killed, the father, mother, or guardian should sue. In all other cases the suit was to be by the legal representative. Acts 1875, p. 183. The act applied only to injuries by the trains of railways. In 1883 another act upon the subject was passed, embodying in this particular the provisions of the English statute of 9 & 10 Vict., known as "Lord Campbell's Act."

Mansf. Dig. §§ 5225, 5226. It contains no express repeal of either of the other provisions; and it is argued that, as the act of 1875 is a special act relating only to railways, none of its provisions are abrogated by the subsequent general act, but, unless it supersedes the act of 1875, in so far as it affects this inquiry the law is left in an anomalous condition. It would stand thus: If an actionable injury resulting in death should occur by an agency other than the trains of a railway, the widow and next of kin would enjoy the benefit of damages recovered therefor under the last act; but if the injury was inflicted by the trains of a railway the recovery would be solely for the benefit of the estate, because the last act would not apply in such cases. *Railway Co. v. Townsend*, 41 Ark. 382. Again, a mother dependent upon her adult son for support could recover nothing for a culpable injury to him by the trains of a railway resulting in death, but could recover if the injury was inflicted by a natural person, a street railway, or other corporation, or perhaps by a steam railway by other means than through its trains. We cannot attribute an intention to the legislature to work out such a result. As if to dispel all doubt as to the intent to extend the benefits of the last act to the widow and next of kin of the deceased in all classes of cases, the act declares that it shall apply in every case where "the person who, or the company or corporation which," is liable for the injury, is sued. The reasonable construction of the act is that it applies to all cases in which a recovery may be had, regardless of the agency by which the injury was inflicted. Such has been the accepted construction of the act by bench and bar, without an express ruling on the point. See *Fordyce v. McCants*, 51 Ark. 509, 11 S. W. Rep. 694; *Railway Co. v. Townsend*, 41 Ark. supra.

The question, then, is, what is the effect of this statute (Mansf. Dig. §§ 5225, 5226) upon the general provision (Id. § 5223) regulating the revival of actionable wrongs to the administrator or executor of the injured person? We are not without authority upon the question. The English rule, which is commonly followed by the courts of the states whose statutes embody the provisions of Lord Campbell's act, is that the right of action given by the latter statute to the personal representative of one whose death has been caused by the default of another is created by the statute, and is not a continuation of the right of action which the deceased had in his life-time, although the new right, it has been ruled, arises only by preserving the cause of action which was in the deceased. If the deceased never had a cause of action, none accrues to his representative or next of kin. The right which accrued to the deceased revives to his administrator by virtue of the former statute. Id. § 5223. The newly-created right results from an accrual on the death of the injured party. Both actions are prosecuted in the name of the per-

sonal representative, where there is one, and may proceed *part passu* without a recovery in the one having the effect of barring a recovery in the other, because the suits are prosecuted in different rights, and the damages are given, upon different principles, to compensate different injuries. One is for the loss sustained by the estate, and for the suffering from the personal injury in the lifetime of the decedent, the recovery in which goes to the benefit of the decedent's creditors, if there are any; the other takes no account of the wrongs done to the decedent, but is for the pecuniary loss to the next of kin occasioned by the death alone. The death is the end of the period of recovery in one case, and the beginning in the other. In one case the administrator sues, as legal representative of the estate, for what belonged to the deceased; in the other, he acts as trustee for those upon whom the act confers the right of recovery for the pecuniary loss inflicted upon them. *Blake v. Railway Co.*, 18 Q. B. 93; *Pym v. Railway Co.*, 2 Best & S. 759; *Barnett v. Lucas*, 6 Ir. Com. Law, 247; *Needham v. Railway Co.*, 88 Vt. 294; *Brass & Copper Co. v. Babbitt*, 74 N. Y. 395; *Littlewood v. Mayor, etc.*, 89 N. Y. 24; *Railway Co. v. Phillips*, 64 Miss. 698, 2 South. Rep. 537; *Hulbert v. Topeka*, 34 Fed. Rep. 510; *Fordyce v. McCants*, *supra*. The statutes under which the two actions are brought do not, therefore, cover the same ground. There is no repugnancy between them, and the latter does not impair the right conferred by the former. *Needham v. Railway Co.*, *supra*; *Com. v. Railway Co.*, 107 Mass. 236. We are aware that the cases are not harmonious to this effect. The conflicting arrays are marshaled in an elaborate article on the subject in 28 Amer. Law Reg. 385, 513. But the position assumed above is, as we conceive, sustained by principle, and the weight of authority.

The same reasons which prevent the right given by the statute to the next of kin from being exclusive of that which accrued to the decedent, and survived to his administrator, preserve the right of the father to maintain his common-law action against the railway for the deprivation of his minor child's services. The statute confers no right of recovery upon the father for the loss of services prior to the minor child's death, nor was it intended to deprive him of any right. Its object was to enable him, through the personal representative, to recover the value of the services of which he is deprived, just as he recovers for any other pecuniary loss which he sustains by the death. But where the injury resulted in death the father's right of recovery by the common law was limited to the interim between the disabling injury to the child and its death. His right of recovery was restricted to the value of the minor's services, and the cost of medical attendance and nursing to the time of death. The right fell with the life of the minor. This was upon the theory that no civil action

would lie for a right springing from the death of a human being. The application of the rule to a case like this has been ably contested and denied. See opinion by Judge DILLON in *Sullivan v. Railway Co.*, 8 Dill. 334. But the question is not an open one upon authority. *Railway Co. v. Barker*, 33 Ark. 350; *Railway Co. v. Townsend*, *supra*; *Insurance Co. v. Brame*, 95 U. S. 754; *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. Rep. 140; *Cooley, Torts*, 262. It follows from these views that the court erred in dismissing the action prosecuted by the administrator for the benefit of the estate, and also in permitting the plaintiff, in his suit as parent, to recover the value of his minor son's services after the latter's death. Damages accruing from that cause could be recovered only in the suit by the administrator, prosecuted for the benefit of the father as next of kin. In that suit the verdict was for the railway company, and we are asked to reverse it upon the ground that the court's charge to the jury is erroneous.

While the plaintiff's intestate, who was a youth 18 years old, and of limited experience in railway matters, was in the discharge of his duty, in uncoupling the cars of one of the defendant's trains in its yard at Knob, where he was employed, his foot caught in a space between the guard and main rails of the track, and he was injured by the moving train. The testimony was conflicting upon the question whether a block in the space where the boy's foot was caught could be used so as to lessen the hazard of the employe without enhancing the danger of derailing the trains. The question for the jury's consideration was not whether the railway company was guilty of negligence in failing to block the space between the main and guard rails, because, even if the failure to do that could, upon the evidence adduced, be found to constitute negligence, (as to which see *Railway Co. v. Lonergan*, 118 Ill. 45, 7 N. E. Rep. 55; *Rush v. Railway Co.*, 12 Pac. Rep. 582, 28 Amer. & Eng. R. Cas. 488, and note; *Mayes v. Railway Co.*, 63 Iowa, 562, 14 N. W. Rep. 340, and 19 N. W. Rep. 680; *Huhn v. Railway Co.*, 4 S. W. Rep. 937,) the proof shows that the deceased continued in the service after he knew—or, what is the same thing, had full opportunity to know—that the rails were unblocked, (*Railway Co. v. Leverett*, 48 Ark. 333, 3 S. W. Rep. 50.) But service about the unblocked rails was attended with danger, and the knowledge of the fact that the rails were unblocked did not necessarily imply knowledge of the attendant danger. Knowledge of the danger was itself a question of fact; and, if the jury believed that the deceased, by reason of his youth and inexperience, did not know of or appreciate the danger incident to service about the unblocked rails, and that the company had exposed him to the danger without warning him of it, they should have found that the risk was not one he had assumed by entering the service. *Railway Co. v. Lev-*

erett, supra; Fones v. Phillips, 39 Ark. 17; Bauer v. Railway Co., 46 Ark. 396; Jones v. Mining Co., 66 Wis. 268, 28 N. W. Rep. 207.

It is useless to follow the charge on these points. The duty of the master to instruct the young and inexperienced servant so as to enable him to appreciate the danger attending the employment was submitted to the jury in an instruction given on behalf of the plaintiff, while the charge given at the instance of the defendant submitted the case as though there were no question of inexperience in the servant presented by the evidence. That was at least misleading, and its tendency was to confuse the jury. But there was positive error in the charge in saying to the jury, in effect, that the intestate's knowledge of the fact that the rails were unblocked was knowledge of the attendant danger. Whether he had knowledge of or appreciated the danger, or ought to have done so, was a question for the jury to determine upon the facts and circumstances shedding light upon the question. The charge is made up wholly of requests for instructions from the parties, and the two theories of the case presented by them are not so consistent and harmonious as to render it an easy task for the jury to determine where their duty lay. The fault is inherent in the practice of giving in charge to the jury the requests for instructions prepared by counsel. They are not uncommonly framed with a view to giving the greatest advantage to the side which presents them, and do not, in that event, tend to lighten the labors of the jury; and, when they are accurately and fairly framed on both sides, and involve no contradictions, the issues are presented in disconnected propositions of law which the jury will find more difficult to comprehend than in a charge presenting all the issues on a single phase of the case together, in close contrast, and presenting the whole law of the case as emanating from the court, without apparent instigation from either side. What can be a greater paradox in the administration of justice, or more confounding to a jury, than for a court to say to them, as is sometimes done: "For the plaintiff, the court declares the law to be thus; for the defendant, so; and on its own motion, as follows,"—as though there were three sides to a single legal proposition, between which the jury is at liberty to choose? It is the duty of counsel to present their prayers for instructions, in order to aid the court, and to show their position in the case on appeal; but the better rule for the court would be to treat the request only as counsels' suggestions of what they desire the court to call the jury's attention to, and to embody no more than the substance of them in the charge. The records of this court bear abundant testimony of the success of this practice at the hands of the learned and usually careful and painstaking judge who tried this cause. The practice of making up the charge from the requests for instructions

prepared by counsel leads to the constantly recurring argument in this court that the charge to the jury is inconsistent and misleading, and has resulted in the remanding of many causes, and perhaps in the miscarriage of justice in many others by the indulgence of the presumption that the jury was able to reconcile the apparent inconsistencies, or penetrate the obscurities of the charge. For the errors indicated, each of the judgments will be reversed, and the causes remanded for further proceedings.

HAHLO v. MAYER et al.

(Supreme Court of Missouri. May 19, 1890.)

PARTNERSHIP—ACTION ON NOTE—EVIDENCE.

In an action by a purchaser for value, before maturity, on a note purporting to have been executed by M. & Son, where the partnership between defendants is denied, and M. testifies that the note was executed without his knowledge, though it is shown that, at the time of its execution, he was holding himself out to the public as the partner of his son in business, plaintiff cannot recover without showing that he knew of such ostensible partnership.

Appeal from St. Louis circuit court; GEORGE W. LUBKE, Judge.

Hugo Muench and Frederick A. Cline, for appellants. Albert Arnstein, for respondent.

BRACE, J. This is an action against Abraham B. Mayer and Frederick Mayer, as partners under the firm name of A. B. Mayer & Son, on two negotiable promissory notes,—one for \$1,500, dated September 4, 1884, the other for \$1,000, dated September 6, 1884,—each payable to J. R. Wallach & Bro. six months after date, and signed "A. B. MAYER & SON." Abraham B. Mayer answered under oath, denying the execution of the notes and the alleged partnership. Frederick answered, admitting that he executed the notes, avers that they were executed by him without consideration, for the accommodation of the said J. R. Wallach & Bro., and without the knowledge of his co-defendant, the said Abraham, and denies the alleged partnership between him and the said Abraham. There was a verdict and judgment for the plaintiff for the amount of the notes, interest, damages, and costs, against both defendants, and they appeal.

The evidence tended to prove that the notes were executed by Frederick Mayer, without any consideration, for the accommodation of the payees, J. R. Wallach & Co., and by them negotiated, and that the plaintiff acquired them for value before maturity, and that they were so executed and negotiated without the knowledge of the said Abraham. The main question in the case was, were the said defendants, at the time the notes were executed, partners? and, if not partners in fact, did the said Abraham so hold out the said Frederick as his partner as that he is estopped from denying that he was a partner, in an action upon the negotiable promissory notes executed by the said Frederick in said firm name, brought by the

holder thereof, who acquired the same for value before maturity? Upon the second proposition the court gave the following instructions, (we quote only so much of them as bears upon the proposition:) "(2) The court instructs the jury that, if they find from the evidence that at the time the notes in controversy were executed, and were received by plaintiff, the business of A. B. Mayer was conducted under the name of A. B. Mayer & Son, and that said A. B. Mayer knew such to be the fact and acquiesced therein, then said A. B. Mayer is liable on the notes in suit even though the jury finds that there was in fact no actual partnership then existing between said A. B. Mayer and his son, Frederick. (3) The court instructs the jury that the presumption of law is that a party to whom a negotiable note is transferred takes it upon the faith of the persons whose names appear upon it as makers. Therefore, if the jury find from the evidence that A. B. Mayer knew that his son, Frederick, was using the name of the firm of A. B. Mayer & Son in the business of said A. B. Mayer, and said A. B. Mayer acquiesced therein, then plaintiff had a right to rely on the signature on said notes as being the signature of A. B. Mayer and of his son, Frederick; and the jury will find against both defendants, even though they find that the defendant Frederick had no express authority to sign the name of 'A. B. MAYER & SON' to the notes." The name that appeared upon the face of the notes sued upon, as maker, was "A. B. MAYER & SON." The plaintiff took the note upon the faith of that firm. He has a right to look for payment of his note to every individual who was a member of that firm at the time the note was executed. He has the further right to look for payment to every individual who, when he acquired the notes, was holding himself out to him as a member of that firm, whether he was in fact a member of that firm or not. If the instructions had been confined within these limitations, they would have been unobjectionable; but they go further, and declare that the defendant Abraham B. Mayer is liable as a member of the firm of A. B. Mayer & Son, although in point of fact he was not a member of such concern, if, at the time of the execution of the notes sued on, he was holding himself out to the world as a member of the firm of A. B. Mayer & Son, whether the plaintiff knew of such holding out to the public or not. While this proposition may be said to have had the sanction of respectable authority, (Young v. Axtell, cited in Waugh v. Carver, 2 H. Bl. 242; Poillon v. Secor, 61 N. Y. 456; Smith v. Hill, 45 Vt. 90; Rizer v. James, 26 Kan. 282,) it has not been able to stand the test of critical judicial inquiry, which has in vain sought for a principle upon which it could stand. The great weight of modern authority is against it. The only conceivable ground upon which one can be charged as a partner by one who contracts for him, and in his name, as a part-

ner, without his authority, and when in fact he was not a partner, is upon the ground of estoppel. The supreme court of the United States in Thompson v. Bank, 111 U. S. 529, 4 Sup. Ct. Rep. 689, considered this question very fully, and, after a thorough review of the authorities, held that a person not in fact a partner could not be made liable to third persons on the ground of having been held out as a partner, except upon the principle of equitable estoppel, and approved the following summing up of the law on this subject by Mr. Justice Lindley in his treatise on the Law of Partnership: "That no person can be fixed with liability on the ground that he has been held out as a partner unless two things concur, viz.: *First*, the alleged act must have been done by him or by his consent; and, *secondly*, it must have been known to the person seeking to avail himself of it. In the absence of the first of these requisites, whatever may have been done cannot be imputed to the person sought to be made liable; and, in the absence of the second, the person seeking to make him liable has not in any way been misled." 1 Lindl. Partn. (2d Amer. Ed.) 43. The court cites many authorities which on examination will be found to sustain this position, to which others might be added if it were necessary. The doctrine thus announced has been expressly recognized and approved in this state in the cases of Rimel v. Hayes, 83 Mo. 200, and in Hannah v. Baylor, 27 Mo. App. 302, while the earlier case of Dowzlet v. Rawlings, 58 Mo. 75, may be said to rest on the same principle. It is maintained by all the recent text-writers on the subject. In a work just published, reviewing many, and citing nearly all, the leading English and American cases on the subject, it is said liability by holding out "proceeds solely on the ground of estoppel," and "a person being liable as a partner, by holding out on the ground of estoppel solely, is therefore not liable to one who did not know of such holding out at the time of contracting. The holding out must antedate the contract; and the plaintiff's knowledge of, and reliance in, his alleged connection, must be proved as of that time, for otherwise the plaintiff was not misled." 1 Bates, Partn. c. 5, § 90 et seq. The same doctrine is asserted by another author, whose valuable work has just come to hand, (J. Pars. Partn. 1889, c. 8, § 69,) the correctness of whose position is recognized by Mr. Bigelow in the last edition of his work on Estoppel, (5th Ed.) 565, note 1.

He who holds another out to be his partner, holds himself out as a partner of such other person. There was evidence tending to prove that at St. Louis, where the defendant A. B. Mayer was engaged in business for some months previous to the execution and negotiation of these notes, he had been holding out to the public that his son, Frederick, was a partner of his, under the firm name of A. B. Mayer & Son. The notes were negotiated in the city of New York, where

the payee, Wallach & Co., for whose accommodation the son executed them, was doing business, and where the plaintiff acquired them. There was no evidence tending to prove that the plaintiff had any knowledge of any act of the defendant Abraham Mayer relied upon to show that he was holding out his son as a partner. The facts of the case presented simply a holding out to the public as a partner; and the court, as matter of law, declared in the instructions quoted that such holding out to the public was sufficient to render the defendant Abraham Mayer liable, although he was not a partner of his son, and the plaintiff may not have known, or had any reason to believe, that he had ever held out his son to be his partner. In this the court committed error, for which the case must be reversed, and the cause remanded for new trial. All concur except BARCLAY, J., who will express his opinion in a separate opinion.

STATE v. GRAY.

(Supreme Court of Missouri. June 2, 1890.)

CRIMINAL LAW—TRIAL—SEPARATION OF JURY.

On a criminal trial, a separation of the jury by which, while some of the jurors took their dinner in the dining-room of a hotel, the others remained in the office because there was not room at the table for them all, is ground for reversal.

Appeal from circuit court, Mississippi county; H. C. O'BRYAN, Judge.

J. T. Wilson and J. J. Russell, for appellant. The Attorney General, for the State.

SHERWOOD, J. The defendant, a negro, was indicted for ravishing a girl of his own color, under the age of 12 years, and there was evidence to establish that to be her age, and that he had had sexual intercourse with her. An instruction was given at the instance of the state to the effect that, if the girl was under the age of 12 at the time, and the defendant had sexual intercourse with her, then he was guilty under the law; and, at the instance of the defendant, an instruction the converse of the preceding one was given. There is no complaint about the instructions.

The jury returned a verdict of guilty, and assessed the punishment at 10 years in the penitentiary, and defendant has appealed. The point of complaint made in this court, as in the lower court, is the separation of the jury, and the evidence establishes that this occurred when the sheriff took the jury over to the hotel to dinner. Some of the jurors were in the dining-room, and some in the office. The fact that the dining-table was crowded, and therefore there was not room for all the jurymen to eat at once, furnishes not the shadow of an excuse for allowing them to separate. The law does not recognize such an excuse, and accords to it no validity whatever. This is a capital case, (Ex parte Dusenberry, 97 Mo. 504, 11 S. W. Rep. 217,) and the law is mandatory that in such

cases the jury shall not separate, (State v. Murray, 91 Mo. 95, 8 S. W. Rep. 897, and cases cited.) Judgment reversed, and cause remanded. All concur.

KELLY v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri. May 19, 1890.)

CONTRIBUTORY NEGLIGENCE—RAILROAD TRACK IN STREET—RATE OF SPEED.

1. Plaintiff, while driving along a public street, came to a point where it was blocked with teams for the distance of 50 feet, except in the middle of the street, which was occupied by defendant's railroad track. He drove through this opening, and just as he was turning off at the further end the hind wheel of his wagon was struck by defendant's engine, coming in the same direction he had been driving, and running at the rate of 15 miles an hour. The city ordinance provided that trains should not run faster than 6 miles an hour. Held error to charge that plaintiff was guilty of contributory negligence for not looking back to see if a train was coming.

2. Where plaintiff's injury is caused by his negligence in going on defendant's railroad track in a public street, and by defendant's negligence in running its train faster than allowed by law, plaintiff cannot recover, unless defendant discovered plaintiff's peril, or might, by the use of ordinary care, have discovered it, and then neglected to use the means at his command to prevent the injury; and in such case recovery is granted, not on the ground that defendant's second act of negligence was the sole cause of the injury, but on the ground that defendant is estopped by its recklessness from asserting plaintiff's contributory negligence.

Appeal from St. Louis circuit court; SHEPARD BARCLAY, Judge.

T. J. Portis and Henry G. Herbel, for appellant. Wm. C. & Jas. C. Jones, for respondent.

BRACE, J. Action for damages for personal injuries. Verdict and judgment for plaintiff for \$5,000. Defendant appeals. The petition charged negligence in defendant's employes in managing and operating the train which caused the injury, specifying failure to ring the bell, and running at a greater rate of speed than six miles an hour, in violation of city ordinance. On the first act of alleged negligence no evidence was given, the answer was a general denial, and a plea of contributory negligence. The accident happened in the city of St. Louis, on the levee between Christy avenue and Morgan streets. The evidence for the plaintiff tended to prove that the plaintiff was a rag-peddler; that in the course of his business he was pursuing his way in a one-horse wagon along the levee, in the city of St. Louis, which lies in a general direction north and south, and on which the defendant's track was laid, and on which it was operating its train. He was going north on the levee, near the corner of Christy avenue and the levee. He found the space on each side of the track for a distance of about 50 feet occupied by standing wagons, leaving an open way between them occupied by defendant's track as the only way for him to pursue his journey unobstructed. He entered this gangway between

the wagons; drove along it, the east wheels of his wagon on the inside of the west rail of the track, and his west wheels on the outside, a distance of about 40 or 50 feet, when the hind wheel of his wagon was struck by the defendant's engine drawing a train of freight-cars, going north on its tracks. The plaintiff was thrown out of his wagon, onto the west rail of the track, in front of or under the engine, which passed over him, crushing his left arm and elbow so that his arm had to be amputated, bruising one of his legs, inflicting a cut over one of his eyes, and several contusions on his back. That at the time of the collision the train was going at the rate of about 15 miles an hour. That it did not stop, but passed on at the same rate of speed. That a train of 15 loaded cars going north on this grade, at 15 miles an hour, could not be stopped within less than 900 feet, and going at the rate of 6 miles could not be stopped within 60 feet, and that a train of 8 loaded cars, going 4 or 5 miles an hour, could be stopped within 30 feet, and going at the rate of 15 miles an hour within from 400 to 450 feet. That at the time plaintiff's wheel passed inside the track he did not look back south, in the direction from which the train was coming, nor afterwards, before he was struck.

The defendant, to sustain the issues on its part, introduced the evidence of the employees engaged upon the train, the leading witness of whom, John A. Cook, testified as follows: "I was a switchman and brakeman on the Missouri Pacific Railway on the 9th day of July last. Remember of an accident occurring on the afternoon of that day, between 4:30 and 5:30 o'clock, on the levee, between Morgan street and Christy avenue. I was on the rear end of the rear car of a train going north on the levee at that time and place. I saw a one-horse wagon, with three persons in it, standing near the curbstone. As the train was passing it, the horse began to back, and backed the wagon up against the last, or next to the last car of the train. I was on the top of the rear box-car at the time, about 30 feet from the wagon, and looking at it. I did not know whether plaintiff was in the wagon or not. I did not know him at that time. When we came back, I went in to see how seriously he was injured, but could not learn anything from him, as he couldn't talk, and would not tell us anything. The wagon did not tilt up. The rear wheels backed into the car, and the horse started up again. Don't know whether Kelly fell or jumped out of the wagon. Our train went up to Biddle street, and came back again in five or six minutes. There were ten or eleven cars in the train,—box-cars. The train was not moving faster than five or six miles an hour at that time. The rear wheels of the wagon struck the car. The cars were loaded." Tatley, the brakeman, testified that he was standing on the front of the engine from the time it left Poplar street, and did not notice any team on the track as

the engine passed along between Christy avenue and Morgan street; that he was in a position to see one, if there had been one on the track, and that the train was running between four and six miles an hour; that he saw the plaintiff's wagon on the west side as he passed. The fireman and engineer also testified that they were at their posts, observing the track, and they did not see plaintiff's wagon on the track, and that it was not struck by the engine. On cross-examination, the engineer, Lunderberg, testified that he "saw no obstruction between Christy avenue and Morgan street as we went north on the levee. Saw none from the bridge to Biddle street. The way was perfectly clear, and if Kelly had been on the track I would have seen him." The evidence of Donderville, the fireman, was to the same general purport as the others. In addition, he testified that the train was loaded with ice and beer, and upon this grade could be stopped to prevent an accident, when going at the rate of four or five miles an hour, within 60 feet, and going at the rate of 15 miles an hour, "within 5 car-lengths or less,—say 80 feet." It seems to be undisputed that the distance from the bridge to the place of the accident was about 450 feet; that there was nothing to prevent the defendant's employees from seeing the plaintiff's wagon on the track (if it was on the track) during the whole time the train was passing from the bridge to the place where the collision took place.

Upon this state of facts the court, upon its own motion, gave the following instruction on the main question: "(1) Under the pleadings and evidence in this case, the court instructs you that, at and just before the alleged injury, the plaintiff was not exercising ordinary or proper care to avoid injury or danger; and therefore your verdict should be for defendant, unless you further find the facts to be as mentioned in instruction 2. (2) If you find from the evidence that in the early part of July, 1886, the plaintiff's wagon was struck by an engine of a train operated at the time by defendant on the levee between Christy avenue and Morgan street; that, in consequence thereof, plaintiff was run over by said engine and injured; that said wagon was so struck by reason of the fact that said train was then running at a rate of speed greater than six miles an hour, and that, if said train had not been running at a rate greater than six miles an hour, the train could have been stopped in time to have averted the said collision with plaintiff's wagon, after defendant's employees in charge of said train had discovered (or by the exercise of ordinary care could have discovered) that plaintiff or his wagon was in danger of being so struck; and if you so find the facts to be, your verdict should be for the plaintiff."

The second was the only instruction given presenting a theory upon which the jury were authorized to find for the plaintiff, and it

seems to us that it cuts the throat of the first. In the first the jury are told, as matter of law, that the plaintiff was guilty of an act of negligence that contributed to his injury; therefore he cannot recover. Nevertheless they were told in the second that, if they find that the defendant committed an act of negligence which also contributed to his injury, but which would not have done so if it had not been committed, then they will find for the plaintiff. The whole theory of plaintiff's case was that he was injured by the negligence of defendant in running its train at a greater rate of speed than six miles an hour; that this act was the sole direct cause of his injury. Now, while to find the fact that, if the defendant had not been running its train at a greater rate of speed than six miles an hour, the injury would not have occurred, is to find a fact tending to prove that the running of the train at a greater rate of speed than six miles an hour was a cause of plaintiff's injury, how can it make such excessive running any more than a contributory cause, when plaintiff's act was also there and then present at the same time, contributing to the injury? The instruction presents this strange anomaly that, if the jury find that the wagon was struck by reason of the fact that said train was then running at a rate of speed greater than six miles an hour, and by reason of the fact that the plaintiff was negligently on the track, the plaintiff cannot recover, on the ground that defendant's negligence was the sole cause of the injury, because of plaintiff's contributory negligence, but, if they find that if the train had not been running at a greater rate of speed than six miles an hour, the plaintiff would not have been struck, then the plaintiff can recover, although the injury was the joint product of plaintiff's act of negligence, and this very negligent act of defendant. How can the fact that the injury would not have resulted if the defendant had not committed the act of negligence change the character of the injury which actually did occur as the joint product of plaintiff's and defendant's contributive acts of negligence, as assumed in the instructions?

We know of but one exception to the rule that, where an injury is the product of the joint concurring acts of negligence of both plaintiff and defendant, the plaintiff cannot recover, and that is an exception made, on grounds of public policy and in the interest of humanity, to prevent and restrain, as far as may be, a willful, reckless, or wanton disregard of human life or limb or property, under any circumstances, and that is when the injury was produced by the concurrent negligent acts of both plaintiff and defendant; yet if the defendant, before the injury, discovered, or by the exercise of ordinary care might have discovered, the perilous situation in which the plaintiff was placed, by the concurring negligence of both parties, and neglected to use the means at his command to prevent the injury, then his plea of plaintiff's

contributory negligence shall not avail him. This exception proceeds, not upon the theory that the defendant has been guilty of another and independent act of negligence which is the sole cause of the injury, and which must be charged as a separate and independent cause of action, but upon the ground that the negligence he was then in the very act of perpetrating was characterized by such recklessness, willfulness, or wantonness as that he shall not be heard to say that the plaintiff was also guilty of contributory negligence. In this case, it is contended by counsel for the defendant that, conceding plaintiff's theory of the facts to be true, the evidence tends to show that defendant's employees, if they had been in the exercise of ordinary care, could have discovered the plaintiff's wagon on the track in time to have prevented the accident, and that it could have been prevented if they with promptness, after such discovery, had used the means at their command to stop the train. Therefore the sole cause of the injury was the negligence of the defendant in failing to discover the perilous situation of the plaintiff, and thereafter failing to use the means at their command to prevent the injury, and, as the plaintiff's petition did not contain a count charging this negligence as a separate and independent cause of action, the plaintiff cannot recover. This view seems, on the trial, to have been acquiesced in by counsel for the plaintiff, and adopted by the court, and perhaps led to the anomalous instructions in the case, and was, we think, a misapprehension of the principle upon which a recovery is permitted for an injury resulting from concurrent acts of negligence of plaintiff and defendant, but which might have been avoided if, after the consequences of such negligence became apparent to the defendant, or ought to have been known to him, he failed to use the means at his command to prevent it. What has been said is upon the theory that the first instruction ought to have been given.

But, on the facts in the case, could the court, as matter of law, declare that the plaintiff was guilty of such contributory negligence as to prevent his recovery? The plaintiff was no trespasser. He was where he had a right to be,—as much right as the defendant. He was pursuing his way along one of the most crowded public streets of the city, along which the defendant's track was laid. He came to a point in the street where it was blocked by wagons for a short distance on both sides. The only way open to him was the space occupied by the defendant's track, and a narrow margin between the wagons and the track. In order to get over this space to the open street beyond, a distance, say, of about 50 feet, he turns his team a little to the right, which causes the right wheels to pass within one rail of the track a short distance, and, in less time probably than a minute, he reaches the open street again, turns to the left, his fore wheel passes

out over the rail, the hind wheel is caught by the engine before it gets entirely clear of the passway of the train, is "tilted up," and he is thrown under the wheels, the train running at the time at the rate of 15 miles an hour. This was the case that the plaintiff's evidence tended to make. If it be true that the train was going at the rate of 15 miles an hour, confessedly he would have gotten clear of the track without injury if the train had only been going 6 miles an hour.

Now, what act of negligence had he been guilty of that warranted the court in declaring, as matter of law, that he could not recover? That just before and while making his brief passage he did not look behind him for an approaching train. When can one be said to be guilty of negligence that will *per se* prevent a recovery because he does not look behind him for a train approaching him from the rear, before turning upon a railroad track along a public street on which he has a perfect right to travel, and whose duty it is simply to make way for such train? We should say when by so looking he would have discovered that the train was approaching him at such a distance that probably he could not, if he got upon the track, move out of its way in time for it to pass him without striking him. He would be guilty of negligence if, upon looking, he had discovered that the train was so near that, at the rate of speed he might expect it was traveling, it would be hazardous for him to turn upon the track; and he is negligent in not looking only because by looking he would have discovered that, taking into consideration the speed he was traveling at, the distance he had to go on the track, the distance he was from the train, the rate of speed he had a right to believe the train was traveling, it would appear, to a reasonably prudent man, to be dangerous for him to drive on the track. These are all questions of fact to be passed upon by the jury, in the light of the established law "that the violation of municipal ordinances which regulate the speed of trains is negligence *per se*," and that every person on a public street in a municipality has the right to presume that the railroad will obey such ordinances. *Schlereth v. Railway Co.*, 96 Mo. 509, 10 S. W. Rep. 66; *Eswin v. Railway Co.*, 96 Mo. 290, 9 S. W. Rep. 577. It must be remembered that the plaintiff was no trespasser. He was not crossing a railroad track at a point where the train might be run at an unlimited rate of speed. He had but about 50 feet to go. He had a right to rely upon the fact that no train would be run on that track at a greater rate of speed than six miles an hour; that it was as much the duty of the railroad employes to look out for him on the track as it was for him to look out for a train. *Eswin v. Railway Co.*, *supra*. The evidence in this record does not show at what gait he was traveling, nor how far the train was behind him, when he turned his wheel inside the rail. He may have acted imprudently in attempting to make the

passage in the manner and at the time he did, but we think the question whether he did or not should have been passed upon by the jury, in the light of all the facts and circumstances in the case. There are risks which the most prudent man may take, and the plaintiff is not to be barred of recovery if he adopted a course that the most prudent man would have taken under the circumstances. *Kelly v. Railroad Co.*, 70 Mo. 604; *Smith v. Railroad Co.*, 61 Mo. 588; *Meyer v. Railroad Co.*, 40 Mo. 151. Paraphrasing the language of this court in the last case, it may be said that the proposition is monstrous that, because a man does not "look," although that is not the proximate cause of the injury, he is placed beyond the pale of legal protection. He can be placed beyond the pale of such protection not simply because he did not look, but because if he had looked he would have discovered such a condition of affairs as that it would have been imprudent for him to pursue the course which he did pursue, and in which he met with the injury. If by looking he would not have discovered such a state of affairs, his failure to look cannot be the proximate cause of his injury. This was evidently a difficult case to try. The plaintiff and his witnesses were Poles, some of whom could not speak the English language, and the others but imperfectly. From the record here, it is difficult to clearly understand the actual situation at the time the accident happened, but we do not think it was tried on the correct theory; and, if we have been able to properly appreciate the force of the evidence as it appears in this record, an instruction ought to have been given submitting to the jury the question of plaintiff's alleged contributory negligence, and one submitting the question whether the defendant's employes could, by the exercise of reasonable care, have discovered his situation, and thereafter have stopped the train in time to have prevented the accident. The instructions upon the defendant's theory of the case, as well as the other instructions, are unobjectionable. For error in the instructions quoted the judgment will be reversed, and the cause remanded for new trial, with the concurrence of RAY, C. J., and BLACK, J.; SHERWOOD, J., concurring in the result; BARCLAY, J., not sitting.

WERNSE et al. v. McPIKE.

(Supreme Court of Missouri. May 19, 1890.)

EXECUTORS AND ADMINISTRATORS—ALLOWANCE OF CLAIMS—JUDGMENTS—LIMITATION.

1. Gen. St. Mo. 1865, p. 502, § 5, provides that any person may exhibit his demand against an estate, by serving on the executor or administrator written notice of his claim, with a copy of the instrument or account on which the claim is founded; and such claim shall be considered legally exhibited from the time of serving such notice. Page 502, § 8, provides that any person having a demand against an estate may establish it by the judgment of some court of record, in the ordinary course of proceedings, and exhibit a copy of such judgment to the court having

probate jurisdiction. Page 504, §§ 26, 27, provide that the clerk of the probate court shall keep an abstract of all judgments of other courts filed, and of all demands established, in said court against such estate, which shall show their amount, date, class, and to whom payable; and that if any "judgment" of a court of record "be filed" in said court, and when "demands" are "allowed" against an estate, such court shall determine its class, and the clerk shall make an entry thereof in his abstract, and, when thus classed, the executor or administrator may satisfy such demand according to such classification. *Held*, that where a judgment was rendered against an administrator on an intestate's note, in a circuit court, the filing of the judgment in the probate court for classification was sufficient, without a presentation for allowance, as in case of simple "demands." Overruling *Bryan v. Mundy*, 14 Mo. 458; *Ewing v. Taylor*, 70 Mo. 394; and *Wernse v. McPike*, 76 Mo. 249.

2. Where a valid judgment has been rendered on a note, the note is no longer a demand to be presented for allowance against a decedent's estate.

3. Service of the process of a court not having jurisdiction of an action against an administrator is not an exhibition of a demand against the estate which can be amended after the time limited for exhibiting the demand.

4. The judgment of a court of another state that plaintiff's action on a note was barred by the laws of this state is a bar to an action on the note in this state.

Appeal from circuit court, Ralls county; THEO. BRACE, Judge.

The Traders' Bank of St. Louis held a note for \$3,200 made by Leiper, Bowling & Co., and indorsed by Abraham McPike. Abraham McPike died, and Henry C. McPike qualified as administrator of his estate, in the probate court of Ralls county, January 28, 1878. The note, being unpaid, was duly protested, and the bank brought suit on it in the circuit court of St. Louis county against Leiper, Bowling & Co. and Henry C. McPike, administrator. The former resided, and the latter was found, and all were personally served, in St. Louis county on the 5th of July, 1878. In due time judgment by default was entered against all the defendants, October 16, 1878. Thereupon a transcript of the record was filed in the probate court of Ralls county, and the administrator being present, as the record recites, the judgment was duly exhibited and placed in the fifth class on the 15th of April, 1874, from which classification no appeal was taken. The administrator subsequently filed a petition for an order of sale of the realty to pay debts, and in that petition included, in the list of allowed demands, this claim as due by and established against the estate as a fifth-class demand. The judgment was subsequently assigned to plaintiffs, Wernse and Haeussler. The administrator having failed to pay any part of it, while he was paying other fifth and sixth class claims in full, plaintiffs filed a motion in the probate court to compel payment. This motion was denied, the probate court holding that the judgment was void for want of jurisdiction in the St. Louis circuit court to render it. Plaintiffs appealed to the circuit court of Ralls county, where the judgment was affirmed, and thence to this court, where the judgment of the circuit court was also affirmed. 76 Mo. 249. This was done

November 27, 1882. Several letters appear by the record to have been written by the administrator to plaintiff Haeussler at various times, and from different places, extending from the date of the first, June 30, 1876, to November 2, 1877. In all of these letters except the last the administrator talks about compromise and settlement. He suggested, at one time, payment in land; at another time, a house and lot in Louisiana, which he recommends as well worth the whole debt.

On the same day on which the appeal was taken in the cause just mentioned to the circuit court, to-wit, on the 12th day of December, 1877, both parties being present in the probate court, the plaintiffs presented the note upon which the judgment aforesaid was based, for allowance, and the cause was continued to January 16, 1878, and again continued; and on the 14th day of March, 1878, plaintiffs dismissed their cause, and withdrew the note and other papers. February 26, 1878, plaintiffs petitioned the county court of Madison county, Ill., for letters of administration on the estate of Abraham McPike, deceased; stating in their petition, in substance, that they were creditors of the deceased, in what manner, and to what extent; that their debt remained due and unpaid; that deceased had a large amount of real and personal property in said county; and that no letters of administration had ever been granted to said estate in said county. Letters were granted on the 2d day of April, 1878, and, on the 5th day of July following, the administrator, H. C. McPike, appeared in court, and filed the following motion: "And now, at this day, comes H. C. McPike, the administrator of the estate of Abraham McPike in the state of Missouri, and who is the original and principal administrator of said estate, and in his own behalf, as well as in behalf of the heirs of said Abraham McPike moves the court to dismiss the suit, and rescind the letters of administration granted William H. Hall, public administrator of Madison county, for the following reasons, viz.: That the claim of Herman Haeussler, upon whose petition letters of administration were granted, is barred by the laws of the state of Missouri; that the said Haeussler was at the time of the death of said Abraham McPike a citizen and resident of the state of Missouri, in which was intestate's domicile at the time of his death, and must recover his claim under the laws of Missouri, if at all; that all the personal property of the said Abraham McPike in the state of Illinois had all been collected and paid over to the principal administrator before the grant of administration in this state, and at the time when said grant of administration was made there was no personal property in the state of Illinois belonging to the estate of said Abraham McPike." On the following day the court, passing on this motion, dismissed plaintiff's suit, and revoked the letters. Thereupon an appeal was taken to the circuit court of Madison county,

where the judgment was affirmed, and it was also affirmed in the appellate and the supreme courts. 101 Ill. 423. On the 22d of November, 1878, this appeal was heard in the circuit court; parties all present and consenting, the cause was heard by the court without a jury. The record shows the finding of the court to be as follows: "Does find from the evidence in this cause that Abraham McPike, deceased, was at the time of his death a resident of the county of Ralls, in the state of Missouri; that letters of administration were very shortly after his death granted by the county court of said Ralls county to H. C. McPike, the brother of the deceased; that due notice of the grant of letters of administration and of notice to creditors was given by said administrator in said state of Missouri, as required by the laws of said state; that said plaintiffs were before and at the time of the death of said Abraham McPike, and ever since have been, residents of the state of Missouri; that the plaintiffs presented their claim against said estate before the probate court in Missouri, and the said claim is now being litigated in the state of Missouri; that the estate of said Abraham McPike is solvent, and is in due course of administration in the state of Missouri; that said Abraham McPike left no creditors in the state of Illinois, and has no personal property in the state of Illinois, except an interest in a partnership in Alton, Ill., which partnership was all settled up by the surviving partners, and the portion belonging to the said Abraham McPike's estate was paid over to said H. C. McPike, as such administrator, long before the filing of the petition in this proceeding by the plaintiffs." Plaintiffs' claim was disallowed, and the letters of administration revoked December 31, 1878. Plaintiffs appealed to the appellate court.

On the 25th of March, 1879, that court rendered its decision, affirming the circuit court. On March 18, 1881, writ of error was sued out to the supreme court of Illinois. The court delivered its opinion on the 18th day of January, 1882, affirming the decision of the appellate court. On the 19th of March, 1879, plaintiffs served upon the administrator notice of their intention to present their demand to the probate court of Ralls county for allowance. Thereafter, on the 16th day of July, same year, it was so presented, and, being disallowed, plaintiffs at once appealed to the Ralls county circuit court. There, on the 25th day of March, 1882, the case was tried by the court, and judgment rendered for defendant. An appeal was taken to this court, where, at its October term, 1885, this judgment was reversed, and the cause remanded to the Ralls county circuit court, to be proceeded with in conformity with the opinion. 86 Mo. 565. The cause was tried by the circuit court, December 9, 1886. The judgment was for the plaintiffs, and the defendant appealed.

When a cause, entitled as this one, was

here, one judge dissented from the conclusion reached by the court; and the same judge dissented from the conclusion reached when this cause came here, though no dissent is marked; and two of the judges of this court dissented upon the overruling of the motion for rehearing, of which no mention was made in the report of the case. These dissents were based upon the ground that the decision rendered herein, reported in 76 Mo. 249, was wrong in holding that the circuit court of St. Louis county acquired no jurisdiction by the service of its process on the administrator of McPike; and was wrong, also, in holding that notice has to be given an administrator on filing a judgment for classification.

Silver & Brown, for appellant. D. H. McIntyre, for respondents.

SHERWOOD, J., (after stating the facts as above.) 1. The provisions of the law relating to jurisdiction of the probate court of St. Louis county at the time of the institution of this litigation in the St. Louis circuit court were as follows: "Said court shall have exclusive original jurisdiction in all cases relative to the probate of last wills and testaments; the granting letters testamentary and of administration, and repealing the same; appointing and displacing the guardians of orphans, minors, and persons of unsound mind; in binding out apprentices; and in the settlement and allowance of accounts of executors, administrators, and guardians; to hear and determine all disputes and controversies whatsoever respecting wills, the right of executorship, administration, and guardianship, or respecting the duties or accounts of executors, administrators, or guardians, and all controversies and disputes between masters and their apprentices; to hear and determine all suits and other proceedings instituted against executors and administrators upon any demand against the estate of their testator or intestate, when such demand shall not exceed one hundred dollars; and concurrent jurisdiction with the circuit courts in all such cases, when the demand shall not exceed that sum, subject to appeal, in all cases, to the circuit court, in such manner as may be provided by law." Gen. St. 1865, pp. 900, 901, § 6. It will thus be seen that, where the "demand" did "not exceed one hundred dollars," then the probate court of St. Louis county had "exclusive original jurisdiction;" but, where the demand exceeded that sum, then the circuit court of St. Louis county had "concurrent jurisdiction." So that indubitably the circuit court of St. Louis county had jurisdiction to issue and have served its process on the administrator of McPike, he being found in St. Louis county, as well as on the living co-defendant who resided in that county, and to render judgment against both of them. The statute in relation to the jurisdiction, already quoted, of probate courts, was substantially as it existed in 1825. This view of the concurrent jurisdiction of the

circuit court, where the demand against an estate exceeds \$100, is held in *Miller v. Woodward*, 8 Mo. 169; *Tevis v. Tevis*, 23 Mo. 256; and *Rutherford v. Williams*, 62 Mo. 252. The cases in 23 and 62 Mo. were both cases of moneyed demands against estates, originating in St. Louis county, and both the defendants in such actions were the sole defendants therein; and in *Rutherford's Case*, supra, after service had, the defendant died, and it was held the cause could be revived against the legal representatives of the decedent. The jurisdiction of the circuit court of St. Louis county thus being settled beyond question, it is wholly immaterial to inquire whether an action on the note in this cause should have been instituted in the circuit court of Ralls county, or presented for allowance in the probate court of that county, since, whatever view may be taken of this matter, there can be no divergence of opinion as to the jurisdiction of the circuit court of St. Louis county to proceed as it did. The case of *Dodson v. Scroggs*, 47 Mo. 285, and other similar cases, have no bearing whatever on the case at bar.

2. The judgment of the circuit court being then validly rendered, by a court of competent jurisdiction, the process of that court, duly served, was an exhibition of the demand, since section 5, p. 502, Gen. St. 1865, provides: "Any person may exhibit his demand against such estate, by serving upon the executor or administrator a notice, in writing, stating the amount and nature of his claim, with a copy of the instrument of writing or account upon which the claim is founded; and such claim shall be considered legally exhibited from the time of serving such notice." And, as the circuit court of St. Louis county had jurisdiction in the premises, it was competent to establish the demand by the judgment of that court; since section 8, Id., provides: "Any person having a demand against an estate may establish the same by the judgment or decree of some court of record, in the ordinary course of proceeding, and exhibit a copy of such judgment or decree, and shall also exhibit copies of all judgments and decrees rendered in the life-time of the deceased, to the court having probate jurisdiction." The demand of the plaintiff in the original suit being thus legally exhibited and legally established, the next steps were to be taken in the probate court of Ralls county, where letters of administration had been granted. Sections 26, 27, p. 504, Id., are as follows. "The clerk of the court shall keep an abstract of all judgments of other courts filed, and of all demands established in the said court against such estate, which shall show their amount, date, and class, and to whom payable. If any judgment of a court of record be filed in said court, and when demands are allowed against an estate, such court shall determine its class, and the clerk shall make an entry thereof in his abstract; and, when thus classed, the executor or administrator may

satisfy such demand according to such classification." These sections show, in a manner not to be misunderstood, the clear line of demarkation drawn by the legislature between judgments of other courts, which only have to be filed in the probate court and then classified, and ordinary demands, which are to be allowed before being classified. This distinction between a judgment of another court and of an ordinary demand has been recognized by this court. *Carondelet v. Desnoyer*, 27 Mo. 87. In that case, SCOTT, J., said: "All that was required on the part of the city was to file in the probate court transcripts of the judgments obtained in the circuit court, in order to have them classed and paid as other demands against the estate. Rev. St. 1855, §§ 26, 27, pp. 156, 157." The same view was taken of the point in *Gibson v. Vaughan*, 61 Mo. 418. A different ruling was made in *Bryan v. Mundy*, 14 Mo. 458, wherein it was held that a judgment recovered in the life-time of a defendant would have to be presented for allowance in the probate court upon notice duly given, etc., just like any ordinary demand. We do not suppose any lawyer in this state ever thought it necessary to serve notice on an administrator when he was going to have a judgment, duly rendered in the life-time of a decedent, or upon process served on his administrator, filed for classification. The plain terms of the statute are repugnant to any such construction. All that it is necessary to do where a judgment is held by a claimant, whether rendered in the life-time of the decedent or against his administrator, is to file that judgment for classification in the probate court. This is sustained by the cases in 27 and 61 Mo., supra, and opposed by the case of *Bryan v. Mundy*, 14 Mo. 458, and *Ewing v. Taylor*, 70 Mo. 394; but, being satisfied of the incorrectness of the cases last cited, we overrule them, and affirm the correctness of the ones first cited. It follows from this ruling that the case of *Wernse v. McPike*, 76 Mo. 249, is not law, and we will no longer sanction it by giving it our approval.

3. If, as heretofore determined, the judgment rendered on the note was a valid judgment, because rendered by a court of competent jurisdiction, upon proper process duly served, then it necessarily follows that there was no longer any promissory note in existence to present for allowance against the estate of *McPike*; the original demand was destroyed by the judgment rendered. *Bigelow, Estop.* (5th Ed.) p. 103.

4. But, granting that the note was not thus merged in the judgment rendered, still in its alleged exhibition to the administrator, and in its presentation for allowance, the statutory requirements in that behalf were not complied with. Letters of administration, as before stated, were granted on the estate of *McPike* on the 28th of January, 1873, and the transcript of the judgment rendered filed and classified in the probate court of Ralls

county on the 15th day of April, 1874. But notice of the presentation of the note for allowance was not given to the administrator in Ralls county until March 19, 1879. This was over six years after the grant of letters of administration, and after the note fell due, and over five years after the service on the administrator of summons made returnable to the circuit court of St. Louis county. Such exhibition of the demand and such presentation for allowance obviously did not comply with the statute then in existence, which required that an ordinary demand should be exhibited within two years, either by suit in the circuit court or by serving the administrator with notice; and such notice had to contain a clause that the claim would be presented "for allowance at the next term of the court." Gen. St. 1865, p. 503, § 15. And the statute is express that, even when proper notice is given, no claimant shall avail himself of it unless he presents his demand for allowance within three years. Id. p. 502, § 6. Neither of these things was done. And the process served upon the administrator commanded him to appear before the circuit court of St. Louis county, and not before the probate court of Ralls county. Most certainly service of process requiring an appearance by the administrator in the former court, to answer to an ordinary action on a promissory note, would not give notice of the faintest intention to present the note for allowance in the probate court of Ralls county, hundreds of miles away; and when a cause entitled as this one, and between the same parties, (76 Mo., supra.) was here, it was distinctly ruled that the "judgment of the circuit court, being void, was nothing, and no right could be founded on it." If so, surely the process which resulted in the rendition of that void judgment must be regarded as equally void and worthless. But it is said in the last deliverance of this court on the subject that the circumstances of this case take it out of the operation of the statutes quoted; and some decisions of this court are cited and quoted from as sustaining this theory. Let us examine them:

The case of *Mulloy v. Laurence*, 31 Mo. 583, was a suit to enforce a mechanic's lien, and hence does not seem to be greatly in point.

The case of *Tevis v. Tevis*, 23 Mo. 256, was one where the statute was quoted which has already been quoted, which authorized a suit in the circuit court against an administrator, and declared that the demand should be considered as exhibited from the time of serving the original process upon him. In that case such service was had on action brought, and it was held that, though a non-suit was afterwards compelled to be taken in the circuit court, this was an exhibition of the demand, and authorized its subsequent allowance in the probate court of St. Louis county when presented in time for that purpose; but, of course, the validity of the service of the process in that case, as well as the

jurisdiction of the circuit court, were and had to be conceded; otherwise no validity could attach to either. The claim there was based on a promissory note, and not upon an account, and there was no notice given of the presentation of an account, and no notice other than that given by service of process in the ordinary way, and it was not ruled that the plaintiff could amend his notice, nor was permission granted him to do so, nor the judgment reversed for that purpose. These observations are necessary to correct misapprehension of the facts in that case, as shown in 86 Mo. 565, supra.

The case of *Williamson v. Anthony*, 47 Mo. 299, was one where there was but one administrator of the estate. He presented his claim in time against the estate, it was filed and allowed, and his claim and other papers remained among the files of the court, no one being appointed by the court to resist the claim; and upon these facts it was ruled that the claim could still be allowed, though four years had elapsed since the grant of letters, the administrator not being in fault, and the probate court having failed to discharge its duty of appointing some one to resist the claim, and there was no one upon whom notice could be served.

In the case of *North v. Walker*, 66 Mo. 453, letters of administration were granted December 10, 1868; but the note sued on did not mature till March 17, 1870, and suit was brought on the note in May, 1872, in the St. Louis circuit court; but the note was presented in due time to the probate court, the executor being present and waiving all objections, the judge declining to make a formal allowance because the note was not yet due, and two extensions of time were granted on the note in February, 1870, at the request of the executor, covering a space of two years from the 17th of March, 1870, and a written agreement to that effect was filed by the creditor and by the executor, and filed in the probate court, together with a copy of the deed of trust which secured that note, various payments of interest notes being made from time to time by the administrator, and filed by him, with the approval of the court, as vouchers, and finally the trust property sold for about three-fourths of the debt, and that credited on the note, and upon these facts it was held that neither the two-years nor the three-years statute had run against the claim. The obvious correctness of that ruling cannot be questioned. But what matters in common the cases cited and the one at bar have cannot easily be perceived. In the present instance no notice was given to the administrator of an application for an allowance of the note till March 19, 1879, over six years after the grant of letters; and the first time the note was even so much as presented to the probate court for allowance was on December 12, 1877, nearly four years after the grant of letters, and over three years after the service of what this court termed the "void process" of the

St. Louis circuit court. So that if you treat the alleged void process of the circuit court as valid process, you are met by two difficulties: If the process was valid, then the resulting judgment swallowed up and destroyed the original demand, as already stated; if valid to the extent only of being good enough as an exhibition of the claim, but not good enough to render a judgment upon, then you are confronted by the fact that the note was not presented for allowance within three years after the grant of letters. In addition to that, the plaintiffs, after bringing their note into the probate court for the first time on the 12th day of December, 1877, without notice to the administrator, continued their cause to January 16, 1878, and again to March 14, 1878, when they dismissed their case, and withdrew their note and other papers. So that there was nothing left on file, as in *Williamson's Case* and in *North's Case*, showing a continued assertion of the claim. On the contrary, the records of the probate court show an absolute abandonment of the claim. It would seem that a case differing so widely in all its essential facts from those cited, ought to differ also in the conclusions of law arising on such differing facts.

5. Moreover, we are met with the further difficulty that, pending the time when the plaintiffs dismissed their cause and withdrew their note and papers from the Ralls probate court, and the service of the first notice on the administrator on the 19th day of March, 1879, the case was passed upon by the supreme court of Illinois, and decided adversely to the plaintiffs. *Wernse v. Hall*, 101 Ill. 423. That ruling was based upon several grounds: That the claim was barred by the statutes of Missouri in consequence of its not having been exhibited in time, the service of process on the administrator being held not the "service of process in a judicial proceeding," and therefore worthless; and in consequence of not having been presented for allowance in time, and being thus by the statutes of this state barred, it was also barred in the courts of Illinois under a statute of that state; and, being thus barred there, the plaintiffs were not creditors of the estate, and could not subject the real estate of *McPike* to the payment of their demand; and consequently that their claim was properly disallowed, and their letters of administration, granted upon the theory that they were creditors, properly revoked. The effect of this adjudication cannot be doubted; it amounts to a conclusive bar to any further prosecution of this claim of plaintiffs in its present shape.

6. But we are not unmindful that plaintiffs have a meritorious claim, and one which, in the first instance, they took the appropriate legal steps to have adjudicated and determined, and did have adjudicated and determined. The judgment then rendered in the circuit court of St. Louis county still stand unappealed from and unreversed, and so does the classification of that judgment in the probate court of Ralls county. We are not un-

mindful, either, of the wholesome common-law rule that "the default of the court shall not prejudice any one." 2 Hawk. P. C. 534; *State v. Snyder*, 98 Mo. 555, 11 S. W. Rep. 1036. The parties to this proceeding are the same as reported in 76 Mo., supra; and, barring the technicality already noted, the cause of action is the same. Taking a broad view of the subject, we shall therefore reverse this judgment and remand the cause, with directions to proceed with the judgment classified in the probate court precisely as if the rulings made in 76 Mo., above cited, had not been made.

BRACE, J., not sitting. RAY, C. J., and BLACK, J., concur; BARCLAY, J., in reversing and remanding.

STATE v. STRATTMAN.

(*Supreme Court of Missouri. June 2, 1890.*)

DEFLING FEMALE WARD—EVIDENCE.

1. Under Rev. St. Mo. 1879, § 1260, providing that, "if any guardian of any female under the age of 18 years, or any other person to whose care or protection any such female shall have been committed, shall defile her by carnally knowing her while she remains in his care, custody, or employment," he shall be punished, a conviction may be had of one in whose family such female was employed to look after his children; there being evidence that he promised her father to give her clothing and board, and send her to school, and treat her like one of his children.

2. It is no defense to a prosecution under the statute that the female was unchaste.

3. The fact that prosecutrix testified that defendant always forced her does not render the evidence demurrable as showing another crime, where the circumstances testified to by her tend to show that force was not used.

4. Error cannot be predicated of the court's charge that, before the jury could acquit because a higher degree of crime had been shown, they would have to believe from the evidence that, if defendant were on trial for such higher degree of crime, then it would be their duty from such evidence to convict defendant of such higher degree of crime, if they believed such evidence to be true; especially where any possible ambiguity there might be in the words "higher degree of crime" is explained by another charge that they should acquit if they found that defendant accomplished his object by force, and the prosecutrix only yielded to his superior strength.

5. An application for continuance on account of the absence of a material witness must state the facts to which such witness would testify. It is not enough to state that his testimony was "material."

Appeal from circuit court, Osage county; RUDOLPH HIRZEL, Judge.

At the April term, 1886, of the Osage circuit court, the defendant was indicted under the provisions of section 1260, Rev. St. 1879. The indictment is in proper form, and charges that defendant, on the 4th day of July, 1885, defiled one Mary Berhorst, a female under the age of 18 years, who had been confided to the care and protection of defendant by her father; and that such criminal act was done while she was in the care, custody, and employment of the defendant. The defendant was tried at the April term, 1887, the trial resulting in a verdict of guilty, and an

assessment of punishment at three months' imprisonment in the county jail, and \$100 fine. Before the trial began the defendant filed the following application for a continuance: "The said defendant cannot safely proceed to trial at this term of court on account of the absence of a material witness, to-wit, one James Clinton; that said witness has been duly served with the process of this court long prior to this term of court; that said witness is not absent by the act, knowledge, or consent or connivance of this defendant; that the evidence of said witness is material to the defendant in the trial of this cause; that he cannot prove by any other witness the same facts that he expects to show by said Clinton; that said Clinton lives within the reach of process of this court; that said defendant cannot safely proceed to trial without the evidence of said witness; that defendant verily believes that said witness can be had here at the next term of this court; the said witness was here at the last term of this court."

The transcript in this cause is prepared and indexed by E. F. Bautzer, circuit clerk, whose work is done so well in every particular as to leave nothing to be desired. If all transcripts in criminal causes were as well prepared as this one, our labors would be greatly lessened. The testimony is the following: Fred Berhorst: "I have a daughter, Mary Berhorst. She was living with defendant during 1884 and 1885. She is now 16 or 17 years old. Defendant came after her to take care of his children. The first time he came after her she would not go with him. The second time he came she went with him. Defendant was to give her clothing, board, and send her to school. She remained with defendant 5 or 6 years. I had no wife. The defendant married the sister of my wife. He said he would treat my daughter as his own child. He did treat her well. Then sent her away from his home. She was 9 or 10 years old when she first went there. Mary went to Haltmeyer's not quite two years ago, and remained there two or three months. All lived in Osage county." Cross-examined: "Defendant came after my daughter to take care of his children. He had one or two children then. He agreed to give her clothing, board, and send her to school, and treat her like his own child. He was to pay for the schooling." Mary Berhorst: "I live with Conrad Avers. I know the defendant. Have known him for 5 years. Lived at his house about 1885. I was about 10 years old when I went there. He said he would give me nice clothes, board me, and send me to school, and treat me as a child. One day he said he would go out in the field to work,—fix fence, I believe. He then told me such things. I told him I would not do such things. He took hold of me, threw me down, and did it. Defendant is the father of my child. The child is 13 months old. I am 16 or 17 years old. This was in Osage county, Mo. He said he would give me his farm if I would let him do it. I

said I did not want his farm. He took hold of me, and threw me down. I remained there 7 months after that. He did not send me off. I left him. He gave me all my things. He did it a good many times." Cross-examined: "The first time he did it was two years ago. I tried to keep him from it. He did it any way. He said he would kill me if I told any one,—would kill me if I told his wife. I know V. Stewart. He was at Strattman's about that time. I know James Clinton and Thomas Scott. I never had anything to do with Clinton or Scott. Clinton was there as a hand about that time. A peddler was there about two years ago. He was at my bed at night. I told him to leave, and he left. I never had anything to do with any other person. Every time defendant did it I tried to keep him from it. I always resisted when he wanted to do it. I did not want him to do it." "Question. Did defendant force you every time he carnally knew you? Answer. Yes; I always resisted, and tried to keep him from doing it, and then he would throw me down, and do it anyway. Defendant had two children when I went there. Think he has four now. There are two rooms in the house. I never said anything about it until I went to Haltmeyer's. Defendant treated me bad toward the last. He got rough when he found I was with child. There were often men there. I often went in the field with them. Defendant and his wife never said anything about it to me." Defendant introduced evidence as follows: V. Stewart: "I live in Osage county, Mo. I know defendant and Mary Berhorst. I was working at defendant's during 1885. I know James Clinton and Thomas Scott. I do not know of Mary Berhorst having carnal connection with Scott, but I do know she had carnal connection with James Clinton. I saw it at Strattman's house, at night, before July 4, 1885." Mrs. Strattman: "I am the wife of defendant. I know Mary Berhorst. One night my husband was absent. Mary Berhorst went to bed with my little child. She went in the room with the hand. I told her not to go, but she went. At night the child cried. I went to find out what was the matter, and when I opened the door I heard a man jump out of Mary Berhorst's bed. In the morning Mary Berhorst told me that the hand, James Clinton, had been in bed with her. I asked her why he was there. She said, nothing; he only slept on the pillow with her. The next morning she told me that the peddler had been in bed with her about an hour, then left, and came back and got in bed with her again, and slept on the pillow with her. I tried to keep her from going with the men." Cross-examination. "My husband had nothing to do with her. I never saw anything out of the way with them." Redirect examination: "I always tried to keep my husband straight." Donke: "Defendant treated Mary Berhorst as well as his own child. I was there a year and nine days while she was there. I never

saw anything wrong between them. I worked in the field with them. Never saw anything wrong." Cross-examination: "He treated her as well as his own child. She lived there as one of the family. I was at Strattman's from September, 1888, and staid there one year and nine days." Henry Strattman, defendant: "I never had anything to do with Mary Berhorst. I am not the father of her child."

At the close of the testimony of the state the defendant asked an instruction in the nature of a demurrer to the evidence, which was refused; but the court gave all the other instructions asked, whether for prosecution or defendant, as follows: "(1) The court instructs the jury that, if they believe from the evidence that Mary Berhorst was confided to the care and protection of defendant, being then and there under 18 years of age, and that the defendant, in Osage county, Mo., at any time within three years next before the finding of the indictment, defiled the said Mary Berhorst by carnally knowing her, and by having sexual intercourse with her, while she was in his care, custody, and employment, and while she was still under the age of 18, they will find him guilty as charged in the indictment, and assess his punishment at imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not exceeding one year, and by a fine not exceeding \$100. (2) The court instructs the jury that, in considering the weight of the evidence given by both the defendant and his wife, they will take into consideration the fact that he is the defendant, and that she is his wife, and you may consider their interest in this case, and the marital relations, in passing on the credibility of their testimony. (3) The court instructs the jury that, before they can acquit because a higher degree of crime has been shown, they will have to believe from the evidence that, if the defendant were on trial for such higher degree of crime, then it would be their duty from such evidence to convict the defendant of such higher degree of crime, if they believe such evidence to be true. (4) The court instructs the jury that, although they may believe from the evidence that Mary Berhorst was seen in bed with Jim Clinton, or any other person, yet this will not be sufficient reason for acquitting defendant, provided they further believe that defendant defiled her by having carnal knowledge of her while she was under his care and protection, and while she was still under 18 years of age." *Defendant's Instructions*: "(1) The burden of proving the guilt of defendant rests on the state. The defendant is presumed to be innocent, and, before the jury can find the defendant guilty, they must believe from the evidence, beyond a reasonable doubt, that the defendant is guilty in manner and form as charged in the indictment, and, if the state has failed by such evidence to remove such doubts, then the jury will find the defendant not guilty. (2) If, upon the whole case, the jury have a

reasonable doubt as to the guilt of defendant, they will find a verdict of not guilty. By reasonable doubt is meant a real, substantial doubt arising on careful consideration of all the facts and circumstances of the case; not a mere possibility of innocence. (3) If the jury believe that any witness has testified willfully, falsely, to any material matter in issue in this case, then the jury should disregard such false testimony, and are at liberty to disregard the entire evidence of such witness in this case. (4) If the jury believe that, at each one of the times of carnal connection testified to by Mary Berhorst, such connection was against her will, and was accomplished by force on the part of defendant, and that said Mary Berhorst resisted each attempt, and only yielded to the superior strength and force of the defendant, then the jury will find defendant not guilty. (5) Evidence simply showing that the girl, Mary Berhorst, was the servant hired to take care of the children of defendant, and as wages therefor was to receive her clothes and board and be sent to school, is not sufficient evidence to show that said Mary Berhorst was a ward of defendant, or was under his special care and trust. The jury must further find from the evidence that Mary Berhorst at the time was under the special care of defendant, and under his protection, and was confided or intrusted by her father to his care and protection. (6) The court instructs the jury that, even if the jury do believe from the evidence that the defendant had carnal connection with the said Mary Berhorst, yet said evidence alone is not sufficient to convict the defendant; the jury must believe from the evidence that the defendant defiled her, and corruptly debauched her, while under his care and protection. (7) The court instructs the jury that by the word 'defile' is meant the having carnal connection with a woman previously chaste, or corrupting the chastity of a woman, or lewdly debauching a woman."

Silver & Brown and Ryors & Voshell, for appellant. *The Attorney General*, for the State.

SHERWOOD, J., (after stating the facts as above.) 1. The application for a continuance was properly overruled. It disclosed no grounds why it should have been granted. In what respect the testimony of Clinton, the absent witness, was "material" was not stated. Such an allegation in an application of this sort is but the statement of a legal conclusion, and for that reason insufficient. In such cases, facts must be stated in order that the court to whom application is made may determine for itself whether the facts set forth warrant the granting of the order. *State v. Pagels*, 92 Mo. 300, 4 S. W. Rep. 931. The contention made that, because under the former rulings of this court an application for continuance had to set forth the matters on which the applicant relied, in order that the state might consent to their being

read as and for the testimony of the absent witness, and as this can no longer be done, therefore it is no longer necessary to set forth the facts on which the application is based, is simply a *non sequitur*. On the contrary, the necessity of setting forth the facts showing prior diligence of the applicant, etc., are just as necessary now as ever.

2. The next contention made is that the court should have sustained the demurrer to the evidence. It is true the prosecutrix swore point blank that the defendant always forced her, but that statement is to be received with many grains of allowance. This is a case where "actions speak louder than words." In *State v. Woolaver*, 77 Mo. 108, where a defendant was also prosecuted under section 1260, an instruction was given which told the jury to find the defendant guilty if he had carnal knowledge of the girl either with or without force, and it was held erroneous, but the judgment was notwithstanding affirmed, because the physical facts testified to by the girl herself showed beyond peradventure that the force required to constitute the sexual act rape had not been employed. In our opinion the deductions from the evidence in the case at bar must be similar to those in that one. The testimony of the girl when contrasted with her actions; her failure to make complaint, although forced "a good many times,"—only furnishes one in the long list of instances of which that profound philosopher of human nature, Shakespeare, speaks:

"The wiles and guiles that women work,
Dissembled with an outward show."

The demurrer to the evidence was therefore properly overruled.

3. There is no valid objection to the third instruction given at the request of the state, and there was no difficulty in understanding its meaning by a jury of ordinary intelligence and experience as to what was meant by the words "higher degree of crime;" and, apart from that, the fourth instruction given on behalf of the defendant explains any ambiguity there might have been in the words cited, by directing the jury to acquit the defendant if they should find that he accomplished his object by force, and the prosecutrix only yielded to his superior strength.

4. The fourth instruction given at the request of the state correctly told the jury that, if the defendant defiled the prosecutrix by carnally knowing her while, etc., they should convict him, notwithstanding she may have also had sexual intercourse with another. The section upon which the present indictment is grounded levels its denunciations and penalties against every one to whose care or protection any female under the age of 18 years is confided, who violates the trust reposed in him in the manner that section condemns. Unchaste to all the world beside, she must be pure to him. This is the evident policy and central idea of the statute. These remarks dispose of the seventh instruction given for the defendant. That instruction

v.13s.w.no.16—52

was, for the reasons just stated, erroneous in favor of defendant; but he cannot take advantage of error committed at his own instance. Rev. St. 1879, § 1821.

5. In conclusion, the testimony of the father of the girl fully makes out a case covered by the statute, and which brings it within the principles announced by this court in an analogous circumstance in *State v. Young*, 12 S. W. Rep. 642. We affirm the judgment.

All concur.

MURRAY v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri. June 2, 1890.)

RAILROAD COMPANIES—ACCIDENT AT CROSSING—INSTRUCTIONS.

1. In an action against a railroad company for personal injuries received by one in a collision with defendant's train while attempting to drive over a public crossing in a city, an instruction that the burden of proving contributory negligence as alleged in the answer is on defendant does not deprive it of the benefit of plaintiff's evidence showing contributory negligence, as the instruction does not require defendant to prove that fact by its own witnesses.

2. Where the amount expended by plaintiff for medical services is shown, and it further appears that he was in bed five months, during which time he was nursed by ladies about the house, a verdict which does not appear to be excessive will not be set aside on account of an instruction that plaintiff is entitled to recover for medical services and nursing, though there is no evidence as to the value of the nursing; the presumption being that jurors were reasonably familiar with the value of such services. *Duke v. Railway Co.*, 12 S. W. Rep. 688, distinguished.

3. Where there is evidence that the bell on defendant's engine was not rung, and that a brakeman was not stationed on the rear car, as required by an ordinance, an instruction that, if defendant's failure to keep a watchman at the crossing "directly contributed" to the accident, plaintiff could recover, provided he exercised care in attempting to drive across, is not open to the criticism that it authorizes a recovery if the negligence of defendant "contributed" with that of the plaintiff in producing the injury. It simply means that plaintiff can recover if defendant's failure to keep a watchman "directly contributed" to the injury with its other negligence.

4. Though, as matter of law, where witnesses are of equal credit, positive evidence that the bell on defendant's engine was ringing as it approached the crossing is entitled to more weight than that of witnesses who say they did not hear it, yet the position and situation of the witnesses, the attention they were giving, and their credibility, are questions for the jury, and hence it is proper to submit to them the ultimate fact as to whether or not the bell was ringing.

5. Failure of defendant to have a flagman stationed at a public crossing in a city, as required by its ordinance, is negligence *per se*.

Appeal from St. Louis circuit court; L. B. VALLIANT, Judge.

T. J. Portis, Bennett Pike, and Henry G. Herbel, for appellant. A. R. Taylor, for respondent.

BLACK, J. This is a personal damage suit. Plaintiff was a driver of a hose carriage connected with the fire department of the city of St. Louis. He and others in charge of the hose were going north on Summit street. The defendant's road crosses this street; there being four or five tracks at the crossing, which run in an east and west direction,

As the plaintiff attempted to go over the crossing, a train of box and flat cars backed in from the west, and struck his team and carriage. He was thrown from his seat, and received severe and permanent injuries; one of them being a broken leg. The cause of action is based upon a violation of certain ordinances which make it the duty of defendant to have a watchman at crossings like the one in question to display a signal flag; to constantly sound the engine bell when the train is moving; to have a man stationed on top of the car furthest from the engine, when the train is backing, to give danger signals; and to have the train well manned with experienced brakemen at their posts. Undisputed evidence shows that the gates at the crossing were up at the time of the accident; that there was no flagman present; and that a caboose car stood on one track so as to obstruct, to some extent, a view of the backing train. Other evidence for the plaintiff tends to show that he was driving his team at a walk or slow trot; that he exercised due care; that there was no man on the car furthest from the engine; and that the bell was not ringing. The defendant's evidence tends to show a full compliance with the ordinances in the last-mentioned respects. The accident occurred during a strike by the defendant's employees, and a number of strikers and policemen were at the crossing. There is evidence to the effect that four or five persons shouted to plaintiff to stop when he was 50 feet from the tracks, but that he went on, seeming to think the train was not close enough to catch him. Plaintiff says no one hallooted to him until just as the train struck his carriage, and in this he is corroborated by two persons who were on the horse carriage.

1. Of the instructions given at the request of the plaintiff, the first is that the burden of proving negligence of defendant as alleged in the petition is upon the plaintiff, and the burden of proving negligence as alleged in the answer is upon the defendant. That this instruction asserts correct propositions of law in the abstract is conceded, but the objection to it is that it deprived defendant of the benefit of evidence offered by the plaintiff tending to show contributory negligence on his part. There was some evidence introduced by the plaintiff having some tendency to show he might have seen the approaching cars, and that he attempted to cross the track when he should have stopped. There is nothing, however, in the instruction which deprives the defendant of the benefit of this evidence. It does not say that the defendant must show contributory negligence by the evidence of witnesses introduced by itself. The jury are left to determine the question from all the evidence, no matter by whom offered.

2. The instruction concerning damages allowed, among other things, a fair compensation "for any expenses necessarily incurred by plaintiff for medical attention and nurs-

ing." The objection is that there is no evidence of any expenses incurred for nursing. The plaintiff was in bed for five months, and, according to the evidence of the surgeon, was nursed by ladies about the house who were constant in their attendance,—relatives, he thinks. There is no other evidence upon the subject. This case is quite unlike that of *Duke v. Railway Co.*, 12 S. W. Rep. 636. There the jury was told that, if plaintiff expended large sums of money for professional services, physicians, and nurses, also for drugs and medicines, then she could recover therefor. She had been treated and cared for at a hospital, and there was not a word of evidence as to any of the alleged outlays. Here there is express proof as to the amount of the surgeon's bill. The only question is as to nursing. The time during which the plaintiff had and required nursing is sufficiently fixed, and the only want of evidence is as to the value. Jurors may well be presumed to be reasonably familiar with the value of such services, and they may measure the same by their own knowledge and experience. It has never been the practice to enter upon detailed proof upon this element of damages in suits of the character of the present one. The plaintiff is crippled for life, and the judgment for \$5,750 cannot be said to be excessive. Under these circumstances, the judgment ought not to be reversed on the objection now being considered.

3. By the third instruction the jurors were told that, if defendant failed to have a watchman stationed at the crossing, and if plaintiff, while exercising care in driving across the same, was injured by a collision with a train of the defendant's cars, "and if the failure to keep said watchman directly contributed to cause plaintiff to be injured, then plaintiff is entitled to recover." If this instruction allowed a recovery in the event that defendant's negligence contributed with negligence of the plaintiff to produce the injury, then it would be radically wrong, but it asserts no such a proposition. By this very instruction, as well as one given at the request of the defendant, the jury must have found that plaintiff was exercising ordinary care before there could be a finding for him. Other grounds of recovery, namely, failure to ring the bell, and to have a man on the car furthest from the engine to give danger signals, were presented by other instructions. If a failure to comply with the ordinances in these respects, or either of them, and a failure to have a watchman at the crossing, combined in producing the injury, then plaintiff was entitled to recover. The instruction means this, and nothing more; for it is clearly stated that to recover he must have been using ordinary care. If, without fault of the plaintiff, he should be injured by the joint negligence of defendant and a third person, he would have a cause of action against the defendant. For a much stronger reason may the plaintiff recover where he is

injured by two or more negligent acts of the defendant.

4. Witnesses on the part of the plaintiff testified that they did not hear the bell of the engine ringing, while those for the defendant testified in positive terms that it did ring. With this negative evidence on the side of the plaintiff, and the positive evidence on the side of the defendant, the contention is that defendant's evidence should have prevailed, and the court erred in submitting this question to the jury. *Isaacs v. Strainka*, 95 Mo. 517, 8 S. W. Rep. 427, states the true rule, namely, where the witnesses are of equal credit, the positive evidence that the bell was ringing is, as a general rule, entitled to more weight than that of witnesses who say they did not hear it. Much depends upon the situation and position of the witnesses, and the attention they were giving at the time. All these matters, and the credit to be given to the witnesses, were questions for the jury to consider; and the ultimate question, whether the bell was ringing or not, was one of fact, and was properly submitted to the jury.

5. The evidence shows beyond all controversy that there was no flagman at the crossing, and this violation of the ordinance was negligence *per se*. A flagman at his post, and in the performance of his duty, would doubtless have avoided the calamity. The real question of fact in the case was whether plaintiff was guilty of contributory negligence. The evidence on this question is voluminous and conflicting. The instructions given at the request of the defendant are full and fair, and those given at the request of the plaintiff proceed upon the hypothesis that he was using ordinary care. The real question in the case was fairly submitted, and the judgment should be and is affirmed. The other judges concur.

STATE v. CLAYTON.

(Supreme Court of Missouri. June 2, 1890.)

ASSAULT WITH INTENT TO KILL—INDICTMENT—EVIDENCE.

1. An assault with intent to kill, which is punishable, under 1 Rev. St. Mo. 1879, § 1262, by imprisonment in the penitentiary for a term not exceeding 10 years, is a felony, within the definition of that term by section 1676, as an offense for which the offender "is liable" to be imprisoned in the penitentiary; and an indictment which fails to allege that such assault was committed with a felonious intent is bad.

2. An indictment for an assault need only charge the assault in general terms, without specifying the manner in which it was committed. Overruling *State v. Jordan*, 19 Mo. 212, and *State v. Greenhalgh*, 24 Mo. 373, and following *State v. Chandler*, Id. 371, and *State v. Chumley*, 67 Mo. 41.

3. On a trial for assault with intent to kill, evidence is inadmissible as to the killing of a third person by the prosecuting witness a few minutes before defendant made his assault, at which encounter defendant was not present, and with which he was not shown to have been connected; and where, on the admission of such evidence, the court promises to withdraw it if defendant's connection is not shown, it is error to permit such

evidence to go to the jury with the court's approval impressed on it.

4. Where there is nothing to show that the prosecuting witness was acting as a peace-officer at the time of the assault, it is error to admit evidence that he then held the office of town marshal. *BARCLAY, J.*, dissenting.

Appeal from circuit court, Hickory county; W. I. WALLACE, Judge.

Indictment of William C. Clayton for an assault with intent to kill, committed on the person of one Thomas G. Allen. Evidence on the part of the state was admitted, showing that, a few minutes before the assault, Allen had shot and killed one Charley Clayton. J. H. Kinney, a witness for the state, testified: "The difficulty between Tom Allen and W. C. Clayton occurred at Holmes' store. I was at the store when Bill Clayton shot at Tom Allen. When Clayton stepped in the door, and Tom Allen pointed his pistol, I was in range of Allen's pistol, and stepped outside. Clayton fired, and I can't say whether Tom Allen fired or not. Tom Allen was in the back part of the store, standing in the door. Clayton was near the front door, partly behind a stack of goods, and shot from behind a box of goods. Clayton, when he fired, was about 60 to 65 feet from Allen. Tom Allen had pistol in his right hand, pointing towards Clayton. Clayton was rather behind stack of goods, pointing his pistol around. Next I saw of Allen, he was crossing the street east and west. Clayton came out at front door. One shot was fired, and, I thought, two. Allen was standing still with pistol when Clayton fired. When Clayton came in, Allen drew his pistol down on Clayton. Tom Allen was standing in back door when Bill Clayton came in at front door, and Allen drew his pistol on Clayton a little before Clayton pointed his at Allen. Bill then presented his pistol. Clayton was eight or ten feet from the front door when he fired. Clayton did not say anything when he came in, that I heard. Don't remember of his saying anything at any time." Defendant was found guilty, and now appeals. 1 Rev. St. Mo. 1879, § 1262, provides: "Every person who shall, on purpose and of malice aforethought, shoot at or stab another, * * * with intent to kill such person, * * * shall be punished by imprisonment in the penitentiary not exceeding 10 years." Section 1676 is as follows: "The term 'felony' * * * shall be construed to mean any offense for which the offender, on conviction, shall be liable by law to be punished with death or imprisonment in the penitentiary."

Amos S. Smith, for appellant. *John M. Wood*, Atty. Gen., for the State.

SHERWOOD, J. The charging part of the indictment in this cause is the following: "that Wm. C. Clayton, late of the county aforesaid, on or about the 17th day of June, 1886, at the county of Hickory, state aforesaid, did upon the body of one Thos. G. Allen, then and there being, feloniously, on

purpose, and willfully, with a deadly weapon, to-wit, a revolving pistol loaded with gunpowder and leaden balls, which he, the said Wm. C. Clayton, then and there had and held, did then and there make an assault with intent him, the said Thos. G. Allen, then and there to kill, against the peace and dignity of the state."

1. The indictment herein attempts to charge a felony; that is, a crime which is liable to be punished by imprisonment in the penitentiary, not one which must be thus punished. Rev. St. 1879, § 1676. This has been the law in this state over 50 years. St. 1835, p. 216, § 36; Rev. St. 1845, p. 414, § 36; Rev. St. 1855, p. 645, § 38; Gen. St. 1865, p. 828, § 38; Johnston v. State, 7 Mo. 183; Ingram v. State, Id. 293; State v. Murdock, 9 Mo. 739; State v. Green, 66 Mo. 632; State v. Reeves, 97 Mo. 668, 10 S. W. Rep. 841. Being thus a felony, it was indispensable that the indictment should charge that the act, to-wit, the assault, was done with a felonious intent, because without a felonious intent there can be no felony. Curtis v. People, Breese, 256; State v. Swann, 65 N. C. 380; 1 Archb. Crim. Pl. 885, 929; 3 Chit. Crim. Law, 788, 828; 2 Bish. Crim. Proc. §§ 79, 651, 653; State v. Thompson, 80 Mo. 470; Beasley v. State, 18 Ala. 535. The making of an assault like the one under discussion is not a new offense created by statute,—was an offense at common law, but was only a misdemeanor. 1 East, P. C. 411. The grade of the offense, however, having been raised to a felony, the common-law rule as to charging felonies must apply, and the act charged like any other felony originating at common law. On this ground, it must be held that the indictment is insufficient, and that the objection to its sufficiency was well taken.

2. It seems that most of the authorities favor the view that assaults may be charged in general terms; that is, without specifying the means by which the assault was made. 2 Bish. Crim. Proc. §§ 77, 656. In this state, however, the point has been ruled both ways. Thus, in State v. Jordan, 19 Mo. 212, and State v. Greenhalgh, 24 Mo. 373, it was held essential to state the manner in which the assault was made. In State v. Chumley, 67 Mo. 41, without adverting to former opinions, it was ruled that it was unnecessary to allege the manner of the assault; and in State v. Chandler, 24 Mo. 371, it was ruled that the manner of the assault charged need not be alleged. It is, therefore, an open question in this state; and we decide to follow the general current of authorities, and the well-established forms and precedents, and hold the present indictment good in the particular mentioned. 3 Chit. Crim. Law, 821, 828.

3. Allen, upon whom the assault is charged to have been made, had an encounter, a few moments before the assault occurred, with Charley Clayton, in which the latter was shot and killed. William C. Clayton was not present when this passage at arms occurred, and had nothing at all to do

with it. Any testimony on this point was wholly irrelevant, and should not have been admitted. If there had been any connection shown between the two encounters, if they both had formed but part of the *res gestæ*, then it would have been different. 2 Bish. Crim. Proc. § 662; Johnston v. State, 7 Mo. 183. As it was, an entirely independent matter was injected into the trial of this cause, the only effect of which was to distract the minds of the jurors from the real issues, or else to fill their minds with prejudice against the accused. State v. Parker, 96 Mo. 382, 9 S. W. Rep. 728, and cases cited. The court had promised that, "unless defendant's connection with such prior difficulty was shown, he would withdraw it from the jury;" but this was not done. This action of the court, therefore, had the effect to sanction this inadmissible testimony; and it went to the jury with the approval of the court impressed upon it. This was error, and is condemned by the ruling in State v. Rothschild, 68 Mo. 52, where a similar promise, and a similar failure to comply with it, occurred. The like line of argument applies to the action of the trial court in refusing to give the fourth instruction, in which defendant asked that such objectionable testimony be withdrawn from the jury.

4. And, for similar reasons, testimony should not have been admitted that Allen, at the time of the assault, held the position of town marshal. There was no testimony whatever that Allen was acting in his official capacity, as a peace-officer, in trying to effect the arrest of the defendant, at the time the assault was made; and, certainly, because he was such an officer gave him no greater rights than any other citizen, when engaged in a mere personal encounter. Indeed the testimony of Kinney rather seems to show that Allen himself was the assaulter, instead of the party assaulted. If so, the fact that Allen was marshal had no possible relevancy to the case, and should have been excluded. In this latitude, at least, we have not yet reached the point where "there's such divinity doth hedge" an official that he is exempted from the operation of the ordinary laws of the country. As to those laws, he occupies just the same position as the humblest citizen,—no better and no worse. It is only where an officer is actually engaged in performing some official duty that the law throws around him its "special protection," and not otherwise or elsewhere. State v. Dierberger, 96 Mo. 666, 10 S. W. Rep. 168; State v. McNally, 87 Mo. loc. cit. 652 et seq., and cases cited.

5. The instructions given at the instance of the state by the court were as follows: "The court instructs the jury that, if they find from the evidence that Wm. C. Clayton, at any time within three years prior to the finding of the indictment in this cause, at the county of Hickory and state of Missouri, feloniously, on purpose, and willfully, made an assault on one Thomas G. Allen with a pistol loaded with gunpowder and leaden

balls, with the intent him, the said Thos. G. Allen, then and there to kill, they will find the defendant guilty, and assess his punishment at imprisonment in the penitentiary not exceeding five years, or in the county jail not less than six months, or by both a fine of not less than one hundred dollars and imprisonment in the county jail not less than three months, or by a fine of not less than one hundred dollars." "The court instructs the jury that, before they can acquit the defendant on the ground of a reasonable doubt, such doubt must be a substantial doubt, and not a mere possibility of his innocence." "The court instructs the jury that, in passing upon the guilt or innocence of the defendant, they will take into consideration all the facts and circumstances detailed in evidence." "The court instructs the jury that, before they can acquit the defendant upon the ground of self-defense, you must believe and find from the evidence that the defendant had reasonable cause to apprehend that Thomas Allen was about to inflict upon him some great bodily harm, and that such danger was imminent and impending; and, unless you so believe, you will find the defendant guilty, and assess his punishment as provided in these instructions." No valid objection can be taken to these instructions.

For the errors aforesaid, the judgment will be reversed, and the cause remanded. All concur; BARCLAY, J., does not do so in paragraph 4.

OLDEN *et al.* v. HENDRICK *et al.*

(*Supreme Court of Missouri. June 2, 1890.*)

ESTOPPEL IN PARI—PLEADING.

1. Where a father in embarrassed circumstances buys land, and takes a deed in the name of his son, with the understanding that the latter should hold the title for his benefit, and on the faith of such understanding builds on the land, plats it, and sells many of the lots, the widow and heirs of the son, after 25 years of non-claim, are estopped to assert title to the land as against the father's grantees, though they have made no improvements on the land, and though the deed to the son was duly recorded.

2. Where the father's grantees, on their own motion and without objection, have been made parties to an action of partition between the widow and children of the son, their answer, which sets up the facts, and avers that by reason thereof the widow and children are estopped, and to which no objection was taken by way of demurrer or motion to make more definite and certain, will, after judgment, be held to sufficiently plead the estoppel.

Appeal from circuit court, Greene county; W. D. HUBBARD, Judge.

Boyd & Delaney, for appellants. *F. S. Hef-fernan*, for respondents.

BLACK, J. The plaintiff Eliza C. Olden is the widow of William R. Hendrick, and she and her present husband brought this suit against her children by her former marriage for the partition of lots 29 and 30, in Hendrick and Jones' addition to the city of Springfield. Fannie E. Holland and her husband, George Holland, were made defendants on their own motion. The controversy is be-

tween Holland and wife on the one hand, and the other parties to the suit on the other. The two lots are a part of 80 acres of land formerly owned by L. Hendrick, who was the father of William R. Hendrick, the former husband of the plaintiff Eliza. The 80-acre tract was sold under a judgment in favor of Greene county against L. Hendrick and others, and William R. Hendrick became the purchaser, and received a sheriff's deed dated in December, 1850. This is the title of the widow and heirs of William R. Hendrick. In 1859, L. Hendrick, William R. Hendrick, and N. T. Jones joined in making and filing a plat of Hendrick and Jones' addition, and the lots in question are a part of the property covered by the plat. In November of the same year, 1859, L. Hendrick, by warranty deed and for a full consideration, conveyed four lots to John Norris; and thereafter, and in the same year, Norris conveyed two of the lots to the defendant Fannie E. Holland. She and her husband claim under this title. On the face of the deeds the title, it will be seen, is in the widow and heirs of William R. Hendrick. The controlling question in the case arises over the equitable estoppel set up in the answer of Holland and wife. The evidence on this branch of the case is, in substance, this: The sheriff's deed to William was executed and recorded in 1850, and the consideration therein recited is \$345. L. Hendrick, father of William and the judgment debtor, was financially embarrassed; but he borrowed \$345, and with the money bought in the land, taking the deed in the name of his son William. On this point some hearsay evidence was admitted, but, excluding all such evidence, it is still clear that the money was borrowed by L. Hendrick, and by him used in paying for the property so purchased at the sheriff's sale. The plaintiff, being called as a witness by the defendants Holland and wife, testified that she married William in 1864, and lived with him until his death, in 1879. She says: "I never heard him speak of owning this land or of claiming it. The first I heard of it was in 1888, from Mr. Matlock, and then I had this suit brought. My boys put a wire fence around the lots." A son of L. Hendrick, and brother of William, says he knew of the sheriff's sale; that he is satisfied his father bought in the land, taking a deed in the name of William; that William was an invalid, living with the father, and had no property, except a horse; that the land was sold at sheriff's sale because of trouble which his father had with the Miller heirs; that the sale of the lots to Norris was talked over in the family; that he believes William knew of the sale to Norris, as he was always at home, but he cannot be positive; that his father built upon and inclosed part of the 80 acres after the sheriff's sale, and the family lived on the place; that witness, his father, and Norris went over the ground to look at the lots, but he cannot say whether William was along or not; that his father attended to the sale of lots, and no one

else claimed them; and that William joined in some of the deeds made to purchasers. William administered upon his father's estate in 1863, and in his inventory he included the notes given by Norris for the lots, and also all of the unsold lots, as the property of his father.

The chief objection to the application of any principle of estoppel is that the sheriff's deed to William was made matter of record in 1850, so that the public records disclosed his title, and hence he was not bound to take any active measures to prevent persons from purchasing from his father. Mere standing by in silence will not bar one from asserting a title to land which has been spread upon the public records, so long as no act is done to mislead the other party. *Biglow, Estop.* (5th Ed.) 594. But the very statement of the rule shows that the fact that the title is of record is no justification for an act which does mislead the other party. Where the owner concurs in the sale, by participating in it at the time, he makes it his own act. 2 *Herm. Estop.* § 964. Representations made by one of two copartners that he intended to give the other his interest, and would make no claim to the land, and which representations were made to be and were acted upon by a third person by the expenditure of money, will estop the person making the representations from thereafter asserting his title. *Dickerson v. Colgrove*, 100 U. S. 579. In the case last cited the court quotes from *Faxon v. Faxon*, 28 Mich. 159, where, among other things, it is said: "There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on. The rule does not rest on the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect." The evidence in this case shows to our entire satisfaction that the father, and not the son, paid for the land at the sheriff's sale. It shows, too, that the son simply held the title for the use and benefit of the father. That such was the understanding between them and the other members of the family cannot be doubted. Such was the situation of affairs when Norris purchased, and such continued to be the situation of affairs from the sheriff's sale, in 1850, to the death of the father, in 1863, and on to the death of the son, in 1879. The son said to the father: "You have purchased and paid for the land, and I hold the title in trust for you, and you can dispose of the lots as you see fit." The testimony does not in words show such an agreement, but the circumstances and course of conduct between these parties during the residue of their lives show that this was the understanding just as plainly as if it had been reduced to writing. On the faith of

this agreement, the father built upon the land, laid it off into an addition, and sold many of the lots. Can the widow and heirs of the son now repudiate the agreement, and recover the lots from the grantees of the father, and that, too, after 25 years of non-claim on their part and that of William? We say, no.

The statute of limitations constitutes no defense, for, though the defendants have paid taxes on the lots from 1859 to 1885, still the actual possession of L. Hendrick has not been continued since the sale to Norris. The long lapse of time, with no claim of ownership by William or his widow and heirs, is a circumstance to be considered with the question of estoppel. *Evans v. Snyder*, 64 Mo. 516; *Dickerson v. Colgrove*, supra. It is true that the evidence in this case does not show that defendants have expended money on the property by way of improvements, but the other facts are strong enough to make out a complete estoppel without that element. It is to be remembered that the grantors of the defendants' grantor did lay out and expend money in improvements, and the clear inference is that this was done on the faith of the understanding between father and son.

It is insisted, further, that estoppel is not well pleaded. Holland and wife became parties to this partition suit without objection on the part of the other parties, and their answer sets up the substantial facts disclosed by the evidence, with the assertion that by reason of such facts William R. Hendrick, his widow and heirs, are estopped from claiming the lots. The answer is sufficient, and especially so in view of the fact that no objection was made to the pleading by demurrer or motion to make more definite and certain. The judgment, which was for Holland and wife, is affirmed. The other judges concur.

BELOHER'S SUGAR REFINING Co. v. St. LOUIS GRAIN ELEVATOR Co.

(*Supreme Court of Missouri. June 2, 1890.*)

CITIES—LEASE OF WHARVES—PRIVATE USE.

1. The city of St. Louis leased to defendant, an elevator company owning an elevator on the river front, a portion of its unpaired wharf, for the purpose of erecting thereon "a shed or warehouse for storage and handling of grain or other merchandise in connection with the elevator," reserving the right to control the use of such buildings and grounds, and to terminate the lease on six months' notice, if it were desired to pave and extend the wharf. *Held*, that the lease is valid under the general power to erect, repair, and regulate wharves, and collect wharfage; and especially so under the charter, which gives power "to set aside and lease portions of the unpaired wharf for special purposes, such as the erection of sheds, elevators, and warehouses, * * * and for any purpose tending to facilitate the trade of the city."

2. By defendant's charter, railroads are to have a connection with its elevators, which are required to be so constructed as to accommodate the river interests, and give all facilities for storing grain in bulk or otherwise. *Held* that, although defendant may make reasonable charges, its property is subject to a public trust and to public reg-

ulation, and therefore the lease is not invalid as granting a public franchise for private use.

3. By the act of incorporation, December 18, 1863, defendant was given power to acquire, free from condemnation, any real estate on the Mississippi river "not exceeding 500 feet frontage * * * in any one locality; * * * and the said corporation may also erect one or more grain elevators upon the public wharves," with the consent and under the direction of the city authorities. *Held* that, although defendant owned and occupied 500 feet of river frontage, it had power to lease and occupy a portion of the public wharf contiguous thereto.

4. The charter power to lease portions of the "unpaved" wharf applies to any portion not paved in a manner suitable for receiving and discharging passengers and freight; and a portion not used for that purpose, from which most of the macadam was washed away in 1873, and which has been used ever since as a scavenger dump, is not paved, in the sense of the charter.

5. Plaintiff corporation, having shown no violation of duty to itself, cannot complain of the acts of defendant corporation on the ground of *ultra vires*. Only the state or defendant's stockholders can maintain an action on that ground.

Appeal from St. Louis circuit court; WILLIAM H. HOMER, Judge.

Jas. O. Broadhead, for appellant. *Smith P. Galt*, for respondent.

BLACK, J. This is a suit to enjoin the defendant from erecting and maintaining a shed or warehouse for the storage of grain or other merchandise upon the wharf of the city of St. Louis. The circuit court on the first trial dismissed the petition, but the judgment was reversed, and the cause remanded, by this court. 82 Mo. 121. Pending that appeal the defendant erected the warehouse. The second trial resulted in a decree for the plaintiff requiring the defendant to remove the buildings, and restore the ground so that it might be used as a wharf.

The plaintiff is a corporation organized under the laws of this state; and the defendant, the St. Louis Grain Elevator Company, was organized under the special act of December 18, 1863, the third section of which provides: "The corporation hereby created shall have power to acquire, by purchase or otherwise, any real estate in the city of St. Louis, fronting on the Mississippi river, not exceeding 500 feet frontage on the same in any one locality. The real estate so obtained by this corporation shall not be subject to condemnation for any purpose so long as the same shall be used for grain elevators, and uses connected therewith; and the said corporation may also erect one or more grain elevators upon the public wharves of the city of St. Louis, with the consent and under the direction of the constituted authorities of the same." The elevators are to be so constructed as to give railroads a track-way through the same, and so as "to accommodate the river interests, giving all requisite facilities for the elevating and storing grain in bulk or otherwise, and so as not to interfere with or obstruct the navigation of the river. No provision of this charter shall be construed to interfere with the right of the city to collect wharfage within the city limits." Besides the general powers to establish and

regulate public wharves and docks, and to collect wharfage, the charter of the city of St. Louis of 1876 provides that the mayor and assembly shall have power, by ordinance, "to set aside and lease portions of the unpaved wharf for special purposes, such as the erection of sheds, elevators, and warehouses, and for railroad tracks, for quay places for the loading of lumber for mills, for cotton presses, for manufactories, and for any purpose tending to facilitate the trade of the city; but no permit to use any portion of the wharf, or any lease of the same, shall be granted for a term exceeding fifty years."

The city, by an ordinance approved the 6th August, 1864, established a wharf, "as a public highway for wharf purposes," along the river front from Biddle street to the northern boundary of the city. The streets passed, going north from Biddle, are Ashley, O'Fallon, Bates, etc. City block 226 lies between Ashley and O'Fallon streets, and city block 225 lies between O'Fallon and Bates streets. Both of these blocks are bounded on the west by Lewis street, and, at the date of the ordinance establishing the wharf, extended east to the river, a distance of about 300 feet. The wharf, as established by the ordinance, was opened under condemnation proceedings instituted by the city in 1867; and by virtue of these proceedings the city condemned the greater portion of the above-designated blocks, leaving only a strip along Lewis street having a width of 80 feet. The plaintiff owned a large portion of both of these blocks, the parts owned by it extending from Lewis street to the river, and received as a compensation for that part which was condemned the sum of \$21,643. Before the institution of this suit the plaintiff had acquired additional property in these blocks, so that, at the commencement of the suit, it owned 180 feet front on Lewis street in block 226; the whole front of that block being 215 feet. On this property, and that owned by plaintiff in block 225, there are coal-sheds, and other buildings used in connection with the refining works. Plaintiff also owns several blocks of ground on the west side of Lewis street, with large buildings thereon, wherein it carries on its business of refining sugar. The business is extensive, and it is estimated that 75,000 tons of sugar are received annually from boats which are unloaded at the city wharf. The defendant, on and prior to 18th August, 1879, owned and operated an elevator which had been built, under its charter, upon the river front, and extended southwardly from the south line of Ashley street for a distance of 500 feet. On the last-mentioned date the proper city officers, in conformity with an ordinance dated the 8th August, 1879, leased to defendant 90 by 298 feet of the wharf, extending along the water-line from the south line of Ashley street northward to O'Fallon; the part thus leased being the entire river landing in front of block 226, and including

the foot of Ashley street extended. This lease was for the term of 20 years, upon an annual rental of \$300, and provided that the leased premises should be used by the elevator company "for erecting and maintaining thereon a shed or warehouse for storage and handling of grain or other merchandise in connection with the use of the elevator."

On the foregoing state of facts the circuit court dismissed the plaintiff's bill, but that judgment was reversed, and the cause remanded, by this court. Thereafter the city passed an ordinance approved December 10, 1884; and in compliance with and in pursuance to this ordinance the defendant surrendered the prior lease, and the proper city authorities executed to it a new one, covering the same portion of the wharf, for a period of 15 years, upon the same rental and for the same purposes, save that the new lease contains these additional stipulations: "The city of St. Louis reserves the right to cancel this lease on six months' notice in writing to the lessee, whenever it shall elect to pave and extend the wharf on the premises mentioned aforesaid. The buildings and structures placed on the said premises by the lessee, and the said premises, shall during the term of this lease be used by the lessee for the storage and handling and loading and unloading of grain and merchandise, and the loading and unloading of boats and barges and vessels and railroad cars engaged in carrying the same, and for no other purpose. The city of St. Louis shall retain control over the buildings and structures placed on said grounds by said lessee, and over the use of the same by said lessee, and over the ground covered by this lease, and may at any time, by ordinance, prescribe regulations governing the same, and the business of said lessee." The defendant, by an amended answer, set up this new lease, and now justifies under it.

1. The plaintiff insists that the last lease is as objectionable as the first one, while the defendant insists that it was made in exact conformity to the rulings of this court on the former hearing. The property in question was condemned for wharf purposes, and it cannot be appropriated to a different and inconsistent use; nor can it, or any part thereof, be disposed of by the city for private purposes. These general propositions were asserted in strong terms when the case was here before. They are again contended for on the one side, and conceded on the other, so that on these points additional observations are unnecessary. The principal and important inquiry presented by this record is twofold: *First*, whether the maintenance of the building upon the wharf to be used, in connection with the defendant's elevator, for storing and handling grain and merchandise, and for loading and unloading boats and railroad cars carrying such freight, is a use incident to a public wharf; *second*, whether the erection and maintenance of the structure in this case is for private purposes only, and an illegal use of the wharf for that

reason. In respect of these questions, as this case stood on the old lease, this court said: "In order to meet the demands of commerce, and the changed methods of handling grain and other produce, the city may license the erection of elevators and warehouses in connection with them, upon the unpaved portion of the wharf, without violating the rights of the owners of the fee; but she has no right to lease any portion of it for a term of years without a reservation of the right to cancel the lease whenever it should become necessary to pave and extend the wharf so leased." And further on it is said: "There is no reservation by the city, in the lease to defendant, of any control whatever of the building or business. The property is conveyed away from the city for twenty years; and if, at any time within that period, it should become necessary to extend the wharf and pave it in front of the block in question, the needed work could not be done. The city has no right, and can acquire none from the legislature, to make such a disposition of the property condemned for wharf purposes as will prevent her, in the event it becomes necessary to extend and pave the wharf, from doing its duty in that respect." 82 Mo. 126, 127. In *Illinois & St. L. R. & C. Co. v. St. Louis & P. El. Co.*, 2 Dill. 70, the city of St. Louis had, by ordinance passed and approved in 1872, leased 150 by 600 feet of the wharf to the Pacific Elevator Company for a period of 50 years, with no reserved rights to cancel the same. The ordinance was held to be illegal because it set aside to the exclusive use of the elevator company the leased portion of the wharf for 50 years, and that the city had no right or power to thus tie up its hands in disregard of the future wants of the public. This was the principal ground upon which the ordinance was held to be invalid. The city of St. Louis then had general power to erect, repair, and regulate wharves; but it had no express authority, as it now has, to set aside and lease portions of the wharf for elevator and warehouse purposes. The want of such express authority constitutes the substructure of the whole opinion. Though the city had but general powers to establish, repair, and regulate wharves, yet Judge DILLON makes these pertinent and forcible observations: "The dedication of the property was perpetual, and for the benefit of the public. The extent of the dedication—its scope—remains the same, but the mode of using property dedicated for a wharf may change from time to time as the wants of commerce or the public may require; and this the dedicatory is presumed to contemplate when he makes the dedication. * * * A wharf is intended to afford convenience for the landing of vessels, the loading or unloading of their cargoes, and to supply a place on which the wares discharged from vessels, or awaiting shipment, may be laid or deposited; and it would seem that structures or appliances of any kind intended, and which have the effect, to

facilitate the handling and preservation of merchandise arriving at the wharf, erected upon it under municipal authority, and remaining at all times subject to municipal control, would be lawful, and within the purposes for which the wharf property was acquired or dedicated. * * * And we are clearly of opinion that the erection, under the sanction of the city, of an elevator to be used in handling grain at the wharf, and at all times under the direction and control of the municipal authorities, is such a use of wharf property as does not fall without the scope of dedication: and such a structure would not, therefore, be a public nuisance." In *Barney v. Keokuk*, 4 Dill. 598, affirmed in 94 U. S. 325, a strip of land along the river margin had been dedicated to public use for a street, and the plaintiff owned two lots fronting thereon. The city of Keokuk widened the street in front of plaintiff's lots by filling in stone and earth for a space of about 200 feet. A packet company leased from the city a portion of the street thus widened, for wharf purposes, for 10 years, and erected thereon, at the water-line, a building for its own use, for storing merchandise for the convenience of shippers and for its own office, but was not allowed to make storage charges. There was also a railroad freight depot on that part of the street next to plaintiff's lots. It was held that the railroad freight depot was an unauthorized and improper use of the street, but that the packet company depot was a necessary and proper use of the landing and wharf. There is a wide difference between a street and a wharf. Wharves on our rivers are not only ways for traveling, but they are necessarily used for the deposit of merchandise. The products of the soil and of the manufactories find there legitimate place of temporary deposit, whether outgoing or incoming. There can be no doubt but a city, having only a general power to establish and regulate wharves, may erect sheds and warehouses thereon to protect such property from damage and theft, and the wharfage charges may be proportioned to the accommodations afforded. So, too, the maintenance of an elevator on a public wharf for handling grain thereat is no new or additional burden or servitude. It is simply a new method for using the wharf for the very purposes for which it was condemned or dedicated. There is no reason or sound law for holding that the old method of shipping grain in sacks, and covering them up while on the wharf with tarpaulins, must be continued. Elevators not only furnish a cheaper, better, and more rapid method of handling grain, but they economize wharf space, and are to be commended, rather than condemned.

This much has been said concerning warehouses and grain elevators because the structure in question, though used in connection with the defendant's elevator, is used for handling grain and other merchandise, and performs the duties of both a warehouse and

an elevator. The erection and maintenance of such a structure is a proper and legitimate use of a portion of a public wharf, when used in handling property going to and from the same. The cases cited from 2 and 4 Dill. justify the conclusion that the city may permit such a structure to be erected and used under a general power to erect, repair, and regulate wharves, and to collect wharfage, provided the structure and business is at all times under the control of the municipal legislature; and for a much stronger reason may this be done when, as here, the city has express power to set aside and lease portions of the unpaved wharf for such purposes. We do not say that the state has the power to confer upon the city the right to turn the wharf to purely private uses, or to charge it with burdens not contemplated by the condemnation, without additional compensation; but there is a wide field over which the legislature is supreme, and many structures may be justified under legislative sanction which would otherwise be a nuisance.

The lease considered on the former occasion was for 20 years, without any right on the part of the city to terminate it should the public wants demand such action; and there were no other reserved rights save that of collecting wharfage from boats landing at the leased premises. The city has the right to terminate the lease now in question, on six months' notice, whenever it shall elect to pave and extend the wharf on the leased ground; and it is also provided that the city may by ordinance prescribe regulations governing the business of defendant. It is to be remembered that the city has miles of what is denominated "unimproved wharf;" and it would be a remarkable state of affairs if portions thereof cannot be used for warehouse and elevator purposes, and especially so in view of the fact that they are proper adjuncts to a wharf. In *Ferry Co. v. Honkey*, 81 Md. 347, the legislature conferred upon the ferry company, not the exclusive right of ferrying across the harbor, but the exclusive right of using a designated end of the wharf. The act was upheld, and the exclusive right of the company to the particular part of the wharf enforced. The power of the legislature to set apart portions of these public places for designated purposes is illustrated by the case of *Railroad Co. v. Ellerman*, 105 U. S. 166. The present lease is so framed as to enable the city at all times to keep within its charter powers, and there can be no doubt but the lease on its face is valid, and a proper exercise of the charter powers of the city of St. Louis.

The next question is whether the lease is void on the ground that the property is to be used for private purposes. According to the plain words of the charter of the elevator company, railroads are to have a connection with, and a track through, any elevator erected by it; and the elevator is to be so constructed as to accommodate the river interests, giving all requisite facilities for ele-

vating and storing grain in bulk or otherwise. The elevator, it will be seen, is made one of the connecting links between the great land and water common carriers. The defendant can show no favoritism between railroads, nor as between different vessels. It must treat all alike, and is bound by its charter to afford requisite facilities to all. This is the plain meaning of the charter, and there is no escaping it. As we understand the evidence, there is a railroad track constructed through the building now in question. The powers granted to and duties imposed upon the elevator company, of themselves, show that the property of the company is clothed with, and has attached to it, a public trust. Just like a railroad or a steam-boat, the property is private, and it is operated for private gain; but the use is public. It is true the defendant is entitled to collect compensation for handling grain and other merchandise, and so may a railroad or steam-boat establish rates and collect compensation for transporting persons and property. The wharf itself is not absolutely free; for the city has the right to make reasonable wharf charges, and so may the defendant make reasonable charges when performing wharf duties. But it is said the city has no control over the charges which defendant may make. If this elevator company has, as we hold, engaged to execute a public trust, then it is subject to public regulations, and the state may prescribe regulations even as to the charges. *Munn v. Illinois*, 94 U. S. 113. Whether the state has delegated the power to the city to regulate charges is a matter of no consequence to the present inquiry. It is enough to know that the combined elevator and warehouse is erected and maintained to aid in carrying on business which has a public trust attached to it, and a business which may be properly conducted at and upon the wharf.

2. The city charter powers in question are "to set aside and lease portions of the unpaved wharf for special purposes, such as the erection of sheds, elevators, and warehouses;" but the permit or lease must not exceed the term of 50 years. The contention is that the portion of the wharf leased to the defendant was not an unpaved portion thereof, and for this reason the lease is unauthorized by the charter. There is a diversity of opinion among the witnesses as to what is meant by "paved." Some of them say it means stone cut in parallelograms, and laid in sand; and they call irregular stone set on edge, and then covered with macadam, "riprapping." Others regard the latter as a pavement when laid upon a street or wharf. "Pavement" is a generic term, and includes many species. It may be of wood, brick, stone, iron, or of many other substances. 2 Dill. Mun. Corp. (3d Ed.) § 796, and note. A pavement is not limited to uniformly arranged masses of solid material, as blocks of wood, brick, or stone; but it may be as well formed of pebbles or gravel, or other hard substance, which

make a compact, even, hard way or floor. *Burnham v. Chicago*, 24 Ill. 499. There can be no doubt but macadam is a species of pavement, and may well be called a pavement. But, whether we are considering an agreement or statute, the great object is to get at its true meaning. Here the charter is speaking of a particular wharf, namely, that of the city of St. Louis; and it may well be read in the light of the facts as they existed when it was adopted. We say "adopted," because it was framed and approved by the qualified voters of the city of St. Louis under constitutional authority. It seems the wharf from Biddle street south to Chouteau avenue was and is paved with stone fashioned to parallelograms, and placed so as to form a convenient place for loading and unloading cargoes, and so as to resist the pressure of heavily-loaded vehicles. Other portions were in a state of nature. In 1871 or 1872 the city graded that portion now in question from the railroad tracks to the water, and paved it with irregular stone, placed on edge, covered with macadam. It was used by a stone company for unloading their barges in 1873, but the high water washed away the macadam, and in 1874 the city built a scavenger dump thereon; and it was used for that purpose until 1879, the date of the first lease to the defendant. A dirt road-way to the dump, made by the city, and accumulated rubbish, covered the remaining stone to a depth of five or six feet. The plaintiff never received any sugar or other freight at this place, and the evidence is that it was always too steep and narrow for a boat landing. Paved portions of the wharf cannot be set aside and leased for warehouse and elevator purposes, but the exemption applies to that part which is paved in a manner suitable for wharf purposes,—for landing and receiving passengers, or for loading and unloading freight. It is perfectly plain that the part of the wharf in question was in no such a condition. For all purposes of a wharf, it was unpaved, and could, under the provisions of the charter, be leased for warehouse or elevator purposes.

3. The defendant at the date of the lease held and occupied 500 feet south from the south line of Ashley street, and the lease in question covers a strip 298 feet long adjoining and to the north thereof; and the contention is that by defendant's charter it can only occupy 500 feet at any one place. The third section of defendant's charter has been set out in the statement of this case. This charter was enacted before the city extended its wharves by condemnation, and the design of the legislature seems to have been to allow the defendant to own 500 feet exempt from condemnation. After giving the defendant the right to acquire and hold 500 feet fronting on the river free from condemnation for any purpose, the section goes on to say: "The said corporation may also erect one or more grain elevators upon the public wharves of the city of St. Louis," with the consent of

the city authorities. The limitation is as to the amount of river front which the company may hold exempt from condemnation, but it does not apply to any property which it may occupy on the city wharves by consent of the city authorities. This, we are convinced, is the true meaning of that limitation.

4. The defendant's charter gives to it the right to handle and store grain in bulk or in any other way, and the lease in question contemplates that the structure will be used, not only for such purposes, but for the purpose of handling and storing merchandise; and the latter, it is urged, is beyond the defendant's charter powers. For all the purposes of the present inquiry, it will be assumed, but not decided, that the defendant's charter does not authorize it to store and handle property other than grain. We have seen that the city, under its charter, has a perfect right to set apart and lease to natural persons this portion of the wharf for the very purposes for which it has been leased to the defendant. The plaintiff, though the owner of the fee, has no right to complain because the property is used for a warehouse and elevator. No rights of the plaintiff have been invaded, and the complaint is simply this: that the defendant corporation is acting *ultra vires*. The defendant's stockholders and the state may complain, but the plaintiff cannot base a cause of action alone on any such ground. He must show that some duty owing to him is being violated before he can maintain this suit because the defendant is exceeding its charter powers. The case of Railroad Co. v. Ellerman, 105 U. S. 166, is to the point, and disposes of this question.

The ultimate question in this case is whether the lease in question is valid,—whether the city authorities had the right, under the charter, to make the contract in the lease expressed. The question is one of vast importance to the commercial interests of the city of St. Louis, and it has been most thoroughly presented on both sides; and it is our opinion that the lease is valid, and that plaintiff has no just ground of complaint. The property is being used for the very purposes for which it was condemned, and full compensation paid. The judgment is reversed, and the cause remanded, with directions to the circuit court to dismiss the bill. Costs of this appeal, and costs accruing since the filing of the amended answer setting up the second lease, should be taxed to plaintiff; the prior costs to defendant.

BRACE, J., absent. The other judges concur.

STATE v. CLAY.

(Supreme Court of Missouri. June 2, 1890.)

FALSE PRETENSES—INDICTMENT—CONSTITUTIONAL LAW.

1. An indictment under Rev. St. Mo. § 1561, for obtaining property by false pretenses, which substituted "valuable thing" for "property," in the form prescribed thereunder, and, after the recitals,

concluded with a separate paragraph, beginning, "All and singular, by means and by use of a trick," etc., thus failing to connect the charge with what had gone before by proper words, is bad.

2. In an indictment for falsely obtaining an option of purchase and power of attorney, the fact that the instrument, which is copied in full, recites that "the said parties of the first part * * * own, in the right of said Mrs. Eliza Splitlog, certain real estate and land situated," etc., does not supply the lack of a charge that defendant obtained the "property," as required by Rev. St. Mo. § 1561.

3. Where the said instrument relates to lands situated in Kansas, and no showing is made to the contrary, the common law is presumed to prevail therein; and as by the common law a married woman's contract to convey could not be enforced, the option contract was neither "property" nor a "valuable thing."

4. It was also invalid because at common law a married woman's power of attorney was void, although executed jointly with her husband.

5. As the power of attorney was invalid, the indictment is not good under Rev. St. Mo. § 1335, which defines the crime of obtaining a written instrument, etc., with intent to cheat and defraud another.

Error to circuit court, Newton county; M. G. MCGREGOR, Judge.

The defendant was tried under the following indictment:

"State of Missouri, County of Newton—ss.: In the circuit court of Newton county, Missouri, May term, 1889. The grand jurors of the state of Missouri, duly summoned from the body of the county of Newton, being duly impaneled, charged, and sworn as such at the May term of the circuit court to inquire within and for Newton county, Missouri, A. D. 1889, upon their oaths present that heretofore, on or about the 11th day of April, 1887, one Moses W. Clay did unlawfully, feloniously, obtain from Eliza and Mathias Splitlog, with intent to cheat and defraud them, the said Eliza Splitlog and Mathias Splitlog, a certain valuable thing, to-wit, a certain option and power of attorney, in words and figures, substantially in words and figures, to-wit:

"This agreement, made and entered into on this 12th day of March, 1887, by and between Mrs. Eliza Splitlog and her husband, Mathias Splitlog, temporarily of the county of McDonald, state of Missouri, parties of the first part, and Moses W. Clay, of Newton county, state of Missouri, party of the second part, witnesseth: The said parties of the first part, who formerly resided at Wyandotte, Kansas, own, in the right of said Mrs. Eliza Splitlog, certain real estate and land situated in Wyandotte county, Kansas, bounded by lines commencing ten (10) poles north of the north-east corner of the south-east quarter of section sixteen, (16,) township eleven, (11,) range twenty-five, (25,) and running thence eighty (80) poles; thence south one hundred and forty poles, (140;) thence east eighty (80) poles; thence north one hundred and forty, (140,) to the place of beginning,—containing seventy-one (71) acres, more or less; excepting, however, the right of way of the Union Pacific Railway Company across the same. That the said parties of the first part desire to sell and convey said property

to the said party of the second part or his assigns for the price and sum of \$800 per acre. That for and in consideration of \$1 paid by the said party of the second part to the parties of the first part, who acknowledge the receipt thereof, the said parties of the first part hereby contract, agree, and covenant to give, and do hereby give and convey, unto the said party of the second part, the right, license, privilege, and option for himself and assignees to buy and become the purchasers or purchaser and vendee or vendees of the said property, at any time within one year from said date, at and for the said price and sum of \$800 per acre for the said tract or parcel of land and estate, or any part thereof, which price, by the election of the said party of the second part or his assigns, or to avail himself or themselves of the said license or option or any part thereof, shall be paid and delivered to the said Mrs. Eliza Splitlog, wife of the said Mathias Splitlog, and the said option may be devisable and severable; and of different dates, and relate to different portions of said property, at the discretion of the said party of the aforesaid second part. That for the purpose of expediting the sale and conveyance on one hand, and purchase on the other, the said parties of the first part do make, constitute, and appoint said party of the second part their true and lawful attorney, agent, and attorney in fact for them, and in their name and stead, to sell and confirm unto any assignee or assigns of this contract the option hereby contracted in and to of the aforesaid property for the price and sum of \$800 per acre, and in their names and as their act and deed to sign, execute, acknowledge, and deliver such deed or deeds, or any part thereof, with such clauses, agreements, covenants of warranty as the said party of the second part shall see fit, hereby ratify and confirm all of such deeds, and covenanting with them will, at the request and cost of the vendee, make, execute, and deliver all such further acts, deeds, conveyances, assurances, for the further and more practical granting and confirming of or any part of said premises to the said purchaser or purchasers and grantees, as may or shall be desired and requested of the parties of the first part. In testimony whereof the said parties of these presents have hereunto set their hands and seals the date first above written.

his
 "MATHIAS X SPLITLOG.
 mark.

her
 "ELIZA X SPLITLOG.
 mark.

"All and singular by means and by use of a trick, fraud, and deception, and by false and fraudulent representations, statements, and pretenses, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Missouri.

"R. F. CLARK,

"Prosecuting Attorney of Newton Co., Mo."

The trial resulted in the defendant's being convicted, and his punishment assessed at

nine years' imprisonment in the penitentiary. He has appealed to this court.

W. Cloud and Adiel Sherwood, for plaintiff in error. The Attorney General, for the State.

SHERWOOD, J., (after stating the facts as above.) 1. The indictment before us is bottomed on section 1561, Rev. St. 1879, as follows: "Every person who, with intent to cheat and defraud, shall obtain, or attempt to obtain, from any other person or persons, any money, property, or valuable thing whatever, by means or by use of any trick or deception, or false and fraudulent representation or statement or pretense, or by any other means or instrument or device, commonly called the 'confidence game,' or by means or by use of any false or bogus check, or by any other written or printed or engraved instrument, or spurious coin or metal, shall be deemed guilty of a felony, and, upon conviction, be punished by imprisonment in the penitentiary for a term not less than two years. In every indictment under this section it shall be deemed and held a sufficient description of the offense to charge that the accused did, on —, unlawfully and feloniously obtain, or attempt to obtain, (as the case may be,) from A. B., (here insert the name of the person defrauded,) his or her money or property, by means and by use of a cheat or fraud or trick or deception, or false and fraudulent representation or statement, or false pretense, or confidence game, or false and bogus check or instrument or coin or metal, as the case may be, contrary to the form of the statutes," etc.

It only requires a very cursory examination of the statute, and a very cursory comparison of it with the indictment, upon which the trial in this cause was had, to determine that that indictment does not conform to the section on which it is drawn in several particulars: (1) It fails to copy the prescribed statutory form. (2) It does not, in compliance with that form, charge that the defendant obtained the "property" of Eliza Splitlog and Mathias Splitlog. The fact that the instrument or option copied into the body of the indictment recites that "the said parties of the first part, who formerly resided at Wyandotte, Kan., own, in the right of said Mrs. Eliza Splitlog, certain real estate and land situated in Wyandotte, Kan.," (describing it,) does not supply the lack of the charge in the indictment that the defendant obtained the "property" of Eliza and Mathias Splitlog. (3) It does not comply with the statutory form by substituting the words "valuable thing" for the word "property." (4) It does not comply with the statutory form in that it does not charge that the property of Eliza and Mathias Splitlog was obtained "by means and by use of a trick, fraud," etc., because the *addendum* at the concluding portion of the indictment, commencing with the words, "all and singular," etc., has neither real nor apparent connection with what has gone be-

fore. And, unless the statutory form is followed, the indictment is bad under the former rulings of this court in the following cases: *State v. McChesney*, 90 Mo. 120, 1 S. W. Rep. 841; *State v. Horn*, 93 Mo. 190, 6 S. W. Rep. 96; *State v. Dowd*, 95 Mo. 163, 8 S. W. Rep. 7.

2. Again, the option contract set out in the indictment, as "a certain valuable thing," recites that the parties of the first part, husband and wife, own certain real estate in the state of Kansas in the right of Mrs. Eliza Splitlog, etc. At common law, the contract of a *feme covert* as to her real estate was wholly void. The only way whereby her land could be conveyed was, for instance, by levying a fine, etc., in which she joined with her husband, and was privily examined, (2 Bl. Comm. 351, 355,) in a manner similar to her acknowledgment of a deed in modern times. But in the indictment here there is no mention made of any acknowledgment, or of any similar ceremony having occurred, as to the instrument in question. In the absence of any showing to the contrary, it will be presumed that the common law prevails in a sister state. *Meyer v. McCabe*, 73 Mo. 236; *Benne v. Schnecko*, ante, 82.

But, apart from any question of acknowledgment, the agreement of the wife as to land held simply in her own right is not enforceable at common law, whether in making it she joins with her husband or not. On this point Bishop remarks: "Though the statutes authorize *femes covert* to convey their lands, and this authority ought to be construed to comprehend everything properly belonging to the contract of actual sale, yet it does not qualify them to enter into a valid executory agreement to sell; for a prior agreement to sell is not an essential part of the actual selling. * * * No executory agreement to convey, formal or informal, with or without the concurrence and joinder of the husband, will bind the wife. Not even a court of equity will give such an agreement effect by decreeing its fulfillment against her." 1 Bish. Mar. Wom. § 601. To the like effect, see *Shroyer v. Nickell*, 55 Mo. 264, and cases cited; 7 Cent. Law J. 182, and cases cited; *Atkison v. Henry*, 80 Mo. 151, and cases cited. In *Purcell v. Goshorn*, 17 Ohio, 105, AVERY, J., observed: "No precedent, as it is supposed, can be found of a decree against a *feme covert* to convey lands held by descent, or by the usual conveyance, upon the ground of her having agreed to convey, or her having executed any defective conveyance, whether upon a full consideration paid or not." Now, if a married woman could not be compelled to specifically perform her written agreement to convey her real estate to which she holds but a fee-simple title, it logically follows that her option contract, even though acknowledged by herself and husband, would possess no validity, and therefore could in no sense be regarded as "a valuable thing," even if those words could be held as the legal equivalent of the word

"property." So that upon the face of the indictment it appears that the alleged "valuable thing" is an instrument incapable of enforcement, and therefore a nullity, into whatever hands it might fall. If this be true of the written agreement to convey, then, of course, the power of attorney which is contained in the same instrument has nothing upon which it can operate, and is therefore equally invalid.

But the power of attorney is *prima facie* invalid for another consideration. At common law, a married woman could not execute a letter of attorney. Such an instrument was unknown to that system of jurisprudence. Bac. Abr. "Attorney," B; *Hardenburgh v. Lakin*, 47 N. Y. 109; *Snyder v. Sponable*, 1 Hill, 567; *Holladay v. Daily*, 19 Wall. 606. Apart from statutes specially authorizing a *feme covert* to convey her lands by joining her husband in the execution of a power of attorney, she is powerless, either with or without her husband, to execute such an instrument. 1 Bish. Mar. Wom. § 602. Indeed, the authorities show that, unless authorized by statute, and unless pursuing the precise means pointed out by the statute, a married woman's contract (saying nothing about her separate estate) cannot affect in any manner her lands, either at law or in equity, but are simply void. *Martin v. Dwelly*, 6 Wend. 9, and cases cited; *Story*, Eq. Jur. § 1391. Indulging, then, the presumption before mentioned, of the prevalence of the common-law rules in the state of Kansas, in the absence of any allegation in the indictment to the contrary, it must be held that the power of attorney, also, possesses no validity for the additional reason mentioned. Of course, any lack of necessary allegation in the indictment on the points discussed could be supplied neither by intendment nor by evidence *altunde*.

3. The indictment, being thus fatally defective, considered with reference to the section upon which it is based, is, of course, equally or more defective, considered with reference to section 1835, Rev. St. 1879,—the general section in relation to obtaining the signature of any person to any written instrument, or any money, personal property, right in action, or other valuable thing, with intent to cheat and defraud another, etc. An indictment under this section just cited is similar in its substance and substantial requisites to one at common law; and, unless the indictment be good either at common law or under the statutory form, it is invalid. *State v. McChesney*, 90 Mo. 120, 1 S. W. Rep. 841. That the present indictment is insufficient, under section 1835, supra, is readily seen by an examination of the following authorities: *State v. Evers*, 49 Mo. 542; *State v. Saunders*, 63 Mo. 482; *State v. Bonnell*, 46 Mo. 395.

4. Moreover, after much consideration, we have determined that the form given in section 1561 can no longer be upheld as constitutional. That form, as it stands, violates in

all essential particulars section 22, art. 2, of our constitution, commonly called the "Bill of Rights," in that it fails to inform the accused of "the nature and cause of the accusation." This an indictment drawn according to the form laid down in section 1561 signally fails to do. An indictment under our statutory criminal procedure means just what it did at common law. The legislature may change it in form, but cannot change the substance of its material averments. *State v. Meyers*, 12 S. W. Rep. 516. We therefore feel constrained to rule that *State v. Fancher*, 71 Mo. 460, and cases subsequently conforming thereto, shall no longer be followed. The authority of that case was greatly shaken by that of *State v. Crooker*, 95 Mo. 389, 8 S. W. Rep. 422, wherein it was held, contrary to the letter of section 1561, that, in order to the validity of an indictment drawn on that statute, it was indispensable that the specific property obtained should be stated. Of course, it is no more necessary specifically to describe the property obtained than to designate the false pretense by which that property was obtained. And *State v. Fancher*, supra, was virtually overruled by that of *State v. Hayward*, 83 Mo. 299. In that case, when discussing the constitutional right aforesaid of the accused, we quoted with approval from an eminent author, where he observes: "The doctrine of the courts is identical with that of reason, namely, that the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted. This doctrine pervades the entire adjudged law of criminal procedure. It is made apparent to our understandings, not by a single case only, but by all the cases. Wherever we move in this department of our jurisprudence, we come in contact with it. We can no more escape from it than from the atmosphere which surrounds us." 1 Bish. Crim. Proc. § 81. And elsewhere the learned author observes: "The right of the accused person to have every element of his supposed crime—in other words, every individual thing which the law has specified as constituting any part of the foundation for its punishment—set down in allegation in the indictment is secured in this country by constitutional guarantees." "The United States constitution provides, as to crimes against the general government, that 'in all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation.' * * * More or less nearly in these words are provisions in the constitutions of other states. But the 'nature and cause' of an accusation are not stated where there is no mention of the full act or series of acts for which the punishment is to be inflicted. * * * There can be neither indictment nor information, except in writing, which, to justify the whole punishment, must specify the whole crime." "Wisely, therefore, the law requires the allegation to be full. As already shown, every

fact which is an element in a *prima facie* case of guilt must be stated; otherwise there will be at least one thing which the accused person is entitled to know whereof he is not informed; and, that he may be certain what each thing is, each must be charged expressly, and nothing left to intendment. All that is to be proved must be alleged." Id. §§ 86, 88, 519. Controlled by these considerations, and pursuing the same course pursued by us in the following cases: *State v. Hayward*, supra; *State v. Crooker*, 95 Mo. 389, 8 S. W. Rep. 422; *State v. Horn*, 93 Mo. 190, 6 S. W. Rep. 96; *State v. McChesney*, 90 Mo. 120, 1 S. W. Rep. 841,—we shall reverse the judgment, and discharge the defendant. All concur, except that they do not hold section 1561 unconstitutional.

STATE v. HARKINS.

(Supreme Court of Missouri. June 2, 1890.)

CRIMINAL LAW—INSTRUCTIONS—ACCOMPLICE.

1. In the trial of an indictment for arson the court, instructing the jury, made use of the words "willfully" and "maliciously," without defining them. Held not error where they were used in their ordinary sense, and the evidence was clear, as it will be presumed to have been where it does not all appear in the bill of exceptions.

2. Section 1042, Rev. St. Mo. 1879, providing, "if any court shall not be held on the first day of the term, such court shall stand adjourned from day to day until the evening of the third day," applies to special as well as to regular terms.

3. While the uncorroborated testimony of an accomplice should be received with great caution, yet, if the jury are fully satisfied of its truth, and the state of facts sworn to establishes the guilt of the defendant, they may convict on that alone.

4. The fact that the prosecuting attorney made objectionable remarks in the absence of the judge, to which, therefore, no exceptions could be taken, must nevertheless be established in some appropriate manner in order to be effectual on appeal.

Appeal from circuit court, Ozark county; J. F. HALE, Judge.

Indictment for arson, under the provisions of section 1288. A grist-mill was the subject of the crime. One Caldwell was alleged to be the owner. The defendant and one Thomas Carroll were jointly indicted for the crime. A special term was called by the judge of said court upon the written request of defendant's attorneys and the prosecuting attorney, and upon due notice from the sheriff of said county. The special term was ordered for June 4th, but, the judge not appearing on that day, the sheriff adjourned said court until the next day, (June 5th.) The state dismissed the case as to Thomas Carroll, for the purpose of procuring his testimony on the trial of the defendant. The defendant was arraigned, and pleaded not guilty, and, being put upon his trial, was found guilty as charged, and his punishment assessed in the penitentiary for a term of six years. His motions for a new trial and in arrest being overruled, he appealed from the judgment and sentence of this court. The testimony in the cause, copying from the bill of exceptions, was the following: The state, to sustain the allegations of the indictment, intro-

duced as a witness one Thomas Carroll, who was jointly indicted with the defendant, who, before the jury was sworn, was discharged by a *nolle prosequi*; that the said Carroll testified that he burned the mill as charged in the indictment, and that defendant was not with him at the time, but prior to the burning by him of the mill the defendant, Harkins, hired him to do the burning, and was to pay him \$10 for doing so; that the defendant then and there objected to the defendant being sworn as a witness, for the reasons alleged in his motion for a new trial, and his objections were overruled, and he saved his exceptions at the time. The state introduced other witnesses, who testified in regard to some conversations had with defendant before and since the burning, and rested. The defendant introduced witnesses as to the general reputation of Carroll, and one Strong, who had testified in the case against defendant. The defendant was sworn as a witness. Mrs. Harkins, the wife of the defendant, was also produced and sworn as a witness. Defendant then rested.

Ort & Davis, for appellant. *The Attorney General*, for the State.

SHERWOOD, J., (after stating the facts as above.) 1. Section 1042, Rev. St. 1879, declares that "if any court shall not be held on the first day of the term, such court shall stand adjourned from day to day until the evening of the third day." This section is full authority for the course pursued in this case. The judge not appearing on the first day, the court stood adjourned to the next day by operation of law. This section applies as well to special terms as to regular terms. The law makes no distinction in this regard, and there is as much reason for its application in the one case as in the other.

2. It is objected that the first instruction for the state contains, in reference to the commission of the crime charged, the words "willfully" and "maliciously," without defining their meaning. The instruction in question is as follows: "(1) The court instructs the jury that if you find from all the facts and circumstances in this case that Thomas Carroll, at any time within three years before the finding of the indictment, and at and in the county of Ozark in the state of Missouri, unlawfully, willfully, maliciously, and feloniously did set fire to and burn a certain grist-mill there situate, the property of John C. Caldwell, of the value of one thousand dollars, or of any other value, and that from all the facts and circumstances in evidence in this case you believe that Thomas Harkins, at any time within three years before the finding of said indictment in Ozark county, Mo., before the said arson and felony was committed, did unlawfully, willfully, maliciously, and feloniously incite, move, procure, counsel, hire, or command the said Thomas Carroll to commit the said felony and arson in manner as charged in the indictment, you will find him guilty,

and assess his punishment at imprisonment in the state penitentiary for a term not less than five years." It will have been observed that all the testimony in the cause has not been preserved in the bill of exceptions. Thus, after giving the testimony of Carroll, the accomplice, it is said in the bill of exceptions "the state introduced other witnesses who testified in regard to some conversations had with defendant before and since the burning, and rested." It is also stated in the bill of exceptions that both the defendant and his wife were produced and sworn as witnesses. We can only conjecture what was testified to by the other witnesses for the state. Were the conversations related by them as having occurred between them and the defendant both before and after the arson of a damaging character or not? And did the defendant, in his testimony, admit or deny those conversations? If the testimony in any given case is abundant and clear, it may have much to do in curing any mere irregularity or unhappy employment of undefined words in an instruction. If such was the case in this instance, (and we are bound to indulge all reasonably favorable presumptions in favor of the action of the trial court,) then we are not of opinion that reversible error was committed in failing to define the words in question. Besides, jurors of ordinary intelligence will be presumed conversant with customary words of their vernacular, such as "willfully" and "maliciously," especially so when it is evident that the words are used only in their every-day meaning, and not in a strictly technical sense. *State v. Kilgore*, 70 Mo. 546; *State v. Andrew*, 76 Mo. 101. This point, also, is therefore ruled against the defendant.

3. Instruction 2 for the state, and instruction 1 for the defendant, are as follows: "(2) The court instructs the jury that you are at liberty to convict the defendant Thomas Harkins on the uncorroborated testimony of an accomplice alone, if you believe the statements as given by such accomplice in his testimony to be true, and if you further believe that the state of facts sworn to by the witness, if any, will establish the guilt of defendant." "(1) The court instructs the jury that the testimony of an accomplice in the crime, that is, a person who actually commits or participates in the crime, is admissible. Yet the evidence of an accomplice in crime, when not corroborated by some person or persons not implicated in the crime as to matters material to the issues, that is, matters connecting the defendant with the commission of the crime as charged against him, ought to be received with great caution by the jury, and the jury ought to be fully satisfied of its truth before they should convict the defendant on such testimony." These instructions, taken together, placed the law respecting accomplices very fairly before the jury under the former rulings of this court. *State v. Jones*, 64 Mo. 391; *State v. Reavis*, 71 Mo. 420; *State v. Walker*, 98 Mo. 95, 9

S. W. Rep. 646, and 11 S. W. Rep. 1133; State v. Chyo Chiangk, 92 Mo. 413, 4 S. W. Rep. 704.

4. Other instructions were given on the subject of reasonable doubt, and of the presumption of innocence attending the defendant, and that such presumption was stronger than any other presumption, and that the burden of proof remains with the state throughout, and is never shifted to the defendant; so that, taking the instructions as a whole, the defendant appears to have no just ground of complaint.

5. The objectionable remarks alleged to have been made by the prosecuting attorney, conceding that they were such as ought to reverse this case, as to which nothing need be said, were said in the absence of the judge, and therefore no exceptions as to them could be saved; but certainly the fact of their having been made ought to have been established in some appropriate way in order that we could notice them here. State v. Johnson, 76 Mo. 121. These views result in an affirmance of the judgment, and it is so ordered.

All concur.

STATE v. MILLER.

(Supreme Court of Missouri. June 2, 1890.)

MURDER—STATE'S EVIDENCE—CORROBORATION—EVIDENCE.

1. Two men living, with their wives, in the same house, were accused of a murder, evidently committed in the course of a burglary. After their arrest, during an altercation in which each accused the other of the shooting, defendant betrayed a guilty knowledge of the location of objects in deceased's house at the time of the murder. By his direction, too, a partially burned pistol was found in his co-defendant's stove, into which a ball extracted from deceased's body was found to fit. His co-defendant, having turned state's evidence, testified that they went together to deceased's house, that defendant went inside while witness remained at the gate, and that while standing there he heard a shot within. His wife testified that she heard them talking together after they came back, when defendant said it was the first time he had taken his shoes off, and that he stepped on a carpet newly put down, which made a noise, and awakened deceased. Defendant had expressed ill will towards deceased, and said he ought to be shot. Held sufficient evidence to justify a conviction of murder in the first degree.

2. On a trial for murder, where defendant was charged as principal in some of the counts, it was error to dismiss, over his objection, a count which charged a co-defendant as principal, and defendant as accessory after the fact, when there was evidence tending to prove such charge.

3. It was error to charge that the testimony of a person aiding and abetting a crime "is admissible; yet such evidence, when not corroborated by the testimony of others not implicated in the crime, as to matters material to the issues, ought to be received with great caution," without explaining the meaning of "matters material to the issues," and stating that the corroboration must go to the extent of identifying the person of the prisoner against whom the accomplice speaks.

4. If defendant was present, aiding and abetting another, who deliberately and with malice aforethought killed the deceased, he was guilty of murder in the first degree.

5. Where two persons were accused of murder in the first degree, it was error to admit the testimony of one against the other upon an agreement "to testify against" him, in consideration of the

prosecuting attorney's accepting a plea by the witness of murder in the second degree.

6. It was proper to admit the testimony of the co-defendant's wife as to a conversation she overheard between defendant and her husband tending to show that defendant participated in the crime, when she gave all of the conversation, or all that she heard.

7. It was not error to ask a witness whether he had not been in the penitentiary two or three times. When the purpose is only to discredit the witness, it is not necessary to produce the record to prove a previous conviction.

8. Where the jury returned into court and stated that they were unable to agree because of a certain difficulty, it was proper to give additional instructions thereon; and it will be presumed, in the absence of any showing to the contrary, that defendant was then present.

9. It was proper to charge that if defendant shot and killed the deceased in the perpetration of, or the attempt to perpetrate, a burglary, he was guilty of murder in the first degree.

RAY, J., dissenting.

Appeal from circuit court, Audrain county; E. M. HUGHES, Judge.

The defendant was indicted at the January term, 1889, of the circuit court of Audrain county for murder in the first degree, for shooting and killing one Samuel Apgar, in said county, on the 17th day of April, 1888. The indictment contained four counts. The first count charged murder in the first degree, by shooting and killing with a pistol, in the usual, formal, and general manner; the second and third counts charged murder in the first degree, committed in the attempt to perpetrate a burglary; and the fourth count charged George Mortimer with the commission of the offense in perpetrating a burglary, and defendant as being an accessory after the fact. He waived formal arraignment, and pleaded not guilty, and at the June term, 1889, of said court, was tried and found guilty, the jury returning a verdict of guilty of murder in the first degree. Thereupon he filed his motion for a new trial, which was continued until July, when it was overruled, and defendant sentenced, from which he appealed to this court. At the close of the evidence on the part of the state, the state entered a *nolle* as to the fourth count of the indictment, and this was done over the objection of the defendant. At the time defendant was indicted, George Mortimer was also separately indicted for the same offense. Apgar was an old man, about 65 years old, and lived with his wife in a house that fronts south, and on the same street, about six blocks west of the house which had been for a few weeks occupied by both Miller and Mortimer with their wives. Miller and Mortimer, before moving to this place, occupied a house together in a different part of the town, and Miller conducted a sort of barber-shop in both of these houses. Apgar's house consisted of four rooms and a summer kitchen, which was connected with the north-west room of the main house by a platform. This north-west room had a door in the west, through which one passed onto the platform, which was three or four feet wide, and on into the east door of the summer kitchen. A

door was between this north-west room and the south-west room of the house; and on the night of the murder Apgar had gone to bed with his wife in the south-west room. A day or two before the murder the summer kitchen had been brought into use, and at night, when Mrs. Apgar retired, the summer kitchen door was fastened, and the drawers in the safe were in their places. Just immediately after the murder the doors of the north-west room and the summer kitchen were open, and the drawers of the safe in the kitchen pulled out, and things in it disarranged, besides other things in the kitchen were removed and disarranged. About 2 o'clock in the night Mrs. Apgar heard a pistol-shot in the north room, and a door slam. Immediately her husband returned into the room, and said, "I am shot." Presumably he had heard a noise, and gone out to ascertain what it was, and in doing so met with the burglar, who shot him. Apgar was shot with a number 22 pistol, and a pistol of that size was found partly burned in Miller's stove, and cartridges of the same kind and size as those which would fit the pistol found in Mortimer's possession, on his person; and the pistol was proven and admitted to be his, and the ball taken from Apgar's body exactly fitted the empty cartridges found in Mortimer's pistol. Three or four cartridges of the same kind were found in a box on Miller's work-bench in the north-west room of the house in which he and his wife stayed. Though that room was the common pass-way to the kitchen, Miller and his wife and child had a bed in the north-west room, and Mortimer, wife, and child the south-east corner room, and both families lived in common; the respective heads of each alternating in furnishing provisions. The trial resulted in Miller being found guilty of murder in the first degree; hence his appeal.

Miller and Mortimer lived together in a house with four rooms in it. It fronted east, and had one east front door. Passing in that door, you come into the north-east room; from that room you pass into a room directly south, with no outside door; also from that north-east room you pass into a room just west, and from that room into a kitchen south, being the south-west room of the house, which room had a door leading west into the outside. These rooms were all used in common by both Mortimer and Miller. There were no outside doors to this house but the one in the east, and the one leading from the kitchen in the west. Apgar was an ex-Federal soldier, and drew a pension, and this fact was known to Miller, who had spoken of it, and had expressed ill will against Apgar. The wife of Mortimer was introduced as a witness on the part of the state, as was also Mortimer himself. The testimony introduced was substantially as follows:

Mrs. Apgar, the wife of the deceased, testified: "I live now in St. Louis. Before I went to St. Louis I lived in West Mexico. I

have lived there seven or eight years. My husband's name was Samuel Apgar. The house we lived in had three rooms sixteen feet square, and one about twelve feet. It was on the north side, and stood back from the street about twelve feet,—may be a little further. My husband's death occurred on the 17th day of April, 1888, in Audrain county, Mo. The first to attract my attention was a pistol shot. I was in the west sitting-room. There was a dining-room north of that. It was a very small room. There was a passage from the room I was in to the dining-room. My husband and I were sleeping that night in the west room, south of this dining-room. The bed was in the west corner of the room, the head extending west. It stood against the wall next to the dining-room. There was a small kitchen located about four feet from the dining-room. There was a door which led out of the dining-room west. There was nothing but a platform between the dining-room and kitchen. It had no roof over it. It was just four feet from the west door of the dining-room to the summer kitchen door. The door in the summer kitchen faced east. There was a safe in the summer kitchen. Mr. Apgar went to bed early that night. I closed all the doors that night. The door to the summer kitchen was closed with a bolt. The front gate was closed. The report of a pistol woke me up that night. I was in bed. The report sounded to me as if it was north of the dining-room door. I heard the door slam against the safe, and the dishes rattle. My husband came in soon thereafter, and told me he was shot. He came in, and got his pistol to go out, and he just stood there, and I went out to make the alarm, and when I came back he was dead. He knelt down at the foot of the bed with his left hand at the bed-post. He did not live more than two and a half minutes after he was shot. The drawers and doors of the safe were shut that night when I left them. The next morning they were pulled out, and the things in the drawers were stirred around. Mr. Apgar went to bed that night about seven o'clock. He was old, infirm, and sickly. He had been down town that day. He always kept a pistol, and slept with it. It was one of these big ones. I did not hear him when he got up. He always got up at that hour to take his medicine,—had for years. He had nothing when he came in, but he came to get his pistol, and I would not let him. He was in the dining-room when I heard the pistol shot. It was a dark night, no moon shining. This occurred between two and three o'clock in the morning. My husband had \$5.25 when he was killed. He was drawing a pension every three months. He applied for it on the 4th day of March; in a couple of days after a voucher was sent in."

Jacob Flora testified: "In April, 1888, I lived directly across the street from Apgar. The night of Apgar's death my wife woke me up, and said some one was hallooing, and

I went to the door, and looked across the street, and saw Mrs. Apgar, and she was hallooing for Mr. Lawler, a man who lived in the second house from me, almost directly across the street from her. I went there. Saw Mr. Apgar on the floor, half-way sitting and laying, holding to the foot of the bed. I spoke to him. He didn't speak, but shook his head, and I picked him up, and put him in bed. He gasped once, and I laid him down, and ran to Surber's, and told him to go and stay with Mrs. Apgar while I went for Dr. Fritts or Murdock. I went back and found him dead. Blood was running out of his mouth, and there were blood stains on his breast from a bullet hole either on the right or left side of his breast. This was about two o'clock, I think."

Andrew Surber testified: "Live about 150 or 200 yards from Apgar's. Mr. Flora came to my house, and woke me up, and told me to go there. When I got there Apgar was lying on the bed dead. He had a bullet hole in his right breast, and the blood was oozing out of this hole. This was between two and three o'clock in the morning. [He describes the rooms in the buildings.] In the summer kitchen was a safe, the drawer in which was pulled pretty near out. The door of the dining-room was open when I got there. Saw Apgar's pistol. It had not been fired off that night."

Dr. E. S. Cave testified: "Saw Apgar about three o'clock the morning he was killed. He was dead. Had a bullet hole in the breast. The bullet severed one of the pulmonary veins, which would cause death by bleeding within in a very short time. Extracted the ball. The ball was what we call a 22 for a pistol. I afterward tried it in a 22 pistol and in a 22 cartridge, and it fit both. (Pistol shown him which he says he fitted the ball in.) Pistol was handed me by Botkins or Potts. Looks like it had been burnt. I kept the pistol a year, perhaps, and gave it to the prosecuting attorney."

Richard Ball testified: "I knew defendant in April, 1888. He and George Mortimer lived together. Defendant was a barber. I was at his place the last time either the last of March or first of April, 1888. I had a talk with defendant about shaving. He said he was not in good order,—didn't feel well; and I think likely I spoke to him something about his pension papers. He said, 'There is Apgar, an old scoundrel, and he is drawing a pension as a Union man,' and that he was no more a Union man than any other rebel was; that he ought to be killed. He said Apgar was drawing it every three months."

Joseph Botkins testified: "Defendant lived about five or six blocks from Apgar's at the time of the killing, and, at the time of defendant's arrest, [describes Miller's house,] John Miller and his wife and child, and George Mortimer and his wife, were living there. In the morning after Miller's arrest, (I don't know whether I happened in the

calaboose or whether he sent for me,) but we got into a conversation, and he asked me to send for Hamilton Hall to go on his bond. That he and Warner McIntire had said if he got two others to go on the bond, he would go with them. That brought up the murder, and I told him if he would furnish me the name of the man that killed Apgar I would see that he was bailed out. Then after that Miller wanted to see Mortimer's wife. I proposed to go down and bring her up. He said he would rather see her at the house. I returned again a time or two during the afternoon. I talked of bringing her up, and he said he would rather see her at the house. Then I got permission to go down with him, and he and I and Joe Pratt went together, but before we got there we saw the woman at another house. Before we got to the house he said to Mortimer's wife: 'Mr. Mortimer told me to tell you to let me have your pistol.' Mrs. Mortimer said: 'Mr. Mortimer has not got a pistol here.' It was repeated a time or two by Miller that Mortimer had said, 'Give the revolver to me,' and she let on to get mad about it. Then Miller says: 'Well, give him what there is left of it.' Then she turned, and beckoned to me to come on, and went to the kitchen, and turned the lids off the stove, and took the stove-hook, and grabbed out of the ashes a revolver. (Revolver produced, and shown witness.) That was what she scratched out of the fire. It was red hot when she scratched it out. We found some cartridges, in some of Miller's boxes, the same size of the cylinder of that pistol. They call the pistol a 22 in size. On returning, Miller demanded his liberty on showing the pistol. I said, 'I believe you have found the pistol that did the killing; now find the man;' and that ended the matter, so far as that was concerned; but he insisted on being bailed, and let me guess at the balance. When I told him I would bail him out if he would point out Apgar's murderer, he wanted to see Mortimer's wife, and I think he said he thought perhaps he could point me to the man. He wanted to see her first; that is my recollection."

Joe Pratt testified: "Remember of going with Mr. Botkins and defendant to defendant's house. (Pistol shown witness, and identified as the one recovered at that time.) We were going down there, but I didn't know what they were going for, and Botkins told me we were going to get Miller's pistol. I didn't hear the first conversation when we got in. When I got in, Miller said to Mortimer's wife: 'Get that thing for these gentlemen.' She said: 'I don't know what you mean.' He said: 'Yes, you do;' and she said: 'You are making me out a liar before these men;' and then, afterwards, she said: 'All right, come ahead;' and then scratched in the stove, and found this pistol. [As to finding cartridges and the size of them, and the size of the pistol, his testimony was the same as Botkins'.] There were two empty shells in the pistol when we found it. The

shells in the pistol were 22 brand, with a 'U' on the end of it, and were long."

Mattie Mortimer testified: "I am the wife of George Mortimer, who is indicted for the homicide. I live in St. Louis now. Lived at Miller's, in this town, in April, 1888. We all lived and ate together, except that I had a separate sleeping room. Miller rented the house. We were living there when Apgar was killed, and when Miller was arrested. (Pistol shown witness, and recognized.) Saw the pistol before we moved to the place. Saw it the evening Miller told me to put the pistol in the stove, the Friday night after my husband was arrested. My husband was arrested on Friday evening. I put it in the stove. It had a wooden handle on it, and one load in it, and after I put it in it went off. After I put it in the stove he told me not to tell he had anything to do with it. When he gave me that pistol he got it from the privy. I put it there. He told me to put them in the privy. That was on Friday night. He said they would be down there to search, and he wanted me to put them in the privy, and he went down town, and then came back, and told me to go and get them, and bring them in, and then he went down and buried them, except that, and he told me to burn it, and then went and took the other things up, and told me to burn those. The next morning after Apgar's death heard Miller talking in the room to Mortimer. He said: 'Last night was the first night I ever had my shoes off, and then I stepped on the carpet that had just been put down, and it made a fuss, and they heard me.' I remember when Botkins came there with Miller. Miller said to me: 'Mattie, George sent me down here for that pistol;' and I said: 'I have not got it;' and he said: 'He told me to tell you to get it;' and I said, 'You know where it is;' and he says, 'Well;' and started in, and I went in, and didn't get it out, but Botkins did himself, and it was hot. There was an alarm bell in that house at the east bedroom window. It was put on the window, and a string to it, and a hole in it to pull it. The string went on the outside. Miller directed it put there. He said: 'Put it there to wake me up, because I was so hard to wake.' It was put there after Apgar was killed, and the same week Mortimer and Miller were arrested."

James Marshall testified: "I was on the police force. Went to the house of Miller and Mortimer, and arrested Mortimer in the evening before the morning of Miller's arrest. After I arrested Mortimer, on the same evening, I went back and searched the house. I found some 22 cartridges on Mortimer, and asked Miller for the 22-caliber pistol, and he said there was none there. I found a larger pistol there, and he said that was the only pistol on the place. When I went to the house to arrest Mortimer, I knocked on the front door, and Miller came to the door, and I called for Mortimer, and he said he was there. I heard a noise at the back part

of the house, looked, and saw Mortimer go out of the south door of the kitchen, and make for the fence. I hallooed to him to halt, and he stopped and came back. There are two kinds of 22 cartridges,—a long and a short. The cartridges found in the possession of Mortimer were long. The cylinder of the pistol offered in evidence is for a long cartridge."

Warner Potts testified: "A few days after Miller and Mortimer were arrested, I heard a conversation between them at the jail. Each accused the other. Mortimer said Miller was with him, and Miller denied it; and Miller said to Mortimer: 'You know, you scoundrel, you killed that old man. Didn't you hide behind that box in the kitchen, and kill that old man?' and Mortimer said he didn't know there was a safe or box in the kitchen. They argued the question between themselves, and I made them talk one at a time, and Miller said he didn't go with him."

George Mortimer testified: "Miller and I were living together in the same house. He had three rooms, and I had one. I remember that Apgar was killed. I learned he was killed. I was at Apgar's gate at the time. Miller and I went up there together. I had been in bed, and I suppose Miller had. We started out, just to be going out, about twelve o'clock. We walked west up the street. When I stopped at the gate, Miller walked inside the yard. I heard a pistol shot in the house. Apgar's house was north of me. After I heard the shot, I saw Miller coming from around the house. He did not say anything when he came round. He went down the street then. We went home together, not saying anything on the way. (The 22-caliber pistol referred to before shown witness, and he said it was his.) I did not have a pistol with me that night. Saw this pistol lying on the bureau in Miller's room the next morning. Soon after the pistol shot was fired saw Miller come round the corner of the house. When he came round he was running rapidly. When he came to the gate we went home together, and went in at the kitchen, and went to bed. We did not talk of our purposes and plans before we went up to Apgar's house that night, nor as we were going up there, nor on our return home, nor afterwards, did we talk of Apgar's murder. Nor did Miller tell me of his purpose in going up there; nor did I have any purpose in going with him; nor do I know what purpose Miller had that night in going up there." This witness also testified that, on that very afternoon which he testified, he had negotiated with the state to testify against Miller, and upon his agreeing to do so the state agreed to accept, and did accept, a plea from him of murder in the second degree on a separate indictment then pending against him for the murder. And the state also made the further agreement that, in consideration that the witness would thus testify against Miller, the state would *nolle* several other indictments then pending in the same court

against the witness. On cross-examination, this witness was also asked if he had not been in the penitentiary two or three times, but this question the court refused to permit the witness to answer, for the reason that "a conviction must be proven by the record." He also admitted that he had caused several men to be arrested and put in jail on his representations concerning their guilt of the murder, and that such representations he knew were false. At this juncture the state moved for permission to enter a *nolle* as to the fourth count in the indictment, and, over the objection of the defendant, this was permitted to be done.

At the close of the testimony several instructions, such as are usually given in cases of this sort, were given to the jury. Such of them as require special mention will be noticed hereafter.

After argument, the jury were sent out to consider of their verdict, and remained in consultation for six hours, and came into open court, and were inquired of by the court if they had agreed, and it was answered that they had not, and were not likely to; and, being inquired of by the court as to the obstacle in the way of an agreement, one of the jury reported that some members of the jury did not believe from the evidence in the case that defendant, Miller, personally shot and killed the deceased, Apgar, and they wished to know if they could convict defendant if he had aided and assisted, etc., said Mortimer in his killing said Apgar. And thereupon the court gave the following further instruction to the jury: "Although the jury may believe from the evidence in the case that George Mortimer fired the fatal shot that killed said Apgar, yet if they believe that defendant was present, aiding, abetting, helping, comforting, and assisting the said Mortimer in such killing, then defendant is guilty of murder in the first degree equally with said Mortimer, provided that said Mortimer fired said fatal shot and killed said Apgar willfully, deliberately, premeditatedly, and of his malice aforethought, or in the perpetration or attempt to perpetrate a burglary, as defined and explained in other instructions." Exceptions were duly saved by the defendant to giving such additional instruction. These matters have been stated thus at large, because it is claimed here, as it was in the lower court, in the motion for a new trial, that there was no evidence to warrant the conviction of the defendant, and because such statement will enable our rulings of law upon the facts as set forth to be more readily understood.

W. A. Edmonston, for appellant. *The Attorney General*, for the State.

SHERWOOD, J., (after stating the facts as above.) 1. There was error committed by the trial court in permitting the prosecuting attorney, after the testimony was closed, to dismiss the fourth count of the indictment, such dismissal including not only the charge

against Mortimer as principal in the murder, but also the defendant Miller as accessory after the fact. There was testimony which tended to show that the defendant was guilty of being such accessory, and it should not have been withdrawn from the jury, as it was by the course pursued by the prosecuting attorney, with the permission of the court, and over the defendant's objections.

2. The same line of remark applies to the action of the court in giving the first instruction for the state, which told the jury "that, under the evidence in this case, they must find the defendant guilty of murder in the first degree or acquit him;" and that the fourth count in the indictment, charging the defendant as accessory after the fact, had been dismissed, and should not be further considered by them. A trial court, where murder is charged in one count of an indictment, and there is testimony to sustain it, and one count charging manslaughter in the fourth degree, and there is evidence to sustain it, might with equal propriety permit a dismissal of the last count, and instruct the jury to disregard it, and to consider only as to the truth of the first count, taken literally. In the case at bar, if there had been no evidence as to the defendant being an accessory after the fact, then the order of dismissal as to the fourth count might well have gone, not only as to Mortimer, but also as to the defendant; but in the circumstances related such order was erroneous, and the instruction based upon it simply duplicated the previous error.

3. Was error committed in refusing permission to the defendant to interrogate Mortimer as to whether he had not been in the penitentiary two or three times? In order successfully to ask and have answered such a question, it seems to be unnecessary to produce a record of conviction. Such record only has to be produced where it is proposed to show that the witness has been convicted of some crime, in which case the judgment of conviction is the only competent evidence. It is otherwise, however, where the question is asked the witness for the purpose of honestly discrediting him; then the question is competent. This is the tendency of adjudication in this country. Whart. Crim. Ev. (9th Ed.) § 474, and cases cited; 1 Bish. Crim. Proc. § 1185.

4. The sixth instruction given at the instance of the state was the following: "The court further instructs the jury that the testimony of a party aiding, assisting, encouraging, and abetting a crime is admissible; yet such evidence, when not corroborated by the testimony of others not implicated in the crime as to matters material to the issues, ought to be received with great caution by the jury, and they ought to be fully satisfied of its truth before they convict defendant on such testimony." This instruction is almost a literal transcript of an instruction given and condemned in *Chyo Chlagk's Case*, 92 Mo. 395, 4 S. W. Rep. 704, and is faulty,

therefore, for the same reasons there mentioned, in that it does not explain to the jury the meaning of the words, "matters material to the issues," and in that it fails to tell the jury that, in order to the corroboration of the testimony of an accomplice, such corroboration should go to the extent of identifying the person of the prisoner against whom the accomplice speaks. The object of the rule which requires that the testimony in corroboration of that of the accomplice should go to the extent mentioned is that the danger may be guarded against of an accomplice relating the circumstances of the criminal transaction truly, except that he substitutes the name of the accomplice for his own; thus practicing a fraud upon the triers of the issues, as well as upon the prisoner. Citation has been made of Walker's Case, 98 Mo. *loc. cit.* 109, 9 S. W. Rep. 646, and 11 S. W. Rep. 1133, as supporting this instruction, but it does not do so. On the contrary, the instruction in that case is very specific touching the necessity of the corroborating testimony identifying the person of the accused as a guilty participant in the crime charged. Citation is also made of Pratt's Case, 98 Mo. 482, 11 S. W. Rep. 977, as showing that, even if the instruction was faulty, it did no hurt. This rule may well be applied where the testimony is very convincing of a defendant's guilt, so that the testimony of the accomplice may be dispensed with altogether, and still abundant evidence be left for the conviction of the accused; and this was Pratt's Case, and all that it decides on the point in hand. The evidence in this case does not possess such strong probative force as to cure or neutralize the error of an instruction such as was given in the present instance. It must be a very clear case which will enable this court to say that an error of this sort is harmless in the particular circumstances of any given case.

5. There was no error in the second instruction for the state, to the effect that, if the defendant shot and killed Apgar in the perpetration or the attempt to perpetrate a burglary, then he was guilty of murder in the first degree. *State v. Hopkirk*, 84 Mo. 278.

6. It is claimed that error occurred in giving the jury another instruction, the tenth, after they came into court and announced they could not agree, and the point of their difficulty. It is competent to give additional instructions to the jury, when they return into court, and signify the difficulty under which they labor, where this is done in open court, as it was here, the counsel for the defendant being present. *State v. Williams*, 69 Mo. 110. It does not indeed appear whether the accused was present in this case, as in that; but, in the absence of any showing to the contrary, if such presence were necessary, it will be presumed that the trial court did its duty, and that the accused was present.

7. Relative to the instruction itself, it contains no error. It simply announces the fa-

millar doctrine that one aiding and abetting the commission of a murder is as much a principal in the eye of the law as though his own hand fired the fatal shot; and the indictment may either allege the matter according to the fact, or charge both the participants as principals in the first degree, the act of one being the act of the other. *State v. Anderson*, 89 Mo. *loc. cit.* 333, 1 S. W. Rep. 135, and cases cited.

8. Relative to the conversation overheard by Mrs. Mortimer between her husband and the defendant, she gave the whole conversation between them, and this removes any objection that all of the conversation was not given. Besides, even if a part of a conversation, it was all she heard, and the law would not require her to testify to more than that, or reject that which she did hear. Whart. Crim. Ev. (9th Ed.) § 688. Considered in and of itself, this conversation was of little worth, but, when considered in connection with other circumstances already detailed, its tendency was to show that the defendant was a participant in the crime charged. If Mrs. Mortimer testified after her husband had pleaded guilty to the same crime charged against him in another indictment, there can be no question as to her competency as a witness for the state, because the prosecution against her husband was then closed by his plea of guilty in the other case; and there can be no question as to the competency and relevancy of her testimony respecting the conversation she overheard between her husband and the defendant.

9. Now, as to the claim that there is no evidence to support the verdict. The admissions made by Miller, in his altercations in prison with Mortimer, show a guilty knowledge on his part of the situation at Apgar's house on the fatal night, and that he knew who did the murderous deed; and his knowledge of the locality of the pistol, that it was concealed in the stove, and had been partly consumed by fire, are also pregnant circumstances evincive of guilt. This, of course, leaves out of consideration any testimony of Mortimer or of his wife. Taking in consideration the facts just related, as well as those related by Mrs. Mortimer, there was certainly sufficient testimony to go to the jury as to whether the defendant was guilty, even if the testimony of Mortimer be left out of consideration altogether.

10. Blackstone says: "It hath also been usual for the justices of the peace, by whom any persons charged with felony are committed to jail, to admit some one of their accomplices to become a witness (or, as is generally termed, king's evidence) against his fellows, upon an implied confidence, which the judges of jail delivery have usually countenanced and adopted, that, if such accomplice makes a full and complete discovery of that and of all other felonies to which he is examined by the magistrate, and afterwards gives his evidence without prevarication or fraud, he shall not himself be prosecuted for

that or any other previous offense of the same degree." 4 Bl. Comm. 330. Mr. Bishop says this is, in substance, the modern practice. He says also: "Doubtless, in most cases, the mere fact that an accomplice testifies as a witness for the government, freely and fully acknowledging his own participation in the offense, will constitute an implied agreement, in the absence of an express one, for his exemption from further prosecution. * * * The agreement is that the accomplice shall disclose all he knows, honestly and fairly, and, if his testimony is corrupt, or if otherwise his disclosures are only partial, he gains nothing, and his confessions may be used against him. But when he has fulfilled the agreement on his part, he is equitably entitled to be no further pursued for his own crime, and equally whether the party testified against is convicted or acquitted." 1 Bish. Crim. Proc. § 1164. In the present case the agreement made by the prosecuting attorney with Mortimer was not that the latter would make a complete and full disclosure of the facts within his knowledge respecting the charge then being prosecuted, and of all other felonies, but Mortimer agreed with the prosecuting attorney that if that official would accept a plea from him of murder in the second degree, and would also *nolle* several other indictments pending against him, that then he would "testify against Miller." No such instance as this can be found in the books; and I do not believe that such a bargain as this to testify against the life of another should receive any countenance or sanction in a court of justice, or that, in the circumstances mentioned, Mortimer should have been admitted as a witness in the cause. For the errors heretofore mentioned the judgment should be reversed, and the cause remanded. All concur, except BLACK, J., who dissents. RAY, C. J., in the result; BARCLAY, J., specially, in a separate opinion.

BELL *et al.* v. MANSFIELD'S ASSIGNEE.

(Court of Appeals of Kentucky. May 22, 1890.)

PROMISSORY NOTE—PLEADING—ATTACHMENT.

1. An allegation in a petition that "the defendant, by his promissory note filed herewith, agreed and promised to pay," etc., is sufficient averment of the execution and delivery of the note.

2. An allegation that one of the payees on a note assigned all his estate to plaintiff for the benefit of creditors sufficiently alleges the assignee's right to sue in his own name in connection with the other payee.

3. The failure, through a clerical error, to enter a credit which should have been allowed upon giving judgment in the circuit court, is not a ground for reversal, when no effort has been made to correct the error in the court below.

4. Under Carroll's Code Ky. § 249, an affidavit for a writ of attachment, wherein plaintiffs state "that they have reasonable grounds for believing, and do believe, that, unless prevented, the tobacco will be sold or concealed by the defendant, that their claim is just," etc., is sufficient, and need not state the amount they ought to recover, when the debt and credits have been set forth in the petition.

Appeal from the circuit court, Hart county.

"To be officially reported."

P. F. Edwards, for appellants. Lewis McQuoron, for appellee.

PRYOR, J. Curle, as assignee of John L. Mansfield and William Glenn, instituted this action on a note for \$750, executed by Henry Bell to Glenn & Mansfield on the 6th of April, 1881, having indorsed upon it various credits paid by the obligor. It is alleged that the defendant undertook and agreed to pay said sum, and the note evidencing the indebtedness is filed with and made part of the petition. It is further alleged that Mansfield, one of the payees on the notes, assigned all his estate to Curle, including the note sued on, for the benefit of creditors; that by reason of the arrangement he, (Curle,) as assignee, was vested with all of Mansfield's interest. It is insisted that the petition is not sufficient, because it fails to allege that the note was delivered, and that no right to sue in the name of Curle appears from the petition. The promise to pay, with the note in the possession of the payees, is sufficient to show a complete obligation; that is, that the note was executed and delivered. "The defendant, by his promissory note filed herewith, agreed and promised to pay," includes all the essentials of a complete undertaking by the defendant, and the averment of the assignment for creditors by one of the payees vests in the latter the right to sue in conjunction with Glenn, one of the original payees. There was an attachment obtained to subject property upon which the appellees had a lien by mortgage, and it is further contended by the appellant that the attachment should have been discharged for want of proper verification. The appellees state "that they have reasonable grounds to believe, and do believe, that, unless prevented, the tobacco will be sold or concealed by the defendant; that their claim is just," etc. Section 249 of the Code (Carroll's) provides expressly that, in an action to enforce a lien, this affidavit is sufficient. It prescribes the language to be used, which seems to have been followed by the appellants in this case: "If the plaintiff state on oath that he has reasonable cause to believe, and does believe, that, unless prevented by the court, the property will be sold, concealed, or removed from the state, an attachment may be granted against the property." The case of *Williamson v. Martin*, 1 Metc. (Ky.) 42, relied on by the appellant, was under the law applicable to general attachments. Nor is the affidavit defective by reason of the failure of the appellees to state the amount they ought to recover, aside from the facts stated in the petition. The amount of the debt, with the credits, is already set forth in the petition, with the statement that the claim is just, and a prayer for a judgment for the balance due. This is verified by the oath of the appellees that he believes the statements in the petition are true, which is a substantial compliance with the provisions of the Code. The order of attachment follows

section 254 of the Code, and the failure to enter one of the credits, amounting to \$17.60, when giving judgment, was only a clerical misprision, and is no ground for reversal, as the error can be corrected below, and no effort seems to have been made for that purpose. Judgment affirmed.

STENGEL v. PRESTON *et al.*

(Court of Appeals of Kentucky. Feb. 27, 1890.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS
—ACCORD AND SATISFACTION.

1. The charter of the city of Louisville, (section 12,) as amended by the act of 1873, provides that improvements of public streets shall be made at the expense of the owners of lots in each fourth of a square; each subdivision of territory bounded on all sides by a principal street being deemed a square. The property west of a street improved was in form a triangle, that east in form a quadrangle, cut by three short streets, extending from the street improved, making four squares within the area described bounded by principal streets. *Held*, that the lots on both sides of the improvement were liable to assessment, and those upon the east side could be included in one assignment and apportionment.

2. Defendants gave a note in payment of the amount of an assessment for a public improvement. Upon a subsequent and corrected assessment being made, it was found that their share of the cost was more than the amount stated in the note. *Held*, that such payment was not an accord and satisfaction of the entire amount assessed against them.

Appeal from Louisville law and equity court.

"To be officially reported."

Lane & Burnett, for appellant. *Brown, Humphrey & Davis*, for appellees. *Goodloe & Roberts*, for trustee.

Lewis, C. J. This action was instituted by appellant, May, 1876, against appellees and others, for recovery and enforcement of a statutory lien to satisfy amounts assessed, and for which apportionment warrant had been issued, to pay for improvement of Overhill, from Broadway to Underhill streets, in the city of Louisville. But the judgment rendered in 1879 for appellant was, in 1884, reversed by this court, upon the principal ground, as appears from the opinion delivered, it was not alleged in the petition that there was a publication of the ordinance of the city council, under which the improvement was made. Upon return of the case, an amended petition was filed, containing all the averments required by law in order to maintain the action, which seem to be supported by the evidence. But by the judgment now appealed from the action was dismissed as to all the appellees, though the reasons therefor, as appears from the opinion of the chancellor, except the main one, involving right of the city council to direct the improvement and assessment in the mode it was done, are not applicable to all the parties alike. The three streets—Broadway, running nearly east and west, Underhill, nearly north-east and south-west, and Baxter ave-

nue, nearly north-west and south-east—form about an equilateral triangle, which is cut by Overhill, extending parallel with Baxter avenue from Broadway to Underhill, leaving the land west of Overhill, though in form a triangle, in the meaning of the city charter as heretofore interpreted by this court, a square for purpose of such improvement. But the land east of it, quadrilateral in form, is cut by three short streets, Rogers, Felter, and Wilson, extending parallel with each other from Baxter avenue to Overhill, and perpendicular to both, but parallel to neither Broadway nor Underhill, whereby there exists within the area mentioned four squares instead of one, bounded by public streets. And thus arises the question whether to pay the cost of the improvement, done under an ordinance and on contract, the lots lying east of, and adjacent to, Overhill can be assessed, and the lien upon them exists as if there was, in fact, but a single square on that side.

This question affects directly only appellees, Preston, Brehan, and Webb & Schillenger, whose lots are east, but the chancellor seems to have regarded those owning lots west of Overhill street, though all are in the same square, as equally affected; and the determination of it depends upon the proper construction of "An act to amend the charter of the city of Louisville," approved 1873, which is as follows: "Section 1. That in lieu of section 12 of the charter * * * the following law shall prevail concerning public ways: *First*, public ways, as used in this charter, shall mean all public streets, * * * and shall be under the exclusive management and control of said city, with power to improve them by original construction and reconstruction, as may be prescribed by ordinance. Improvements, as applied to public ways, shall mean all work and material used upon them in the construction and reconstruction thereof, and shall be made and done as may be prescribed by either ordinance or contract, approved by the general council. Sec. 2. When the improvement is the original construction of any street, * * * such improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the general council, according to the number of square feet owned by them, respectively, except that corner lots, say thirty feet front, and running back, as may be prescribed by ordinance, shall pay twenty-five per cent. more than others for said improvements. Each subdivision of territory bounded on all sides by principal streets shall be deemed a square. When the territory contiguous to any public way is not defined into squares by public streets, the ordinance providing for the improvement of such public way shall state the depth on both sides, partitioning said improvement, to be assessed for the cost of making the same, according to the number of square feet owned by the parties, respectively, within the depth, as set out in

the ordinance. A lien shall exist for the cost of original improvement of public ways, * * * for the apportionment and interest thereon against the respective lots, and payment may be enforced as other city assessments for taxes upon the property bound therefor, or by proceedings in court; and no error in the proceedings of the general council shall exempt from payment after the work has been done, as required by either the ordinance or the contract, but the general council, or the courts in which suits may be pending, shall make all corrections, rules, and orders to do justice to all parties concerned; and in no court shall the city be liable for such improvement without having the right to enforce it against the property receiving the benefit thereof, so that no one shall be assessed or charged with the improvement of public ways, except those binding on the fourth of a square, of which his lot forms a part apportioned, as aforesaid." No personal judgment could be recovered by appellant against any one of the owners of lots assessed, nor, as expressly provided, could the city be made liable; and, consequently, the effect of the judgment is to leave him without full compensation, although the improvement has been made without any objection by, or attempt of, appellees to enjoin it, and they have ever since enjoyed the benefit of it.

The ground upon which the judgment is attempted by counsel to be sustained is that each separate square is, under the charter, chargeable with cost of only such improvement as may be done opposite to it; and that property in different, though adjoining, squares, cannot be included in one and the same assignment and apportionment. The leading purpose of the charter in respect to improvement of public ways is to charge property immediately benefited by an improvement with the cost of it, whereby to secure approximate equality and uniformity; and to accomplish that purpose the plan was adopted of requiring each improvement "made at the exclusive cost of owners of lots in each fourth of a square." But it was not intended, nor would it be just or practicable, to apply that rule in a case like this, when the result would be to either place the burden entirely upon property situated on one side of a street, or else prevent any improvement being made. To make assessment upon those lots west of Overhill street legal, or the improvement of practical advantage, it was necessary for such improvement to extend from Broadway to Underhill street, the whole length of the square in which they are situated; but to rigidly apply the rule of apportioning the cost to those lots east of Overhill street would enable the owners of them to escape contribution entirely, although equally and especially benefited by extension of the improvement of Overhill street, the entire distance from Broadway to Underhill, whereby an outlet by an improved way was afforded to them. In our opinion, all those whose property is situated on Overhill street,

as well those east as those west, are liable to assessment for the improvement; for, as the court in which this action was instituted was empowered to make all "corrections, rules, and orders to do justice to all parties concerned," we do not perceive how they have been prejudiced by being required to pay a fair proportion of the cost, and it was error to dismiss the proceedings.

It appears that soon after the work was done, and apportionment of cost made by the city engineer, appellant applied to appellees Webber & Schillenger for payment of the amount assessed against them; and they then executed to him a note therefor, due in three months, receiving at the same time a receipt from him for the amount then appearing to be due. But subsequently it was ascertained by another and corrected assessment, which is not disputed or controverted, that they, in fact, owed to appellant, as their just share of the cost of improving the street, \$——, which he, now in this action, seeks to recover by enforcing a lien on their lots. As a defense they plead and rely on the payment mentioned as an accord and satisfaction of the entire amount assessed against them.

It seems to us the payment and acceptance of the amount first assessed against appellees cannot be regarded as an accord and satisfaction. To sustain such a plea, there must be shown some advantage to the creditor, arising not from the mere prompt payment of a debt due and undisputed, but growing out of the fact there is some uncertainty or contest about the right to payment in whole or part, or some contingency upon which such right exists. It was of no benefit or advantage, in legal contemplation, for appellees to pay the assessment, for appellant had the right to it, and it was their duty to pay. Nor, as is well settled, was the payment to, and acceptance by, appellant, of what then appeared to be the whole amount due, a satisfaction of what was afterwards ascertained by the engineer to be an additional amount due; for it was not then known to, or in contemplation of, either party, and, consequently, there could not have been, in respect to it, either accord or satisfaction. Appellee John N. Barr was not made a party by the original petition, either in person or as trustee of Pope Rogers, but subsequently an amended petition was filed making him a party. But this court, in the former opinion, decided no cause of action was stated, and no summons on the second amended petition was executed, and, consequently, the judgment was held for that reason alone reversible as to Barr. Upon the return of the case, another amended petition was filed against said Barr, and also against appellee the Fidelity Trust & Safety Vault Company, his successor, as trustee of said Pope Rogers; but, as more than five years had then elapsed since the cause of action accrued, the chancellor properly sustained the plea of limitation, and dismissed the action as to them, and his judgment to that extent is affirmed; but as to all

the other appellees the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

COOPER v. NEVIN.

(Court of Appeals of Kentucky. April 8, 1890.)

STREET IMPROVEMENTS—ASSESSMENTS.

1. A city charter provided that, "where the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement of such public way shall state the depths on both sides, fronting said improvement, to be assessed for the cost of making the same, according to the number of square feet owned by the parties, respectively, with the depths as set out." A street on which improvements were made was bounded on the north by a lot containing 32 acres, which was 640 feet wide from north to south, and was surrounded by principal streets, but was not intersected by other streets. South of the improved street, the territory was divided by a street (Twenty-Fifth) running 420 feet south to another principal street, so as to form two squares. In front of one of these squares the improvements were much more expensive than in front of the other. The ordinance fixed the depth to be assessed at 210 feet on both sides of the improved street. It was not contended that the territory north of the improved street would ever be subdivided by streets running from east to west. Held that, as the ordinance required property in one of the defined squares on the south to pay for improvements bordering on a different square, it was erroneous; that the area to be taxed should be found by treating the territory on the north as intersected by Twenty-Fifth street, and thus formed into squares; and that these squares should be taxed to one-half their depth for the improvements in front of each, though such squares and those on the south would be unequal.

2. Under an amendment to the charter, providing that "no error in the proceedings * * * shall exempt from payment after the work has been done as required by either the ordinance or contract," where a contract for improvements has been complied with, one whose property has been erroneously assessed may, on reversal of the assessment, be required to pay the proper amount.

Appeal from Louisville law and equity court.

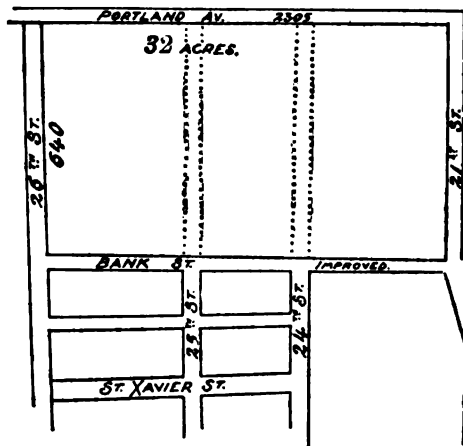
"To be officially reported."

M. L. Cooper appeals from a judgment against him, and in favor of Joseph Nevin, for an assessment against his property for street improvements.

John Barret and John Stites, for appellant. Lane & Burnett, for appellee.

PRYOR, J. The ordinance in question was passed in accordance with the provisions of the city charter, and the only trouble arises from the manner in which the burden of payment was imposed on the property bordering on the improvement. Each subdivision of territory bounded on all sides by principal streets is ordinarily deemed a square, and such is the provision of the city charter; still, the territory between the streets may be of such dimensions, covering a large area, as would show not only the necessity, but the certainty, that such an area must at some time be subdivided into squares for public convenience, and therefore the city council, in ordering the improvement, will only extend the taxing district as far into the territory that is liable to this subdivision as that

taxed on the opposite side of the improvement, where the territory has already been defined by squares surrounded by principal streets, as contemplated by the charter. The charter provides that, "where the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement of such public way shall state the depths on both sides, fronting said improvement, to be assessed for the cost of making the same, according to the number of square feet owned by the parties, respectively, within the depth as set out in the ordinance." The improvement in this case was the construction of a carriage-way on Bank street 36 feet in width, from the center of Twenty-Fourth street to the east line of Twenty-Sixth street. The work was completed by the appellee, and accepted by the city. The court below gave a judgment against the appellant for his proportion of the cost of the entire improvement, ascertaining the contract price, and making each property holder pay to the extent of the property owned that bordered on the improvement. This was error, if the appellant is right in his contention that the property taxed was included within squares, as defined by the charter, and not susceptible of subdivision. Bank street is bounded on the north by Portland avenue, on the south by St. Xavier street, on the east by Twenty-Fourth street, and on the west by Twenty-Sixth street. Twenty-Fifth street divides the territory between Twenty-Fourth and Twenty-Sixth, making two well-defined squares, and for a better illustration of the location of the property a diagram of the territory is hereto appended:



It will be seen from this map that the territory between Bank street and Portland avenue, extending from Twenty-Sixth street to Twenty-First street, embraces 32 acres of land, and this area being surrounded by principal streets, but not subdivided, the question presented is, does the charter in such a case determine the territory to be taxed and the mode of assessment, after the passage of a valid ordinance ordering the improvement,

or is the entire question left to the city council? When not defined into squares by principal streets, the charter requires that the ordinance providing for the improvement "shall state the depths on both sides fronting said improvement to be assessed for the cost of making the same, according to the number of square feet owned by the parties, respectively, within the depth, as set out in the ordinance." The city council, regarding the territory north of Bank street, and between that street and Portland avenue, as not being within a square, fixed the depth on each side of the improvement to be assessed at a distance of 210 feet, thus taxing the area within the two defined squares bordering on the improvement, and south of Bank street, as directed or required by the charter, and running the same distance into the territory that had not been subdivided by the extension of Twenty-Fourth, Twenty-Fifth, and Twenty-Sixth streets. The distance from Bank street to Portland avenue is 640 feet, and the distance from Twenty-Sixth street on the west to Twenty-First street on the east exceeds 2,000 feet. From Bank street south to St. Xavier street is a distance of about 420 feet, and this territory is divided by Twenty-Fifth street, leaving a square between Twenty-Fifth street and Twenty-Fourth street on the east, and a square between Twenty-Fifth street and Twenty-Sixth on the west; and, these two squares bordering on Bank street, the contiguous area is assessed to the depth of 210 feet on each square. The appellant's lot lies within the square between Twenty-Fifth and Twenty-Sixth streets, and the testimony uncontradicted shows that the surface of the street bordering on his lot is almost level with the adjoining land, with scarcely any excavation or cut required; while on the square between Twenty-Fourth and Twenty-Fifth streets there is an average cut of $3\frac{1}{2}$ feet, or nearly so, and the cost of the excavation is fixed by the engineer at \$1,800, when but little, if any, was required fronting the square where appellant's property is located; still, the latter was taxed to pay for this excavation, or the work done on a square, entirely distinct from his lot. This mode of assessment could not have been contemplated by the charter in a case where the area on the one side of the improvement to be made is surrounded by principal streets; and a mere extension of intersecting streets from the opposite side, where the territory is already defined into squares, would produce that equality of burden sought to be obtained by the provisions of the charter.

If, therefore, Twenty-Fourth, Twenty-Fifth, and Twenty-Sixth streets are extended, as the dotted lines on the map show, from Bank street to Portland avenue, you have the territory that must be taxed in order to produce equality of taxation, and at the same time carry out the plain meaning and spirit of the charter. The charter itself fixes the mode of assessment and the extent of the area to be taxed in a case like this. In Cald-

well v. Rupert, reported in 10 Bush, 179, the territory was so large and so located as to render it certain that a subdivision would subsequently be made, so as to form squares approximating those already laid off in the city. In such a case, the council is to determine the extent of the area to be taxed, having the same depth on each side of the improvement. As said by this court in *Schmelz v. Giles*, 12 Bush, 491, the purpose is to charge the cost of the improvement on the property to be benefited by it. It is true that when the extension of the parallel streets is made to Portland avenue the distance from Bank street to the former street is 640 feet, making the one-half to be taxed 320 feet, while from Bank street, on the opposite side, south to St. Xavier street, it is only 420 feet, making the one-half to be taxed 210 feet. So you would assess 320 feet on the one side and 210 feet on the other. The squares, it is true, would not be equal, but the area to be taxed is to the center line, and the property being benefited, and the tax by the square foot, the irregularity of the area is not such as to make it open to constitutional objection. As said in *Schmelz v. Giles*: "Those having more square feet of ground will receive a corresponding increase of benefits." The squares in a city are not all of the same shape or dimensions; and the fact that one square is larger than another can make no difference in the event you can approximate equality in fixing the burden. In the case of *Stengel v. Preston*, ante, 839, (decided at the present term,) the peculiar formation of the territory bordering on Overhill street necessitated the apportionment according to the extent of the area bordering on the improvement. The territory between Overhill street and Broadway had not been subdivided into squares, and there could be no imaginary extension of Wilson, Fetter, and Rogers streets, through the ill-shapen territory beyond Overhill street, so as to produce equality in the burden. The council, therefore, had to fix the depth for taxation on this territory, and then, by reason of the excessive burden caused by excavation, and having complete power over the subject-matter, apportioned the cost in proportion to the number of square feet owned by each proprietor, and for the additional reason that benefits flowed alike to all. The court did not mean to hold, in that opinion, that a square defined by principal streets, such as contemplated by the charter, or the property thereon, could be taxed to improve another and distinct square; and it is only in cases where the contiguous property on the opposite side of the street is not defined into such squares as gives to the city council the power to make such an apportionment. In the first-named case, the charter fixes the mode of assessment, and in the last-named case it is with the city council. The court was discussing the case before it, and with the right of the council to designate the property to be taxed, and to judge of the burden to be imposed, thought proper by

reason of benefits received, and to equalize the burden, to make each lot-owner contribute.

It is not argued, nor will it be contended, that this territory between Bank street and Portland avenue will be subdivided by principal streets running from west to east; that is, from Twenty-Sixth to Twenty-First street. All the territory requires is to extend the streets running north and south from Bank street to Portland avenue, as they are found on the map of the city, and you have the taxing district. On the plan adopted by the city council they have fixed the depth at 210 feet. Now, when you come to improve Portland avenue, you can extend the area only to the same depth, (210 feet;) and therefore you have lying between the area that has been taxed a space of 220 feet that escapes all taxation for such improvements. The fact that there is a long strip of land between these two principal streets, Portland avenue and Bank street, with no intersecting streets, affords no reason for disturbing the provision of the city charter imposing on the property bordering on the square the burden of improving it. If the space between Bank street and Portland avenue was as great as that between Twenty-Sixth and Twenty-First streets, then it would not only be within the power of the council, but their duty, to fix the area to be taxed. No such question arises in this case, and, the charter itself having fixed the extent the property is to be taxed, it is plain the court below erred in so apportioning the cost as to make the appellant's property pay for improving the street bordering upon a different square.

The charter amendment approved on the 24th of March, 1882, provides that "no error in the proceedings of the general council shall exempt from payment after the work has been done as required by either the ordinance or contract." Under this provision, the work having been completed, and the contract complied with, we perceive no reason, as this case must be reversed, why the appellee, if he desires it, may not have a reapportionment of the burden, as indicated in the opinion, and the appellant required to pay in the same manner, and in the same proportion, as if Twenty-Sixth, Twenty-Fifth, and Twenty-Fourth streets extended north to Portland avenue, the taxing area to be fixed at the center of the square; that is, instead of 210 feet, it should be 320 feet, from Bank street. This reaches the center between Bank street and Portland avenue. In *Loeser v. Redd*, reported in 14 Bush, 23, this court said: "Where the property contiguous to the improvement is bounded by streets, or lies within a square, all that is left to be done, under the law in such cases, is to determine by calculation that equality in the apportionment as directed by the city charter, the law having designated the property to be taxed." If the judgment below is followed, it would result in making the appellant, whose property lies within a square, pay for improving

the street contiguous to and bordering on an entirely different square; and, not only so, would, in effect, exempt a space of 210 feet of ground lying between Bank street and Portland avenue from any taxation for street improvements.

The judgment below is reversed, and remanded for proceedings consistent with this opinion.

JUMP v. JOHNSON.

(Court of Appeals of Kentucky. May 22, 1890.)

PRINCIPAL AND SURETY—JOINT MAKERS—USURY.

1. Judgment for a balance due, and a decree of foreclosure, were rendered against the joint makers of a promissory note secured by mortgages of their lands. On the sale of the land of one of them, the amount computed as due by the commissioner in charge of the sale was realized, but was subsequently found to be insufficient. On motion for order of sale against the land of appellant, the other co-maker, for the deficiency, he urged that, by an arrangement with his co-maker, they had divided the borrowed money equally; that he had paid half of the debt and interest; that he was liable for the balance only in the relation of surety for his co-maker; and that the acquiescence of the payee in the mistake of the commissioner, thereby causing him to take no step to secure himself against loss, operated a release of that liability. *Held*, that appellant was liable to payee as principal, and that an order of sale was properly granted.

2. Where a note bearing lawful interest is signed and delivered, and on the same day a check for the amount of the consideration is received, the contract is complete; and the fact that, before the payment of the check, a law takes effect reducing the legal rate of interest below that stipulated in the note, does not taint the contract with usury.

Appeal from circuit court, Hardin county.

"To be officially reported."

Jas. Montgomery, for appellant. *J. P. Hobson and Brown & Haycraft*, for appellee.

BENNETT, J. The appellant, Henry Jump, and William Bird, as principals, and Eliza S. Monin as surety, executed their note to the appellee for \$2,000, borrowed money, which note was due and payable 12 months after date, and bore 10 per cent. interest from date until paid. The note bore date the 29th day of August, 1876. The appellant and Bird mortgaged their respective lands to Eliza S. Monin to secure her as their surety on said note. The mortgage was dated and acknowledged on the 29th day of August, 1876. The appellee, in the spring of 1884, recovered judgment for the balance due on this note, and for the enforcement of Eliza S. Monin's mortgage lien to satisfy said judgment. There was no defense to this proceeding. The appellant, however, pleaded that he had paid half of the note, including interest, which, by an arrangement between him and Bird, was all, as between them, he should pay; and he asked the court to order Bird's land to be first sold to satisfy the balance of the debt, interest, and cost. To this Bird, by his answer, assented. Accordingly the court ordered the land of Bird to be first sold; and, if it did not bring enough to satisfy

said balance, etc., then the appellant's land was to be sold to satisfy the deficiency. Bird's land was first sold, and it brought an amount supposed to be sufficient, according to the calculation of the commissioner making the sale, to satisfy said balance and cost. Bird himself bought the land, and the appellant was one of his sureties on the sale-bond. After the confirmation of the sale and collection of the purchase money, it was ascertained that the commissioner, by a miscalculation, fell short of the correct balance due by about \$251. Consequently, Bird's land did not sell for enough to satisfy said balance by that sum. Bird being dead, and his estate being insolvent, and said land having been sold by his heirs and purchased by the appellant, the appellee, upon notice,—the case still being upon the docket,—moved the court to order the sale of so much of the appellant's land as would satisfy said balance. The court, notwithstanding the objections of the appellant, made said order.

The first objection is that, as the borrowed money was received on the 2d day of September, 1876, the 10 per cent. interest law having expired on the 31st of August preceding, the agreement to pay 4 per cent. in excess of 6 per cent. interest was usurious, and the payment of said usury more than extinguished the balance that the appellee claimed to be due. It is to be observed that the appellant does not claim that the agreement was made after the 31st of August, and that the note and mortgage were antedated to make it appear that the contract was made before the expiration of the 10 per cent. law. It is alleged that the money was not received until after that time. It is certain from the proof that the contract was made on the 29th of August, and the note and mortgage were given on that day, and the latter was acknowledged on that day, and a check for the money was executed and received on that day. In a word, the contract was in each essential completed on that day; and the mere fact that the money was not received on the check until the 2d day of September did not impress the contract to pay 10 per cent. as usurious.

The second objection is that the appellant was only bound for one-half of the note as principal, and stood in the relation as surety for Bird for the other half, and that, by the conduct of the commissioner, acquiesced in by the appellee, in selling Bird's land apparently for the full amount of the alleged balance, thereby causing the appellant to believe that the whole amount of the debt had been paid, and causing him to take no steps to secure himself against loss by reason of said balance being unpaid, he was released from the payment of the same. It is clear from the proof that the appellant and Bird were co-principals to the appellee for the whole amount of said note; and the arrangement between themselves, to the effect that they would divide the money borrowed equally between them, was a mere agreement between themselves, which in no

wise entered into the contract with the appellee. If each one had, without any express agreement, taken half of the money, an equity would have arisen between them to be, as between themselves, responsible for one-half each. But this would not have entered into a contract, expressed or implied, with the appellee, that each was to be surety of the other for one-half of the debt. This collateral agreement of theirs to divide the money between themselves stands in precisely the same attitude as would the case just supposed; and the appellee, not having expressly or impliedly entered into it, was not bound by the rule that governs principal and surety in such cases. The judgment is affirmed.

CASSILLY v. COCHRAN'S GUARDIAN. SAME v. WALKER. COCHRAN'S GUARDIAN v. COCHRAN *et al.* WALKER'S GUARDIAN v. SAME.

(Court of Appeals of Kentucky. June 5, 1890.)
PRINCIPAL AND SURETY—RELEASE—GUARDIAN'S BOND.

A guardian invested a portion of her ward's property in the stock of a solvent bank, and deposited the balance to her individual credit. After the sureties on the bond then in force were released, and a second bond executed, she sold the stock, withdrew the deposit, and wasted the proceeds. *Held*, in a controversy between the sureties as to which bond was liable, that, although the unauthorized investment and deposit to her individual credit amounted to a conversion, the sureties on the first bond were not liable therefor, because the fund in her hands was still susceptible of being traced and identified, but that the second bond was liable for the guardian's subsequent appropriation of the fund.

Appeals from Louisville law and equity court.

"To be officially reported."

Bullitt & Shield and *Wm. B. Dixon*, for Cassilly. *John C. Russell, Dodd & Grubbs*, and *J. C. Dodd*, for Cochran's Guardian. *Humphrey & Davis* and *John Barret*, for Green and Doll.

PRYOR, J. Mrs. Cochran was the statutory guardian of her infant children, with Green and Doll as the sureties on her bond, and remained so until the 19th of July, 1880. On that day, Green and Doll were released, and a new bond executed, with Cassilly and Erskin as sureties. There was no provision in this last bond to indemnify the sureties on the former bond; and, the money of the infants having been wasted by the guardian, the question arises as to which set of sureties is liable,—the sureties on the first or on the last bond. The controversy is between the sureties; the infants being content with the judgment below, making the sureties in the last bond liable. The question then is, did this loss or waste of the infants' money occur before July 19, 1880, the date when these last sureties signed the bond? It is contended by counsel for Cassilly and Erskin that the loss of the money occurred before they executed the bond, and that at the date of its execu-

tion the guardian had no money belonging to her children. Green and Doll, the sureties in the first bond, were indebted to Mrs. Cochran in the sum of \$4,626, for which she held their note as guardian. On the 19th of April, 1880, they paid to her the amount of this note and interest, being \$4,700. They had previously paid to Mrs. Cochran a considerable sum of money belonging to her, and both sums were deposited to her individual credit in the German Bank. She kept no account as guardian. On the day the new bond was executed, she had to her credit in this bank \$2,870. In June preceding, the guardian, under the advice of friends, had invested \$2,000 of the wards' money in bank-stock. The bank in which the stock was purchased, and the money deposited, was then and is now perfectly solvent. Having placed the money to her own credit, and purchased the stock in her own name, the loss, if the bank had proven insolvent, would have been her loss, and not that of the infants. There was, however, no loss by reason of the inability of the bank to meet its demands, but the money and stock remained subject to the order and disposition of the guardian, either for her own benefit or that of her wards. She could have used it for her own benefit, as she could the money if in her pockets, in utter disregard of the rights of her children, as she seems to have done by using the money, and disposing of the bank-stock, after the last sureties had signed the bond.

It is improper for the guardian to mingle the funds of his ward with his own, and contrary to law to make investments in bank-stock, in his own name, with the infants' money; but, if done, it nevertheless belongs to the infants, and no claim can be asserted by the guardian against the ward to the stock or the money because invested or deposited in the wrong name. It may result in loss to the guardian, or the stock may be required to be held by him, and he compelled to pay the money in lieu of the stock. No such question arises in this case. A guardian, with money belonging to his ward, although deposited to his individual credit, is liable for the money, and his sureties with him, who are on the bond when the money is wasted by the guardian, or placed beyond the reach of the infants. When did the guardian withdraw this money from the bank and convert the bank-stock to her own use? It was disposed of after the new bond was executed, and had been in bank, and liable to be applied to the use of the wards, for months after these appellants signed the bond. It was in fact the duty of the guardian to change the entry on the bank-books, in order to show to whom the fund belonged; and the conversion by the guardian, by a deposit of the wards' funds in her own name, or the investment in stocks, in no wise deprived the infants of the right to claim the fund and the investment as belonging to them. It could be traced and identified as the property of the infants in the hands of the guardian, and not

until there was a disposition of it by the guardian to others, for her own use, was this identity lost; and, this occurring after the last bond was executed, the sureties upon it are liable. The manner of the holding by the guardian did not make the money hers; and, while there may be doubt as to the liability of the first sureties to the infants in the event the last sureties were insolvent, the fact of the manner of the holding when these appellants became bound can constitute no defense to a recovery by the infants. They had agreed, by the terms of the bond, to make themselves liable for the acts of the guardian from the date of its execution and acceptance by the county court. Besides, the facts of this record show that Green and Doll had proceeded to have themselves released, and they were released, in a few months after they had paid the money that was owing the guardian, and these appellants must have been conversant with the facts, and knew with what amount the guardian stood charged; and to say that because the deposit was in her name would release the sureties on her bond, when the entire loss occurred after they signed it, would result in hazarding the rights of infants, and afford but little protection to those who were asking to be released as sureties, and others substituted, as provided by the statute. We think the entire case, including the settlement with the guardian, of which the infants complain, was properly decided; and the judgment on all the appeals is affirmed.

BARNES *et al.* v. WILLIAMS *et al.*

(Supreme Court of Arkansas. May 3, 1890.)

MUNICIPAL CORPORATIONS—CITY OFFICERS—INCREASE OF SALARY.

Under Mansf. Dig. Ark. § 926, which provides that a city council shall not increase the salary of a city officer during his term in office, when the council of a city of the second class has fixed the salary of the city attorney, it cannot, after becoming a city of the first class, increase his salary during his term in office.

Appeal from circuit court, Sebastian county; J. S. LITTLE, Judge.

Suit by C. M. Barnes and others against S. A. Williams, as mayor of Fort Smith, and others. Decree was rendered for defendants, and plaintiffs appealed.

Clayton, Brizolara & Forrester, for appellants. U. M. & G. B. Rose, for appellees.

HEMINGWAY, J. That the council of Fort Smith was authorized, while it was a city of the second class, to create the office of city attorney, to prescribe the duties of the incumbent, and fix his compensation, seems to be conceded. While it was such, it passed an ordinance entitled "An ordinance establishing the office of city attorney." The ordinance provided that it should be the duty of the city attorney to attend all regular meetings of the council; to advise the mayor, council, chairman of committees of the council, and marshal, as to matters of law, when

requested; and to prosecute or defend, as the case might be, all cases in which the city was plaintiff or defendant. It fixed the term of his office, and the manner of his compensation. The title of the ordinance, and the character of the duties it devolves, fixes the relation of the incumbent to the city as that of an officer. When the corporation was preparing to organize as a city of the first class, the council passed an ordinance fixing the salaries of its different officers, including the city attorney. This was done in order that such compensation might be made according to the law relating to cities of the first class, which prohibited its being made in fees. This ordinance amended the ordinance establishing the office of city attorney in so far only as affected his compensation. That it was regularly passed is not denied, and that it was within the scope of corporate authority cannot be contended. So when the corporation was organized as a city of the first class in April, 1887, there was an ordinance regularly passed, creating the offices of city attorney, and fixing the compensation of the office at \$500. The next council, acting by virtue of that ordinance, elected a city attorney, who qualified and served one term. J. C. Peel, the appellee, was elected for the term beginning in April, 1888, and entered upon the discharge of his duties. Afterwards the salary of the city attorney was increased by ordinance. His title to the office and rights to its emoluments are derived from the ordinance first cited. The office was created under the authority granted by the general incorporation law of the state, and it provides that no change of compensation shall affect any officer whose office is created by its authority during his existing term. Mansf. Dig. § 926. Therefore the temporary restraining order should have been perpetuated on the final hearing. The decree will be reversed, and a decree rendered here, forever restraining appellees, Williams, as mayor, Hamilton, as clerk, and Davis, as treasurer, of the city of Fort Smith, and their several successors, from paying to J. C. Peel, as city attorney, any compensation for his services as such, during the term for which he was elected, in 1888, in excess of the amount to which he was entitled under the ordinance in force when his term began.

SEEMULLER *et al.* v. THORNTON *et al.*

(Supreme Court of Texas. April 25, 1890.)

ADVERSE POSSESSION — EVIDENCE — VOID TAX-DEEDS.

1. In an action for the recovery of land, where defendant claims title by adverse possession, a tax-deed under which he claims is properly admitted in evidence to show the basis for adverse possession, although by reason of its irregularities it is insufficient as evidence of title.

2. Where the tax-receipts showed that the taxes were paid on lands granted to one Cole, while the land in controversy was granted to one Coles, but identified the land in other respects, they were properly admitted in evidence as bearing upon the question of payment of taxes.

Appeal from district court, Bell county.

Action of trespass to try title brought by John R. Seemuller and others, heirs of Augustus Seemuller, against Paul F. Thornton and George J. Carney. Defendants also made Silas Baggett and Peter G. Rucker parties defendant, they being the grantors of Thornton, and prayed judgment over against them in case plaintiffs should recover judgment establishing title to the land. The land in controversy was originally patented to Benjamin L. Coles. It is admitted that plaintiffs were entitled to judgment for the land, unless their title was divested by operation of the statute of limitations of Texas for five years, which land had been held for five years next prior to the filing of this suit, during which time defendants had had exclusive, continuous, and adverse possession, cultivating, using, and enjoying the same. The color of title claimed by defendants was a tax-deed purporting to have been executed on the 7th day of June, 1878, by W. S. Rather, tax collector of Bell county, Tex., to collect the taxes due by unknown owner or owners to the state of Texas and Bell county, as assessed against him, her, or them, for the year 1877, upon 320 acres of land out of the B. L. Coles 320-acre survey, which taxes amounted to the sum of \$2.67, as appears from the roll of said county for the year 1877. Said land was sold to Silas Baggett. The time, place, or manner of the sale is not stated. Deed purports to be dated on the 7th day of May, 1878, but was acknowledged on the 7th day of June, 1878; was filed for record on the 4th day of December, 1880, with county clerk of Bell county, Tex. The payment of taxes by defendants during the time of their occupancy was not conceded. Defendants recovered verdict and judgment. Motion for new trial was duly made and overruled, and plaintiffs appealed.

Monteith & Furman, for appellants.
Harris & Saunders and *Geo. W. Tyler*, for appellees.

STAYTON, C. J. It is conceded that appellants were entitled to recover the land in controversy, unless appellee Thornton had acquired title through adverse possession. No question is made as to the insufficiency of the evidence to show facts necessary to the acquisition of title to land under the five-years statute of limitation. It is claimed, however, that the court erred in admitting in evidence a tax-deed under which appellee claims, and in admitting some tax-receipts, as well as in a charge given. Appellee offered in evidence a tax-deed under which he claimed, executed by the tax collector of the county in which the land was situated. The deed on its face professes to convey the 320 acres of land sued for, which constitutes the entire grant, and no objection is taken to its form; but it is claimed that the deed had been altered since its execution by the addition of the terminal letter to the name of the original grantee. The land was patented to B. L.

Coles, and it was insisted in the court below, as it is here, that the name of the grantee was written in the deed at the time of its execution without the final letter, and that this has been since inserted without authority. To show that fact, the original deed was sent up, and from the inspection of it we see no reason even to suspect that the deed has been in any manner altered since its execution, or that it is not in every respect just as it was first written. The admission of the tax-deed was objected to on the following grounds: That it did not appear from the face of the deed that the land had been assessed as property of an unknown owner before advertisement and sale; that it did not appear, except from a statement in the deed, that time for payment of taxes had expired when sale was made; that it did not show that taxes had been demanded of the owner, except through a recital in the deed; that the deed did not show how the levy was made; that the deed did not show how long the land was advertised for sale; and because it was not shown that the person who executed it was authorized to exercise the power of tax collector, he signing the deed in that capacity, and being shown to have been sheriff of the county. The deed was admitted solely as a basis for limitation pleaded, and the charge of the court carefully required the jury to consider it for no other purpose. The instrument offered in evidence was, within the meaning of the statute, a "deed." Whether the land had been properly assessed, the time for making sales for unpaid taxes had arrived, the land advertised for the proper time, or the officer legally empowered to make the sale and deed, would be important inquiries, if the deed had been offered as evidence, within itself, of title; but it was not offered for that purpose, and therefore it may not have been effective to pass title; it was nevertheless a "deed." As said in *Wofford v. McKinna*, 23 Tex. 43: "The statute intends an instrument which is really and in fact a deed, possessing all the essential legal requisites to constitute it such in law; * * * an instrument by its own terms, or with such aid as the law requires, assuming and purporting to operate as a conveyance; not that it shall proceed from a party having title, or must actually convey title to the land; but it must have all the constituent parts, tested by itself, of a good and perfect deed." The instrument may not have passed title for any of the reasons which would have deprived the officer making it of power to sell and make a deed; yet it was in form a deed professing to convey the land in controversy, executed by a person having power under given facts to make a deed that would pass title. The court properly admitted it for the single purpose. It is urged that the court erred in admitting in evidence tax-receipts for the years 1884 and 1886. The objection made was that the receipts did not evidence payment of taxes on the land in controversy. These receipts showed that the taxes were paid on lands granted to B. L.

Cole, while the land in controversy was granted to B. L. Coles; but the receipts identified the land by the correct abstract number, and, if the names were not *idem sonans*, the court properly admitted the receipts, and left the question of payment of taxes on the land in controversy to the jury. The charge of the court as to the purpose for which the deed offered in evidence might be used was strictly correct. There is no error in the judgment, and it will be affirmed.

COOK v. COOK.

(Supreme Court of Texas. April 29, 1890.)

SPECIFIC PERFORMANCE—DEFENSES—QUIETING TITLE.

In an action for specific performance, and for the recovery of land, it appeared that D. conveyed the land to defendant in trust for plaintiff, subject to the payment of a debt; that plaintiff paid the debt, and D. executed a deed to plaintiff authorizing defendant to convey to plaintiff. Defendant, claiming that plaintiff owed him certain sums for attorney's fees expended by him in perfecting title to certain lands, refused to convey. It did not appear, however, that the transaction set up by defendant had any connection with the land in controversy. *Held*, that plaintiff was entitled to a decree vesting title to the land in him.

Commissioners' decision. Error from district court, Grayson county.

This is an action for specific performance, brought by S. A. Cook against J. M. Cook, to remove cloud from title, and recover 150 acres of land described in plaintiff's petition, brought in the district court of Grayson county, August 18, 1884, by plaintiff in error against the defendant in error. Plaintiff claimed that one D. A. Cook transferred said land, or caused it to be transferred, with other land, to defendant, by deed absolute on its face, but which was in reality in trust, to be held by said defendant for plaintiff subject to a debt of \$980.30 with interest; that prior to November, 1882, plaintiff paid said debt to defendant, and on that date said D. A. Cook, by deed, conveyed said land to plaintiff, and in said deed authorized said defendant to convey it to plaintiff, but that defendant had failed and refused to do so, claiming said indebtedness had not been paid. Trial, May 7, 1885, by jury. Verdict and judgment for defendant. Motion for new trial overruled May 8, 1885, and notice of appeal given in open court. Petition and bond for writ of error filed April 30, 1887. Writ issued May 2, and served May 3, 1887.

The first, second, and third assignments relate to the same thing, and will be treated together, and are as follows: "(1) The court erred in the first charge given by assuming that S. A. Cook was indebted to J. M. Cook in the sum of \$980.30, thus improperly taking the question of fact away from the jury; (2) the court erred in said charge by construing the writings as showing an indebtedness by S. A. Cook to J. M. Cook; (3) the court erred in said charge by saying that S. A. Cook claimed to have paid the indebtedness mentioned therein, when his pleadings

and testimony deny that he ever owed said debt." First proposition, first, second, and third assignments. "The court erred in charging that the papers show that the lands are held subject to a debt of \$980.30 owed by S. A. Cook, when the papers, pleadings, and testimony show that it had been held for a debt of \$980.30 that D. A. Cook formerly owed, but which had been paid; (2) the testimony all showing the payment of the indebtedness for which the land had been held, the court in the charge should have assumed its payment." Statement under propositions, first, second, and third assignment.

The charge complained of was: "The several deeds and other written instruments used in evidence vest the title to the land in controversy in the defendant, J. M. Cook, which said evidence shows he holds in trust for S. A. Cook, subject, however, to the payment of a debt of \$980.30, with interest from April 1, 1879, at ten per cent. per annum, owing by S. A. Cook to J. M. Cook, which debt the said S. A. Cook claims has been fully paid off and discharged. In order for the plaintiff to recover, he must prove by a preponderance of the evidence that he paid off and discharged said debt in full. If he has done so, you will find in favor of the plaintiff; but, if he has not proved the payment of said debt in full, you will find in favor of the defendant."

The receipt from defendant, J. M. Cook, to D. A. Cook, of April 1, 1879, stated that defendant held the land in controversy, with various other lands, in trust, subject to a debt owing defendant of \$980.30, and bearing 10 per cent. interest. Plaintiff testified: The land in controversy was held in trust by J. M. Cook for the payment of \$970 and some cents due him by D. A. Cook; that said amount had been fully paid by the sale of a tract of land belonging to plaintiff for \$325, and by the payment to one Webb of a note for \$200, which J. M. Cook owed him, and that the amount for which defendant held the lands had been fully paid. D. A. Cook testified that S. A. Cook had transferred to witness his interest in the lands mentioned in the receipts from J. M. Cook, and that the land in controversy is part of said land, and that he had deeded the land in controversy to plaintiff in 1882. Said deed was also in evidence. Defendant himself testified that he received the tract of land for \$325, and that the note for \$200, which he owed Golden, had been paid by plaintiff's direction, and that these amounts should go to the credit of D. A. Cook on the \$980.30 mentioned in his receipt to D. A. Cook.

The fifth and sixth assignments of error relate to the same subject, will be treated together, are sufficient propositions, and are as follows: "(5) The court erred in said second charge by making the land in controversy liable to the expense of perfecting the title to other land; (6) the verdict was against the evidence, and the court erred in not granting a new trial, because the testimony shows

that the debt secured by the land had been paid."

S. S. Fears and J. W. Finley, for plaintiff in error.

HOBBY, J., (after stating the facts substantially as above.) The land in controversy was held in trust by defendant to secure a debt of \$980.30. The plaintiff testified that said indebtedness was paid in full before suit by a tract of land at \$325, and the payment of a \$200 note that defendant owed. Defendant testified that he received the tract of land for \$325, and the payment of the note by plaintiff which defendant owed one Golden, amounting to \$200, and that these amounts should go to the credit of D. A. Cook on the \$980.30 mentioned in the receipt to D. A. Cook, which receipt was meant to contain the name of S. A. Cook instead of D. A. Cook. D. A. Cook conveyed the land to plaintiff in November, 1882. There are several errors assigned by the appellant which we think would necessitate a reversal of this cause. But there is only one, we believe, need be considered, in view of the fact that the case as developed can be finally disposed of by the rendition of a decree in the supreme court. The action is one to remove clouds from the title to, and for the recovery of, 150 acres of land, described in the petition, brought in the district court of Grayson county, August 18, 1884, by plaintiff in error against the defendant in error. Plaintiff claimed that one D. A. Cook transferred said land, or caused it to be transferred, with other land, to defendant, by deed absolute on its face, but which was in reality in trust, to be held by said defendant for plaintiff subject to a debt of \$980.30 with interest; that prior to November, 1882, plaintiff paid said debt to defendant, and on that date said D. A. Cook, by deed, conveyed said land to plaintiff, and in said deed authorized defendant to convey it to plaintiff, but that defendant had failed and refused to do so, claiming said indebtedness had not been paid. Trial, May 7, 1885, by jury. Verdict and judgment for defendant. Motion for new trial overruled May 8, 1885, and notice of appeal given in open court.

The sixth assignment is that "the verdict was against the evidence, and the court erred in not granting a new trial, because the testimony shows that the debt secured by the land had been paid." The proof in the case showed that the land in controversy was held in trust by J. M. Cook, the defendant in error, for the payment of about \$980.30; that this amount had been paid to J. M. Cook by the sale of a tract of land, owned by plaintiff, which realized the sum of \$325, and the payment of the note to one Webb, due from defendant, amounting to \$200. These facts are not disputed by the defendant. But it appears from his testimony that the plaintiff and he, who were partners in the acquisition of land, at one time owed (or so defendant claimed) the latter for amounts the latter

paid to attorneys for services in perfecting titles to other lands in which they were interested. But it is not made to appear, even if the plaintiff was bound for such sums of money to defendant as claimed, that this had any connection with or reference to the land involved in this suit. The testimony, however, discloses that the appellee had no authority to pay attorney's fees to any one, from the plaintiff. Whatever obligations may have been incurred by the plaintiff for the payment of attorney fees, or other expenses in perfecting the titles to the lands in which he and appellee were interested, were matters wholly foreign to the question involved in this suit. The proof showed that plaintiff had conveyed the land by absolute deed to the defendant; but, as already stated, it was undisputed that the land was held in trust by defendant to secure a debt of \$980.80, which, it is clear from the evidence, plaintiff has paid. Having performed the conditions of the deed of trust or mortgage, the land necessarily reverts to plaintiff; and, upon the failure of the defendant to convey, the former is entitled to a decree vesting title. The plaintiff is, under the facts, entitled to such decree, and we think the judgment of the court should be reversed and remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment reversed and the cause remanded.

MOTON *et al.* v. HULL.

(Supreme Court of Texas. April 20, 1890.)

GARNISHMENT—WAGES—EXEMPTIONS.

1. Sayles' Civil St. Tex. art. 2335, provides that current wages for personal service shall be exempt from attachment or execution. Plaintiff, a resident of Texas, was indebted to defendant, also a resident of Texas, and was employed by a corporation doing business in Texas, and also in Missouri. Defendant, in order to secure payment of his claim, brought suit against plaintiff in Missouri, and garnished his wages in the hands of the corporation. *Held*, that injunction would lie to restrain defendant from prosecuting his claim in Missouri by a garnishment of wages exempt by the laws of Texas.

2. The allegations of plaintiff's petition, to the effect that on the day the garnishment proceedings were begun plaintiff and defendant were residents of Texas, and had been for several years past, and were now residents of Texas, are sufficient as to the residence of the parties.

Commissioners' decision. Appeal from district court, Grayson county.

Otis Hull brought suit in the district court, April 18, 1887, to restrain Moton & Son from prosecuting a garnishment suit in justice's court, Sedalia, Mo., in which the Missouri Pacific Railway Company was garnishee, and appellee defendant. The petition alleged that all parties reside in Grayson county, Tex.; that appellee's claim against said railway company was current wages for personal service; and that the resort to the Missouri court was in fraud of our laws, and to subject exempt property to the payment of appellants' claim. Appellants moved to dis-

solve the injunction (1) for want of jurisdiction to issue it; (2) because no ground is shown for equitable interference, the plaintiff having a complete remedy at law; (3) for the reasons set forth in the sworn answer, said answer alleging, among other things, that plaintiff was justly indebted to defendants, which he refused and failed to pay, and that the sole object of bringing the suit in Missouri was to collect said debt, and not in fraud of our courts or laws. This motion was overruled by the court. A trial was had, and judgment was rendered June 2, 1887, in favor of plaintiff, for costs and perpetuating the injunction. From this judgment defendants appeal.

S. S. Fears and J. W. Finley, for appellants. Sandtfer & Moseley, for appellee.

HOBBY, J., (after stating the facts substantially as above.) The leading question in the case presented under assignments in proper form is whether the courts of this state have the power, upon the petition of a resident of this state, to whom current wages for personal services are due, to restrain, through the process of injunction, a citizen of the county in which the suit by injunction is commenced from proceeding in another state by a writ of garnishment to seize such current wages for personal service, with purpose of evading by such garnishment proceeding the constitution and laws of this state, which expressly exempt from such seizure or attachment said current wages. The correct rule upon this subject we understand to be is that, if the averments of the petition for injunction are of such a character as to make it the duty of the court to restrain or enjoin the party from instituting or conducting like proceedings in a court of this state, it would be a proper case for restraining him by a similar process from prosecuting such suit in the courts of another state. *Dehon v. Foster*, 4 Allen, 550. In the case of *Snook v. Snetzer*, 25 Ohio St. 519, and *Dehon v. Foster*, 4 Allen, 550, it was declared to be clear and indisputable that a court of chancery upon the statement of a proper case possessed the power to restrain persons within its jurisdiction from prosecuting suits either in its own courts or of other states or foreign countries. This power or authority is exercised upon the ground of the right of the state to compel its citizens to respect its laws beyond its territorial jurisdiction. "Although the courts of one country have no authority to stay proceedings in the courts of another, they have an undoubted authority to control all persons and things within their own territorial limits. When, therefore, both parties to a suit in a foreign country are resident within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon those parties, and direct them by injunction to proceed no further in such suit." Such is the principle laid down by Mr. Justice Story. Story, Eq. Jur. § 899. The exercise of this power does not proceed

upon any claim of right to interfere with or in any manner control or stay the proceedings in the courts of another state, but upon the ground that the person to whom the restraining process is directed is residing within the court's jurisdiction, and that he is in the power of the court issuing such process. *Keyser v. Rice*, 47 Md. 213. The decree acts directly upon the person, and its validity as to him is not affected by the fact that it does not extend to the court in which the proceedings are directed to be restrained. In *Snook v. Snetzer*, 25 Ohio St. 516, it was decided that a citizen of Ohio could be enjoined from prosecuting an attachment in another state against a citizen of Ohio to subject to the payment of his claim the earnings of the debtor, which by the laws of Ohio were exempt from the payment of such claim. See, also, *Engel v. Scheuerman*, 40 Ga. 209. In *Keyser v. Rice*, 47 Md. supra, it was held, in effect, that it was against equity for a creditor to evade the laws of his own country in order to thereby obtain a preference over other creditors. As such was the necessary effect of the garnishment proceeding in Missouri, such will be presumed to have been the purpose of the creditor in this case. We are of opinion that the court rightly perpetuated the injunction. See *Whart. Conf. Laws*, § 711a. The petition, we think, sufficiently alleged that the residence of plaintiff was at the time of the proceedings in garnishment in this state. The petition was filed April 18, 1887, and alleged that appellants and appellee reside in the city of Denison, in said county of Grayson, "where they now are and for several years have been residents; that on March 18, 1887, and for many months hitherto, appellee had been engaged in the employ of the Missouri Pacific Railway Company in the shops of said company in the city of Denison, said county and state; that on March 12, 1887, the garnishment suit was instituted in Sedalia," etc. The evidence fully sustained these averments. There is no error in the judgment, and we think it should be affirmed.

STAYTON, O. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

CHANNEY v. COLEMAN.

(Supreme Court of Texas. April 20, 1890.)

CANCELLATION OF DEED—FALSE REPRESENTATIONS—EVIDENCE.

1. Plaintiff conveyed to defendant land in Texas in consideration of the conveyance by defendant to him of land in Tennessee, and the payment of \$200. In an action for the cancellation of plaintiff's deed to defendant on the ground that defendant had misrepresented the value of the land in Tennessee to induce him to make the exchange, defendant answered, alleging that plaintiff had misrepresented the value of the land in Texas, by which defendant was misled. *Held*, that exceptions to such allegations in the answer were properly sustained.

2. Defendant had the right to recover for valuable improvements made by him on the land, and

his claim for such improvements was properly set out in the answer.

3. Testimony to the effect that the land conveyed by defendant had prior to the conveyance been offered at auction, and the highest bid therefor was so low that no sale was made, was improperly admitted; there being nothing to show that there were more than two or three persons present, or that the bid was made in good faith.

Appeal from district court, Denton county.

Action by J. E. Coleman against L. J. Chaney for the cancellation of a deed and reconveyance of lands. Judgment for plaintiff, and defendant appealed.

Jagos & Ponder, for appellant. *Smith & Batorff*, for appellee.

HENRY, J. This suit was brought by appellee. The petition charges that plaintiff, on the 2d day of September, 1886, owned, and then conveyed to the defendant, a tract of land in the county of Denton, state of Texas, which it particularly described; that the consideration of the conveyance was a tract of land in Sumner county, Tenn., which was conveyed by defendant to plaintiff, and \$200 in money paid to plaintiff by defendant; that the quality and value of the Tennessee land were misrepresented to plaintiff by defendant, as was also the character of the improvements situated thereon. Plaintiff offered to return the \$200 in money, and reconvey to defendant the Tennessee land, and prayed for a cancellation of his deed for the Denton county land. The defendant answered, denying the charges of fraud made against him, and resisting the relief sought by plaintiffs. He pleaded valuable improvements placed by him on the Denton county land, and charged that plaintiff was guilty of fraudulent conduct, by which defendant was misled and imposed upon, with regard to the value of that tract. The court sustained exceptions to so much of the answer as related to improvements, and to deception practiced by plaintiff upon the defendant. The plaintiff recovered.

Defendant, when sued for the cancellation of the deed for the land conveyed to him on the ground that he had fraudulently procured it by means of false representations made by him to his vendor, could not be permitted to defeat a recovery, and continue to hold the land, on the ground that his vendor had also misrepresented the land conveyed by him. In that respect, plaintiff's exceptions to the answer were properly sustained. In the case of *State v. Snyder* this court quoted with approval, when discussing the subject of fraudulent conveyances, the following extract from *Pomeroy's Equity Jurisprudence*: "It may be regarded as a universal rule governing the court of equity, in the administration of its remedies, that, whatever may be the nature of the relief sought by the plaintiff, the equitable rights of the defendant growing out of, or intimately connected with, the subject of the controversy in question will be protected; and for this purpose the plaintiff will be required, as a

condition to his obtaining the relief which he asks, to acknowledge, admit, provide for, secure, or allow whatever equitable rights, if any, the defendant may have, and to that end the court will, by its affirmative decree, award to the defendant whatever reliefs may be necessary in order to protect and enforce those rights." 66 Tex. 698. In *Kerr on Fraud and Mistake*, it is said: "The terms on which a reconveyance will be ordered are the repayment of the purchase moneys, and all sums laid out in improvements and repairs of a permanent and substantial nature, by which the present value is improved, with interest thereon from the times when they were actually disbursed. On the other hand, charges for the deterioration of the property must be set off against the allowances for permanent improvements. The party in possession must also account for all rents received by him, and for all profits, such as moneys arising from the sale of timber, or from working mines, with interest thereon from the times of the receipt thereof. He must also pay an occupation rent for such part of the estate as may have been in his actual possession." Pages 345, 346. We think the court erred in sustaining the exceptions to defendant's claim for the value of permanent and beneficial improvements. On another trial, such improvements on the one hand, and the value of use and occupation on the other, should be considered.

Appellant complains of the exclusion of evidence offered by him showing the value of some farms adjoining the one sold by him to plaintiff. We think the evidence was properly excluded. The question was as to the value of the farm conveyed to plaintiff by defendant. It is not readily seen how its value can be correctly shown by comparing it with others, as was proposed to be done by the defendant in this case. The farm in question was an improved one, and was valued in the trade as such. Before a value can be given to it by proving the average value of farms in that vicinity, it should be proved that the improvements, and other things to be considered in estimating its value, correspond with like things and the farms with which it is classed. That was not done in this case; and it is not probable that it can be done, or that a proper predicate can be laid for the adoption of such a method of establishing its value, instead of proving it directly.

A witness for plaintiff, after testifying that the Tennessee farm that had been represented by defendant to plaintiff to be worth \$1,000 was not worth over \$200, was permitted, over defendant's objections, to state: "When Mr. Chaney left here, three years ago, he tried to sell the place; and I bid \$1.15 per acre for it, and I was the highest bidder. Chaney had a by-bidder there, and he bid over me, and there was no sale. Bill Fugua bid one dollar an acre for it." While this evidence suggests that the land had been offered for sale to the highest bidder at public

auction, it does not disclose that there were more than two competitors, or more than three persons, present. We do not find in the record any other evidence relating to an auction or bidding for the land. If, in any case, what was bid for land when it was offered for sale can be received as evidence of its value, it can only be when the circumstances and conditions attending the transaction are explained so that the court may have the means of estimating the weight of the testimony. In this case the evidence should have been excluded. Except as indicated, we find no error in the rulings of the court upon the admission or rejection of evidence.

The charge given by the court correctly presented the law upon the issues in the cause. The only criticism that can be justly attached to it is that it went somewhat beyond what was strictly required in presenting the issues arising out of the evidence. We deem it unnecessary to discuss other objections, as they are not such as are likely to recur upon another trial. The judgment is reversed, and the cause is remanded.

CLEVELAND v. SIMPSON *et al.*

(Supreme Court of Texas. April 20, 1890.)

EXECUTION — VALIDITY — CONFORMANCE TO JUDGMENT.

Under Rev. St. Tex. art. 2281, providing that executions shall correctly describe the judgment, stating the names of the parties, an execution issued in the name of C. alone, on a judgment rendered in favor of C. and L. as partners, is not authorized by the judgment, and a sale of lands thereunder is invalid.

Appeal from district court, Hill county.

This was an action of trespass to try title, brought by W. D. Cleveland against M. A. Simpson and S. Mason. It appeared that on the 4th day of March, 1887, W. D. Cleveland & Co., a firm composed of W. D. Cleveland and C. Lombardy, procured a judgment against Dyer & Driggs, a firm composed of H. L. Dyer and H. G. Driggs, and against H. L. Dyer individually, for the sum of \$2,521.83. On the 31st day of August, 1887, an execution was issued, conforming in every respect to the above-mentioned judgment, except that it recites a judgment in favor of W. D. Cleveland, instead of W. D. Cleveland & Co., a firm composed of W. D. Cleveland and C. Lombardy. The return on this execution shows that on the 31st day of August, 1887, a levy was made on the house and lot in controversy, as the property of Dyer & Driggs, and that said property was, after having been duly advertised, sold to W. D. Cleveland. On the 4th day of October, 1887, the sheriff executed a deed to W. D. Cleveland, conveying to him the property in controversy, by virtue of the levy and execution aforesaid, a consideration of \$200 being mentioned. Article 2281 of the Revised Statutes of Texas provides that executions shall correctly describe the judgment, stating, among other things, the names of the parties there-

to. There was judgment for defendants, and plaintiff appealed.

McKinnon & Carlton and Jones & Kendall, for appellant. V. H. & Thos. Day, for appellees.

HENRY, J. This was an action of trespass to try title, brought by appellant. The defendant pleaded "Not guilty." The cause was tried by the court without a jury. The conclusions of fact filed by the court show that the plaintiff deraigned his title to the premises as follows: W. D. Cleveland and C. Lombardy, composing the firm of W. D. Cleveland & Co., recovered in the district court of Hill county a judgment for money against Dyer & Driggs and H. L. Dyer. Execution upon the judgment was issued in the name of W. D. Cleveland alone, and levied upon the property in controversy, pursuant to which it was sold by the sheriff, and deeded to plaintiff. The execution was not authorized by the judgment, and the sale and deed made under it cannot be sustained. Rev. St. art. 2281; *Battle v. Guedry*, 58 Tex. 111; *Criswell v. Ragadale*, 18 Tex. 443. The judgment is reversed, and the cause is remanded.

CHESTNUTT v. POLLARD.

(Supreme Court of Texas. April 29, 1890.)

JUDGMENT BY CONFESSION—RECORDS—CORRECTION.

1. Where a judgment is confessed by defendant, who was served with process, and answered, and upon confession was granted a stay of execution, the judgment will not be set aside on the ground that no affidavit of the justness of the debt was filed, as required by Rev. St. Tex. art. 1347, providing that where judgment is rendered by confession the justness of the debt must be sworn to by the person in whose favor the judgment is confessed.

2. The district court has authority, on proper proof, to correct its minutes in any action, even after such action has been removed to the superior court by appeal or writ of error.

Appeal from district court, Clay county.

This action was brought by G. J. Pollard against J. C. Chestnutt upon a promissory note, and to enforce a vendor's lien for its payment. There was judgment for plaintiff, and defendant appeals. Rev. St. Tex. art. 1347, provides that any person indebted, or against whom a cause of action exists, may, without process, appear in person or by attorney, and confess judgment therefor in open court; but in such case a petition shall be filed, and the justness of the debt or cause of action be sworn to by the person in whose favor the judgment is confessed.

J. C. Chestnutt, pro se. James S. Burts, for appellee.

GAINES, J. The appellee instituted a suit against appellant upon a promissory note, and to enforce a vendor's lien for its payment. The number of this suit was 422. Cause No. 409, upon the docket of the same court, was a suit for divorce, in which T. D. Morris was plaintiff, and Joanna Morris was defendant.

The plaintiff in the case first mentioned obtained a recovery, but in entering the judgment upon the minutes the number of the second suit was stated in the style of the cause. The plaintiff in error thereupon sued out this writ of error complaining of the judgment of defendant in error against him, gave bond, and caused a writ of *supersedeas* to issue. He also filed in this court a transcript, which contains the petition, citation, and judgment in cause No. 409, of *Morris v. Morris*, but which embraces neither the judgment described in his writ of error, nor the pleadings in the case in which that judgment was rendered. The defendant in error has filed a full transcript of the proceedings in his case, and has moved the court to consolidate the two proceedings. The latter is evidently a more complete transcript than the former, and therefore the motion is granted.

The plaintiff in error first complains, in substance, that the court erred in rendering judgment against him in a suit in which he was not a party, and in which he had neither been cited nor appeared. This assignment is based upon the theory that, because in the judgment entry the number of another suit was given in the style of the case, it was a judgment in such other suit. The assignment is frivolous. The names of the parties, and the subject-matter of the judgment, in connection with the petition, show that the number stated was a mere clerical error, and identify the case beyond any controversy. Besides, since the writ of error was sued out, upon motion of the plaintiff, the court below has made an order so amending the judgment as to give it the proper number.

It is insisted, however, that, after the jurisdiction of this court attached, the court below had no power to correct the minutes. It is true that after an appeal or writ of error has been perfected the district court has no further jurisdiction in the cause until it be remanded. But a court has authority, upon proper proof, to correct its minutes at any time so as to make them present a faithful record of its action. *Cowan v. Ross*, 28 Tex. 227; *McNairy v. Castleberry*, 6 Tex. 286; *Russell v. Miller*, 40 Tex. 495. The defendant below had notice of the motion, and the entry upon the judge's docket showed conclusively that the amendment was proper. *Ximines v. Ximines*, 43 Tex. 458. We think, however, it was unnecessary.

There is no substance in the assignments of error presented in the brief. But defendant in error has suggested delay, and we have had some difficulty in determining whether we should not reverse the judgment upon the ground that it purports to be a judgment by confession, and that the justness of the debt was not sworn to by the plaintiff. Rev. St. art. 1347. But a judgment by confession is not erroneous for want of an affidavit of the justness of the debt, when the defendant has been served with process. *Gerald v. Burthea*, 29 Tex. 202. No citation and service appear in the transcript; but, since the rules require

that they shall be omitted unless some question is made upon them, we will not assume that process was not issued and served. Rules Dist. Ct. No. 82. The petition was filed February 10th, the answer September 16th, and the judgment rendered October 2d, all in the same year. Besides, the judgment provides for a stay of execution for six months, and shows that it was rendered by agreement. Under these circumstances, if it had appeared that no citation had been served, we should not hold that this was such a confession of judgment as was contemplated by the statute above cited. That provision was made in the interest of third parties, and its object was to prevent collusive judgments upon fictitious debts. It was intended to restrain parties who were pressed by their creditors from appearing in court without process, and confessing judgments, except upon *bona fide* obligations. The facts that the suit was brought long before the judgment, that an answer was filed, and that the judgment is the result not only of the defendant's admission of the correctness of the demand, but of his request for time, show that it was not a judgment by confession, within the provision of the statute. We find no error in the judgment, and it is affirmed, without damages.

ST. LOUIS, A. & T. RY. CO. v. WHITLEY.

(Supreme Court of Texas. April 29, 1890.)

FOREIGN CORPORATIONS—ACTIONS—APPEARANCE—PLEADING.

1. In an action against a foreign corporation, the citation was served upon the corporation, in its own state, by delivery to the president of the corporation. The corporation answered by pleas to the jurisdiction, on the ground of non-residence and substituted service, and, reserving its right thereunder, filed a plea to the merits. *Held*, that its voluntary appearance by plea to the merits was a waiver of the objection to the jurisdiction.

2. Under Rev. St. Tex. art. 1262, providing that the defendant, in his answer, may plead as many several matters, whether of law or fact, as he shall think necessary to his defense, each separate plea is to be tested by its own averments; and it is immaterial that it may be inconsistent with, or contradicted by, the averments of other pleas.

3. Under Acts Tex. 1885, p. 79, providing that foreign corporations doing business in the state may be sued in any county where such company may have an agent or representative, such corporation can be sued only in counties where it has an agency or representative.

Commissioners' decision. Appeal from district court, Grayson county.

Mrs. E. A. Whitley, a resident of the state of Arkansas, brought this suit in the district court of Grayson county against a corporation styled by her the "St. Louis, Arkansas & Texas Railway Company," upon which two citations issued. One was served on a local agent in Bowie county, and the other by leaving it at an office in the state of Missouri alleged in the return to be the principal office of the company named. On June 3, 1887, plaintiff filed an amended petition against two corporations,—the St. Louis, Arkansas & Texas Railway Company in Texas, incorporated under the laws of Texas, and the St.

Louis, Arkansas & Texas Railway Company in Arkansas and Missouri, incorporated under the laws of the state of Missouri. It was alleged that one of these corporations was operating the other, or that there was some joint interest between them, and that S. W. Fordyce was the president of both companies. The suit was brought to recover damages for personal injury alleged to have been received by plaintiff in Monroe county, Ark., in consequence of defendants' negligence in failing to keep lights at the depot, which caused plaintiff to fall over a stump in the path to the depot. Citation issued on the amended petition to the Missouri corporation, which was served in that state by delivering to S. W. Fordyce, a resident of that state, president of the company. The Texas corporation answered by general demurrer, and general and special pleas. The Missouri corporation answered by three pleas to the jurisdiction, and, reserving its rights thereunder, in due order of pleading filed its plea to the merits. The first two pleas to the jurisdiction presented the grounds that, the defendant being a non-resident corporation, owning and controlling no road within the state of Texas, and carrying on its business wholly without the state, and none of its property having been seized by process, and the service being substituted, it was not amenable to the jurisdiction of the court. The third plea presented the ground that at the time the suit was instituted, and at the time of filing the plea, the defendant had an office and agent in the county of Bowie, in the state of Texas, and not elsewhere in said state, and that, if the courts of Texas could acquire jurisdiction of it at all, it could be only the courts of Bowie county. The foregoing statement is taken substantially from appellant's brief, which is sustained by the record. The pleas in abatement were overruled, and the trial without a jury resulted in judgment in favor of the Texas corporation, and in favor of plaintiff against the Missouri corporation for \$1,000. The court filed findings of fact and of law. The court found the pleas to the jurisdiction "on the ground that the defendant is a non-resident not good, because, at the same time with the filing of said pleas, it entered its voluntary appearance in this case by filing its answer to the merits." Rev. St. Tex. art. 1262, provides that the defendant, in his answer, may plead as many several matters, whether of law or fact, as he shall think necessary to his defense, and which may be pertinent to the cause.

Bryant & Dillard, for appellant. *W. W. Wilkins*, for appellee.

ACKER, J., (after stating the facts substantially as above.) The first and fourth assignments relate to the action of the court in overruling the first and second pleas to the jurisdiction, which were put upon the ground that the defendant was a non-resident, and that citation was served upon its president in the

state of Missouri. In the case of *York v. State*, 73 Tex. 651, 11 S. W. Rep. 869, it was held that an appearance in the courts of this state by a non-resident defendant served with citation without this state, even though such appearance is expressly declared to be limited to the sole purpose of presenting a plea to the jurisdiction of the court over his person, is a waiver of his immunity from the jurisdiction of the courts of this state by reason of his non-residence and substituted service without the state, and has the effect to perfect such service. This authority is a conclusive determination against appellant in so far as it contends that the filing of its pleas to the jurisdiction was not such appearance as subjected it to the jurisdiction of the courts of this state, or, more correctly speaking, perhaps it waived its exemption from such jurisdiction by reason of its non-residence and such substituted service.

The only other question presented that we think necessary to consider arises on the action of the court in overruling the third plea, which was put upon the ground that, if defendant was amenable to the jurisdiction of the courts of Texas at all, it could be only in the county of Bowie, where it had its only local agent and representative in this state. The court found the third plea "not good for the reason that it shows on its face that said defendant is not doing business in this state, and therefore does not come within the provisions of the act of March 31, 1885, and, therefore, that jurisdiction as to it can be maintained in any county where personal service can be had, or where it may enter its voluntary appearance." The record does not sustain the construction placed by the court on the plea. It was not stated in this plea that the defendant was not doing business in this state, and the fact that the previous pleas each contained such averment could not be considered in determining the sufficiency of this plea. Each plea must be tested by its own averments, and it is immaterial that it may be inconsistent with, and contradicted by, the averments of other pleas. Rev. St. art. 1262; *Hillebrant v. Booth*, 7 Tex. 499. In the absence of an averment contradicting it, we think the fair inference from the statement that the defendant had a local agent in Bowie county would be that it was doing business in that county; else, why keep an agent there? It appears from the findings of fact that the defendant companies are separate and distinct corporations, operating different lines of road connecting at the line between the states of Arkansas and Texas; that they use a common depot situated about 1,000 feet from the state line in Bowie county, where the appellant has its only local agent in the state of Texas; and that appellants' trains are run over the 1,000 feet of road between the state line and its depot. These facts, we think, bring the case clearly within the provision of the act of March 31, 1885, fixing the venue of suits against foreign corporations doing business within this state.

Acts 1885, p. 79. The first plea questioned the jurisdiction of the courts of the state of Texas in every county, but, in raising and presenting the question, we have seen that it waived the ground upon which it was predicated, and thereby became subject to the jurisdiction of the courts of this state; the appearance having the effect to cure the imperfect service on the defendant in the state of Missouri. Besides this, the appearance had no other effect, and did not deprive the defendant of the right or privilege of being sued in the county where the statute fixes the venue of such suits. If there had been no question as to the validity of the service on appellant, would its right to plead its privilege of being sued in Bowie county be questioned? We think not. The statute of 1885, supra, provides "that foreign * * * corporations * * * doing business within this state may be sued * * * in any county where such company may have an agency or representation." The caption of this statute reads: "An act prescribing and fixing the venue of suits against foreign corporations," etc. We think the evident intent of the legislature was to prescribe and fix the venue of such suits by defining the counties in which they should be brought. "May be sued" in certain defined counties, we understand to mean "may not be sued" in any other. The plea was in the nature of a plea of privilege,—more a plea of venue than to the jurisdiction; and we think it should have been sustained. We do not want to be understood as holding that appellant could have been forced to trial without being allowed an intervening term, if it desired it. Because of the error in overruling the third plea, we are of opinion that the judgment should be reversed, and the cause dismissed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, the judgment reversed, and the cause dismissed.

MILLS v. HERNDON.

(Supreme Court of Texas. April 29, 1900.)

ADMINISTRATORS—APPOINTMENT—RECORD—PRESUMPTION OF REGULARITY.

In an action for the recovery of real estate, where defendant's title was based upon an administrator's sale and deed, the record of the probate court did not show any petition for the appointment of the administrator except the statement, in the order of appointment, that on a certain day the petition came on to be heard. *Held*, that it would be presumed that the probate court had jurisdiction, and that sufficient facts were before the court to authorize the appointment of the administrator.

Commissioners' decision. Appeal from district court, Grayson county.

This suit was brought in the district court of Grayson county on February 15, 1879, by J. P. Mills, as guardian *ad litem* of Sue M., Jessie L., Willie H., Benjamin E., and Nannie H. Toler, minors, against W. S. Herndon, Mary J. Ewell, Jesse Cook, L. M. Hap-

kins, Marion Brown, John Griffin, and E. Bynum, to recover 1,480 acres of land in said county, patented to Charles P. Green, assignee of John Brown, on July 6, 1841. Plaintiffs claimed title under the will of Charles P. Green, devising his estate to his brothers T. J. and N. P. Green, and making the latter his executor; deriving their title through a deed executed by the executor. The defendants, except W. S. Herndon, were in possession of the land, claiming under a lost and unrecorded deed from Charles P. Green in his life-time. W. S. Herndon claimed title under an administrator's sale of the land, in administration upon the estate of Charles P. Green in the county court of Brazoria county, Tex. On a former trial the title of plaintiffs was held invalid, and judgment rendered for defendants. This was reversed on appeal, and plaintiffs' title pronounced sufficient, and the proof of the defendants as to the alleged deed from C. P. Green held insufficient. 60 Tex. 360. On the second trial in the district court, on May 5, 1887, a compromise was made between plaintiffs and defendants, except Herndon, disposing of the matters in controversy between them. Defendant Herndon, however, relied on his title under the administrator's sale, and upon the trial the court held his title good, and directed the jury to return a verdict in his favor; and he had verdict and judgment accordingly. From this judgment the guardian has prosecuted this appeal, assigning as error the action of the court in directing a verdict in favor of the defendant Herndon, because his title was invalid in the particulars pointed out in the several propositions in this brief, all of which fall under one assignment: "*Assignment of Error.* The court erred in its charge to the jury, in instructing them that the defendant W. S. Herndon, by his paper evidence, showed perfect title to himself to the land in question, and that they should find for the said Herndon, because the evidence showed title in the plaintiffs in this suit, and the paper evidence exhibited as showing title in defendant Herndon, was not sufficient, in this: that the transcript from the county court of Brazoria county showed that the administration on the estate of Chas. P. Green, and the administrator's sale under which the defendant Herndon claimed title, were illegal, and insufficient to pass the title of the estate or heirs of said Chas. P. Green to the land in dispute, because said county court of Brazoria county had no jurisdiction to grant administration on the estate of said Chas. P. Green, as by said transcript appears; and said administration and sale were fraudulent and void, as appeared by said transcript; and said county court had no jurisdiction to order the sale of the premises in controversy, as by said transcript appears; and said county court had no jurisdiction or authority to order a sale of the land in controversy for the purposes or in the manner pursued; and the said sale was illegal and void, and such as was beyond

the power of the court to order, as appears by said transcript.

The following statement of the facts proven is equally applicable to each of the five propositions presented under this assignment, and applies as a statement to each. The land in controversy was patented to C. P. Green, by whose will, duly probated upon his death in the state of North Carolina, it was devised to his brothers N. T. Green and T. J. Green; the former being named as executor, who conveyed the land to S. H. Toler, from whom plaintiffs acquired it by inheritance. Defendant Herndon exhibited in support of his claim of title a transcript from the records and papers on file in the county court of Brazoria county, by which it appeared that, on December 26th the following order was there made: "This day came on to be heard the petition of Thomas J. Green, representing that his brother Charles P. Green (who formerly resided in this county, and belonging to the firm C. P. Green & Co., of which he is the surviving partner) died some time in the fall of 1843, leaving some property in Texas, in which the said deceased and the petitioner were jointly interested, and praying that letters of administration on said estate of C. P. Green may be granted to Peter McGreal, Esq.; and it having been proved to the satisfaction of the court that notice of the application has been given for ten days by posting up advertisements, three in number,—one at the court-house door, and two others in said county, not in the same city or town,—for all persons interested to appear and file their objection, and no objections appearing on file, it is considered by the court, ordered, adjudged, and decreed, that letters do issue to the said Peter McGreal upon his entering into bond of the sum of five hundred dollars; and it is further ordered that R. L. Clements, H. O. Wilcox, R. Rudder, and Samuel Harris—two to act—be, and they are hereby, appointed appraisers to make an estimated inventory of said estate." Peter McGreal gave bond in the sum of \$500 on January 8, 1849, and made oath that Charles P. Green died without leaving any lawful will, so far as he knew or believed, and that he would well and truly perform all the duties of administrator of his estate.

No inventory appeared to have been made, or property belonging to the estate discovered, until June 28, 1854, when the administrator presented the following petition to the court: "The state of Texas, county of Brazoria. To the Hon. S. W. PERKINS, Chief Justice of said county: Peter McGreal, administrator of the estate of Chas. P. Green, deceased, respectfully shows that he has discovered, after a great delay and trouble, the following tracts of land belonging to the said deceased, viz., 420 acres of land situated in Fannin county, known as 'Survey No. 75,' patented No. 207, vol. 1, to Chas. P. Green, assignee of William McGill; 480 acres of land situated in Fannin county, known as 'Survey No. 89,' patented No. 216,

vol. 1, to Chas. P. Green, assignee of Wm. Brookner; 960 acres of land situated in Fannin county, known as 'Survey No. 70,' patented No. 215, vol. 1, to Chas. P. Green, assignee of John Brown; 480 acres of land situated in Fannin county, known as 'Survey No. 90,' patented No. 214, vol. 1, to Chas. P. Green, assignee of W. S. Brown; making in all 2,840 acres of land. That said estate is indebted to petitioner for costs of administration and services rendered said estate, and for traveling expenses, \$250; that William H. Hunt, of Fannin county, located said lands under a contract, and claims one undivided third part of the said land, or six and one-fourth cents per acre, with interest, on said premises, for several years, and refuses to deliver up the said patents unless paid or compensated as aforesaid; that taxes for several years are owing on said lands, and petitioner has never had or received one cent for or on account of said estate; and that there is a necessity for sale of the said lands for the purpose of paying the said debts, costs of administration, and taxes. Petitioner prays, therefore, that an order of sale be made by your honor; that said lands be sold in two tracts, viz., two-thirds undivided part of each tract for the payment of said debts, and one undivided third part for the payment of locating fees, and upon all such other order as to your honor may seem just and legal."

On the same day an order of sale was made by said court as follows: "June 28th. This day came on to be heard the petition of Peter McGreal, administrator of the estate of Chas. P. Green, representing that he had procured certain tracts of land belonging to said estate; that said estate was indebted to the said administrator in the sum of two hundred and fifty dollars,—and, arising the necessity of a sale of the said lands, and the court, having considered the allegation in the petition, and being satisfied of the necessity of a sale of the said lands, ordered and decreed that the said administrator sell the following described tracts of land belonging to said estate, viz.: 420 acres of land in Fanning district, Grayson county, known as 'Survey No. 75,' on the south side of Red river, patented on the 5th day of July, 1841, to Chas. P. Green, assignee of Wm. McGill, by patent No. 207, vol. 1; 480 acres of land, Fanning district, Cooke county, known as 'Survey No. 89,' on the south side of Red river, patented to Chas. P. Green on the 7th day of July, A. D. 1841, by patent No. 216, vol. 1, made to said Chas. P. Green as assignee of Wm. Brookner; 960 acres of land in Fanning district, Grayson county, on the south side of Red river, known as 'Survey No. 70,' and patented to Chas. P. Green on the 6th day of July A. D. 1841, by patent No. 215, vol. 1, issued to the said Chas. P. Green as assignee of John Brown; 480 acres of land in Fanning district, Cooke county, on the south side of Red river, known as 'Survey No. 90,' and patented to Chas. P. Green on the 6th day of July, A. D. 1841, by patent No. 214, vol. 1. It is ordered and

decreed that said lands be sold at the court-house door of the county of Brazoria, on a credit of 12 months, the purchaser to give notes with security, and a mortgage on the land to secure the purchase money, and that each of said tracts of land be sold in two parcels,—two-thirds of each tract to be sold to pay the debts and costs, and one undivided third of each tract to be sold for the benefit of the location, on the payment of the location of the said lands,—the proceeds of which to be paid over or assigned to the said Wm. H. Hunt or his legal representative." On June 30, 1854, the administrator gave notice of sale of land belonging to the estate of Charles P. Green, describing the land to be sold as a tract of 480 acres of land granted to said Green as assignee of W. S. Brown by patent No. 214, vol. 1, in Fannin county, on the south side of Red river, known as "Survey No. 90," and giving the metes and bounds of the tract. The notice contained no mention of the tract of land in controversy, nor of any of the other tracts ordered sold. The sale was announced to take place on the first Tuesday in August, 1854, in front of the court-house door in the town of Brazoria, and that the above-described land would be sold in two separate parcels,—one containing two undivided thirds, and the other one-third thereof,—and on a credit of 12 months. On August 2, 1854, an order was entered in the county court of Brazoria county as follows: "This 2d August, 1854, P. McGreal, administrator of the estate of Chas. P. Green, deceased, presented his report and account of sales of the following described lands belonging to said estate, viz.: [Here followed a description of all the tracts embraced in the petition for and order of sale.] Said sales amounting in the aggregate to nine hundred and twenty-nine dollars and sixty cents. The said report and account of sales being sworn to by the said administrator. The court proceeded to inquire into the manner in which said sales were made; and, being satisfied that said sales of said lands were fully, fairly, and legally made, and that James McFadden was the purchaser of said lands, it is ordered and decreed that the same be confirmed. It is further ordered and decreed that the said report and account sales be approved and recorded by the clerk; and it is further ordered and decreed that the said Peter McGreal, administrator of said estate, shall execute and deliver to the said James McFadden titles and conveyances for the said lands, upon the said McFadden complying with the terms of sale." Defendant Herndon also introduced a deed from Peter McGreal, administrator of the estate of C. P. Green, to James McFadden, of date August 1, 1854, and showed, by mesne conveyances from the said McFadden to himself, that he had whatever title said McFadden got by the deed from said Peter McGreal, as said administrator, to said McFadden. Defendant Herndon testified by deposition that he purchased the land in good faith, and paid the

purchase money, \$600, without any notice of a claim by the plaintiffs or any one.

The court instructed the jury as follows: "The defendant W. S. Herndon, by his paper evidence, shows perfect title in himself to the land in question. You are therefore instructed to return a verdict for W. S. Herndon, one of the defendants, against the plaintiffs." Verdict was returned, and judgment entered, in accordance with this instruction.

W. W. Wilkins and A. E. Wilkinson, for appellants. T. J. Brown, for appellee.

HOBBY, J., (*after stating the facts as above.*) As stated in the brief of appellee, the only question in the case is whether the title of appellee is void upon its face or not. This title depends upon a sale made by an administrator of the deceased, under whom appellants claim. Appellants claim that no fact existed that conferred jurisdiction upon the probate court of Brazoria county over the estate of C. P. Green. Upon the former appeal of this cause by appellants, after stating the title under which appellee claims, the opinion set forth the application or petition for administration as recited in the order of the probate court appointing McGreal administrator. The opinion then proceeds to recapitulate the statutory contingencies which must have existed to have authorized administration upon the estate, and disposed of the appeal in the following language: "Owing to the defect in the record, [that is, the absence of the petition for letters of administration except as contained in the order appointing the administrator,] it is sufficient * * * to say that, if upon another trial it does affirmatively appear from the record that the jurisdiction of the probate court did not attach in this particular case, then the proceeding must be considered as void, and subject to collateral attack," etc. 60 Tex. 360. The same record is now before the court as that mentioned in the opinion cited, with reference to the petition or application for letters of administration. It does not appear affirmatively, upon the face of so much of the petition as is embraced in the order of appointment, that the probate court was without jurisdiction. The record is silent, and in that case it will be presumed that the facts were before the court which authorized the administration. It appears from the application for the sale of the land that the estate was indebted, and that the court did not transcend its powers in ordering the sale of the land. Under repeated decisions of the supreme court, the administration in this case is not subject to collateral attack, and it is entirely unnecessary to do more than refer to the cases already well known and familiar. *Alexander v. Maverick*, 18 Tex. 194; *Murchison v. White*, 54 Tex. 82, and cases cited. We think the judgment of the court below should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

DIGNOWITY et al. v. COLEMAN.

(Supreme Court of Texas. April 29, 1890.)

TEMPORARY ADMINISTRATOR—AUTHORITY—PLEADING.

Plaintiff was appointed temporary administrator to sue for the recovery of land belonging to the estate of a deceased person, under Rev. St. Tex. art. 1887. Under section 1880 such temporary appointment ceased to operate at the next regular term of the county court, unless an order was made at that time continuing the appointment. More than one term of the county court intervened between the appointment of plaintiff and the trial of the cause. Held, that defendant could not compel plaintiff to show his authority to prosecute the suit under a general denial or plea of not guilty, but only under a special plea denying plaintiff's authority.

Appeal from district court, Val Verde county.

This action was brought by W. B. Eastman, as administrator of the estate of Alvino Perez, deceased, against A. F. Dignowity and others, to recover certain real estate. Eastman having died, J. M. Coleman was appointed temporary administrator to prosecute the suit. The facts appear in the opinion. Rev. St. Tex. art. 1877, provides that, "whenever it may appear to the county judge that the interest of an estate requires the immediate appointment of an administrator, he shall, either in open court or in vacation, * * * appoint some suitable person temporary administrator." Article 1880 provides that such appointment shall cease to be of force on the day designated for taking up probate business at the first term of the court held next after the date thereof, unless at such term it be continued in force by an order entered upon the minutes.

Clamp & Clamp, for appellants.

GAINES, J. This suit was originally brought by W. B. Eastman, as administrator of the estate of Alvino Perez, deceased, to recover certain town lots, alleged to have been the property of the intestate in his lifetime. Eastman having died, the county judge, during the vacation of his court in April, 1887, appointed appellee temporary administrator of the estate of Perez, with special authority to prosecute this suit. Appellee, by an amended petition, appeared and made himself a party plaintiff, alleging his appointment and authority. The defendant pleaded not guilty, and, upon the issue so joined, the parties, on the 12th of October, 1887, went to trial, and the plaintiff recovered a judgment. The statute provides that an order appointing a temporary administrator shall cease to operate at the next regular term of the county court, unless an order be made at that time continuing the appointment. Rev. St. art. 1880. It will be seen that by due course of law more than one term of the county court must have elapsed between the appointment of the administrator and the trial of the cause.

Appellant's first assignment of error is that "the court erred in overruling the plea to abate the action, and, over defendants' objec-

tion, in permitting plaintiff to introduce in evidence the order of the county judge of Val Verde county, Texas, made in vacation, on October 16, 1886, and the letters of administration thereon issued, appointing J. M. Coleman temporary administrator, to appear and prosecute this suit in the district court of Val Verde county, the said orders and letters of administration being absolutely void. There not appearing at any subsequent term of the county court of Val Verde county, Texas, since October 16, 1886, that the said county court, by an order entered upon the minutes of said court, extended the power of said temporary administrator, and therefore said letters were void, and subject to attack in any proceeding."

If a plea had been interposed denying the authority of the appellee to further prosecute the suit, the question here presented would have been properly before the court for its consideration; but, though the assignment suggests that there was such a plea, there was none in fact filed. An administrator who is plaintiff in a suit cannot be required to prove his authority to prosecute the cause under a general denial or a plea of not guilty. *Cheatham v. Riddle*, 12 Tex. 112. Having gone into trial without having pleaded specially that plaintiff was no longer administrator of the estate of Perez, it was too late for defendants to question his authority. The plaintiff was not required to exhibit his letters of administration, and the defendants were not prejudiced by their admission in evidence.

It is also assigned as error that "the verdict of the jury in finding for plaintiff was directly against the charge of the court, when the court charged the jury that if J. V. Dignowity was shown to have a joint occupancy and interest in said lots with A. F. Dignowity, the defendants, then to find by their verdict for defendants such interest as was thus shown in J. V. Dignowity; the proof fully showing that J. V. Dignowity and A. F. Dignowity were the joint owners and occupants by tenants of said premises." The charge of the court here referred to is to the effect that, if the jury should find that J. V. Dignowity had title to a portion of the lots in controversy, and that the tenants in possession were the joint tenants of A. F. Dignowity and J. V. Dignowity, then they should find for defendants as to the interest shown to be in J. V. Dignowity. The latter was not a party to the suit, but why this charge should have been given we are at a loss to discover. In 1882 the lots were conveyed by Martin, the patentee of the survey, to one Alvino Perez. There were two persons of that name, father and son. The father died in 1883, and appellee is the administrator of his estate. In 1884 a judgment was obtained against the son, and by virtue of that judgment the lots in controversy were sold under execution as the property of Alvino Perez, Jr. The purchaser at that sale conveyed the property to A. F. Dignowity and J. V. Dignowity. Was the

Alvino Perez to whom the lots were conveyed in 1882 the father or the son? is the question which was presented on the trial. If they were conveyed to the father, neither of the Dignowitys had any title, and plaintiff had the right to recover against either or both. The tenants of J. V. Dignowity were in no better position, he not being a party, than they would have been if he had been a defendant in the suit. If the lots were the property of the son, then the father had no title, and his administrator had no right to recover against any person. The jury evidently found that the grantee in the deed from Martin to Perez was the father. There was some testimony tending to show the contrary, but the evidence was amply sufficient to sustain the verdict. The judgment is affirmed.

HUNT v. STATE.

(Court of Appeals of Texas. May 17, 1890.)

ASSAULT WITH INTENT TO MURDER — EVIDENCE — INSTRUCTIONS.

1. On a trial for assault with intent to murder, it appeared that, while the person assaulted had his back turned, and was walking away, the defendant drew a knife and advanced towards him, but was stopped by a third person. The court charged in the language of Pen. Code Tex. art. 489, subd. 8, that the use of any dangerous weapon, or the semblance thereof, in an angry or threatening manner, with intent to alarm another, and under circumstances calculated to effect that object, comes within the meaning of an "assault." *Held*, the charge not being justified by the evidence, it was error.

2. Defendant requested the court to charge the jury that if they "believed that, at the time of the alleged assault, defendant did not use any degree of violence with intent to injure, but was merely making some preparation to defend himself against any real or apparent danger, they should acquit." *Held*, there being some evidence which presented the issue covered by the request, it was error to refuse it.

Appeal from district court, Eastland county; T. H. CONNER, Judge.

Indictment was for assault to murder, and conviction for aggravated assault and battery. The proof shows, in substance, that, while McCarty and Jackson were seated in McCarty's door, talking, McCarty at that time having a pocket knife in his hand, with which he was whittling, the defendant approached, and in a loud, violent, and profane manner denounced McCarty, upon the ground that McCarty had told some person that he (defendant) was a thief; that, while denouncing McCarty, defendant kept his hand in his pocket, working it about as though (according to McCarty) trying to open his knife; that McCarty replied to defendant, "You have come to the wrong man," gestured at defendant with his left hand, and finally got up; that, as he got up, defendant stepped backward two or three feet, when McCarty turned his back on defendant, and walked off; that, when McCarty started off, defendant drew a knife from his pocket, and advanced towards McCarty, but was stopped by Jackson. One witness testified that he struck at McCarty with the knife, but that state-

ment was denied by Jackson. McCarty testified that he did not see the knife drawn. It was shown that defendant was five or six feet distant from McCarty when he drew the knife. The defendant requested the court to charge the jury that if they believe that, at the time of the alleged assault, defendant did not use any degree of violence upon or towards McCarty with intent to injure him, but was merely making some preparations to defend himself against any real or apparent danger manifested towards him at that time by said McCarty, they should acquit.

Truly & Davenport, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. Instructing the jury upon the meaning of the term "coupled with an ability," used in the statutory definition of an "assault," the court told the jury that the "use of any dangerous weapon, or the semblance thereof, in an angry or threatening manner, with intent to alarm another, and under circumstances calculated to effect that object, comes within the meaning of an 'assault.'" Said portion of the charge was excepted to by defendant, and a bill of exceptions was duly reserved. Abstractly, the instruction is correct; it being in the language of the statute. Pen. Code, art. 489, subd. 3. But in our opinion the evidence did not warrant it. It is clear to our minds that, if defendant used the knife in an attempted assault upon McCarty, it was not with the intention to alarm said McCarty, because all the witnesses agree that, before defendant drew the knife from his pocket, McCarty had turned his back upon him, and was walking away from him. Nor was the drawing and attempted use of the knife by defendant, as testified to by the witness Cowart, calculated to alarm McCarty, because he was not in a position to, and did not, see or know of the defendant's act. We are clearly of opinion that said paragraph of the charge is erroneous, because not applicable to or justified by the evidence.

We are also of opinion that special instruction No. 2, requested by defendant, should have been given. It enunciates a correct proposition, and there is some evidence which presents the issue covered by it.

As to other supposed errors presented in the record, we have, after consideration thereof, concluded that the only reversible errors are those above specified; and for said errors the judgment is set aside, and the cause is remanded.

COLE v. STATE.

(Court of Appeals of Texas. May 23, 1890.)

GAMBLING—PUBLIC HOUSES.

1. A school-house is a "public house" within Pen. Code Tex. art. 356, prohibiting the playing of cards in public houses, and is none the less so on a day when there is no school, and the building is temporarily vacant, or being used for other purposes.

2. Where the evidence is sufficient to establish

the fact that the building where the card playing was done was a school-house, as charged in the indictment, it is immaterial that the state was allowed to show, for the purpose of establishing the public character of the building, that on the day in question it was used for religious services.

Appeal from county court, Brown county; R. P. CONNER, Judge.

Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. The charge as set forth in the indictment was that the defendant did, etc., "play at a game with cards at a certain public house, to-wit, a certain school-house, on Stepp's creek, in said county and state, commonly open to the public for educational purposes, and business connected therewith, and where people did then and there resort for purposes aforesaid, and for the purpose of business, recreation, and amusement, and said house being then and there a public place," etc. The evidence fully established that the house where the playing took place was a school-house, built by the public, and used for educational purposes. But the playing was done on a Sunday, and not on a day when the house was used by the public for educational purposes. It was objected by defendant that the state was allowed to prove that said school-house was also used for religious worship, and that religious services were held there on the day of the card playing; the objection being that it was incompetent to give the house a public character by proving it was put to other uses than those alleged in the indictment.

The term "public house," as used in the statute, (Pen. Code, art. 356,) signifies a house commonly open to the public either for business, pleasure, religious worship, the gratification of curiosity, or the like. *State v. Alvey*, 26 Tex. 155. The term "public house" is generic in its character, and is intended by law to include all houses made public by the occupation carried on in them, as inns, taverns, store-houses for retailing liquors, or those made public by the resort of numerous persons, or in any other way. *State v. Barns*, 25 Tex. 654. A school-house is such a public house, and the fact that at times it is not temporarily occupied as such, or that it may be occupied temporarily for any other than school purposes, does not, when temporarily vacant, or when so occupied for other purposes, make it any less a public house during the time it is actually dedicated to school purposes as such. If the house was being occupied during the week for school purposes, it was none the less a public house on Sunday, whether occupied at all, or whether used on that day for religious services. The evidence complained of in the bill of exceptions was immaterial, there being abundant testimony that at the time of the playing the house was a school-house, occupied, used, and resorted to as such. There were no exceptions to the charge of the court, nor to the refusal of the defendant's special requested instructions, and, the case being a misdemeanor, in the absence of exceptions,

the charges will not be revised. *Loyd v. State*, 19 Tex. App. 321; *Comer's Case*, 26 Tex. App. 509, 10 S. W. Rep. 106. Affirmed.

WALKER v. STATE.

(Court of Appeals of Texas. May 7, 1890.)

MURDER—SPECIAL VENUE—INSTRUCTIONS—EXCEPTIONS.

1. Code Crim. Proc. Tex. art. 605, provides for special venues in "capital" cases only. Pen. Code Tex. art. 55, defines "a capital felony" as "an offense for which the highest penalty is death." Article 35 provides that "a person, for an offense committed before he arrived at the age of 17 years, shall in no case be punished with death." Defendant was indicted for murder in the first degree, but the prosecuting attorney admitted in open court that he was under 17 years old. *Held*, that it was not a capital case, and defendant was not entitled to a special venue.

2. While deceased was sitting at the table eating his supper, defendant stepped up behind him, and inflicted the fatal blows. *Held*, that defendant's evidence that deceased was a violent and dangerous man was properly excluded, it being admissible under Willson, Crim. St. Tex. § 1054, only where, at the time of the homicide, deceased did some act indicating his purpose then to take defendant's life, or do him serious bodily harm.

3. A bill of exceptions to a refusal of the trial court to allow defendant to prove his cowardly nature will not be considered where it fails to show the object and purpose of the proposed testimony.

4. Improper and uncalled for remarks by counsel for prosecution in argument are not ground for reversal, where they could not, under the circumstances, have been prejudicial to defendant.

5. Error cannot be predicated of the court's charge that, "unless you believe from the evidence that the defendant struck the deceased with the intent to kill him, or to inflict such serious bodily injury upon him as would probably end in his death, you will acquit him," as it was more favorable to defendant than he was entitled to.

6. The assault having been committed voluntarily, with deliberate design, and with an instrument calculated to inflict serious bodily injury which might, and in fact did, result in death, the crime was murder, and the court properly refused to instruct on the law of aggravated assault and battery.

Appeal from district court, Colorado county; GEORGE McCORMICK, Judge.

Kennan & Mansfield, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. This is the second appeal by appellant to this court. His first was from the refusal of bail on his examining trial. On the appeal in that case it was agreed that the appellant was guilty of murder in the first degree, but that he was under 17 years of age when he committed the murder. It was held that murder of the first degree, committed by a person under the age of 17 years, is not a capital offense, under express provision of article 35 of our Penal Code, and is therefore bailable. *Ex parte Walker*, post, 861.

1. Upon the return of the indictment into court by the grand jury, charging appellant with murder of the first degree, the district attorney declined to apply for a special venue in the case. When, however, the case was regularly reached on the docket, and called for trial, defendant presented a motion in writing, duly sworn to by him, for a special ve-

nuire, under the provisions of article 607 of the Code of Criminal Procedure, whereupon the district attorney stated that he admitted as a fact that defendant was under 17 years of age when he committed the murder, and thereupon the court overruled the defendant's motion for a special venue, upon the ground that he was not entitled to a special venue, the case against him not being a capital case.

Under our Code of Procedure, special venues are only provided for in "capital" cases. Code Crim. Proc. art. 605. "An offense for which the highest penalty is death is a capital felony." Pen. Code, art. 55. Bouvier, in his Law Dictionary, defines a "capital crime" as "one for which the punishment of death is inflicted." Article 35 of our Penal Code expressly declares that "a person, for an offense committed before he arrived at the age of 17 years, shall in no case be punished with death." When the district attorney admitted that defendant was under 17 years, that was an admission that the case was not capital, and that death could in no event be inflicted, notwithstanding he was indicted for and might be convicted of murder of the first degree. The case was not a "capital case," and consequently the court did not err in overruling defendant's motion for a special venue. He was not entitled to one.

2. It was not error to exclude the proposed evidence offered by defendant to the effect that deceased was a violent and dangerous man. Such evidence is only admissible when it is shown that at the time of the homicide the deceased did some act indicating his purpose then to take the life of defendant or do him serious bodily harm. Willson, Crim. St. § 1054. It is shown by the testimony that deceased was sitting at the table eating his supper, and that defendant stepped up behind him, and inflicted the fatal blows upon him.

3. Defendant's third bill of exception complains that the court would not permit him to prove by witnesses that he (defendant) was of a cowardly nature. The bill of exceptions does not show the object and purpose of the proposed testimony, and is too indefinite to demand consideration. *May's Case*, 25 Tex. App. 117, 7 S. W. Rep. 588; *Livar's Case*, 26 Tex. App. 115, 9 S. W. Rep. 552; *Jacobs' Case*, 12 S. W. Rep. 408; Willson, Crim. St. § 2368.

4. The fourth bill of exception was saved to remarks made by the district attorney in his argument to the jury. These remarks were improper and uncalled for. But, as explained by the learned judge in certifying the bill, it is not perceived how the matter, under the circumstances stated, was calculated to injuriously affect the rights of the defendant, and consequently the error as made to appear is not reversible error. Willson, Crim. St. § 2321; *McGill's Case*, 25 Tex. App. 499, 8 S. W. Rep. 661; *Miller's Case*, 27 Tex. App. 63, 10 S. W. Rep. 445.

5. Among other things, the court instructed the jury as follows: "Unless you believe

from the evidence that the defendant struck the deceased with the intent to kill him, or to inflict such serious bodily injury upon him as would probably end in his death, you will acquit him." This charge is complained of as being erroneous. Instead of being a legitimate matter of complaint, the instruction was really more favorable in law than defendant was entitled to. "If a person intentionally inflicts serious bodily injury upon the person of another, which may result in death, although the intent to kill may not exist, the law, if the act was prompted by malice and death ensues, holds him guilty of murder. * * * Indeed, there are a number of cases where a killing would amount to murder, and yet the party did not intend to kill." *White v. State*, 13 Tex. App. 261; *Harrell v. State*, Id. 374; *Gillespie v. State*, Id. 415.

6. It is insisted that the court erred in refusing to give in charge to the jury defendant's special requested instruction upon the law of aggravated assault and battery. Aggravated assault and battery, as an independent offense, was no part of the law of the case. The assault was voluntarily committed, with deliberate design, and with an instrument calculated to inflict serious bodily injury, which might result in death, and which did result in death. Under such state of facts, the law, as we have seen, makes the crime murder. We think the defendant's intent to inflict serious bodily injury, which might probably, and which did, end in death, evidently appears from the facts proved. We have found no reversible error in the record, and the judgment is affirmed.

Ex parte WALKER.

(Court of Appeals of Texas. Dec. 14, 1899.)

MURDER—BAIL—CLASS LEGISLATION.

1. Bill of Rights Tex. § 11, provides that "all prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident." Pen. Code Tex. art. 609, makes murder in the first degree a capital offense; but article 85 provides that one who commits murder in the first degree, while under 17 years of age, cannot be punished capitally. *Held*, that one who is conceded to have committed murder in the first degree, while under 17, is entitled to bail.

2. Pen. Code Tex. art. 85, exempting persons under 17 years old from the death penalty, is not objectionable, as being in the nature of class legislation, and is valid.

Appeal from an order denying a writ of *habeas corpus*, made in chambers by George McCORMICK, Judge of twenty-fifth district.

Mr. Kennon, for relator. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. Appellant is in custody, charged with murder in the first degree, and upon an examination of the case on *habeas corpus* was denied bail, and has appealed to this court. It is agreed that the proof is evident that the applicant is guilty of murder in the first degree. It is also agreed that at the time applicant committed the murder he

was not 17, but was over 16, years of age. Counsel for applicant contends that as, under the law, the applicant cannot be punished with death because he had not arrived at the age of 17 years at the time he committed the murder, therefore the case, as to him, is not a capital one, and he is entitled to bail. "All prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident." Bill of Rights, § 11. A "capital offense" is one for which the highest penalty is death. Pen. Code, art. 55. Murder in the first degree is a capital offense. Id. art. 609. But a person who commits murder in the first degree before he arrives at the age of 17 years cannot, under our statute, be punished capitally; that is, with death. Id. art. 85. Does this statute entitle the applicant to bail? We think it does. As to him, the punishment cannot be death, and his offense is not, therefore, a capital one; for an offense is not capital which may not be punished with death. This statute abolishes capital punishment in all cases where the offender has not, at the time of the commission of the offense, arrived at the age of 17 years. Whenever the death penalty is abolished by law, the offense to which it was attached is no longer a capital one. *In re Perry*, 19 Wis. 376. We conclude that by force of said statute the applicant is entitled to bail.

In an able brief and argument, the assistant attorney general questions the constitutionality of the statute exempting persons under 17 years of age from the death penalty, upon the ground that it is class legislation, and contrary to the principles of our government. We do not regard the statute as obnoxious to this objection. It is not class legislation, within the meaning of that term. *Cooley*, Const. Lim. 487 et seq. As to the policy of the statute, that was for the consideration of the legislature, and it is not within the province of the courts to pass upon it. We believe that the legislature had the power to enact the statute, and that it is a valid law. It is our judgment that the applicant is entitled to bail, and he is granted bail in the sum of \$10,000, upon the giving of which, in accordance with law, he will be released from custody. Ordered accordingly.

MADDOX v. STATE.

(Court of Appeals of Texas. May 28, 1900.)

PERJURY—INDICTMENT.

Defendant, on a trial at which C. was convicted of robbery at a certain time and place, testified that at that time and place he was at another place, D., and there saw C. The indictment for perjury alleged that defendant swore to the above facts on said trial, averred that they were material, and assigned perjury, in that defendant was not at D., but at another place, and therefore could not have seen C. at D. at the time he swore he was there. The indictment further alleged that on the trial of C., his defense being an *alibi*, it was a material issue whether he was at the place of the robbery or at D. *Held* that, the indictment having failed to allege that C. was not at D. at the

time sworn to by defendant, there was no assignment of perjury on a material fact; the allegation that defendant was at another place being only a statement of evidence.

Appeal from district court, Comanche county; T. H. CONNOR, Judge.

Lindsey & Hutchinson, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. This is a conviction for perjury. It appears from the record that W. A. Clark was tried before the district court of Comanche county for robbery. Upon the trial, the state proved by J. A. Taylor, one of the parties alleged to have been robbed by Clark, that the robbery occurred on Saturday, October 6, 1888, about dark, near Adams' ranche, in Comanche county, between four and six miles south-west from Dublin, Erath county. Appellant, Maddox, testified as a witness for defendant on that trial "that, on the evening of the robbery of J. A. Taylor and C. W. Churchwell, he was in Dublin, Erath county, Tex., and saw the defendant, W. A. Clark, in the town of Dublin, Erath county, Tex., about dark, at the butcher shop of Keith & Maddox, in company with his brother, A. A. Clark, at which time they ate some barbecued meat in front of said shop." Upon this testimony the indictment in this case attempts to assign perjury. It alleges that the defendant swore to the above facts on the trial of Clark, averring that they were material, and assigns perjury as follows: "Whereas, in truth and in fact, the said L. H. Maddox was not at that time in the town of Dublin, Erath county, Tex., and could not have seen the said W. A. Clark in said town, but he, the said L. H. Maddox, had left the town of Dublin on the morning of the 6th of October, 1888, in company with other parties to go to the town of Graham, in Young county, Tex., and at the time the said Maddox swore he was in the town of Dublin at dark. * * *" It is not alleged that Clark was not at Dublin at the time stated by Maddox. The issue was whether Clark was at Dublin about dark on the evening of October 6, 1888, and not the whereabouts of Maddox. This is made the material matter of inquiry by this indictment. It says: "Whereupon it then and there became and was a material inquiry before said judge and jury in the trial of said judicial proceeding whether the said W. A. Clark was guilty of having robbed the said J. A. Taylor and the said C. W. Churchwell at the time and place alleged in the indictment as aforesaid, or whether he was not the party who did the robbery, but was at a different place at the time of said robbery, which place was the town of Dublin, Erath county; the defense being an *alibi* on the part of said Clark." Now, it is true that if Maddox was not in Dublin on the evening of October 6th at the time stated by him, he could not have known whether Clark was there at that time or not; and, if the indictment had assigned perjury upon the fact that Clark was at Dublin at the time stated by Maddox, by denying this fact,

proof that Maddox was at another place at that time, to-wit, about dark on October 6, 1888, would have established perjury on the part of appellant, if proof had also been made that Clark was at that time at the place of the robbery. But to allege that Maddox was not at Dublin, but was at another place, was simply pleading the proof of the perjury; and, if this method could be permitted, still, there being no assignment of perjury upon a material fact, such proof would not be admissible for the want of a material issue. But it may be urged that appellant would be guilty if he swore to that which he did not know to be true. This may be so, but the indictment must be framed differently from this. See a form for an indictment in a case in which the perjury is for swearing to some fact or facts which accused did not know to be true, in Whart. Prec. Ind. 308. See, also, Id. 277, for a form for indictment for perjury committed by swearing to an *alibi*. We are of opinion that the indictment is bad, and that the motion to quash the same should have been sustained. The judgment is reversed, and the prosecution ordered dismissed.

Ex parte Cox.

(Court of Appeals of Texas. May 23, 1890.)

INTOXICATING LIQUORS—LOCAL OPTION—ELECTION.

1. Under Rev. St. Tex. art. 3336, (Willson, Crim. St. 120,) relative to local option, providing that no election under the preceding articles shall be held within the same prescribed limits in less than two years after an election under this title has been held therein; but at the expiration of that time the commissioners' court, whenever they deem it expedient, may order another election,—where prohibition has been adopted in a precinct, its subsequent adoption in the same precinct, at an election held more than two years thereafter, but under an order made by the commissioners' court within the two years, will leave prohibition in force, even if the second election is void.

2. Under Sayles' Civil St. Tex. art. 3238, providing that the failure to carry prohibition in a county shall not prevent an election for the same from being immediately thereafter held in a justice's precinct, town, or city of said county; nor shall the failure to carry prohibition in a town or city prevent an election from being immediately thereafter held for the entire justice's precinct or county in which said town or city is situated; nor shall an election in a justice's precinct in any way prevent an election immediately thereafter for the entire county in which such precinct is situated; but, when prohibition has been carried at an election for the entire county, no election on the question of prohibition shall be ordered in any justice's precinct, town, or city of said county until after prohibition has been defeated at a subsequent election held for the entire county; nor in any case where prohibition has been carried in any justice's precinct shall an election on the question of prohibition be ordered thereafter in any town or city in such precinct until after prohibition has been defeated at a subsequent election held for such entire precinct,—if prohibition already existed in a precinct, under an election held for the precinct at the time of an election for the entire county, it would still remain in force in the precinct, though it was defeated as to the entire county.

Appeal from district court, Camp county; J. L. SHEPPARD, Judge.

Sayles' Civil St. art. 3238, provides that

"the failure to carry prohibition in a county shall not prevent an election for the same from being immediately thereafter held in a justice's precinct, town, or city of said county; nor shall the failure to carry prohibition in a town or city prevent an election from being immediately thereafter held for the entire justice's precinct or county in which said town or city is situated; nor shall the holding of an election in a justice's precinct in any way prevent the holding of an election immediately thereafter for the entire county in which such justice's precinct is situated; but, when prohibition has been carried at an election ordered for the entire county, no election on the question of prohibition shall be thereafter ordered in any justice's precinct, town, or city of said county until after prohibition has been defeated at a subsequent election for the same purpose, ordered and held for the entire county, in accordance with the provisions of this title; nor in any case where prohibition has been carried in any justice's precinct shall an election on the question of prohibition be ordered thereafter in any town or city in such precinct until after prohibition has been defeated at a subsequent election ordered and held for such entire precinct."

Todd & Hudgins and E. A. King, for the relator. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. On May 13, 1890, the appellant was indicted for a violation of the local option law which had theretofore been adopted for precinct No. 1 of Camp county. He was arrested upon a *capias* issued upon the indictment; declined to give bail; sued out a writ of *habeas corpus* before the district judge; was adjudged to be legally restrained, and remanded to custody; and from that judgment he prosecutes this appeal. His contention is that local option does not prevail as a subsisting valid law in precinct No. 1 of Camp county for two reasons: *First*, because after its adoption legally at an original election held August 24, 1887, a second election was held in the precinct on August 27, 1889, which second election resulted in favor of local option, but was void because the election was ordered by the commissioners' court in less than two years from the date of the adoption of the law originally; and, *second*, because local option in precinct No. 1 was repealed absolutely by an election legally held on March 1, 1890, throughout the county of Camp, and for the entire county, at which said election local option was defeated for the entire county.

As to the first proposition, we are cited to article 3236, Rev. St., (Willson, Crim. St. 120,) with regard to subsequent elections after local option has once been adopted, which provides that "no election under the preceding articles shall be held within the same prescribed limits in less than two years

after an election under this title has been held therein; but at the expiration of that time the commissioners' court, whenever they deem it expedient, may order another election," etc. The contention is that the statute prohibits the court from ordering a second election until the expiration of two years from the date of the first election. The first election for precinct No. 1 was held August 24, 1887. The order for the second was made by the commissioners' court, before the expiration of two years, and the election was held on August 27, 1889,—just three days after the expiration of the two years. It is insisted that the order, being contrary to and prohibited by law, was a nullity, and that the election held under and by virtue of it was void. Suppose we concede this position to be correct, what then? If the last election was void, then it did not affect the first in any manner, but left local option existing in the precinct under and by virtue of said first election. In either aspect of the case, local option, in our opinion, was still a valid subsisting law in said precinct when the election for the entire county was held on March 1, 1890. Did this election on March 1, 1890, for the entire county, and which resulted in the defeat of local option as to the entire county, repeal the law which was existing at the date of said election in precinct No. 1 of said county? We think not; and such was the construction given by us to the old law. *Whisenhunt v. State*, 18 Tex. App. 491; *Woodlief v. State*, 21 Tex. App. 412, 2 S. W. Rep. 812.

Under the law as it now is since the amendment of April 1, 1887, such construction is, if possible, made more clearly to appear as in harmony with the legislative intention. It is evident to our minds, from the reading of article 3238 of Sayles' Civil Statutes, that the legislature intended that the failure to carry prohibition in an entire county should in no wise affect the rights and interests of the people residing in the justices' precincts, cities, or towns in the county. The failure to carry it in the entire county would leave the *status* of any of these subdivisions of the county just as it was before the county election was held. If local option already existed, it would still remain in force; if it did not exist, the subdivisions could immediately claim another election for their locality without waiting for the expiration of two years. It is only when local option has been carried for the entire county, at an election for the entire county, that such a law takes the place of and supersedes the law of any of the subdivisions of the county. Rev. St. art. 3238; *Dawson's Case*, 25 Tex. App. 670, 8 S. W. Rep. 820. Our conclusion is that local option was legally adopted in precinct No. 1 of Camp county; that it has never been repealed, but is still in full force; and that appellant is amenable for any violation of the same. Affirmed.

WEITZEL v. STATE.

(Court of Appeals of Texas. May 21, 1890.)

INDICTMENT—NAMES—IDEM SONANS.

Where an indictment for theft alleges the name of the owner of the stolen property to be "Fraude," while the name as actually and properly spelled is "Freude," the question of variance should be submitted to the jury; and it is error to rule that the names are *idem sonans*.

Appeal from district court, Goliad county; H. C. PLEASANTS, Judge.

Crain, Kleberg & Grimes, for appellant.
Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. The name of the owner of the stolen property, as written in the indictment, was "Fraude." He spelled his name, and the proper way to spell it was, "Freude." An expert German and English scholar testified that he would pronounce "Fraude" as "Frowdy," and "Freude" as "Froydy," and that, when corrupted, "Freude" was also pronounced "Friday." The learned trial judge held the two names, "Fraude" and "Froydy," to be *idem sonans*, and refused to submit to the jury a special requested instruction asked in behalf of defendant, as follows, viz.: "If the jury believe from the evidence that the name of the party alleged to be the owner of the property alleged to have been stolen is different in sound from the name alleged in the indictment, to-wit, 'William Fraude,' they will acquit the defendant." In the case of *Bell v. State*, 25 Tex. 575, our supreme court say: "Where any question arises concerning the name of the person upon whom the indictment alleges that the injury was inflicted, the practice should be analogous to the practice in the case of a plea of misnomer by the prisoner. The fact should be submitted to the jury, and it would be competent to show, in support of the allegation in the indictment, that the person was as well known by the name used in the indictment as by any other." In that case the judgment was reversed because the judge erred in not leaving the jury to determine as matter of fact, from the evidence, whether the injury was or was not inflicted on the person named in the indictment. Under this authority, the court erred in refusing to give defendant's special requested instruction, and thus submit the question of variance or no variance in the names to the jury, in connection with appropriate instructions explanatory of the rules relating to *idem sonans*. Because of this error the judgment is reversed, and the cause remanded.

BOYD v. STATE.

(Court of Appeals of Texas. May 21, 1890.)

PREVENTING MOVING OF FENCE—CRIMINAL PROSECUTION.

One cannot be convicted under Pen. Code, Tex. art. 495b, of unlawfully preventing another from moving and rebuilding a fence, where there is any doubt, under the evidence, whether the prosecuting witness had the right to move the fence.

Appeal from Comanche county court; C. E. WILLIAMSON, Judge.

Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. This appeal is from a conviction under article 495b of the Penal Code. The charge in the information was that defendant "did unlawfully, and by threatening words, and acts of violence and intimidation, prevent J. Conoway from moving and rebuilding a fence, the property of the said J. Conoway, and situated on the land of said J. Conoway," etc. From the evidence, it appears that the defendant and Conoway were the owners of adjacent tracts of land, and that there was a dispute as to the division line between the two tracts. Defendant refused to permit Conoway to move and reset a fence until the division line had been surveyed and established by competent surveyors; and this is, in fact, the gist and substance of the whole matter. Conoway's right to the line claimed by him was not only doubtful, but the preponderance of the evidence is that the line is not where he claimed it ran, but was in fact as claimed by the defendant. If necessary to go to law, the case is one which should be settled in the civil tribunals. The same rule should apply to the facts here exhibited as applies in certain theft cases, to the effect that, "where the goods were taken under a claim of right, if the prisoner appears to have had any fair color of title, or if the title of the prosecution be brought into doubt at all, the court will direct an acquittal; it being improper to settle such disputes in a form of process affecting men's lives and liberties or reputation." *Evans v. State*, 15 Tex. App. 31; *Harris v. State*, 17 Tex. App. 177. Judgment is reversed, and the cause is remanded, for insufficiency of the evidence.

ARMSTRONG v. STATE.

(Court of Appeals of Texas. May 23, 1890.)

CONVICTION OF ACCOMPLICE—ELECTION OF COUNTS.

1. One cannot be convicted as an accomplice where there is no evidence that the principal committed the crime charged.

2. The state cannot be compelled to elect on which count it will rely where there is proof tending to support both counts.

Appeal from Collin county court; M. G. ABERNATHY, Judge.

H. C. Mack and Abernathy & Beverly, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. Andrew Armstrong and G. T. Armstrong, the appellant, were indicted for the theft of certain *bois d'arc* blocks.—Andrew as principal, and appellant as accomplice. Appellant was tried, and, being convicted, appeals.

There is no proof that Andrew Armstrong stole the blocks, and hence this conviction of G. T. Armstrong is wrong. If Andrew Armstrong was not guilty of fraudulently

taking the property, and G. T. Armstrong, knowing that he had no right to the property, did fraudulently advise, command, or encourage Andrew Armstrong to take the same, he would be a principal, and not an accomplice. If there be doubt as to whether Andrew Armstrong was guilty, then the pleader should charge G. T. Armstrong as principal and as an accomplice; and, if the proof fails to establish Andrew Armstrong's guilt, but shows that G. T. Armstrong did, with a view of stealing the property, advise, command, or encourage Andrew Armstrong to take the blocks, he would be guilty as principal. On the other hand, if the proof shows Andrew Armstrong's guilt, and that G. T. Armstrong fraudulently did advise, etc., Andrew Armstrong to take the blocks, then he would be guilty as an accomplice.

And just here we would state, and emphasize the statement, that the state cannot be compelled to elect upon which count it will prosecute, if there be proof tending to support both counts. Of course, if the evidence fails to support one count, or renders one count more certain than the other, the prosecuting officer will suggest to the jury the count relied on for conviction; or the court may direct an acquittal on one count, and instruct the jury on the other. Because there is not sufficient evidence to establish the guilt of Andrew Armstrong as principal, the judgment is reversed, and the cause remanded.

WREN v. STATE.

(Court of Appeals of Texas. June 14, 1890.)

LARCENY—EVIDENCE—DECLARATIONS.

On trial for larceny, evidence that defendant, while under arrest, on being charged with the theft, and with having changed a \$20 bill in a saloon the preceding evening, at first denied it, but a few minutes later admitted that he got the bill changed, but said that it belonged to another, is inadmissible.

Appeal from district court, Anderson county; F. A. WILLIAMS, Judge.

Defendant was convicted of larceny of \$190 from a safe. Evidence was admitted that, just after defendant was arrested, he was charged with the theft, and with having changed a \$20 bill in a saloon on the preceding evening, which he denied, but a few minutes later admitted that he had had a bill changed, but for another person, to whom it belonged.

Greenwood & Greenwood, for appellant.
Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. It was error to permit the state, over defendant's objections, to prove statements made by defendant while he was under arrest for the theft of which he has been convicted. Said statements were not shown to be admissible in evidence against him under the rules governing confessions. While it is true that this testimony would have been admissible if it had been offered by the defendant, it does not follow

that it is competent evidence against him, when offered by the prosecution. It was his privilege to adduce it, if he desired it. It was equally his privilege to object to it when offered by the prosecution, and it was his right to have it rejected. Said testimony was well calculated, we think, to influence the jury unfavorably to the defendant. Eliminate it from the case, and the inculpatory evidence, as we find it in the record, would not, in our judgment, support the conviction. Because of the error above mentioned the judgment is reversed, and the cause remanded.

STRICKLAND v. STATE.

(Court of Appeals of Texas. June 14, 1890.)

CRIMINAL LAW—EVIDENCE—VENUE.

1. On prosecution for forgery, the forged instrument must be put in evidence, or satisfactorily accounted for; and where the record only shows that it was offered, but not that it was read, it cannot be presumed that it was in evidence.

2. Where the record fails to show that the venue was proved as alleged, the judgment must be reversed.

Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. In a prosecution for forgery, the alleged forged instrument must be adduced in evidence, or its absence must be satisfactorily accounted for by the state. In this case the statement of facts shows that the alleged forged instrument was offered in evidence on the trial, but it is not shown that it was read or otherwise adduced as evidence before the jury, nor is the said instrument set forth in the statement of facts. We cannot assume or presume that it was in evidence. Again, in the statement of facts, there is no proof of the venue of the alleged offense. There is not a particle of evidence showing that, if the forgery was committed by the defendant, it was committed in Tarrant county. There is no material error in the charge of the court, and the objections made thereto, in the absence of exceptions reserved at the trial, do not demand consideration. Because the evidence in the particulars above mentioned is insufficient to sustain the conviction, the judgment is reversed, and the cause remanded.

REED v. STATE.

(Court of Appeals of Texas. May 28, 1890.)

RAPE—INDICTMENT—LIMITATIONS.

An indictment for assault on rape, which alleges that the offense was committed "on or about the 8th day of December, one thousand eight hundred and nine," is substantially defective, under Code Crim. Proc. Tex. art. 420, subd. 6, providing that the date alleged must not be so remote that the prosecution of the offense is barred by limitation.

Appeal from district court, Eastland county; W. KENNEDY, Judge.

Defendant was convicted of an aggravated assault, under an indictment charging assault to commit rape. Code Crim. Proc. Tex. art. 420, subd. 6, provides that the time mentioned in an indictment must be some date anterior to its presentment, and not so remote that the prosecution of the offense is barred by limitation.

Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. As alleged in the indictment, the time of the commission of the offense was "on or about the 8th day of December, one thousand eight hundred and nine." Because the time mentioned is so remote that the prosecution is barred by limitation, the indictment is defective in matter of substance. Code Crim. Proc. art. 420; Willson, Crim. St. § 1954. Wherefore the judgment is reversed, and the prosecution is dismissed.

FINLAN v. STATE.

(Court of Appeals of Texas. May 31, 1890.)

BURGLARY—EVIDENCE—INSTRUCTIONS.

1. An indictment for burglary, which charges a breaking and entry by means of force, is good, whether the offense was committed in the day-time or night-time.

2. Evidence to support such an indictment must show an entry by the use of actual force applied to the house, though it is immaterial whether the entry was made in the day-time or night-time.

3. Circumstantial evidence alone will not warrant a conviction, when it does not exclude every reasonable hypothesis except that of defendant's guilt.

4. Failure to instruct the jury on the defense of *alibi* is not reversible error, when no objection is made below.

Appeal from district court, Lampasas county; **W. A. BLACKBURN**, Judge.

Mr. Adkins, Mr. McFarland, and Matthews & Word, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. An indictment for burglary which charges a breaking and entry by means of force is a good indictment for either a day-time or a night-time burglary, but the evidence must show that entry was made by means of actual force applied to the house. Carr v. State, 19 Tex. App. 635; Martin v. State, 21 Tex. App. 1. In this case the indictment is good, and the evidence shows that the entry into the house was effected by actual force applied to the building, and it is immaterial, therefore, whether the entry was made in the day-time or the night-time.

No exceptions were reserved to the charge of the court, and no additional instructions were requested. There is but one defect in the charge, and that is it omits to instruct as to the issue of *alibi*, which issue was presented by the evidence. This omission, however, is not a fundamental error, and is not, we think, ground for reversal; it not having been claimed as error in the court below, by a requested charge, exception to the charge, nor in the motion for new trial. Willson, Crim. St. § 2343.

We are of opinion that the evidence does not warrant the conviction. It is wholly circumstantial, and does not, it seems to us, exclude every reasonable hypothesis except that of defendant's guilt. Concede that some of the articles stolen from the burglarized house were traced to his possession, this was after the lapse of two or three weeks from the time of the burglary, and other articles stolen from the house at the same time were found at a place which had been occupied by some one as a camping place. May not the defendant have taken the articles he had from the camping place instead of from the house? May not some other person have burglarized the house, and taken the stolen articles to the camp? We think this theory is as reasonable as that he burglarized the house, carried the stolen property, some of it to the camp, and some of it to another place. It does not appear that he was ever informed of the circumstances tending to show his guilt of the burglary, or that he was called upon, either directly or circumstantially, to explain those circumstances. He proved an *alibi* as to the burglary, but not as to his possession of some of the stolen property. He may have been guilty of taking some of the property from the camp, and yet innocent of the burglary. Feeling, as we do, that the evidence is not sufficiently conclusive of his guilt of the burglary, the judgment is reversed, and the cause remanded.

BROWNLEE v. STATE.

(Court of Appeals of Texas. May 28, 1890.)

Appeal from district court, Lampasas county; **W. A. BLACKBURN**, Judge.

The proof for the state established the disappearance from the range of Skippers certain hogs described in the indictment. Some of those animals were afterwards found in the pen of Hughes, and others in the pen of Hoy. The ear-marks on some of the said animals had been recently changed, and others, originally unmarked, wore McAnnely's mark. It was further shown that the animals found in Hughes' pen were sold to Hughes by defendant, and those found in Hoy's pen were sold by defendant to Hoy. The defense proved absolutely that defendant bought the McAnnely stock of hogs from Hooten, who had purchased them of McAnnely; that they were bought on the range; that the hogs sold by Hooten to defendant wore the McAnnely mark, and were delivered to him as the McAnnely hogs; and that defendant did not mark, or change the mark on, any of them.

A. G. Walker and C. F. Greenwood, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. In the court below, appellant was convicted of the theft of eight hogs, and his punishment was assessed at four months' imprisonment in the county jail, and a fine of \$237. In our opinion, the evidence

as contained in the statement of facts is wholly and totally insufficient to support the verdict and judgment. In fact the verdict and judgment are directly against the evidence. Wherefore, judgment is reversed, and cause remanded.

FOAT v. STATE.

(Court of Appeals of Texas. May 24, 1890.)

BAIL BOND—MAGISTRATE'S RECORDS.

1. Under Code Crim. Proc. Tex. art. 314, requiring an examining magistrate to certify to all the proceedings had before him, failure to certify that bail was required for appearance as a witness is fatal to the enforcement of the bail-bond, and parol evidence of the fact is inadmissible to supply the omission.

2. Under Code Crim. Proc. Tex. art. 318, providing that witnesses may be required by the magistrate, "upon the examination of any criminal accusation before him," to give bail for their appearance, etc., a witness' bail-bond not executed till four days after the examination is concluded, and the examining court has adjourned, and where no order requiring the bond had been entered of record by the magistrate, is void.

Appeal from district court, Parker county; J. W. PATTERSON, Judge.

This appeal was prosecuted from a judgment final against the appellant, Foat, as administrator of G. H. Cooper, deceased, one of the sureties on the appearance bond of J. W. Fansler; the bond binding Fansler to appear as a witness.

B. G. Bidwell and G. A. McCall, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. An examining trial held by J. W. SQUYRES, a justice of the peace for Parker county, was finally disposed of, the prisoner refused bail, and was remanded to jail. The said examining court was finally adjourned on the 8d day of July, 1885. On July 7, 1885, four days after the examining trial ended, the justice of the peace, SQUYRES, required John Fansler to appear before him and give bail-bond for his appearance at the next term of the district court of Parker county, as a witness in the case of the state against J. H. Milliken, and there remain from day to day, etc., to testify as a witness in the case. This bond Fansler executed, with sureties, G. H. Cooper being one of them. Cooper died, and his administrator, the appellant, was made a party defendant. Fansler failed to appear as a witness before the district court when the case was called, after indictment had been returned into court. The case was submitted to the court without a jury. The court gave judgment for the state, and Foat appeals. It appears from the evidence that the magistrate made no record of a requirement that the witness should give bail-bond, but the state was permitted to prove by parol testimony that the county attorney, at the conclusion of the examining trial, requested the magistrate to make such requirement, and the trial judge found that such requirement was then made.

Appellant objected to this parol testimony, and reserved a bill of exception to its admission. We are of the opinion that if the requirement was made it should have been entered in the proceedings of the examining court, and certified as a part of said proceedings. An examining magistrate is required to certify to all the proceedings had before him, and transmit them, etc. Code Crim. Proc. art. 314. Unless the certified proceedings show that bail was required of a witness, we do not think that a bail-bond executed by him can be enforced. Such bond is based upon the requirement to give it, and this requirement is a proceeding in the case examined, and is as much a matter of record as any other proceeding in the case,—as much a matter of record as a requirement that the accused shall give bail. We do not think that parol testimony is admissible to show that such requirement was made, and we hold, therefore, that the court erred in admitting such testimony. It is manifest from the record that the bail-bond of the witness was not executed until four days after the examining trial had been concluded and the examining court had adjourned, and that no order requiring such bond had been entered of record by the magistrate. Such being the case, we hold that the bond was exacted without authority of law, and is a nullity. Code Crim. Proc. art. 318;¹ Canal Co. v. Roberts, 62 Tex. 615. The judgment is reversed, and the proceeding is dismissed.

LYNN v. STATE.

(Court of Appeals of Texas. May 17, 1890.)

CRIMINAL LAW—PROCEDURE—APPEAL.

1. Code Crim. Proc. Tex. art. 415, provides that, when an indictment is presented in court, that fact shall be entered on the minutes, noting the style and the "file number" of the indictment, but omitting defendant's name, unless he is in custody or under bond. Article 435 provides that, in transferring indictments from the district to the county court, the judge shall make an order of transfer, stating the cause transferred, and to what court transferred. Article 437 provides that the clerk of the district court shall deliver the indictment, together with the papers in the cause, to the proper court, accompanying the case with a certified copy of all the proceedings taken therein in the district court, and also with a bill of costs. Held that, there being no other statutory provision as to form, the cause was sufficiently designated in the order of transfer and in the certificate as "The State of Texas v. ——. No. 645."

2. A paper purporting to be a statement of facts signed by opposing counsel, but not authenticated by the trial judge, as provided by Willson, Crim. St. Tex. § 2562, will not be considered on appeal.

Appeal from Coleman county court; J. T. EVANS, Judge.

W. L. Vining, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. This appeal is from a conviction for playing cards in an outhouse

¹This section provides that witnesses may be required by the magistrate, "upon the examination of any criminal accusation before him," to give bail for their appearance, etc.

where people resorted. The prosecution is by indictment presented in the district court, and the case was transferred to and tried in the county court. Defendant pleaded to the jurisdiction of the county court, the ground of said plea being that the certificate of transfer of the cause is insufficient. Said plea was overruled, and defendant insists that this ruling was error.

In transferring indictments from the district to the county court, or other inferior court, substantial compliance with the statute is all that is required. *Brannon v. State*, 23 Tex. App. 428, 5 S. W. Rep. 132; *Coker v. State*, 7 Tex. App. 83. No form is prescribed by the statute for a certificate or other proceeding of transfer. It is provided, merely, that the judge shall make an order transferring the indictment, stating in such order the cause transferred, and to what court transferred, (Code Crim. Proc. art. 435,) and that the clerk of the district court shall deliver the indictment, together with all papers in the cause, to the proper court, accompanying the case with a certified copy of all the proceedings taken therein in the district court, and also with a bill of costs. Id. art. 437. In this case the objection urged to the certificate and proceedings of transfer is that the cause is designated in the order of transfer and in the certificate by number only, thus: "The State of Texas v. ——. No. 645." When an indictment is presented in court, the law requires that the fact of presentment shall be entered upon the minutes, noting the style and the file number of the indictment, but omitting the name of the defendant, unless he is in custody or under bond. Id. art. 415. We see from the last cited provision that there must be a file number upon the indictment in the district court, and this file number is evidently for the purpose of designating and identifying the cause. In our opinion, it is a sufficient description and identification of the cause to state its file number; and we hold, therefore, that the proceedings and certificate of transfer in this cause are in compliance with the statute, and that defendant's plea to the jurisdiction was properly overruled.

There is a paper in the record purporting to be a statement of facts, signed by counsel for the state and the defendant; but it is not authenticated by the approval of the trial judge, and cannot, therefore, be considered. *Willson, Crim. St. § 2562*. There being no statement of facts in the record that we can consider, the alleged errors in the charge of the court, and the refusal of the court to give the charges requested by the defendant, cannot be revised; these errors, if errors at all, not being fundamental. The judgment is affirmed.

CRUMES v. STATE.

(Court of Appeals of Texas. May 21, 1890.)

ROBBERY—INDICTMENT—EVIDENCE.

1. An indictment for assault with intent to rob need not describe the property which defendant

intended to take, nor aver that defendant intended to deprive the owner of the property of the value of it.

2. It was proper to permit witnesses to state their opinion as to the correspondence of tracks found at and near the place of the attempted robbery with the shoes worn by defendant, and a party who was seen with him the night of the offense; also to state their opinion that the hair found on a fence to which the tracks lead was from a horse which defendant was riding that night.

3. The state having proved by an officer that he secured the pistol in evidence from the house of defendant's father a week after the alleged offense, the defense proposed to prove on cross-examination that the father told the officer at that time that defendant did not have the pistol on the night of the offense. *Held*, properly rejected as being hearsay, and no part of the *res gestae*.

4. Whether the father delivered the pistol to the officer voluntarily or not was irrelevant.

5. It was not improper for the prosecuting attorney, in his argument, to comment on the fact that defendant's father was present during the trial, and could have been called as a witness.

Appeal from district court, Collin county; H. O. HEAD, Judge.

This conviction was for an assault with intent to rob Mrs. E. Wooten, and the penalty assessed against the appellant was a term of eight years in the penitentiary.

Mrs. E. Wooten was the first witness for the state. She testified, in substance, that she lived with her husband and six children about two and a half miles from Plano, in Collin county. Her husband left home about 8 o'clock on the night of January 1, 1890, to go to the house of Mr. Brown, about 300 yards distant. About midnight the witness was aroused by two persons calling, "Halloo." She responded by asking what they wanted. They replied by asking if the man of the house was at home. Witness replied that he was not; that he was at Mr. Brown's. They then asked for sleeping accommodations for the night. Witness told them she could not accommodate them, as she had no place for them to sleep. One or the other insisted on being admitted, saying that they were tired, and would sit up all night. They then demanded that the door be opened. Witness got up to open the door, and as she went to the door she saw two men through the window. When she got the door open, she was confronted by a large and a small man, the small man standing behind the large one. The large one had a mask on his face, and a pistol in his hand. As soon as witness got the door open, the large man asked her if she had any money. She replied that she had not a cent. He then demanded a ring he discovered on witness' finger. Witness told him that the ring was given her in childhood by her brother, and that she would not surrender it; that it was of little value at best, as it was only silver. He then said, if it was only a silver ring, he did not want it. About this time the small man asked if any one of the household had any money. Her oldest boy, then thirteen years old, produced a nickel, which he offered the parties; but the large man declined to receive it on the statement that it was the only piece of money in the house. The wit-

ness did not recognize the large man, but she recognized the small one as Will Coleman. The witness was satisfied from its general appearance that the pistol in evidence was the pistol exhibited by the large man at the time he demanded money.

The evidence for the state otherwise shows that the tracks of two men—one being a large, square-toed boot track, and the other a smaller, round-toed shoe track—were found near Wooten's gate, and traced to a point about 100 yards distant, where a horse had been tied. Thence the horse track was traced about 250 yards down the road. The said road ran between two wire fence inclosures. At one place the tracks showed that the horse ran into the wire fence, from which several horse hairs were taken. Persons long familiar with the defendant's noted horse, Wilson, declared it to be their opinion that the hairs taken from the fence were hairs of the said horse; and several witnesses testified that they closely examined the foot tracks, and afterwards, on the examining trial, closely observed the feet of defendant and Coleman, and that it was their opinion that the large boot track followed from Wooten's gate to where the horse had been tied was made by the boots of defendant, and that the shoe track was made by the shoes of Coleman. Several witnesses testified that they saw the defendant's horse, Wilson, on the morning after the alleged offense, and that he then showed to have been cut in two places within the preceding few hours. One cut was across the breast, and the other across the leg; the cuts being such as would probably be made by the horse coming into violent contact with a wire fence. The defendant, with a man riding behind him on his horse, was seen by two or more witnesses in the town of Plano early in the night. Defendant and Coleman were located together at a party about a mile distant from Plano as late as 11 o'clock on that night, when they left together. The attempted robbery occurred about 12 o'clock. Deputy-Sheriff Crabtree testified that he got the pistol exhibited in evidence at the house of James Crumes, the father of defendant, about a week after the alleged offense.

J. M. Pierson and M. H. Garnett, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. In an indictment for an assault with intent to rob, it is not necessary to describe the property which the defendant intended to take, nor is it essential to aver that the defendant intended to deprive the owner of the property of the value of it. In this case the indictment alleges all the elements of the offense, and the exceptions thereto were properly overruled. *Morris v. State*, 13 Tex. App. 65.

It was not error to permit witnesses to state their opinions as to the correspondence of tracks found at and near the place of the

attempted robbery and the shoes worn by defendant, and also the shoes worn by one Coleman, who on the same night of the offense was seen in company with the defendant. Nor was it error to permit witnesses to state their opinions that the hair found on the fence was from a horse which the evidence showed defendant was riding on the night of the offense. As to the admissibility of such evidence, there is no longer any question. *Clark v. State*, 11 S. W. Rep. 374.

Defendant's third bill of exception shows no error. What James Crumes may have said when he delivered the pistol to the officer, as to defendant not having had said pistol on the night of the attempted robbery, was hearsay, and not *res gestæ*. James Crumes was a competent witness; and, if he knew that defendant did not have the pistol on the night in question, he should have been produced to testify to that fact, if defendant desired such fact to be established. Whether or not James Crumes willingly delivered the pistol to the officer was irrelevant to the issue in this case. In this connection, we will say that it was proper to permit the state to show that said James Crumes was in attendance upon the trial, and it was not improper for the district attorney, in his concluding argument, to comment upon the fact, and to argue that said James Crumes could have been placed upon the stand as a witness in behalf of defendant, if the defendant had so desired.

Some exceptions were reserved by defendant to the charge of the court, and defendant requested special instructions, which were refused. We have given the charge of the court a careful examination, and in our opinion it is free from error. It presents fully and correctly the law of the case. The evidence, we think, sustains the conviction; and, there being no error shown in the record, the judgment is affirmed.

KEMP v. STATE.

(Court of Appeals of Texas. May 21, 1890.)

PERJURY—CIRCUMSTANTIAL EVIDENCE.

1. The indictment for perjury alleged that, G. H. having been convicted of assault with intent to murder S. H., defendant, in support of G. H.'s motion for a new trial, made a false affidavit that, a few minutes after the assault, S. H. told him that she was not hurt much, and that on the next day she said that the most that hurt her was her thumb, and that she then proposed to accompany him to a party that night. *Held* that, as bearing on intent of G. H. in making the assault, the statements in the affidavit were material to the issue on the motion for a new trial.

2. Code Crim. Proc. Tex. art. 746, provides that no person shall be convicted of perjury "except upon the testimony of two credible witnesses, or of one credible witness corroborated strongly by other evidence as to the falsity of the defendant's statements under oath." S. H. was the only witness who testified directly to the falsity of defendant's statement, and her testimony was that, if she made the statements, she had no knowledge of it, as she may have made them while unconscious from the

blow inflicted on her. *Held*, that a charge that defendant could be convicted on circumstantial evidence alone was error.

Appeal from district court, GOLIAD county; H. C. PLEASANTS, Judge.

On the trial of the defendant, Kemp, for perjury in the case of the state against Guy Hall, for assault with intent to murder Sarah Hall, Herriman testified that he was informed of the assault upon Sarah Hall by Guy Hall soon after it occurred, and went at once to the scene of the trouble. He then found Sarah Hall lying on the ground, face down, and in an apparently unconscious condition. She had a gash in the side of her head two inches long, into which the witness inserted his finger, causing her to wince. Witness found a stick or club about two and a half feet long, and about as large around as a man's arm. That stick had blood on it. Several parties were on the ground when witness arrived, and the defendant reached the scene a few minutes after the witness did. The witness then sent the defendant, and left himself, in pursuit of Guy Hall, and did not return. Sarah Hall did not utter a word while the witness was with her on that day, but lay like one dead. The witness was under the rule during the trial of Guy Hall, but heard no person during that time, or at any other time, threaten the defendant if he testified in the Hall case. L. A. Parker testified for the state that he was the first person to reach Sarah Hall after she was knocked down. She made several attempts to raise her body upon her elbow, but dropped back. Witness asked her once what hurt her. She raised her head by resting her elbow on the ground, looked at witness, but said nothing. Herriman found the club about 100 feet from the place where Sarah lay. Defendant returned after Herriman sent him after help, and with other persons removed Sarah into her mother's house. Up to that time, Sarah had not spoken a word to anybody. Dr. Lipscomb testified for the state that he reached Sarah Hall at the time she was being taken into her mother's house. He then examined her, and found a gash about two inches long on her head. She appeared to be limp, and was cold. She did not speak while witness was with her. The witness called on the next day, and found Sarah in bed, apparently unconscious. It was not impossible for the woman to have spoken after receiving the blow. Even if rendered unconscious, she might have spoken. In reply to a question by the court, the witness said that when he first saw Sarah Hall, after she was hurt, he thought "she was partially feigning,—exaggerating." In reply to a question by the state, the witness said that upon examination he found the wound to be a more severe one than he first thought it was. The third time witness saw Sarah was four or five days, or perhaps a week, after she was injured, when she came to his office for medicine. The wound was then healing. R. D. Newcomb testified

that he was one of the jury which tried Guy Hall for assault with intent to murder Sarah Hall. Defendant was placed on the stand as a witness by the state, and testified that he knew nothing whatever about the case. Sarah Hall testified for the state that her husband, Guy Hall, struck her on the head early on Monday morning. She knew nothing whatever after receiving that blow until late on the following Friday evening. She did not, so far as she had any knowledge, talk to the defendant after receiving the blow until she recovered. The state next introduced in evidence the motion for new trial in Guy Hall's case, together with the supporting affidavit of the defendant, wherein the defendant set out that Sarah Hall told him a few minutes after she received the blow that she was not much hurt; that he (affiant) thought at the first that Sarah Hall was pretending to be more seriously hurt than she really was; and that, on the day after she received the blow, she told him that "the most that hurt her was her thumb," and proposed to accompany him (affiant) to a party on the night of that day.

Anna Anderson testified for the defense that she reached Sarah Hall soon after she received the blow, and, while standing near the said Sarah, she heard the defendant ask her how she was hurt, to which she replied that she "was not hurt much, except her thumb." Anna McCampbell testified for the defense that she went to see Sarah Hall on the morning after she received the blow. She found her sitting by the fire, and asked her what she was doing out of bed. She replied that she was feeling better. Witness told her to go back to bed; and as, in her effort to walk to the bed, she manifested considerable weakness, the witness helped her. On her way out of the house the witness met Dr. Lipscomb going in. Lizzie Gardner testified for the defense that she visited Sarah Hall on the morning after she received the blow. She was then sitting up. On that evening the defendant came to the house, and Sarah asked him to take her to a party that night, to which request defendant replied that she was in no condition to go to a party.

Code Crim. Proc. art. 746, provides that no person shall be convicted of perjury "except upon the testimony of two credible witnesses, or of one credible witness corroborated strongly by other evidence as to the falsity of the defendant's statements under oath, or upon his own confession in open court."

G. W. L. Fly, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. In the prosecution of Guy Hall for an assault with intent to murder Sarah Hall, the intent with which the assault was committed was an essential issue. Bearing upon this issue, the character, extent, and effect of the injury inflicted upon Sarah Hall was, considering the other evidence in the case, an important inquiry. If the injury

inflicted was slight, the presumption would be that he did not intend to kill her, because he had the power to inflict death, and did not exercise the power. But, if the injury inflicted was serious, the contrary presumption might be reasonably entertained. Any circumstance tending to show the motive or intent accompanying an act is relevant and material where motive or intent is essential to make the act a crime, or to fix the grade of the crime. Defendant's statements to the effect that Sarah Hall's injuries were slight, and that she admitted to him that she was not much hurt, etc., as set forth in the affidavit made by him in support of Guy Hall's motion for a new trial, were, in our opinion, material to the issue made by said motion; and the trial court did not err in so holding in its charge to the jury, and in overruling the motion in arrest of judgment.

By the third paragraph of the court's charge the jury was told that the evidence in the case was wholly circumstantial, and said paragraph then proceeds to explain the rules governing in such cases. This paragraph of the charge authorized the jury to convict upon circumstantial evidence alone. This was error. Under the Code of this State, a conviction for perjury cannot be had upon purely circumstantial evidence which is not virtually direct and positive. Such conviction can only be had upon a confession in open court, or upon the direct, positive testimony of two witnesses, or of one witness corroborated strongly by other evidence, establishing the falsity of the statement assigned as perjury. Code Crim. Proc. art. 746; *Maines v. State*, 26 Tex. App. 14.¹ This error in the charge was not corrected by any other portion of the charge, and was, we think, calculated to prejudice and injure the rights of the defendant, in view of the character of the evidence adduced against him, even conceding that the evidence of the falsity of defendant's statement was not wholly circumstantial. We are not prepared to say, however, that the evidence is not wholly circumstantial; and, if it is, then said paragraph of the charge is manifestly erroneous, and necessarily injurious to the defendant. Sarah Hall was the only witness who testified to the falsity of the defendant's statements, and her testimony was not positive, but inferential; that is, that, if she made the statements imputed to her in defendant's affidavit, she had no knowledge of having made them. She may have been unconscious from the effects of the blow inflicted upon her, and while in that condition may have made said statements. The evidence does not absolutely exclude this hypothesis. We are inclined to consider her testimony as circumstantial only, and to agree with the trial judge that the evidence is wholly circumstantial. Such being the character of the evidence, the jury should have been instructed that they could not convict

upon it. Because of the error in the charge above mentioned, the judgment is reversed, and the cause is remanded.

STATE v. WITTEN.

(Supreme Court of Missouri. June 2, 1890.)

RAPE—SEPARATION OF JURY—INSTRUCTIONS.

1. During the adjournment of one hour after the commencement of a trial on indictment for rape, a juror, without the consent of the court, the defendant, or any officer, left the jury-box and court-room, and for 45 minutes mingled with a crowd, which was excitedly discussing the case, freely expressing their opinions of its merits,—some denouncing and others exonerating the accused. *Held*, his conduct was a violation of section 1800, Rev. St. Mo., prohibiting the separation of jurors during the trial of a criminal action without permission of the court, and a new trial will be ordered.

2. Where, in the trial on indictment for rape, it appeared that the prosecutrix, at the time the offense was alleged to have been committed, made no outcry, and did not complain for more than a year, it is error to refuse to charge that these circumstances should be taken into consideration with all the other evidence in determining the guilt or innocence of the defendant.

Appeal from circuit court, Grundy county; G. D. BURGESS, Judge.

R. A. De Bolt, Geo. Hall, and T. A. Witten, for appellant. The Attorney General, for the State.

BLACK, J. The defendant was indicted, tried, and convicted of rape, in the Grundy circuit court, in the month of March, 1887. The prosecuting witness, Mattie Moore, had been a member of the family of John Witten, the father of defendant, Reece Witten, for five or six years before the outrage, which she says was committed after harvest in 1885. She was then 16 or 17, and the defendant 24 or 25 years old. There were two second-story rooms in the house,—one occupied by her as a bedroom, and the other by defendant. The old folks left home on Friday, and returned on the following Sunday; and the crime, it is claimed, was committed on Friday night. The prosecuting witness says: "Reece came to my door, and said: 'If you don't open the door, I will burst it open.' I opened the door, and he threw his arms around me. He took advantage of me. I told him to go away, and if he did not I would tell the old folks. He said: 'If you do, I will make it damned hot for you.' I cried and fought, and he had his arms around my body. I resisted to the utmost, and did everything I could to get away from him, but could not. He had intercourse with me, and then went back to his room." On cross-examination, she said: "I don't know whether I struck him or not. I did not bite, kick, or pinch him, or call for help. He put his arms around me, and put me on the bed. I tried to push him away with my hands, and then I reached up and got hold of the bed, and tried to pull myself away from him." Her evidence is to the further effect that there

¹9 S. W. Rep. 51.

was no one at the Witten residence that night but herself and Reece; that the next morning she went a half mile to a neighbor's, and got a girl to stay with her; that, after doing up the work the next day, she went back to the neighbor's house, and stayed there that night; that she and defendant had intercourse on frequent occasions during a period of a year thereafter; that she did not think they had intercourse before that Friday night; that she never told any one of what had happened until she left for her aunt's, which was in September, 1886, just before confinement. The evidence of the defendant in his own behalf is an admission of improper relations with the girl for a period as far back as 1884, but a denial of the use of any force on any occasion. Other evidence introduced by him is that in March, 1885, he supposed the girl was in a family way, and confessed his conduct to his father. The alarm proved a false one. At that time, Mrs. Witten accused the girl of misconduct with defendant. She at first denied the charge; but, being told that Reece had confessed, and that she would have to leave, she admitted the charge, and promised to refrain in the future. Mrs. Witten says she next learned of their renewed intimacy in July, 1886. The girl is reported to have said on several occasions, before and after defendant's arrest, that they were equally to blame. The first assertion made by her that defendant used force was made to the prosecuting attorney, which was after the birth of the child.

The defendant's ninth refused instruction is as follows: "If the jury believe from the evidence that, at the time the offense is alleged to have been committed, the prosecuting witness made no outcry, and did not, as soon as an opportunity offered, complain of the offense to others, but concealed it for a considerable length of time thereafter, then the jury should take this circumstance into consideration with all the other evidence in determining the guilt or innocence of the defendant, and whether in fact a rape was committed or not." This instruction should have been given. A concealment of the injury for any considerable time after the woman has had an opportunity to complain, and a failure on her part to make any outcry, where the act is committed within the probable hearing of other persons, are circumstances which will justify a strong, but not conclusive, inference that the act was with her consent, and not by force. 1 Whart. Crim. Law (9th Ed.) § 565; Rose. Crim. Ev. (7th Ed.) 879; 3 Greenl. Ev. 212; State v. Wilson, 91 Mo. 410, 8 S. W. Rep. 870. An outcry and resistance are important elements of evidence, and a want of these circumstances, where they may reasonably be expected, go far to disprove the charge of rape. State v. Cunningham, 12 S. W. Rep. 378. And a concealment of the injury, where there is an opportunity for early disclosure, may lead to a like inference. The evidence as a whole tends strongly to show

that this is one of those cases where there has been a mutual gratification of desires and passions, and that the notion of force on the part of the man, and want of consent on the part of the woman, is an afterthought. No disclosure was made by the woman until discovered to be pregnant, and the first charge of force was made more than a year after the alleged outrage. Under these circumstances, the instruction should have been given. The judgment in the case of State v. Wilson, supra, was reversed alone because a like instruction was not given as it was asked; and we must either overrule that case, or reverse the judgment in this one.

The inference to be drawn from the concealment of the alleged outrage, is, of course, one of fact; and it may be said the jury should be left to make such inference from that and the other facts in the case as accords with their judgment. As a general rule, it is an usurpation of the functions of a jury for the judge to tell them what conclusion or presumption of fact they should draw from one or more given facts. Chouquette v. Barada, 28 Mo. 498; Jones v. Jones, 57 Mo. 138. But the refused instruction does not undertake to tell the jury what inference they should draw. They are only told to take the circumstances recited, if true, into consideration in determining the question of the guilt or innocence of the defendant. Such an instruction is in no sense an invasion of the province of the jury. It is the duty of the judge to aid the jury in coming to a correct conclusion, and there are many cases where it is proper, and a due administration of the law demands the giving of such instructions. Thus it is held to be proper to tell the jury that the opinions of expert witnesses are not conclusive, but they are to be considered with the other evidence. Rose v. Spies, 44 Mo. 20. So the jury may be told that the evidence of the defendant's good character may be considered with the other facts in determining the question of his guilt, (State v. Underwood, 76 Mo. 635;) and that flight of one charged with a crime is a circumstance tending to show guilt. State v. Griffin, 87 Mo. 608. The refused instruction is no more than a fair, cautionary one, and should have been given.

The defendant's fifth instruction relates to the credibility of the witnesses, and is not a fair substitute for the one refused.

Misconduct of the juror Thomas B. Berry is also assigned as a ground for new trial. After the trial had commenced, and during the cross-examination of the prosecuting witness, she became confused, and refused to answer questions,—depressed from the heat of a crowded room, some of the affidavits say; and the court allowed her to leave the room, during which time the court took a recess for about one hour. The juror, without the consent of the court, the defendant, or any officer, left the jury-box, and went down stairs, unattended by any one, into the recorder's of-

fice, where he remained, according to the positive affidavit of the recorder, for the space of 45 minutes. During this time there were many persons in that office discussing the case. Some denounced the defendant, and others exonerated him. There can be no doubt but the conversations and disputes were had in the hearing and presence of the juror, though it does not appear that he took any part in them. He conversed with persons, but not upon the subject of the trial. There appears to have been considerable excitement among the many persons who attended the trial, and opinions were freely expressed. Jurors ought not to become subject to such influences during the progress of a trial. The charge against the defendant was one in which the punishment may be the highest known to the law,—the death penalty. The conduct of the juror was a plain violation of section 1909, Rev. St. 1879. There is no analogy between this case and those of *State v. Collins*, 86 Mo. 248, and *State v. Payton*, 90 Mo. 220, 2 S. W. Rep. 394. The conduct of the juror was more like that of the jurors in *State v. Collins*, 81 Mo. 657, and *State v. Murray*, 91 Mo. 95, 3 S. W. Rep. 397, where this court felt bound to interfere. Here the juror, unaccompanied by any officer, mixed with the excited throng of people who were discussing the issues of the case on trial with much freedom; and such conduct cannot be upheld. The judgment is reversed, and the cause remanded.

BRACE, J., absent. SHERWOOD, J., is of the opinion the judgment should be reversed without remanding the cause. BAROLAY, J., concurs in the result, and RAY, C. J., in all that is said in the foregoing opinion.

QUINN v. KINYON.

(Supreme Court of Missouri. June 2, 1890.)

HOMESTEAD—WIDOW AND MINOR CHILDREN.

Under Gen. St. Mo. 1885, p. 450, § 5, providing that on the death of the head of a family his homestead shall vest in his widow or minor children, or, if there be both, in his widow and minor children, without being subject to deceased's debts, unless legally charged thereon in his life-time; and they shall take therein the same estate of which deceased died seised: provided, that such children shall, by force of this statute, only have an interest in such homestead until they shall attain their majority,—where deceased leaves no widow, the property becomes subject to deceased's debts on the arrival of the children at majority.

Appeal from circuit court, Butler county; C. L. KEATON, Judge.

This is an action of ejectment for a lot of land in Butler county. The pleadings are in usual form, and need not be recited. The material facts are not disputed. S. H. Strout is the common source of title. He died in August, 1873, leaving three minor children, but no widow. The property in dispute was his homestead. His children afterwards became of age, and then conveyed their interest in the homestead property to plaintiff. The

estate of Strout was insolvent, and, there being a deficiency of personal assets for the payment of its debts, the administrator *de bonis non* duly sold the land in dispute to satisfy the unpaid demands. The proceedings for this sale were begun in the probate court after all the children of Strout had become of age, and are conceded to have been regular. Defendant's title is traced through this sale. Her possession since 1885 is admitted. The trial court found for defendant, and plaintiff appealed in due course.

L. D. Grove, for appellant. Geo. H. Benton, for respondent.

BAROLAY, J., (after stating the facts as above.) The rights here in question under the homestead law are governed by the statutes in force in 1873, when S. H. Strout died; that is to say, by the General Statutes of 1865, which declared that, "if any such housekeeper or head of a family shall die, leaving a widow or any minor children, his homestead, to the value aforesaid, shall pass to and vest in such widow or children, or, if there be both, to such widow and children, without being subject to the payment of the debts of the deceased, unless legally charged thereon in his life-time; and such widow and children, respectively, shall take the same estate therein of which the deceased died seised: provided, that such children shall, by force of this chapter, only have an interest in such homestead until they shall attain their majority; and the probate court having jurisdiction of the estate of such deceased housekeeper or head of a family shall, when necessary, appoint three commissioners to set out such homestead to the person or persons entitled thereto." Page 450, § 5. We have often ruled that the same estate passed, by this statute, to the widow as was vested in the homesteader at his death; following, in this regard, the rulings of the supreme court of Vermont prior to the time when these provisions were transplanted from that state here. *Skouten v. Wood*, 57 Mo. 380; *Burgess v. Bowles*, ante, 99.

It is true, as claimed in the able brief of appellant, that the homestead estate passes to all the beneficiaries, whether widow or children, "without being subject to the payment of the debts of the deceased;" but it so passes under the qualifications and conditions contained in the law itself. One of these is the proviso that the "children shall, by force of this chapter, only have an interest in such homestead until they shall attain their majority." It is a fundamental rule of statutory construction that, if possible, effect should be given to all the language of an act, rather than that any part should perish by ascribing a greater and conflicting force to another part. The homestead law should be liberally construed to effect the objects in view in its adoption, but it cannot properly be enlarged by construction to create greater exempt estates than the legislature described in the language used.

We think the minor children in the case at bar took the homestead estate free of liability for the debts of the deceased so long as it remained such homestead, but that the homestead right of each child expired when it attained majority, according to the law in force in 1873, by which this case is controlled.

We have been greatly aided in our investigation of this subject by the pertinent suggestions in the written opinion rendered herein by the special judge who tried the cause. We concur in his conclusion that the plaintiff cannot recover, and accordingly affirm the judgment. All the judges concur, except BRACE, J., absent.

STATE v. BRENT.

(Supreme Court of Missouri. June 2, 1890.)

WITNESS—CROSS-EXAMINATION OF DEFENDANT—ASSAULT.

1. On the trial of indictment for a felonious assault, where defendant is a witness in his own behalf, it is error to require him, upon cross-examination, to answer the question, "Were you not convicted of a felony in this state?"
2. Under section 1655, Rev. St. Mo. 1879, a conviction for a common assault may be had under an indictment for assault with intent to kill.

Appeal from circuit court, Hickory county; W. I. WALLACE, Judge.

C. S. Essex and Amos S. Smith, for appellant. The Attorney General, for the State.

RAY, C. J. The defendant was indicted in the circuit court of Hickory county for assault with intent to kill, and upon trial was convicted, and fined \$100. The defendant was introduced at the trial as a witness in his own behalf, and on cross-examination was compelled, over his objection, to answer the following question: "Were you not convicted of a felony in this state?" The witness answered, "I was." Under numerous decisions, this is reversible error. *State v. McGraw*, 74 Mo. 573; *State v. Rugan*, 68 Mo. 214, and authority cited; 1 Greenl. Ev. §§ 377, 457; *State v. Turner*, 76 Mo. 350; *State v. McLaughlin*, Id. 320; *State v. Porter*, 75 Mo. 171; *State v. Douglass*, 81 Mo. 231; *State v. Lewis*, 80 Mo. 110; *State v. Patterson*, 88 Mo. 88; *State v. Chamberlain*, 89 Mo. 133, 1 S. W. Rep. 145. As the case must go back, we may add that a conviction for a common assault may be had under an indictment for assault with intent to kill, and such seems to have been the result in this case, (section 1655, Rev. St. 1879; *State v. Burk*, 89 Mo. 635, 2 S. W. Rep. 10, and cases cited;) and if, on retrial, the evidence should so justify, an instruction to that effect could properly be given.

We deem it unnecessary to now notice other matters complained of. For the reasons above cited the judgment of the trial court is reversed, and the cause remanded for further proceedings in conformity herewith. All concur, except BRACE, J., absent.

CONSUMERS' GAS CO. OF KANSAS CITY v. KANSAS CITY GAS-LIGHT & COKE CO.

(Supreme Court of Missouri. June 2, 1890.)

INJUNCTION—SLANDER OF TITLE—GAS COMPANY.

A petition for injunction alleged that the plaintiff was a corporation duly organized to manufacture and vend gas; that defendant gas company claimed that its franchise was exclusive, and publicly asserted that plaintiff had no franchise to erect works or sell gas, and threatened to invoke all means possible to prevent it from doing so; that by reason thereof the plaintiff's credit, business, and franchise were irreparably injured. Held, that the facts did not present a ground for equitable relief.

Appeal from circuit court, Jackson county; TURNER A. GILL, Judge.

This case presents for review a ruling of the circuit court, sustaining a general demurrer to plaintiff's petition, from which ruling plaintiff has appealed. The pleading referred to is somewhat lengthy, but enough of it will be recited to indicate the nature of the case it makes, with reference to the questions of law discussed in the opinion of the court: "Plaintiff complains and says: (1) That the Consumers' Gas Company of Kansas City is a corporation * * * under the general law of the state of Missouri, * * * and that the purposes * * * for which said corporation was formed are * * * to manufacture, supply, and vend gas and other illuminating agents, for heating, lighting, or other purposes, in said city of Kansas, state of Missouri." (2) [The petition then alleges the performance of the acts said to be necessary to entitle plaintiff to manufacture, sell, and distribute gas in Kansas City through mains and pipes in its streets.] (3) That the defendant is a corporation created by an act of the general assembly of the state of Missouri, approved February 20, 1865, entitled 'An act to incorporate the Kansas City Gas-Light & Coke Co.;' * * * that said act of the general assembly of the state of Missouri, approved February 20, 1865, did not vest in the defendant, nor has it now, any exclusive privileges for the erection of gas-works, or laying of mains or pipes, or for the distribution and sale of gas in the said city of Kansas; that defendant is the only company which has manufactured and furnished gas in said city, and it now alone so furnishes and manufactures gas. The plaintiff further states that the defendant has, ever since the organization of the said the Consumers' Gas Company of Kansas City, wrongfully and falsely asserted, pretended, and claimed, openly and publicly, an exclusive privilege of establishing and operating gas-works, laying pipes and mains, and vending gas, in said Kansas City, and that it is now publicly and openly asserting, claiming, and pretending the same, and does threaten to, and will, unless restrained by this honorable court, continue to so assert, pretend, and claim. Moreover, the said defendant has, ever since the organization of the said the Consumers' Gas Company of Kansas City, wrongfully and falsely asserted, claimed, and pretended, pub-

hly and openly, that the said the Consumers' Gas Company of Kansas City has no right or franchise to establish or operate gas-works, or lay mains or pipes, or to distribute or sell gas, or to carry on its business in said Kansas City, without which the plaintiff's franchise and charter would be of no force, value, or effect; and the defendant is still asserting, claiming, and pretending the same, and threatens to, and, unless restrained by this honorable court, will, continue to so assert, pretend, and claim; and, moreover, the defendant has, by notice in writing, dated June 12, 1888, notified the plaintiff that it will invoke all means which it may command to prevent the plaintiff from operating gas-works in said Kansas City. The plaintiff states that the said claim, pretensions, threats, statements, and notices of the defendant throw a cloud upon the title and right of plaintiff to its franchises and privileges under its charter and municipal grant; that its credit is thereby impaired, its stock is depreciated, and the usefulness and the value of its charter and franchises and other property are practically destroyed, and the market value of the bonds of the plaintiff, which must be issued in order to construct its works, will be depreciated in value by such acts and doings of defendant, whereby the plaintiff will be greatly hindered in establishing and operating gas-works, laying pipes and mains, and distributing and selling gas in said Kansas City, and the purposes for which its charter and privileges were granted will be defeated, to its great and irreparable injury. Wherefore the plaintiff prays this honorable court: (1) To perpetually restrain and enjoin the defendant from setting up and pretending to possess such exclusive privileges; from impeding or preventing this plaintiff from its full enjoyment of its said rights, privileges, and franchises; and from in any manner casting a cloud over its rights and title thereto, and to the full exercise thereof. (2) Judgment for the costs herein expended. (3) General relief."

BARCLAY, J., (*after stating the facts as above.*) Giving to the petition the construction most favorable to the pleader, it yet states no cause of action for equitable relief. Plaintiff claims the right to manufacture and vend gas to the people of Kansas City, and to adopt the needful and usual measures for that purpose. It asserts that defendant's franchise to make and sell gas in that city is not exclusive, but is claimed to be so by defendant; and that such claim of exclusive right, and of an intention to assert it, is an irreparable injury to plaintiff's credit and business, against the continuance of which an injunction and other proper relief should be granted. As no intimation is thrown out of any insolvency of defendant, we need not consider whether such an allegation would strengthen plaintiff's position on the pleadings. As they now stand, the point in dispute is simply whether or not equity can

properly intervene, by injunction or otherwise, to prevent defendant from asserting a claim of exclusive privilege in the manufacture and sale of gas in the circumstances already described. Plaintiff does not allege that defendant is interfering in any way with the property of the former, further than by making the claim of exclusive privilege or franchise mentioned. As now presented, therefore, the case is an attempt to enjoin defendant from an alleged slander of the title and franchises of plaintiff. As such, it is not one for equitable relief on the facts stated. This question has been so lately and fully considered by a court of high authority, whose views on this point we approve, that we content ourselves with merely citing its opinions on the subject. In them will be found references to many other cases supporting the conclusion we announce. *Whitehead v. Kitson*, 119 Mass. 484; *Boston Diatite Co. v. Florence Manuf'g Co.*, 114 Mass. 69. Whether or not defendant has in fact the exclusive privilege claimed, is not material to the determination of this case. We therefore regard the ruling of the trial court sustaining the demurrer to the petition as correct, and affirm its judgment, in which all concur, except BRACE, J., absent.

HYDE v. McCABE.

(*Supreme Court of Missouri. May 19, 1890.*)

LIBEL—PRIVILEGED COMMUNICATIONS.

Where an affidavit, on a motion to require plaintiff to give security for costs, alleges that affiant believes plaintiff to be insolvent, and plaintiff's attorney files a counter-affidavit, denying the insolvency, and alleging the affidavit in support of the motion was "a corrupt, voluntary, and willful case of false swearing," such averment in the counter-affidavit is not sufficiently relevant to the issue to be privileged. *BARCLAY, J.*, dissenting.

Appeal from St. Louis circuit court.

This case comes here by appeal from a ruling by the trial court, sustaining a general demurrer to plaintiff's petition. The exact case presented will best appear from the petition itself, which is as follows, viz.: "Plaintiff states that he is a deputy-clerk of the circuit court, city of St. Louis; and that in said position and calling, as well as in others of a similar character, he has always been of good name and fame; that as such deputy it was his duty to examine into the matter of the solvency, domicile, and ability of suitors in said court, with reference to the payment of costs of suits instituted by them, and to make affidavit of the result of his said examination and inquiry, to be filed in support of motions made by the sheriff and said clerk in said suits for security for costs, under rule No. 4 of said court, which rule constituted such affidavits sufficient evidence to support said motions, in the absence of any counter-affidavits controverting the same; but that, upon the filing of such counter-affidavits, the issue of facts thus presented should be determined by the court; that, in the discharge of his duty aforesaid, he examined into the sub-

ject-matter of the motion of said clerk, and of the sheriff of said city, filed in the case of Charles D. McClure v. F. Kerens, then pending in said court, wherein said court was asked to enter a rule against the plaintiff, requiring him to give security for costs in said court, on the ground that he was insolvent, and so unsettled as to endanger the officers of said court, with respect to their legal demands; that in support of said motion, and in pursuance of his duties, plaintiff made and filed an affidavit in said case, wherein he stated that he had examined into the subject-matter of said motion, and that the facts as aforesaid stated in said motion were true, to the best of his knowledge and belief; that afterwards, on or about the 24th day of November, 1886, the defendant, being an attorney of said McClure in said case, verified, signed, and filed his counter-affidavit, wherein he states (as he was privileged to do, if supported by sufficient evidence) that said McClure was not insolvent, and that he was possessed of large means, a portion of which consisted of real estate on Broadway and Washington avenue, St. Charles and Vandeventer place, in St. Louis, and that plaintiff had never examined into the subject-matter of said motion; but the defendant, maliciously intending and craftily contriving to injure and damage this plaintiff in his good name and fame, falsely and maliciously incorporated into his said affidavit, signed and sworn to as aforesaid, and as the concluding language thereof, the following false, malicious, and unprivileged accusation against this plaintiff,—that is to say: ‘But that the affidavit of said Hyde is a corrupt, voluntary, and willful case of false swearing;’ meaning that this plaintiff, in his affidavit aforesaid, was guilty of corrupt, voluntary, and willful perjury. Plaintiff states that he has been greatly injured in his said occupation and calling, and in his good name and fame, as an officer and as a citizen; that said false, unprivileged, and unwarranted charge on the files of said court has become known to the public; that it will embarrass and cripple this plaintiff in his aspirations and aims to obtain an honest livelihood, and achieve an honorable success in the affairs of life, through all time to come. Wherefore plaintiff prays damages for the wrongs aforesaid, in the sum of ten thousand dollars, and for costs.”

J. J. & Henry D. Laughlin, for appellant.
Sim. T. Price, Wm. C. & Jas. C. Jones, and
F. X. McCabe, for respondent.

BARCLAY, J., (*after stating the facts as above.*) 1. It will be seen at a glance, from the statement of the case, that plaintiff's claim rests upon the supposed liability of defendant for alleged defamatory matter, contained in an affidavit of the latter filed in resisting an application for a rule for security for costs, in a cause between strangers in the present action. Plaintiff was the deputy circuit clerk who made the original affidavit

in support of the motion for security for costs, in response to which defendant's affidavit, herein complained of, was filed. Defendant here was the attorney of record in the other cause for the plaintiff therein against whom the rule for costs was prayed. The exact terms of the alleged defamatory matter appear in the petition, a copy of which is part of the statement preceding this opinion. For reasons of public policy, there are many occasions on which a written or spoken expression of opinion or statement of facts, otherwise defamatory, is not ordinarily actionable as a libel or slander. This case does not require the enumeration of all such instances. They are usually classified by text-writers under the head of “Privileged Statements.” Many of them arise in the course of judicial proceedings. Some utterances made in such proceedings are protected by a shield of absolute privilege, interposed from time immemorial by the rules of the common law, to secure the free and fearless conduct of such proceedings. Others are privileged in a lesser degree, and, upon a proper showing of certain facts, the protection of privilege may be removed. We shall not attempt a detailed statement of the principles governing this subject, further than may be necessary to the precise case in hand. Owing to the differences of opinion among the judges who have construed, from time to time, the common law regarding it, great difficulties arise upon any attempt to properly classify privileged occasions with reference to the rules applicable to each. We refrain from any such attempt. Certain principles, however, are sufficiently well established by authority to furnish a rule of decision in the present case. We will endeavor to limit this opinion to a declaration of them. The general rule is that an affidavit filed in the course of judicial proceedings is not actionable as libelous if fairly relevant to the issue, or responsive to some fact apparently bearing on the issue to which it is directed, assuming, of course, that the court has jurisdiction in the premises. If an irrelevant charge, otherwise libelous, is contained in such an affidavit, it may be the basis of an action for libel if shown to have been maliciously made, without an honest belief that it was relevant to the issue, based upon reasonable grounds for such belief. The nature of the irrelevant charge itself (with reference to the actual issues in the case wherein it occurs) may sometimes furnish evidence of the want of such belief, but where it does not the question of affiant's belief in the relevancy of the charge becomes, generally, one of fact to be determined by the triers of the facts. No action for libel can be maintained upon a charge contained in an affidavit filed in such a proceeding, where the charge is either relevant to the issue, or is believed (upon reasonable grounds) to be so by the affiant. Whether any other action will lie for a false charge so made, if instigated by malice and without probable cause,

is a question not now before us. In the case at bar it will be observed that the affidavit of defendant, which forms its groundwork, contains—*First*, a denial of the allegations of fact in the motion for security for costs; and, *secondly*, a charge that the affidavit of the plaintiff here, supporting that motion, was a "corrupt, voluntary, and willful case of false swearing."

2. A majority of the members of the court are agreed that the defamatory matter in question, contained in the second part of the affidavit, is not sufficiently relevant (to the issue raised by the motion) to afford a privilege to affiant; that, consequently, the question whether or not the affiant made such charge maliciously, without believing it to be relevant, and without reasonable or probable grounds for such belief, is one of fact, which should have been submitted for trial if denied by the defendant; and that the allegations of the petition herein sufficiently and fairly present a theory for a recovery by plaintiff, if established by his evidence. Taking this view of the case, a majority of my brethren are agreed that the demurrer should have been overruled; that the judgment should be reversed, and the cause remanded for a new trial. From that result my respectful dissent is entered, on the ground that the matter in the affidavit was sufficiently relevant to the issue to preclude an action for libel; but the principles stated in the first part of the opinion, down to paragraph the second, meet my entire concurrence, and the point of difference between us does not appear to call for any further comment, at present, on my part. In accordance with the views of the majority of the court, the judgment is reversed, and the cause remanded.

RAY, C. J., and BLACK and BRACE, JJ., concurring; and SHERWOOD, J., expressing no opinion.

CHOUTEAU v. BOUGHTON.

(*Supreme Court of Missouri. May 19, 1890.*)

TRESPASS—TRUSTS—ACTIONS—PARTIES—EVIDENCE.

1. Where a trespass is committed on land conveyed to trustees to secure bonds pending foreclosure proceedings, and the land does not sell for enough to pay the bonds, and is purchased by the bond-holders, they may sue for the trespass, under Rev. St. Mo. 1879, § 3463, providing that every action shall be prosecuted in the name of the real party in interest, except as provided by section 3463, which declares that the trustee of an express trust may sue in his own name without joining the *cestui que trust*, and that the trustee of an express trust shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another.

2. In an action for trespass on plaintiff's land, where the affidavit in attachment alleges that the injuries complained of arose from the commission of some felony or misdemeanor, evidence that defendant, representing himself to be the agent of a third person, from whom he had no authority, sold timber on the land, and collected the proceeds, that the timber was cut and carried away under such sale, and that defendant indorsed the trespass, is admissible under Rev. St. Mo. 1879, § 1859,

which makes it a misdemeanor for one to cut down or carry away any trees on land not his own.

3. Since a cause of action for a trespass on land will survive and pass to the personal representative, under Rev. St. Mo. 1879, § 96, it is assignable.

Appeal from circuit court, Stoddard county; JOHN G. WEAR, Judge.

Houck & Keaton, for appellant. *T. H. Mauldin*, for respondent.

BLACK, J. This is an action of trespass, brought by Charles P. Chouteau against George N. Boughton, to recover treble damages for cutting and carrying away trees and timber from the described lands, situate in Stoddard county. The trespass is alleged to have been committed on the 1st of September, 1879, and at divers times since that date. The suit was commenced on the 14th August, 1889. The affidavit for an attachment sued out in aid of the action states that the amount which the plaintiff ought to recover is \$9,000, single damages, and that he has good reason to believe, and does believe, that the damages for which the action is brought are for injuries arising from the commission of some felony or misdemeanor by the defendant, as set forth in the petition. To this affidavit the defendant filed a plea in abatement. The trial thereon resulted in a verdict and judgment for defendant, and the plaintiff appealed. The errors assigned are (1) the exclusion of evidence offered by the plaintiff; and (2) the giving of an instruction which directed a verdict for the defendant.

The evidence shows that on the 23d of May, 1857, the Cairo & Fulton Railroad Company executed a deed of trust to three trustees, namely, John Moore, John Wilson, and A. G. Waterman, thereby conveying to them the lands in question, and a large amount of other lands and railroad property, to secure the payment of bonds. Joseph C. Moore and George H. Bridges, as administrators of G. M. Patterson, E. O. Reed, Henry E. Seelye, and Charles P. Chouteau, the present plaintiff, owned the bonds, and were the only beneficiaries in the deed of trust. The deed of trust contains a provision to the effect that the lands shall be deemed to be in the legal possession of the trustees. The deed of trust was foreclosed by a decree entered in this court in October, 1881; and the commissioner then appointed by this court sold the lands in question to Charles P. Chouteau, who received a deed therefor dated 26th of October, 1882. The debt evidenced by the bonds amounted to over \$400,000, and the sale of the entire property specified in the deed of trust left a large unpaid balance. The bill of exceptions states that plaintiff offered in evidence a writing whereby the administrators of Patterson and Reed and Seelye assigned to the plaintiff the right to sue for, and recover for, any and all trespasses which had been or might be committed on the lands in question, which assignment was excluded by the court. The date of the assignment is not stated. The plaintiff then offered to show by

a number of witnesses that during 1881 and 1882 the defendant sold to different firms and persons timber standing upon the lands; that the timber so sold was cut and taken away, and that defendant received and collected the money arising from such sales; that defendant sold the timber claiming to be the agent of Thomas Allen; but that he had no authority from Allen to sell the same. The plaintiff offered to show further that defendant indorsed the trespasses, collected pay for the timber, and shared in the profits of cutting and carrying away trees, timber, and sawlogs. All of the foregoing evidence was excluded, wherefore the court directed the jury to find for defendant.

1. One of the objections made to the assignment from Reed and Seelye and the administrators of Patterson to the plaintiff, giving him the right to sue for and collect damages arising from trespasses, was that a right in action arising from the commission of a tort cannot be assigned. There can be no doubt but a cause of action for damages arising from a trespass upon real estate will survive and pass to the personal representatives of a decedent. Section 96, Rev. St. 1879. As the cause of action would survive to the personal representatives, it is assignable, though based upon a tort. *Snyder v. Railroad Co.*, 36 Mo. 613. Indeed, the defendant concedes in this court that the assignment should not have been excluded on the ground that a cause of action for such a tort is not assignable. But the defendant insists that the assignment and also the other evidence was properly excluded, because the plaintiff did not have the title to the land until the date of the commissioner's deed, namely, 26th October, 1882, and that the cause of action for trespasses prior to that date accrued to the trustees in the deed of trust, and not to the plaintiff and the other bondholders, and hence they had nothing to assign to him, and he has no cause of action through the assignment, or in his own right. It was held in *Pace v. Pierce*, 49 Mo. 393, that a trustee in a deed of trust upon personal property given to secure a debt had the right to sue for and recover the property even after he had made a sale. It was considered that he had the right to recover the property, to the end that he might turn the same over to the purchaser. And in the more recent case of *Lancaster v. Insurance Co.*, 92 Mo. 460, 5 S. W. Rep. 23, the plaintiff held the title to the property covered by a building as trustee of a married woman, with power to apply the rents to her sole use, and with power to sell. We held that the trustee could maintain a suit for damages done to the house though the suit was not commenced until after he had sold the property. From these and other cases, the defendant insists, the trustees, and the trustees alone, can maintain this action; and he cites *Myers v. Hale*, 17 Mo. App. 205, which perhaps gives some counte-

nance to the claim. But it does not follow, because the trustees could maintain this suit, that the beneficiaries in the deed of trust cannot. The practice act (Rev. St. 1879, § 3462,) provides that every action shall be prosecuted in the name of the real party in interest, except as provided in the next section; and that section declares that a trustee of an express trust may sue in his own name without joining with him the person for whose benefit the suit is prosecuted. The same section declares that a trustee of an express trust shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another. Under these sections of the statute, it has been held on several occasions that where the contract is made in the name of one person for the benefit of another the suit may be either in the name of the trustee, or in the name of the beneficiary. Either may sue. *Rogers v. Gosnell*, 51 Mo. 466; *McComas v. Insurance Co.*, 56 Mo. 578; *Snider v. Express Co.*, 77 Mo. 523; *Bliss*, Code Pl. §§ 45, 46. A mortgagee is entitled to recover damages for permanent injuries done to the mortgaged land by third persons, and until the debt is paid his right to such damages is superior to that of the mortgagor. 1 *Jones*, *Mortg.* (4th Ed.) § 695a. The alleged trespasses were committed while the suit of foreclosure was pending, and were continued after a final decree had been entered by the supreme court, and the property did not sell for enough to pay the bonds. The beneficiaries are few in number, and are the real parties in interest. A judgment on the merits in their suit, or that of their assignee, would bar an action by the trustees. It follows from what has been said that the beneficiaries or their assignee may maintain this suit, though the trespasses were committed before the date of the commissioner's deed to plaintiff.

2. This much has been said on the questions before considered because they are the only questions urged in defendant's brief, and because they must arise on a trial of this case on its merits. It is deemed proper, however, to say that the only question of fact which does or can arise on the trial of the plea in abatement is whether the damages sued for are for injuries arising from the commission of some felony or misdemeanor. The merits of the plaintiff's case as stated in his petition are not the subject of inquiry on the plea in abatement. On this issue the assignment was irrelevant, and for that reason properly excluded; but the other excluded evidence tended to show that the trespass was one made a misdemeanor by section 1359, Rev. St. 1879,¹ and should have been received. The judgment is therefore reversed, and the cause remanded for new trial. All concur.

¹Section 1359 makes it a misdemeanor for one to cut down or carry away any trees on land not his own.

JOHNSON v. MILLER.

(Court of Appeals of Kentucky. May 22, 1890.)

VENDOR AND VENDEE—BOND FOR TITLE—BREACH.

The price of two pieces of land, containing 20 and 30 acres respectively, was \$1,000 on March 1, 1886, or on taking possession; the payment of two \$300 notes owing by the vendor to his grantor, which were a lien on the 20-acre tract; and an amount sufficient to make the price \$3,900 one year from the date of sale. On or before March 1, 1886, "a good and sufficient deed" was to be given; but, owing to a prior mortgage sale of the 30 acres, the vendor was unable to give it, and one was never tendered. Vendee paid one of the \$300 notes, and one of \$426.88, embracing a settlement of the other, which had been retained to hold the lien, and took an assignment of all three. He then sued to enforce the lien of the \$300 notes against the 20 acres, and to reduce the other note to judgment. *Held*, that the purchaser was not required to make the \$1,000 payment, and take the risk of his vendor being unable to procure and convey a good title, and the failure so to do constituted no defense to the actions; and an order setting aside the sale as to the 30-acre tract, and affirming it as to the other, and judgment for a balance due on accounting, being satisfactory to vendee, was proper.

Appeal from circuit court, Boone county.

"Not to be officially reported."

S. W. Tolin, for appellant. Collins & Fenley and J. J. Landram, for appellee.

HOLT, J. In 1883, J. T. Black conveyed to the appellant, J. L. Johnson, about 20 acres of land for \$1,000, of which \$400 was then paid, and for the remaining \$600 Johnson executed his two notes for \$300 each; the one payable to his vendor, and the other to the vendor's wife. The deed retained a lien for their payment. J. M. Baker became the owner of one of the notes, and the other was transferred to Stewart Baker. Johnson also owned about 30 acres of land adjoining the 20 acres, making about 50 acres in all, and in December, 1885, he sold it all by title bond to the appellee, W. R. Miller, for \$1,900; the latter agreeing to take up the two notes held by the Bakers in part payment, also to pay \$1,000 on March 1, 1886, or when possession should be given, and the balance in a year from the time of the purchase, "a good and sufficient deed" to be made to Miller on or before March 1, 1886. Possession of the land was given, and Miller paid off the Black notes. Prior to doing so the appellant and Stewart Baker had a settlement, and, counting the Black note, the appellant fell in debt to him in the sum of \$426.88, for which he executed his note to Baker, and, as it was not secured by a lien, the latter continued to hold the Black note; it being agreed that, when the new note should be paid, both notes should be given up to the appellant. The appellee paid not merely the amount of the Black note held by Stewart Baker, but that of the new note that had thus been given to him by the appellant; and Baker assigned both notes to the appellee. No deed being made or tendered to the appellee, and the Black note, held by J. M. Baker, having also been assigned to him, he brought an action against the appellant upon the two \$300 notes to en-

force their payment, claiming a lien upon the 20 acres of land which Black had sold to the appellant. He also brought an ordinary action against the appellant upon the \$426.88 note, which by consent was transferred to equity. The appellant also sued the appellee upon an account before a justice of the peace. A set-off in the form of an account was pleaded, and this action, after judgment by the justice, was appealed, and it by consent, also, was transferred to equity; and all three actions were consolidated, and tried together. The two first above named were defended upon the ground that the appellee, in paying off the notes of the appellant, had merely paid that much upon the purchase of the land. The \$1,000 of purchase money was also asserted as a counter-claim. The appellee replied that prior to the sale to him the 30-acre tract of land had been mortgaged by the appellant to three certain parties, jointly, for \$3,000; that they by suit, in 1886, enforced their mortgage, had the land sold, purchasing it themselves; and that it had been conveyed to them by the court. All this is shown to be true. The judgment below set aside the sale of the 30-acre tract because the appellant could not make title. It confirmed the purchase of the 20 acres, as the appellee was willing to take it, charged him with the price of it according to the price he had agreed to pay for the entire land, credited him by what he had paid to the Bakers for the appellant, adjusted the accounts between them, finding a balance due the appellee of \$36.18, for which it rendered judgment in his favor; and Johnson has appealed.

His chief complaint is that, if the appellee had paid him the \$1,000 upon the 1st of March, 1886, he would have released the mortgage lien, as the mortgagees had agreed to accept it, and release their lien upon the land sold the appellee, and that he could then have made him a good title. It is conceded that no deed was ever tendered to the appellee. A part of the land being mortgaged, he could not make a good title; and this part of it had in fact been sold, and the title passed away from him by virtue of the mortgage. It is urged, however, that the contract to pay the purchase money and that to convey were mutual executory contracts not dependent upon each other, and that a failure to comply with one by one party is not a defense to non-compliance with the other by the other party. This argument is not, however, applicable to this case. Here the land has been in fact sold, and the title passed to another, by virtue of a lien created by the appellant prior to the sale by him to the appellee. The title bond given to the latter does not make the payment of the purchase money a precedent act to the conveyance of the land. When the time arrived by virtue of its terms to make the deed, and also to pay the \$1,000, the appellant could not in fact make a good title to the land. The purchaser was not required to pay, and take the

risk of the vendor discharging the lien, even if he could have done so. The evidence shows, however, that while two of the mortgagees were willing to take the \$1,000, and release their lien upon the 30 acres of land, yet they had never agreed with the appellee to do so, and the third mortgagee refused to do so unless their entire debt was paid. Under these circumstances, the claim by the appellant that the appellee cannot rely upon his inability to make title because of the non-payment of the \$1,000 of purchase money falls to the ground. Moreover, it appears that the 30 acres was also incumbered by a potential dower right.

As to the various accounts between the parties, the evidence is conflicting. Their determination involved issues of fact, and the judgment below will not, therefore, be disturbed. It is at least so far sustained by the evidence as to forbid interference by us.

Complaint is made that the appellee had the use of the 30 acres of land during the year 1886, and that he should have been charged for it. An amended answer was tendered on April 13, 1889, setting up a claim for it. The lower court rejected this pleading, and we cannot consider it, because it was in no way made a part of the record. Judgment affirmed.

CHAPMAN v. WESTERN UNION TEL. CO.

(Court of Appeals of Kentucky. June 14, 1890.)

TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE—DAMAGES.

1. A telegraph company which negligently failed to deliver two telegrams announcing the illness, death, and date of the funeral of plaintiff's father is liable to plaintiff in substantial damages for the injury to his feelings, without proof of physical pain or pecuniary loss.

2. The loss of a note which plaintiff avers his father would have given him, had he been able to see him before his death, is a consequence too remote to sustain a claim for damages.

Appeal from circuit court, Marion county.
"To be officially reported."

J. G. Covington and N. A. Porter, for appellant. Wright & McElroy and W. F. Browder, for appellee.

HOLT, J. This is an action against the telegraph company for damages for negligently failing to deliver to the appellant, Joseph Chapman, two telegrams,—the one sent on February 12, 1888, announcing to him the dangerous illness of his father, and the other sent on February 16th, informing him of his death, and when he would be buried. They were sent from Franklin, Ky., to Bowling Green, Ky., a distance of about 20 miles. The appellant then resided in the latter city; and, learning upon the street of the death of father, he called at the telegraph office on February 17th, and received the two telegrams. The jury found one cent, and the cost of the action.

Inasmuch as it must be tried again, we shall not discuss the evidence relating to the

question of negligence. The appellant claims that, by reason of it, he sustained a pecuniary loss, by missing a donation from his father of a promissory note which he says his father would have given him if he had seen him in his last illness, and that he was also damaged in his feelings and affections, by being thereby prevented from attending upon his father in his last illness, and from attending his burial. The claim for the first item of damage was rejected as being too remote for recovery. The second was ruled out upon the ground that damage to the feelings, not blended with physical pain arising from actual injury, or not connected with pecuniary loss, cannot be a subject of recovery. The lower court substantially instructed the jury that the appellant, if entitled to recover at all, was limited to nominal damages.

The company insists that, as the appellant was not the sender of the telegrams, he can maintain no action whatever. The contract under which they were sent, was, however, made for his benefit. He was to be the sole beneficiary. The sender had no interest in them. This the company knew from their character. In such a case the party for whom a telegram is intended may sue the company for negligence as to it. It is said in *Shear & R. Neg. § 560*: "We think, therefore, that upon the principle of these decisions a telegraph company is responsible for its negligence to a person to whom a message is addressed, as well as to the sender. If it were not so, it is obvious that the receivers of telegrams would often receive great damage without any means of redress." This is not the English, but it is the American, rule, and is, in our opinion, supported by reason, necessity, and a proper policy. *Gray, Tel. § 65; Wadsworth v. Telegraph Co., 86 Tenn. 695, 8 S. W. Rep. 574.*

The lower court was correct in rejecting the first item of damage. It was too uncertain and remote. 2 *Greenl. Ev. § 256*, says: "The damage to be recovered must always be the natural and proximate consequence of the act complained of. This rule is laid down in regard to special damage, but it applies to all damage." It does not naturally follow, if the appellant had received the telegram promptly, that he would have received the donation. Perhaps his father would have given him the note. It would not, however, have been a natural consequence of his going to see him. He might and might not have done so. No such loss could have been contemplated by the parties to the sending of the message, if their minds had at the time been drawn to the contingency of its not being properly delivered. Considering the nature of the dispatch, they could not have contemplated that such a loss would arise from a breach of the contract. As well might one claim from a railroad company the amount of a stake in a race upon the ground that, if the train had not been negligently delayed, his horse would have arrived in time, and won the race.

The remaining question is one of some difficulty. It has, upon the state of case now presented, been little before the courts, and but few authorities can be found. Indeed, so far as we have been able to find, but two or three courts of last resort have considered it. One of them has, at least to some extent, varied in its opinion, while the members of another have been divided as to it. It is: Can one, in a case like this, recover damages for an injury to his feelings unaccompanied by any pecuniary loss, or physical suffering from bodily injury? Many of the text-writers say that a person cannot recover damages for mental anguish alone, and that he can recover such damages only where he is entitled to recover some damages upon some other ground. It will generally be found, however, that they are speaking of cases of personal injury. If a telegraph company undertakes to send a message, and it fails to use ordinary diligence in doing so, it is certainly liable for some damage. It has violated its contract; and, whenever a party does so, he is liable at least to some extent. Every infraction of a legal right causes injury, in contemplation of law. The party being entitled, in such a case, to recover something, why should not an injury to the feelings, which is often more injurious than a physical one, enter into the estimate? Why, being entitled to some damage by reason of the other party's wrongful act, should not the complaining party recover all the damage arising from it? It seems to us that no sound reason can be given to the contrary. The business of telegraphing, while yet in its infancy, is already of wonderful extent and importance to the public. It is growing, and the end cannot yet be seen. A telegraph company is a *quasi* public agent, and as such it should exercise the extraordinary privileges accorded to it with diligence to the public. If, in matters of mere trade, it negligently fails to do its duty, it is responsible for all the natural and proximate damage. Is it to be said or held that, as to matters of far greater interest to a person, it shall not be, because feelings or affections only are involved? If it negligently fails to deliver a message which closes a trade for \$100, or even less, it is responsible for the damage. It is said, however, that if it is guilty of like fault as to a message to the husband that the wife is dying, or the father that his son is dead, and will be buried at a certain time, there is no responsibility save that which is nominal. Such a rule, at first blush, merits disapproval. It would sanction the company in wrongdoing. It would hold it responsible in matters of the least importance, and suffer it to violate its contracts with impunity as to the greater. It seems to us that both reason and public policy require that it should answer for all injury resulting from its negligence, whether it be to the feelings or the purse, subject only to the rule that it must be the direct and proximate consequence of the act.

v.13s.w.no.18—56

The injury to the feelings should be regarded as a part of the actual damage, and the jury be allowed to consider it. If it be said that it does not admit of accurate pecuniary measurement, equally so it may be said of any case where mental anguish enters into the estimate of injury for a wrong, and it furnishes no sufficient reason why an injured party should not be allowed to look to the wrong-doer for reparation. If injury to the feelings be an element of actual damage in slander, libel, and breach of promise cases, it seems to us it should equally be so considered in cases of this character. If not, then most grievous wrongs may often be inflicted with impunity; legal insult added to outrage by the party, by offering one cent, or the cost of the telegram, as compensation to the injured party. Whether the injury be to the feelings or pecuniary, the act of the violator of a right secured by contract has caused it. The source is the same, and the violator should answer for all the proximate damages. In *Shear. & R. Neg.* § 605, it is said: "In case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages on account of the want of strict commercial value in such messages. Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings which cannot easily be estimated in money, but for which a jury should be at liberty to award fair damages. Yet in such cases the damages ought not to be enhanced by evidence of any circumstances which could not reasonably have been anticipated as probable from the language of the written message." This seems to us to be the true rule,—one which is in accord with reason, and necessary to a proper protection of individual right, and the interests of the public. The cases of *Stuart v. Telegraph Co.*, 66 Tex. 580, and *Wadsworth* against the same company, *supra*, support this view of the question; and, the instructions of the lower court being *contra*, the judgment is reversed, and case remanded for a new trial consistent with the views herein expressed.

DANFORTH *et al.* v. Moss.

(Court of Appeals of Kentucky. June 7, 1890.)

PARTITION—VENUE.

Civil Code Ky. tit. 10, c. 15, providing that actions for the division of the lands of a decedent, the allotment of dower therein, and sales to pay debts shall be brought in the county in which the greater part thereof is located, has no application to an action for the sale of other lands, which are owned jointly by the heirs of the deceased, and located in another county, and in which there is no right to an allotment of dower. Such an action is governed by Civil Code Ky. § 68, and title 10, c. 14, which provide that an action to sell lands owned by two or more persons jointly shall be brought in the county where the subject-matter, or some part thereof, is situated.

Appeal from court of common pleas, McCracken county.

"To be officially reported."

Hargis & Eastin, for appellants.

LEWIS, C. J. Appellants, heirs at law of E. D. Standiferd, instituted an action in the McCracken court of common pleas for sale of certain land in that county left by him at his death, for the causes and upon grounds provided in section 490, Civil Code; and, all the provisions thereby required having been complied with, judgment was rendered for the sale, which was in pursuance thereof made by commissioner of court,—appellee, Thomas E. Moss, becoming the purchaser. But exceptions, having been filed by him, were sustained by the court, the sale set aside, and the sale-bond quashed, upon the ground the court had no jurisdiction. It appears there had been previously instituted in the Jefferson chancery court, county of E. D. Standiferd's residence, at time of his death, an action for division of the lands left by him among his heirs, and allotment of dower to his widow, and by proceedings had in that action such division and allotment of dower were made of the lands lying in that county. But no disposition was made nor judgment rendered in that action respecting the lands lying in McCracken county, the sale of which is sought in this action. An action for division of land and allotment of dower, which are provided for in chapter 15, tit. 10, Id., must be brought in the circuit or county court of the county in which the land, or greater part thereof, lies, and the court, having acquired jurisdiction for the purpose, might divide or allot dower in lands lying in any other county. But division of land and allotment of dower provided for in chapter 15 does not involve, nor does an action brought for that purpose necessarily comprise, a sale of real property provided for in chapter 14, tit. 10. On the contrary, for the various causes and purposes mentioned in chapter 14, there may be sales of real property belonging to joint owners, lying even in the same county where other tracts are situated, that they may by a separate action have divided. Subsection 3, § 62, Civil Code, provides that actions must be brought in the county in which the subject of the action is situated, for sale of real property, under title 10, c. 14, except for debts of a decedent. The sale in this action was not for debts of the decedent, nor did the widow have a claim to dower in the lands, but it was for the purpose of dividing the proceeds among joint owners; it not being practicable to divide the land without materially impairing its value. We think the McCracken court of common pleas had jurisdiction, and it was error to sustain exceptions to the report of sale. Instead, the report ought to have been confirmed. Wherefore the judgment sustaining the exceptions is reversed, and cause remanded for proceedings consistent with this opinion.

KENTON INS. CO. v. DOWNS *et al.*

(Court of Appeals of Kentucky. June 5, 1890.)

INSURANCE—CONDITIONS OF POLICY—PROOF OF LOSS.

1. A policy of fire insurance contained stipulations enumerating various causes which should work a forfeiture, and release the company from all liability. It then specified that proof of loss should be made within 30 days, and finally stipulated that no action should be maintained until all its conditions had been complied with by the assured, and that any action should be barred unless brought in six months after loss. *Held*, failure to make proof of loss within 30 days did not forfeit the policy, but only postponed the right of action till furnished.

2. Where the agent of the company was on the ground at the time the policy was written, and knew that a portion of the building was used as a store, in consequence of which an increased rate of premium was charged, the fact that gunpowder was kept in the store, in such quantities as is usually kept by country merchants, does not avoid the policy.

Appeal from Louisville law and equity court.

"To be officially reported."

Brown, Humphrey & Davis and Collins & Finley, for appellant. *Hargis & Eastin and Henry L. Stone*, for appellees.

PRYOR, J. The Kenton Insurance Company, on the 26th of March, 1886, issued its policy of insurance to William Downs on a two-story frame building, and household furniture,—\$1,600 on the building and \$200 on the furniture. The building was burned on the 7th of March, 1887. The preliminary proofs of loss were furnished on the 16th of April, 1887, and additional proof on the 16th and 25th of May of the same year. The judgment below was for the policy-holder, (Rebecca Downs, to whom it has been assigned,) and from that judgment the company has appealed. The principal, and in fact the only, question necessary to be considered, and the one upon which a reversal was had in the superior court, arises from the failure to furnish the company the proof of the loss within 30 days after the destruction of the property. It is maintained by the appellant that the provision of the policy requiring this proof to be made and furnished within 30 days is a condition precedent to the liability on the part of the company, unless there is proof showing a waiver. On the other hand, it is argued by the appellees that this requirement is a condition precedent to the right to institute the action. There is some discussion in the briefs of counsel in regard to the question of waiver, but as the main question, and the one decisive of this case, must be considered, it is not deemed necessary to determine whether or not the company waived its right to have the proof of loss within the specified time. Where notice or proofs of loss are required to be made forthwith, or within a reasonable time, which is, in effect, the same, it becomes at once necessary to determine the question of diligence on the part of the insured; and if,

under the circumstances of the particular case, he has used reasonable diligence in furnishing his proof, it is all that should be required. *Insurance Co. v. McGinnis*, 87 Ill. 70; *Phillips v. Insurance Co.*, 14 Mo. 220.

The policy before us, like many others, contains stipulation after stipulation rendering the policy void, and forfeiting all claim on the part of the insured to a recovery. These stipulations are found under the heads, "This Company shall not be Liable," and "General Provisions," in which we find as many as 15 or 20 states of case in which the company is released from all liability. In this contract of insurance the causes of forfeiture are classified, and the attention of the insured called to all the causes working a forfeiture of the policy, or releasing the company from all liability. The contract then proceeds to specify the manner in which the insured shall proceed in case of loss: "Proceedings in Case of Loss. He shall forthwith give written notice of said loss or damage to this company, and shall within thirty days render a particular account of said loss or damage, signed and sworn to by them," etc. Under this heading, it is further provided that either party may, after the proof has been furnished, claim in writing that the difference, if any, shall be referred to arbitrators, with the option on the part of the company to repair or rebuild the property by giving notice of its intention to do so within 60 days after the receipt of the proofs of loss. It is further provided that the loss shall not be payable until 60 days after the proof of loss has been furnished. The contract then closes with the stipulation "that no suit or action, for the recovery of any claim by virtue of this policy, shall be commenced until after the amount of such claim has been ascertained by arbitration, as provided, nor until all the conditions, provisions, and requirements of this policy have been complied with by the assured; nor shall any suit or action be sustained in any court, unless such action shall be commenced within six months next after the fire shall occur; and, should any action be commenced against this company after the expiration of six months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, and an absolute bar to such action."

The peculiar verbiage of this contract, and the various classifications fixing the liability of the company,—the causes of forfeiture, and the directions by which the assured is to proceed in case of loss,—show conclusively the purpose of the company to postpone the right of action merely until the proof of loss is furnished, and by a statute of limitation, made part of the contract, has fixed the period when this liability terminates. We are aware that case after case may be found involving similar questions, under ordinary policies of insurance, where it has been held that the failure to furnish the proof in the time required is held to be a condition preced-

ent to all liability on the part of the company, for the reason that the company for its own protection should at once be permitted to investigate the cause of the fire, and have at hand every opportunity for informing itself with reference to all the facts connected with the destruction of the property; but where the company, by its own contract, has prescribed the conditions upon which the contract is to end, and omits to make the failure to furnish the proof within 30 days as a cause of forfeiture, and fixes a statute of limitation of 6 months, with a proviso that no action shall be commenced until the conditions of the contract have been complied with, it becomes apparent that no such construction should be placed upon the terms of the policy as would defeat the recovery on the ground alone that the proof had not been furnished within 30 days. Such a construction would fix the statute at 90 days instead of 6 months, and inflict upon the assured a punishment by way of forfeiting his right to recover, when, by either a strict or liberal construction of the policy, its plain meaning is that these proofs must be furnished before suit is brought, and that no action can be maintained after 6 months. "Conditions affecting the risk itself are more strictly enforced than those relating to the mode of establishing the loss." *Insurance Co. v. Spiers*, 87 Ky. 285, 8 S. W. Rep. 453. In *Insurance Co. v. Lawrence*, 10 Pet. 507, the insured, by the terms of the policy, was required, as soon as possible after the loss, to deliver an account of the loss and damage; and, further, that said loss or damage was to be paid within 60 days after notice and proof. It was held in that case that the delay was not injurious to the company, but the assured was deprived of the right to sue until the proof was procured. In *Weir v. Insurance Co.*, 4 L. R. Ir. 689, the policy provided: "On the happening of any loss or damage by fire, * * * the insured is forthwith to give notice in writing thereof to the company, and, within fifteen days at latest, to deliver to the company a particular account. * * * And in default thereof no claim in respect of such loss or damage shall be payable until such notice, account, proof, * * * are given and produced." The court held in that case that the failure to deliver the account within the 15 days was not a condition precedent to the right of recovery. While the cases are not exactly similar, it is plain that the provision in this contract, by which no action could be maintained until the conditions in regard to proof of loss had been complied with, enlarged the time for bringing the action, and particularly when the contract created a statute of six months, operating as a complete bar to the recovery. Giving, therefore, this entire contract a just and proper interpretation, it must be held that the failure to produce the proof within the 30 days worked no forfeiture of the right to recover, and the instruction to that extent was proper. Courts have so construed con-

tracts of insurance as to fully protect companies against imposition and fraud on the part of the assured, and have required a strict compliance with that provision of the contract requiring the proof of loss to be furnished in a specified time; but where the company, by its own contract, has interposed a statute of limitation of such short duration as fully protects its rights in this particular with the right to postpone the payment of the loss 60 days, which is to be included in the computation of time when applying this statute, and in the absence of any provision forfeiting the right of recovery on such a ground as the failure to furnish the proof, it obviates the necessity of establishing any rule in this regard, other than the contract itself, for the protection of insurance companies. The appellant has made stipulations for its own protection, and this court will not imply a forfeiture or terminate the contract under such circumstances.

It is insisted by counsel for the appellant that, although the failure to take and present the proof may not have constituted a defense to the action, still, as the proof was presented in May, 1887, and this action instituted in the month of June following, no recovery should be allowed, because the policy provides, in stipulation No. 82, that the loss shall not be paid until 60 days after the proof of the loss has been furnished; that the action was premature, having been brought within 30 days after the proof had been made complete. This defense is made alone by the brief filed, and no plea in abatement or demurrer interposed in the court below on such a ground, but, on the contrary, the appellant relied on various defenses to the action, all of which went to the merits of the controversy, and it is now too late to raise the question. It is manifest from the testimony that the agent of the company was on the ground when the policy was issued. He knew the manner in which the buildings were used and occupied, and the representations, if false, came from the agent, and not the assured. It appears that the agent charged more than is usual in ordinary risks, because a part of the building was used as a store, and the fact that there was gunpowder in the store in such quantities as is usually kept by country merchants constitutes no defense to the action. The jury determined all the questions of fact that are now urged as grounds for a reversal, and, the evidence being conflicting, we have thought proper to decide only the legal questions involved. The judgment below is affirmed.

COMMONWEALTH v. CREMEANS *et al.*

(Court of Appeals of Kentucky. April 19, 1890.)

FRAUDULENT CONVEYANCES—EVIDENCE.

1. A prisoner released upon a bail-bond made by his brother absconded. It appeared that after his arrest certain lands were conveyed by his father to the bail for an expressed consideration of \$2,000, and after his release were reconveyed for the same expressed consideration. The bondsman

would have been unable to qualify except as owner of such lands. *Held* that, in a suit to set aside the reconveyance to satisfy a judgment on the bond, the uncontradicted testimony of the father and a third brother that in both cases the money was actually paid must be taken as true, and the reconveyance upheld.

2. The bondsman not being a witness, it was proper, in the absence of proof that he was a party to the alleged conspiracy, to exclude evidence as to his declarations in his father's absence, that the conveyance was made to him to enable him to go on the bond; that afterwards a reconveyance was executed, and was to be delivered if the accused appeared for trial, otherwise not; but that the father obtained the deed under the pretense of having the land listed for taxation, and, without the bondsman's knowledge or consent, had it recorded.

Appeal from circuit court, Greenup county.
"Not to be officially reported."

The testimony held to be properly excluded in the last paragraph of the opinion appeared in the deposition of B. E. Roe, and was to the effect that Joseph Cremeans told him, both before and since the bond was forfeited, and after the suit was brought, that the consideration for the deed of January 31, 1888, was not \$2,000, but that Joseph Cremeans became the bondsman of his brother, and to secure him for his liability thereon; that, after the execution of the deed to him, he and his wife executed a deed back to his father, A. J. Cremeans, Sr., but was to hold it until the accused stood his trial, and if he did not appear, and the bond was forfeited, was not to deliver it, but was to hold the land as security for his liability; that in August, 1888, his father came to him and said: "The assessor is down at Taylor's Mills. Give me the deed, in order that I may list the land for taxation. You have sworn the land was worth \$2,000, and will have to list it for that sum; * * * but, if I list it, I will do so at \$400 or \$450;" that thereupon he gave the deed to his father, who brought it to Greenup and had it recorded.

James H. Salles and B. E. Roe, for appellant. F. H. Paynter, for appellees.

LEWIS, C. J. William Cremeans, being in custody under indictment for two public offenses, was released on bail-bonds, for the aggregate sum of \$750, executed by his brother Joseph Cremeans as surety. In January, 1888, previous to February 1st, date of the bonds, appellee A. J. Cremeans, the father, conveyed the tract of land in contest to Joseph for the expressed consideration of \$2,000. But in March, for the same expressed consideration, the latter reconveyed the same land to A. J. by deed duly recorded, though not delivered or admitted to record until August, 1888. At the February term of court the two cases were continued, but at the August term the accused, William Cremeans, failed to answer, and the two bonds were forfeited; and, upon return of executions issued thereafter against Joseph Cremeans, the bail, no property found, the commonwealth instituted this action to set aside the deed from Joseph to A. J. Cremeans, and subject the land to satisfy the forfeited bail-bonds. The alle-

gations of the petition are, in substance, that the original deed was made to enable Joseph Cremeans to be accepted as bail for his brother, and the second one was made for the fraudulent purpose of cheating and defrauding the commonwealth. Joseph as well as A. J. Cremeans participated in the fraud.

The evidence is persuasive that Joseph Cremeans did not have, at date of the first deed, sufficient means to purchase the land and pay the consideration expressed; and therefore the natural inference would be that the purpose of the transaction was to give him such credit as to justify the clerk of the court to accept him as bail, and release his brother from custody. But A. J. Cremeans testifies as a witness that the consideration of \$2,000 was actually paid to him by Joseph Cremeans for the land, and that he paid in money the same amount as consideration for reconveyance of the land in March; and James Cremeans, who was introduced as a witness by the commonwealth, corroborated his father, A. J. Cremeans, as to the payment of the consideration by the vendee on each occasion. No other competent evidence was introduced; and, although the circumstances are sufficient to create a strong suspicion that the transactions were entered into for the purpose of procuring the release of the accused son and brother of the parties, and to defraud the commonwealth, still the positive evidence of two witnesses that the sales and conveyances were made in each instance in good faith, and for valuable consideration, being uncontradicted, must be taken as true, especially as the credibility of neither of them is attacked. To make the statements of Joseph Cremeans, who was not introduced as a witness, competent against A. J. Cremeans, who was not present when they were made, it was necessary to show he conspired and united in the alleged fraudulent device to cheat the commonwealth. But, instead of doing so, the evidence, and particularly his statements which it was attempted to prove, all tended to show he acted in good faith; and, besides, it was his interest to establish that the purpose of the first conveyance, as alleged in the petition, was to enable him to become the bail of, and thereby procure the release of, William Cremeans. We therefore think the lower court properly rejected his evidence, and consequently the judgment dismissing the petition must be affirmed.

WILSON v. JASPER.

(*Court of Appeals of Kentucky. May 20, 1890.*)

DEED—REFORMATION—DESCRIPTION.

The court will correct an error in the description contained in the report of a surveyor appointed to locate and mark a line dividing a body of land in partition proceedings, and a corresponding error in the commissioner's deeds referring thereto, where it appears that the bidders at the sale, and the transferee of one of them, all purchased with reference to the line as actually located and marked, and in ignorance of the errors in describing it.

Appeal from circuit court, Pulaski county.
"To be officially reported."

O. H. Waddle, for appellant. W. A. Morrow, for appellee.

BENNETT, J. The appellee sued the appellant for the value of some trees, cut, as is alleged, on appellee's land, and made into staves. The appellant admitted cutting the trees on the particular piece of land mentioned, but denied that the appellee was the owner of said land, although the boundaries of his deed embraced said land. He alleged that said land belonged to him, and the boundaries contained in the appellee's deed, in so far as they embraced said land, was a mistake, and he asked that the mistake be corrected. The lower court refused to correct the mistake, and gave judgment for the appellee. The following facts are alleged in the appellant's answer, and are not denied: That Delilah Wilson owned 355 acres of land; that the same, in an action by her administrator to settle her estate, was divided into two parcels; that the division was made by the surveyor of the county, who ran the dividing line from point 21 south, 19 east, 70 poles, to a rock corner; that the said line was also plainly marked; that in making out his plat he, by mistake, entered said line as running from point 21 south, 29 west, 80 poles, to a rock; that there is no rock corner or marked line on this route; that the court adopted the dividing line as thus reported, and the deed to the purchasers of the respective parcels recited the division line as thus reported. But the said parcels were in fact sold according to the dividing line as actually run by the surveyor, to-wit, running from point 21 south, 19 east, 70 poles, to a rock, and the purchaser of each parcel purchased it according to this division line; that the appellee, who was a transferee of the purchaser's bid at the commissioner's sale, and to whom the commissioner made a deed, knew that said land was sold according to the division line as actually made by the surveyor, and he took possession of said land, and held and claimed it to said line, until a short time before he brought this suit; that the appellant took the possession of the parcel purchased for him, and held and claimed it to said division line, until after this suit was brought; that neither appellant nor appellee knew that his deed, as to said dividing line, was not in accordance with the said line as actually run, but each believed that his deed was in accordance therewith; that the trees were cut on the appellant's side of said land. He asks the court to correct the mistake in the deed, and establish said line as the true one. The chancellor deemed the foregoing facts insufficient to constitute a defense or to correct the mistake in the deed.

It is contended that as the appellee was not the purchaser at the commissioner's sale, and as the deed was made to him in accordance with the surveyor's plat, and judgment of the court, and as the mistake was antecedent

thereto, the appellee is not bound to correct the same. As the deed had been made to the appellee in accordance with the reported plat and judgment of court, he, as an innocent purchaser, would not be bound to correct any mistake that the surveyor might have made, and which did not appear in the record. In such case it would be a fraud upon him as an innocent purchaser to compel him to correct a mistake that he knew not of, or of which the record did not furnish information. Also the original purchaser, under like circumstances, would be protected. Each would have the right to rely upon the reported plat, and the judgment of the court adopting the same, and the confirmation of the deed in accordance therewith, as protecting him against antecedent verbal mistakes, which were unknown to him. Also, if such mistake was known to the first purchaser and not to his vendee, the latter would not be bound to correct it; but the first purchaser, knowing the truth, and knowing that the deed did not represent the truth, would be bound to correct it so as to make it conform to the truth. To deny the right to correct the mistake, under such circumstances, would be to practice a fraud upon the party injured by it. So, also, to correct the mistake to the prejudice of an innocent vendee, nothing appearing to put him upon inquiry, would be a fraud upon him; therefore the law does not allow it. But if he, at the time he made the purchase, was apprised of the mistake theretofore committed, he would be as much bound to correct it as was his vendor. If it were otherwise, he would be allowed to practice a fraud, simply because he was a second purchaser. If the vendor, being apprised of the existence of the mistake, could convey to a third person, who also was apprised of the existence of the mistake, and thereby enable the latter to defeat the correction of the mistake, fraud would be licensed, instead of condemned. In such case fair dealing demands that each party be placed upon the same footing. The judgment is reversed, and cause remanded, with directions for further proceedings consistent with this opinion.

HOUSTON & T. C. RY. CO. v. BRIN.

(Supreme Court of Texas. May 6, 1890.)

RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS —INSTRUCTIONS.

1. In an action against a railroad company for personal injuries sustained at a place where two railroads crossed each other, an instruction that it was the duty of defendant to ring the bell and blow the whistle of its engine, on starting at such crossing, is error, since Rev. St. Tex. art. 4282, relating to railroad crossings, does not require such signals.

2. An instruction in such case that it was defendant's duty to use such care and skill in handling its engine as the "most" prudent are accustomed to exercise in like business is erroneous, since all that is required is the exercise of such prudence as is shown by the "mass" of prudent persons in like business.

Commissioners' decision. Appeal from district court, Travis county.

O. T. Holt, for appellant. *Walton, Hull & Walton*, for appellee.

HOBBS, J. William Brin, defendant in error, sued the plaintiff in error, the Houston & Texas Central Railway Company, in the district court of Travis county, Tex., September 24, 1888, alleging in his petition that plaintiff in error's road, on the 25th day of January, 1888, extended from Houston, in Harris county, to and through Corsicana, in Navarro county, Tex., over which line of road locomotive engines were run and operated; that on or about said 25th day of January, 1888, and while said defendant was operating and using its said railroad, plaintiff was a passenger on the cars and train of the Texas & St. Louis Railroad, which last-named company was at said time, and still is, a common carrier of passengers and freight, owning and operating a line of railroad from Texarkana, in the county of Bowie, and state of Texas, to the said city or town of Corsicana, in said county of Navarro, and through said town of Corsicana, in such manner and so that the said railroad track of said Texas & St. Louis Railroad crossed and intersected the said railroad track of plaintiff in error in and at the said town of Corsicana, and requiring of plaintiff in error, its agents and employees, the duty of exercising great care and diligence in the control and management of its engines and cars at and about said point of intersection; that prior to said accident both of said roads maintained an eating-house near said intersection, which was an eating station for passengers. The defendant in error's petition further alleged that while he was at or near said point of intersection of said railways, on or about said 25th day of January, 1888, as aforesaid, and while in the act of going to the cars or coach of said Texas & St. Louis Railroad as a passenger thereon, it was necessary for him to pass over the said track of plaintiff in error in order to arrive at said coach on the track of the Texas & St. Louis Railroad, where it was standing, and that, while he was so upon said track of plaintiff in error, plaintiff in error did negligently, carelessly, and willfully propel and drive along its track one of its said locomotive engines with such force and such speed, and with such violence, against petitioner, so that petitioner was thereby wounded, bruised, and injured; that one of defendant in error's ankles was thereby so bruised and sprained as to cause him great suffering and pain, and one of defendant in error's knees was thereby so wounded, lacerated, and bruised as to cause and produce a permanent injury thereto. The plaintiff in error answered the above and foregoing allegations of defendant in error by a general demurrer and general denial, and by special plea to the effect that the defendant in error was the sole cause and author of the misfortune that befell him, in that he was then and there, in the attempt to cross this plaintiff in error's track and right of way in front of

one of plaintiff in error's steam-engines, and in full view thereof, and in so attempting defendant in error himself was then and there rash and reckless, imprudent and incautious, and was so the cause and author of his own misfortune.

It appears from the evidence that the defendant in error was a passenger on the train of the Texas & St. Louis Railway; that he was injured in an effort to cross the track of the Houston & Texas Central Railway in order to board the passenger train of the Texas & St. Louis Railway Co. The defendant in error, with his family, were at the town of Corsicana, Tex., waiting for the Texas & St. Louis train to leave, going south, and had been so waiting for an hour or more before that passenger train arrived from the north. When it arrived, it pulled up to the depot, and discharged its passengers, and then moved back across the track of the plaintiff in error—the two roads crossing at that point—to “coal up” the engine. The defendant in error testifies “that while it was taking coal the rest of those waiting rushed across the Houston & Texas Central Railway track, and I and my wife and children followed. When I got on the Houston & Texas Central Railway track, with my baby in my arms, its engine caught me and my baby on the pilot, falling backward.” He further described his injuries, and testified that a great many persons were present, and it was between 8 and 9 o'clock at night. “No warning was given whatever,” he said, “or notice of the engine's approach. Heard no bell or whistle.” There was other evidence, to the effect that he was warned not to cross the track; one witness testifying that he told him the passenger train of the Texas & St. Louis Railway, which had backed for the purpose of coaling, would return to the platform for passengers. There was proof, also, that there was no necessity for crossing the track of plaintiff in error to board the passenger train of the Texas & St. Louis Railway Company. There was proof, also, that the signals were given of the approach of the engine, and that the head-light was shining brightly, and that there was nothing to prevent defendant in error from seeing the engine approach. Plaintiff below recovered judgment for \$613 and costs.

The first error relied on is that the court erred in giving the following charge, to-wit: “It is the duty of the defendant company, and its servants and employes, to ring the bell and blow the whistle on starting at a railroad crossing, and to keep a lookout for persons endangered from the movements of the engine, and to take and use such care and skill in handling the engine, as to avoid inflicting injury, as the most prudent in like business are accustomed to exercise.” There was error in the foregoing instruction. The statute (article 4232, Rev. St.) does not require the bell to be rung and the whistle to be blown “on starting at a railroad crossing.” There seems to be no controversy as

to the fact that the accident resulting in appellee's injury occurred near a place where two lines of railroad cross each other. In approaching such crossing the engine is required to be “brought to a full stop.” *Railway Co. v. York*, 74 Tex. 370, 12 S. W. Rep. 71. It is proper to say that the case did not require the use of such care and skill to avoid inflicting injury as “the most prudent in like business are accustomed to exercise,” but such as the mass of prudent persons in like business are accustomed to exercise.

The next assignment is as follows: “Because the court erred in not giving the following charge asked by defendant, and refused: “If the jury find from the evidence that the plaintiff's injuries resulted from his attempting to cross the railroad track immediately in front of an approaching locomotive engine propelled by the agents of defendant, the burden of proof is on the plaintiff, William Brin, to show affirmatively, not only the want of ordinary care and caution on the part of the agents of the defendant, but the exercise of due care and caution on the part of plaintiff, Brin; and, if the jury find from the evidence that the negligence or want of due care or caution of the plaintiff, William Brin, caused the accident, or even contributed to produce the injury, or that it could have been avoided by the exercise of due care on the part of plaintiff, Brin, then the plaintiff cannot recover, and you will find for defendant.” There was no error in refusing this, because the charge of the court, we think, sufficiently instructed the jury, in effect, that appellee could not recover if he contributed to his own injury by the want of care and prudence. For the error in the charge mentioned, we think the judgment should be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment reversed, and the cause remanded.

JONES v. PRATT et al.

(Supreme Court of Texas. May 6, 1890.)

EXECUTION—SALE—INADEQUACY OF PRICE.

In an action to set aside a sale of land under execution for irregularities and inadequacy of price, it appeared that plaintiff had sued defendant to recover the land, and recovered judgment. On appeal the judgment was reversed, with costs against plaintiff. Plaintiff's interest in the land, of the value of \$1,200, was sold under execution for the costs, for \$55 only, to a third person, who after the sale conveyed one-third to defendant, and one-third to the wife of defendant's attorney. The evidence showed that there was no agreement between the purchaser and his grantees before the sale, and that the conveyances were made solely as a compromise of defendant's claim of title to the land. *Held*, that the judgment of the court refusing to set the sale aside would not be disturbed.

Appeal from district court, Clay county.
A. K. Swan, for appellant. W. G. Eustis
and R. D. Wellborn, for appellees.

HENRY, J. This suit was brought by appellant to set aside a sale under execution of a tract of land on account of irregularities, and the inadequacy of the price for which it was sold. The cause was tried without a jury. In a motion for new trial the plaintiff tendered back to the defendants the amount of purchase money paid for the land, with interest and costs, and offered excuses for not having made such tender before judgment. Under the view that we take of the case, it becomes immaterial to consider whether the delay in offering to return the purchase money was sufficiently accounted for.

It appears that a previous suit was brought by the appellant, Jones, against the defendant Pratt alone, for the same land. Jones having recovered a judgment in the district court, Pratt appealed to this court, and the judgment was here reversed at the cost of Jones. The judgment for cost not being paid, an execution upon it was issued at the instance of Pratt's attorney, who caused it to be levied on the interest of Jones in the land in controversy. The land levied upon was proved to have been worth about \$1,200, and it was sold for about \$55. It was purchased by one Eustis, who had no connection with the litigation. Shortly after the sale, Eustis conveyed one-third of the land to the defendant Pratt, and one-third to the wife of Pratt's attorney. All of the evidence introduced was to the effect that there existed no understanding or agreement between said parties previous to the sale, and that the conveyances were made solely as a compromise of Pratt's claim of title, and that acquired by Eustis by his purchase at the execution sale. The defendants introduced in evidence a tax-deed relating to the land in controversy. We think that the judgment of the court is supported by the evidence. The only irregularity attending the sale, as shown by the evidence, amounts to no more than a suspicion growing out of the facts that the attorney of the defendant in the suit was secretly interested in the purchase. The court believed the witnesses, instead of being controlled by such suspicion, and we would not be warranted in declining to abide by his decision in that respect. The inadequacy of price is not by itself sufficient to require the sale to be set aside. It is so great as to require it to be set aside if even slight irregularities attending the sale had been proved. But, when such irregularities are not proved, they should not be sought after and created by the court in order to avoid the sale. Such a course would be destructive of execution sales. Confidence in such sales must be preserved. When they are authorized, and properly conducted, great inadequacy of price alone will not be held cause for vacating them. The tax-deed introduced in evidence, without any other evidence showing by what authority it was executed, was not, under the pleadings, proper evidence upon any issue, or for any purpose; but, as the cause was tried without a jury,

and as the judgment is amply sustained by the other evidence, the judgment should not be reversed for that cause, and it is affirmed.

WESTERN UNION TEL. CO. v. MORRIS.

(Supreme Court of Texas. May 6, 1890.)

TELEGRAPH COMPANIES—FAILURE TO TRANSMIT MESSAGE—PRESENTATION OF CLAIM.

Where the sender of a telegram presents, in accordance with the contract with the telegraph company, a claim for damages for failure to deliver the message, and classifies the damages as "\$50 actual damage, and \$5,000 exemplary damage," such classification does not prejudice him so as to prevent his recovering over \$50 in actual damage, and nothing as exemplary damage.

Appeal from district court, Dallas county. *Stemmons & Field*, for appellant.

HENRY, J. This suit was brought to recover damage for mental pain of the wife of the plaintiff caused by the failure of defendant to deliver a telegraphic message. The contract with regard to sending the message contained a clause to the effect that the telegraph company should not be held liable in any case where the claim should not be presented to it within 60 days after the message was sent. Plaintiff presented a claim within the time stipulated for the "sum of fifty dollars actual damage, and five thousand dollars exemplary damage," otherwise sufficiently describing his cause of action. By an amended petition, plaintiff prayed for the recovery of \$5,000 exemplary, and \$5,000 actual, damages. The court charged upon the issue of actual damage alone. The jury returned a verdict in favor of plaintiff for \$500.

Appellant complains of the refusal of the court to charge, at its request, that appellant, having presented a claim for \$50 only, actual damage, could not recover a greater sum. Without deciding that the plaintiff would have been, under any circumstances, estopped from claiming a greater amount than the claim was presented for, when the notice given was in other respects sufficient, we are of the opinion that he ought not to be prejudiced by his classification of the damage as actual and exemplary. The claim presented was for \$5,050 damage in the aggregate, and served in all respects to give defendant the information stipulated for.

The other question raised by the assignment of errors has been settled by this court against the contention of appellant. *Stuart v. Telegraph Co.*, 66 Tex. 580. The judgment is affirmed.

EARP v. STATE.

(Court of Appeals of Texas. May 28, 1890.)

CRIMINAL LAW—CARD-PLAYING—PUBLIC PLACE.

One who keeps watch for the purpose of guarding against detection of others, who are playing cards in a public place, is himself a principal in the offense.

Appeal from Brown county court; R. P. CONNER, Judge.

James Earp appeals from a conviction for playing cards in a public place.

Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. This is a companion case to that of *Cole v. State*, ante, 859, (decided this day;) the only difference between the two cases being that in this case the appellant did not engage in the game of cards, but he himself testifies that he kept watch for the parties who did play, to keep them from being caught. This made him a principal in the offense, and liable to prosecution and conviction as such. For the reasons stated in *Cole's Case*, supra, the judgment in this case is affirmed.

LITTLEJOHN v. STATE.

(Court of Appeals of Texas. May 31, 1890.)

THEFT—EVIDENCE.

A conviction for theft of a hog will be set aside where the proof merely shows that the meat of a hog about the size and shape of the missing one was found at defendant's house, and where defendant and two other witnesses testified that it was the meat of defendant's own hog.

Appeal from Fannin county court; W. A. BRAMLETTE, Judge.

One Littlejohn appeals from a conviction for theft. The substance of the evidence for the state was that Peterson's hog disappeared on the day alleged in the indictment, and that on the next day the fresh meat of a hog about the size and shape of the missing hog was found at defendant's house. Three witnesses for the defense, including defendant, testified that he killed the hog, the meat of which was found in defendant's house by Peterson, but that said hog was the property of the defendant.

Agnew & Brazettan, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. The evidence in the record is wholly insufficient to sustain the judgment of conviction in this case, and cannot be permitted to stand. *Ellis' Case*, 27 Tex. App. 190, 11 S. W. Rep. 111. Judgment reversed, and remanded.

WELLS v. STATE, (two cases.)

(Court of Appeals of Texas. June 7, 1890.)

DRIVING CATTLE FROM RANGE—EVIDENCE.

One who is in charge of a large pasture owned by another, and who, under instructions from his employer, drives out of such pasture, at a point several miles from the place where they were turned in, cattle owned by a third person, and turned into such pasture without permission, is not guilty of "willfully driving cattle not his own from their accustomed range," within the meaning of Pen. Code Tex. art. 767, though the owner of the cattle owns a few acres inclosed in the pasture, where he consented to the inclosure thereof, without reserving any right of pasturage, as defendant's act is not "willful," and the cattle are not on "their accustomed range."

Appeal from Clay county court; B. F. TURNER, Judge.

Wells appeals from two convictions of willfully driving cattle from their accustomed range.

A. K. Swan, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. Both of these prosecutions were by information based upon article 767 of the Penal Code, and charged appellant with willfully driving cattle not his own from their accustomed range. The facts in the two cases are essentially the same. Appellant had charge of a large pasture belonging to one Harris. Denison, the owner of the cows charged to have been driven from their accustomed range, lived near this pasture, and his father claimed to own a few acres inclosed in said pasture. He turned his cows into the pasture after appellant and Harris had both refused him permission to do so, and appellant drove them out of said pasture, in accordance with his instructions from his employer, which were that he should turn all cattle out that did not belong to said Harris, or that were not put in there by his authority. In turning the cows out, appellant drove them out of a gate in the pasture fence some three or four miles from the gate at which the owner had turned them in. These are, in brief, the facts of the cases.

If Denison's father did own a few acres of the land in the said pasture, this would not give him authority to turn cattle into it without the authority of, and against the consent of, the owner of the pasture. He had consented for the pasture fence to be built so as to inclose these few acres, but did not reserve the right, in consideration thereof, to turn in any of his cattle. In turning the cows out, under the circumstances, appellant was not guilty of that evil intent, legal malice, or want of legal justification necessary to constitute his act a willful one, in contemplation of the statute. *Thomas v. State*, 14 Tex. App. 201. Again, the cattle were not in their accustomed range when in that pasture, and simply to drive them out was not a violation of the statute. The cows being in the pasture illegally, and that not being their accustomed range, to drive and turn them out of a gate, which would put them, when on the outside, beyond their accustomed range, would not necessarily be a violation of the law. Because the evidence is insufficient to support the convictions, the judgments are reversed, and the causes remanded.

RIDENHOUR v. KANSAS CITY CABLE RY. CO.

(Supreme Court of Missouri. June 2, 1890.)

NEGLIGENCE—CARRIER OF PASSENGERS—PERSONAL INJURIES—MEASURE OF DAMAGES—EVIDENCE.

1. There is no variance between the allegations of the petition that defendant stopped its cars to allow plaintiff to alight, and negligently put them in motion while plaintiff was leaving the car, and proof that the car slackened up only, and then started up with a sudden jerk, etc.

2. In an action for personal injuries received by plaintiff, a youth nine years old, in alighting from defendant's cable cars, the court properly

instructed that, if the jury found plaintiff was a passenger on defendant's car, and that defendant's agents and servants in charge of the car knew at what point he wished to alight, and that, when they reached said point, they did not stop long enough to permit plaintiff, acting with reasonable care and diligence for one of his years, to alight in safety, and that by reason thereof plaintiff, in attempting to alight, was thrown from said car, and injured, then he is entitled to recover.

3. Negligence cannot be imputed to one who has not sufficient capacity or discretion to understand danger, and use proper means to guard against it; and the mere fact that plaintiff was on the steps, when there was room inside, does not absolve defendant from liability; and whether the steps were a more dangerous place than inside the car, and, if so, whether plaintiff had at the time sufficient capacity and discretion to understand that it was the more dangerous, are questions for the jury, under the facts and circumstances.

4. In fixing the amount of damages, the jury should take into consideration plaintiff's age and condition in life, the nature and extent of the physical injuries,—whether permanent or temporary,—and the bodily pain and mental anguish, and any and all such damage which it appears will reasonably result to him from such injuries in the future.

5. The injury consisted of a severance of the nervous connection in the left arm, resulting in a paralysis and contraction of the fingers, though he still had the use of his arm to the elbow. *Held*, that a verdict of \$8,500 was not excessive.

SHERWOOD and BLACK, JJ., dissenting.

Appeal from circuit court, Jackson county; TURNER A. GILL, Judge.

Action by plaintiff, through his next friend, to recover \$25,000 for personal injuries received by him on the 17th day of April, 1886, in alighting from a train of defendant's cars near Holmes street, in Kansas City, Mo. The claim of the plaintiff was that he was permanently injured by the cars running over his left arm, bruising and lacerating the same. The verdict of the jury was for the sum of \$8,500. The answer of the defendant was a general denial, as well as a plea of contributory negligence. There was testimony to sustain the theory of the plaintiff's case, and testimony of a contrary effect. At the time of the accident the plaintiff was between 9 and 10 years of age. The petition, omitting formal parts, is as follows: That on arriving at Eighth and Holmes street, aforesaid, defendant, at the request of plaintiff, stopped the cars for the purpose of permitting plaintiff to alight therefrom, but that defendant, wholly neglecting and disregarding their duty in that behalf, in not using proper care and caution in managing and operating its said cars, carelessly, recklessly, negligently, and wantonly permitted said car, upon which plaintiff was at said time a passenger, to be put in motion while plaintiff was in the act of leaving the car, and without giving him a reasonable time to alight safely therefrom, whereby plaintiff was thrown under the car, the wheels of which passed over plaintiff's left arm, tearing, lacerating, fracturing, and mangling same, and plaintiff was otherwise bruised, wounded, and injured; and also, by means of the premises plaintiff became and was sick, sore, lame,

and disordered, and so continued for a long space of time, during which said time plaintiff suffered and underwent great bodily pain and mental anguish. That said injuries resulted to plaintiff wholly on account of the negligent, careless, reckless, and wanton conduct of defendant in suddenly starting its said car while plaintiff was in the act of getting off same, as aforesaid, and that, by reason of said injuries, plaintiff has been prevented from performing manual labor as heretofore, and is by said injuries otherwise greatly injured, and his health permanently impaired, and is rendered a cripple during his natural life, and unfit for the performance of manual labor during the same. Wherefore, plaintiff prays judgment for \$25,000, with costs. The answer is a general denial, and a plea of contributory negligence; and the reply, a general denial of the new matter in the answer. As there is no dispute as to the correctness of defendant's abstract as to the evidence adduced, that evidence will be accepted and inserted here, except that portion which relates to the plaintiff's competency, which will be sufficiently noticed in the opinion. That evidence is the following:

The plaintiff, Albert Ridenhour, who testified: "I will be ten years old next January. Live on Charlotte street. I had been at work for a man by name of Mr. Henry for about a week. He kept a fruit stand at the corner of Sixth and Delaware. My folks lived on Charlotte street, where they are living now. They moved there on the Saturday evening before I was hurt. I had been at work that day for the gentleman by whom I was employed. About five o'clock, I started home. I went to the junction at Ninth street, and got on the cars. They were going towards Woodland avenue. I went in the grip-car, and remained there during the whole ride. I saw the conductor, and held up my hand, and told him I wanted to get off, just before I got to Holmes street. He rang the bell for the car to stop, and I started to get off; and he started up before I got off, just as I had one foot off the step, and hand hold of the handle of the car. The car did not come to a full stop. It started with a jerk, and threw me off; and my left arm went under the wheel, and it ran over my arm. The conductor was on the platform. I had on a fur cap. (This is the one, showing witness a fur cap.) Yes, sir; I was barefooted, and had on that cap. (Witness takes off his coat, and makes a proffer of his arm.) I cannot stretch out my fingers. I was taken to Mr. Newman's store, at the corner of Eighth and Holmes. I had been there before, and know the way home from this point. My arm and my back pained me severely. Dr. Rieger, the company's surgeon, attended on me. I suffered pain for four weeks. Question. State to the jury whether or not you have suffered since,—whether or not you suffer now at any time? (Objected to by defendant's counsel. Objection overruled by the court. The defendant, then and there, by its

counsel, duly excepted.) My arm hurts yet, right there on the bone. I am awakened at night with pain." On cross-examination, witness testified: "I had been working for Mr. Henry about a week. It was after eight o'clock in the evening that I left his place, on the day of the accident. I had never worked for him before. Ma had washed for him. I never worked for anybody before. It is half a block from Eighth to Charlotte. It is the first house. I went into the passenger-car, and found that full, and then went into the grip-car, and took a seat right close to the gripman. The conductor came around when the car was near Holmes street. It was near Holmes street that I told him I wanted to get off at Holmes. I had been up to that store that morning, and knew the way from there home. I was afraid I could not find my way from Charlotte street. I can see the cable cars from our house, and our house from the cable cars. I had been to Eighth and Charlotte before, and knew the streets around there. Had never been at the grocery store before. When I told the conductor I wanted to get off at Holmes street, he was out on the platform of the other car. I did not call out to him. I just held up my hand, and he seen me. I told him I wanted to get off. He rang the bell. The car did not stop right still. It just slacked up. I went out to the door to get off; and, just as I had one foot off, they gave a jerk, and started right up. I attempted to get off the platform of the other car, on the south side. I had hold of the railing with the right hand. The cars gave a sudden jerk, and I fell off, and was run over by the two hind wheels of the car. I got up, and went over on the south side, and laid down on a little mound. A colored boy came along, and took me to Mr. Newman's store; and Mr. Newman took me, and wrapped my arm up. I did not see any other person I knew except Mr. Newman and the colored boy. A man living on Delaware street helped to wrap up my arm. He was a tall man. Dr. Rieger was the only surgeon that waited on me. I was out of the house about four weeks after the accident. I do not know what an oath is. I do not know what swearing is. I do not know what swearing in court is."

Henry Est testified: "I am in the fruit business on the south side of Sixth street, right on the corner of West Sixth. I had the plaintiff employed about one week. I paid him fifty cents a day, and his board. He was perfectly honest, and polite to the people. Saw him the day of the accident, when I closed up my stand. I wanted him to go home with me. It was between seven and eight. I gave him a dime. After closing up, I went with him to Ninth street and Main. He had the dime in his hand when he got on the car. I did not hear anything more about it until the next morning."

Mary Jones testified: "I live on Thirteenth and Charlotte. The first time I saw plaintiff was on the car, on Sunday evening. He got

on at Ninth and Main. He had a fur cap on and was barefooted. I was out for a Sunday evening ride. I got on at Charlotte and 8th. Rode to west Kansas, and on my way back, near Walnut and 8th, I first saw the boy. I was sitting on the south side of the grip-car, near the gripman. I was in the front end of the car. The boy was right in front of me, on the north side of the car, in the corner. The gripman or conductor came in, and said something to the boy, and he got up, and went out. This was near Holmes street. The car kind of jerked up. It did not stop before it started again. The car stopped. It looked like it had run over something. The conductor and gripman left the car. I do not know whether they got off or not. They came in a second, and said there was a little rock on the track. I cannot say whether this was at Holmes or Charlotte street. I guess it was at the corner of one of the streets. I never heard any bell ring for the train to stop."

J. W. Jackson testified: "I have been a practicing physician and surgeon for about 28 years, and am in the employ of the Wabash Railroad Company. I have examined the arm of the boy. I do not think he will ever have perfect use of it. I regard the injury as permanent. The injury has severed the nervous connection, and resulted in paralysis of the extension muscles. The muscles that extend the fingers are paralyzed. It contracts the fingers down. I made the examination in June. The working of the elbow joint is not impaired. He has but little power of pressure in the two larger fingers. He has the use of his arm in the elbow joints."

Fielding Hyson testified: "I have been working for Mr. Biddle since the 10th of May, attending to his horses, and doing general housework. I first saw the plaintiff between Main and Walnut streets. I was on the cars with Miss Jones. We were on our way back to Charlotte street. Miss Jones said: 'Look at that little boy in here with a fur cap, and barefooted.' He sat down in the north-east corner of the grip-car. The north-west corner of the grip-car he came in and sat down. He remained there until we got very near to Charlotte street. We noticed the boy get up. He spoke to the conductor, and he and the conductor went out of the door. The car hardly checked up from going fast. It did not come to a stop, and then it started up again; and then we stopped all at once, and the conductor and gripman ran out. I went to the door, and they jumped aboard, and started on. The car did not stop. It slackened up, and then started up again really fast, and then stopped again all at once. The car went twenty or thirty yards before it stopped. I am positive the car did not stop at the time the boy went out to get off. The boy was in the north-west corner of the car. I am certain of this. I was in the south-east corner. I do not know whether the conductor rang the bell or not. There were three colored persons in the car. That was all.

The accident occurred between eight and nine o'clock."

Josh Emmons testified: "I was on corner of Eighth and Holmes streets. I saw the cars. They slacked up, then they gave a sudden jerk, and moved off. I saw a little boy get up and go to the corner of Mr. Ryan's house, and he laid down on a little bank where they had blue grass. I picked up his cap, and took it to him. I asked him how he got hurt. He said he wanted to get off, and the car kind of slacked up, and gave a sudden jerk, and jerked him off, and he threw his hand out, and then the conductor did not stop for him. I took him to Mr. Newman's store. He was groaning and bleeding. Mr. Newman wrapped his arm up."

Joseph Newman: "I live on north-east corner of Eighth and Holmes. The boy was brought into my store. He told me he got hurt by getting off the cable car; that the gripman did not slack enough for him to get off; that he told the conductor to let him off; that the car slacked, but did not stop; that he was in the act of stepping off of the car, and it gave a jerk,—a sudden jerk; he suffered a good deal. I heard him groan, and I gave him water."

Sarah Jane Allen: "I am mother of the boy. He suffered about four weeks. It seems like his back and side hurt him a good deal. He was confined to the house about four weeks. His back and side and arms still hurt him."

William H. Lucas: "The Kansas City Cable Railway Company was operating the road at the time of the accident; the defendant in the present action."

This was all the evidence offered for plaintiff, after which defendant's counsel demurred to the plaintiff's case, which was as follows: "Although the jury may believe all the evidence introduced by plaintiff, they will find the issues for defendant." Which instruction the court refused; to which refusal of the instruction thus asked, the defendant, by its counsel, then and there excepted at the time.

The defendant offered the following testimony:

J. H. Rieger: "I am surgeon of the cable road. On April 18th between half past eight and nine o'clock, I was notified that a boy was hurt. I went to see him. I found him at his home, between Seventh and Eighth, on Charlotte street. I examined his injuries, which were on his left arm, above and below the elbow. Above the elbow, the spot appeared somewhat torn and bruised, and below the elbow there was a long wound; and the wound and the muscles were likewise torn and bruised, as well as the skin. I attended the boy until he recovered, at the instance of the company,—furnished all the attendance there was; and neither the boy nor his parents were charged for it. The injury appeared below the elbow. The *ulna* nerve was torn into, and the nerve of this little finger, and the finger containing the ring.

These two fingers are contracted in that shape. It will probably be permanent, but there is some question being raised in the surgical world, in regard to where the nerve is cut, whether nerves that supply other parts adjacent do not furnish some nervous force, and give some movement. The *flexor* and *extensoris* muscles are somewhat injured. He made four different statements as to how he was hurt: First, he told me he was on the steps of the car, and a sudden jerk of the car threw him off. He then told me that, in stepping in between the two cars, he fell in between the cars, and the cars went over him. This second conversation was that night, or about two o'clock the next day. After that, he stated that he was unacquainted with that part of the town; that his land-mark was the store on Holmes street; that he was on the step, waiting until he came to the place, when a sudden jerk of the car threw him off. The next statement was that he told the conductor to stop. Before he could get off, the jerking of the car threw him off. The nature of his injuries lead us to believe the second one was correct. He told me he was standing on the steps of the coach; that is, the passenger car. He was rational when he told me about the accident."

R. J. Ritterhouse: "I was conductor on the train on which it was claimed a boy was hurt, and first learned the fact as I returned from the eastern terminus of the road. Mr. Rogers got on my train, and asked me how it happened that I hurt a boy at Holmes street. I told him that was the first I had heard of the accident; that there was not any boy on my train that had wanted to get off at Holmes street; there was no boy on my train as I went east. I saw several boys around the corner of Holmes street, but could not recognize them, it being about dusk. I stopped at Charlotte street. There were several colored people that wanted to get off at Charlotte street. Did not stop at Holmes, or between Holmes and Charlotte. The travel was light at that time in the evening; and, if any one had told me they wanted to get off at Holmes street, I would have recollected it. I am still in the employ of the defendant."

A. Rogers, assistant superintendent Kansas City Cable Company: "On 17th of last April, I was going out on the line. I was on the train behind the one it was claimed the boy was hurt on. At Holmes street the wife of the gentleman that keeps the grocery store came out, and hallowed that we had run over a little boy. I asked her what train. She said, 'that train up there.' That was about between Harrison and Troost. They were taking him into the store. Dr. Wood came, and bound up his arm. We took him home. Dr. Rieger came, and dressed the wound. I asked the boy how he got hurt. He said he was standing on the front platform, on the step, holding onto the railing next to the car, what we call the dash-board; and he said a jerk of the car knocked him off, and he fell. Then he told me afterwards that he was standing

on the step, and he fell off. I made inquiry of every one about there if anybody had seen it, and there was nobody had seen him when he was hurt but that colored boy."

Whereupon the plaintiff prayed the court to instruct the jury as follows: "(1) If the jury find from the evidence that plaintiff was a passenger on defendant's cars; that the agents and servants of defendant in charge of said car knew at what point plaintiff desired to alight; and that, when they reached said point, said agents and servants of defendant did not stop a sufficient length of time to permit the plaintiff, acting with reasonable care and diligence for one of his years, to alight in safety from said cars, and that by reason thereof the plaintiff, in attempting to alight was thrown from said car and injured,—then he is entitled to recover. (2) Negligence cannot be imputed to one who has not sufficient capacity or discretion to understand danger, and use proper means to guard against it, and the mere fact that plaintiff was on the steps, if he was there, when there was room inside, does not absolve defendant from liability; and whether the steps were a more dangerous place than inside the car, and, if so, whether plaintiff had at the time sufficient capacity and discretion to understand that it was the more dangerous, are questions that the jury must determine under all the facts and circumstances in proof. (3) If the jury find for plaintiff, they will assess his damages at such sum as, in their judgment, he may be entitled to, under the facts proven and instructions given, not exceeding, however, twenty-five thousand dollars; and, in fixing the amount of such damages, they will take into consideration his age and condition in life, the nature and extent of the physical injuries inflicted, whether the same are permanent or only temporary, and the bodily pain and mental anguish, and any and all such damage which it appears from the injury will reasonably result to him from such injuries in the future." Which instructions the court gave as prayed, and to the giving of which the defendant, by its counsel, then and there excepted at the time. The defendant, upon its part, prayed the court to instruct the jury as follows: "(1) On the pleadings and testimony, the jury are instructed to find for the defendant. (2) If the jury believe from the testimony that any witness has willfully sworn falsely to any material fact, then they are at liberty to disregard the whole of the testimony of said witness. (3) In considering the testimony of a witness, the jury are at liberty to determine whether any witness has not the capacity to distinguish between right and wrong; and if the jury believe, from the conduct of any witness, that he has not such capacity, then they will disregard the testimony of such witness. (4) Unless the jury believe from the testimony that the plaintiff was in the car or train of defendant at the time he was injured, the finding will be for defendant." The court gave instructions

numbered 2 and 4, and refused Nos. 1 and 3. To the action of the court in refusing said instructions 1 and 3, defendant then and there excepted at the time.

Johnson & Lucas, for appellant. *J. F. Waters and Crittenden, McDougal & Stiles*, for respondent.

SHERWOOD, J., (*after stating the facts as above.*) The evidence tended to support the claim of plaintiff, and this disposes of the defendant's demurrer to that evidence.

The statement made in the petition that the defendant "stopped" the cars for the purpose of permitting plaintiff to alight therefrom is only the statement of a matter of inducement, and no negligence is charged in doing that act. That negligence charged consists in permitting the car to be put in motion while plaintiff was in the act of leaving the car. There was, therefore, no failure of proof, and no variance between the facts alleged and those proven; and, if there was, the conclusive answer to such a contention is that defendant did not take advantage of the supposed variance in the manner pointed out by the statute, as no affidavit was filed, stating that defendant had been misled. *Rev. St. 1879, § 3565; Turner v. Railroad Co., 51 Mo. 501; Clements v. Maloney, 55 Mo. 352; Waldhier v. Railroad Co., 71 Mo. 514; Ely v. Porter, 58 Mo. 158; Bank v. Wills, 79 Mo. 275; Olmstead v. Smith, 87 Mo. 607.*

A majority of the court are of opinion the instructions given in behalf of the plaintiff are correct, and that the damages recovered were not excessive. I do not concur on either of these points. I regard the instructions faulty under the ruling of this court in *Eswin v. Railroad Co., 96 Mo. 290, 9 S. W. Rep. 577*, and that the damages were far in excess of being compensatory,—all that plaintiff, under the evidence, was entitled to recover.

BLACK, J., concurs with me. Judgment affirmed.

WILKINS v. ST. LOUIS, I. M. & S. RY. CO.
(*Supreme Court of Missouri. June 2, 1890.*)

RAILROADS—STREET CROSSINGS—CITY ORDINANCE
—NEGLIGENCE.

1. When city ordinances prescribe certain precautions to be observed by railway companies at public crossings, they do not relieve the companies from the observance of ordinary care in particulars not mentioned in the ordinances.

2. When a city ordinance requires the presence at a railway crossing of a watchman, "who shall display at the cars, in the day-time, a red flag," it is not sufficient if a watchman is present with a flag at the crossing; but he must also warn passers of the danger from approaching trains.

3. An instruction, "by the term 'negligence,' as used in the instructions, is meant the want of that degree of care that an ordinarily prudent person would have exercised under the same circumstances," is not erroneous.

4. When a person is attempting to pass at a public crossing between two cars, knowledge on his part that one of the cars is being moved by an

engine does not render him guilty of negligence, unless he also knew that the effect of the motion was to shove the cars together.

5. When a part of an ordinance is relevant, and another irrelevant, the admission of the whole ordinance is not error, in the absence of a motion to exclude the irrelevant part.

Appeal from St. Louis circuit court; DANIEL DILLON, Judge.

The action is to recover damages under the statute for the death of plaintiff's husband, who was killed in St. Louis, at the Lesperance-Street crossing of defendant's railroad, by alleged negligence in operating the latter. The issues for trial arose upon a general denial of the petition. The facts of relationship of the plaintiff, and the death of the husband, were admitted; but, as an important issue arose on a refused instruction, in the nature of a demurrer to the evidence, it will be proper to briefly outline the testimony, in so far as it is supposed to establish plaintiff's case. The substance of the evidence given by the principal witness for plaintiff is as follows, viz.: She knew deceased well. On the day he was killed, she was standing on the west side of the railway tracks on Lesperance street, at about 4 or 5 o'clock, intending and waiting to cross the railway tracks there, and to go down to the river. When she first saw Wilkins, he was on the east side of the train. She had been standing on the west side of the train about 15 minutes before the accident happened. During that time the train was standing still, and "they were switching." The train was "headed" south. "They" were backing up the cars at that time. Wilkins, just before he was killed, was standing on the east side of the train, near a flat-car. There was an opening between the ends of the cars, as he intended or attempted to cross, about as "narrow" as a door. "Plenty of room enough for one to go through." She had been standing there, while this space was there, before Wilkins attempted to go through, five minutes or more. There was no man stationed on the back end of the train, and no men on the top of the cars that were shoved back, north of the street, and no gate across the street there. There was no bell rung or whistle sounded as "they" moved the train back. The brakeman connected with the train was on the west side of the train, and the watchman was on the same side, "further south," and he was talking with witness and another lady. She saw no other person standing there. The brakeman was standing on the west side of the train, close up to the car. When Mr. Wilkins attempted to go through, the part of the train pushed up from the south crushed him. Wilkins' legs were broken, and his stomach crushed. On cross-examination, witness said that she knew this crossing well, and had been over it frequently; that at the crossing there is a plank-road over the same, half as wide as a street; that she had seen the cars back up before, and make an opening for teams to go through, and had frequently seen

an opening at said crossing, between the cars, of 25 or 30 feet in width, so that people could cross there on the plank-road; that she had frequently seen the railway employees make the opening there after backing up trains; that, when she first went down there, there was a train on the crossing, and Wilkins was standing on the east side, and his team was on the west side; that they were switching cars back and forth there; that she had been standing there 10 minutes before the opening was made; that she and another lady were waiting there to go across the track; that she didn't attempt to go through when they made the little opening of about two feet, and was waiting for them to make a wider opening; that the opening was so narrow that Wilkins had to go through sideways; and that, as he got in front of the draw-bars, they came together, and crushed him. The plaintiff then offered several city ordinances to the following effect, giving only their substance, viz.: That defendant should maintain gates and place a watchman at the street crossing in question; that watchmen at such crossings should display at the cars in the day-time a red flag, and at night a red light; that cars, etc., propelled by steam-power should not obstruct any street crossing by standing longer than five minutes, and that, when moving, the bell of the engine should be constantly sounded, and a man should be stationed on the top of the car furthest from the engine of any backing train to give danger signals; that no freight train should be moved in said city unless well manned with experienced brakemen at their posts, so stationed as to see the danger signals, and hear the signals from the engine. One of defendant's witnesses described the movement of the train in question as follows: "The train by which Wilkins was injured was on track 7, in what is called the 'East Yard,' at the Lesperance-Street crossing. It was a lot of cars that had been switched from trains that had come off the road. They were engaged in shoving the cars from the south end of track No. 7 to the north end, in order to make room. There were 18 cars in said train, part box and part flat cars." He did not see Wilkins till after the accident. The accident happened on track 7. At that time, there were 11 cars of said train attached to the engine south of the crossing, and 7 cars, that witness had cut off, north of the crossing, and there were more cars north of them. They were going to "shove" these 18 cars on track No. 7 north to make room, and they shoved over all the cars that witness thought the track would hold north of the crossing. Witness then pulled the pin between the eleventh and twelfth cars. The cars were then moving very slowly onto the crossing. He gave the engineer a signal to stop,—to reverse the engine, and stop the cars that were attached to it,—and that as he did that the cars that he cut off came in contact with the north end of track No. 7, and stopped, but did not

clear the crossing plank, leaving a space of 18 inches or 2 feet. Witness was standing at this time a little south of the center of the cars, about 15 feet from the opening. The switchman, Barrett, was standing about 10 feet due south of witness. After witness discovered that the cars had only made an opening of about 2 feet, instead of making an opening, as he intended, of about 30 feet, so as to make a passway for teams, he gave the engineer a signal to back up again, so as to make an opening the width of the crossing planks for teams to pass over. The engineer obeyed his signal to back up, moved the cars north, and witness then heard a man halloo, and saw a man's leg hanging between the cars. At the time, he thinks, he was looking at the opening between the cars. He was standing on the west side of the opening, but he could not see clear through the opening between the cars to the east side. The cars had not been stopping but a few seconds before the accident, and just before the accident he gave the signal to the engineer to back up. The engine was at the south end of the train, and headed south. When the engineer reversed his engine, as the cars were going north, the cars attached to the engine struck the cars north with a kind of a "dash." There was a verdict for plaintiff, and judgment accordingly, from which defendant appealed, after making the usual motions, and saving its exceptions in due form. The instructions, and other facts material to the case, will appear in the opinion of the court.

Bennett Pike, for appellant. *Taylor & Pollard*, for respondent.

BARCLAY, J. (*after stating the facts as above.*) 1. The theory on which the circuit court submitted the cause to the jury is best exhibited by the instructions given, which were these, viz.: For plaintiff: "(1) The court instructs the jury that it was the duty of the defendant's flagman, and its agents and servants, in the management of its locomotive and train under their charge, to exercise reasonable care and precaution to prevent any injury to persons upon the tracks of defendant, and any failure on their part to exercise such care and precaution would be such negligence as to make the defendants liable for any injury to plaintiff's husband resulting from such negligence, unless the jury further believe from the evidence that the negligence of the said husband of plaintiff contributed directly to the injury sustained by him; and, in passing upon the question as to whether the flagman and agents and servants of the defendant were or were not negligent in the conducting and managing of the locomotive and train at said crossing, you should take into consideration all the facts and circumstances as proved by the evidence to have existed at the time when and the place where the injury occurred, and you should give to each fact and circumstance, and to the testimony

of each witness, such weight only as you may deem such fact, circumstance, or testimony entitled to, in connection with all the evidence in the cause. (2) By the term 'negligence,' as used in the instructions, is meant the want of that degree of care that an ordinarily prudent person would have exercised under the same circumstances. If you find for the plaintiff, you will assess her damages in your verdict at the sum of five thousand dollars." For defendant: "(3) If the jury find from the evidence that the deceased husband of plaintiff knew, or by the exercise of ordinary care and prudence would have known, that the train by which he was injured, at the time he intended to cross defendant's track at Lesperance-Street crossing, was moving, or in the act of moving, and he attempted to cross the track between the ends of two cars belonging to said train, separated about two feet apart, then the fact, if they find it to be a fact, that there were no gates at the crossing, no brakeman stationed on the car furthest from the engine, and that the watchman was not at his post, and that no bell on the engine was ringing, is immaterial." For defendant, but modified by the court: "(4) If the jury find from the evidence that the deceased husband of the plaintiff, at the time he was crushed by the cars of defendant, was attempting to cross a track of defendant at the Lesperance-Street crossing by going between the ends of two cars of defendant then standing on said track, about two feet apart, and that the employees of defendant in charge of the train of cars, of which said two cars formed a part, were attempting at the time to separate the parts of said train at said crossing so as to make a passage over said crossing for teams and vehicles, and that said deceased knew, or by the exercise of ordinary care could have known, that said employees of defendant were at the time attempting to move said train so as to make a crossing, as above stated, *and that said cars between which said deceased attempted to pass were liable to be shoved or pushed together suddenly*, then there can be no recovery in this case, and the verdict will be for the defendant." The words italicized in the last instruction were added by the court against defendant's exception. The rest of it was asked by defendant.

It will thus be seen that the main issue put to the jury was whether the death of plaintiff's husband was the result of a breach of any of the duties which the court declared rested on defendant's agents in charge of the train, and its flagman, to exercise reasonable care to prevent damage to persons on the tracks of defendant at the street crossing in question. Defendant insists that this issue was not tendered by the petition, and that only the breach of the ordinances constitutes the cause of action alleged. Undoubtedly the ordinances prescribe certain precautions to be observed by railway operatives, and forbid certain other acts to be done by them;

but the effect of such enactments is not to absolve the company from the observance of ordinary care in many particulars not mentioned in ordinances, but defined by the general law of the land, to avoid injury to those who use the public crossings where its tracks are laid. The petition recites certain sections of the ordinances of St. Louis as having been violated, but it also alleges that the death of deceased was caused by the negligent movement by defendant of the freight-car that struck him, and of a breach of duty in that regard on the part of the flagman and train operatives, whose duties are set forth at some length, and fairly embrace those mentioned in the plaintiff's first instruction.

It is further claimed that that instruction is erroneous "because it imposes a degree of care upon the flagman, and the servants of defendant in charge of said train, that the law does not require; that there is no duty imposed by law upon the flagmen and engineers and firemen and brakemen to exercise care to prevent any injury to persons upon the tracks of the defendant; that the first and only duty of the flagman is to do what the ordinance requires, the common law not requiring the presence of a flagman at a crossing,—that is, to be at the crossing in the daytime, and display his flag thereat." We do not assent to this proposition. As has already been intimated, duties devolve on operatives of a train in many varying circumstances, not referred to in ordinances, to avert injury to persons on the railway track; and the same observation is applicable to the watchman or flagman at such crossings. It is true that the ordinance requires the presence there of a watchman, "who shall display at the cars in the day-time a red flag, and at night a red light." But it is neither in harmony with the letter or spirit of such legislative language to say that it means he shall do no more than hold his flag by day, or lantern by night. Looking merely at the words of the ordinance, he is, first of all, a "watchman,"—one set to espy the approach of danger, and give an alarm or notice of it, as defined by one lexicographer. The flag or lantern might aid him in giving the alarm, but either would be of little avail if he did not act the part of watchman in their use. Considering the spirit and purposes of the ordinance, it is evident that such a watchman's duty includes the exercise of ordinary care in warning persons on or near the street crossing of any approaching danger from passing trains. We think the instruction in question correctly defined the measure of duty resting on defendant's agents at the crossing as applied to the facts, and under the pleadings, of this case. It also submitted to the jury the question of the contributory negligence of deceased as one of fact, and there was a finding in plaintiff's favor on that issue. We shall have occasion to discuss that phase of the case later on.

2. The definition of "negligence" contained in the second instruction given for

plaintiff was not erroneous, in view of what has been already said regarding the proper issues in the cause, and of prior decisions of the court as to what constitutes negligence.

3. The instruction asked by defendant, and modified by the court, was properly refused in its original form. Knowledge by deceased that defendant's employees were about to move the train so as to make a crossing would not, in the circumstances mentioned in that instruction, above copied, constitute negligence as a matter of law. The instruction as finally given by the court was quite as favorable to defendant as in strictness it could demand, to say nothing more; and, as defendant requested the instruction in a form submitting the question of negligence of deceased as an issue of law, it cannot complain that the submission, in the circumstances here shown, of such an issue, was inconsistent with the plaintiff's first instruction, in which that question was properly submitted as one of fact.

4. We next consider the ruling of the trial court refusing defendant's request for an instruction that plaintiff could not recover. Defendant contends that it should have been given, for the reason that the deceased was guilty of such contributory negligence as bars recovery. We pass all questions raised regarding the form in which that issue was presented, and consider its merits. An outline of the salient facts is given in the statement preceding this opinion. We need touch upon only some of them here. It appeared that deceased, who was in charge of a team on Leeperance street, left it at some distance west of the crossing in question, went eastward across it to get a bolt or rod that had dropped from his wagon, and while there the train backed upon and covered the crossing on track No. 7, where the accident occurred. From the evidence of defendant's witnesses, it seems that the train consisted of 18 cars, which were "shoved" north by an engine until the switch foreman pulled a coupling-pin between the eleventh and twelfth car, and had the engine stopped by signal. This left in motion the 7 cars north of the uncoupling point; and soon the cars on that part of the track struck the north end of it, No. 7, and came to a stand. But the opening thus left at the street crossing was only as "wide as a door," or "some two feet," as variously described by witnesses. Through this opening deceased undertook to pass, but was caught and killed by a backward movement northward of the engine and train of 11 cars. This movement is said to have been made with the object of pushing the loose train of 7 cars closer together towards the north; but, as it was evident that an opening for the purpose of clearing the street was to be made, a forward movement of the engine and train of 11 cars was much more likely to be anticipated by a looker-on than the movement that was actually made. There was evidence that no bell was rung or whistle sounded before the movement of the train in

question. Deceased might rightly assume that some such signal would be given before the movement was made. *Meek v. Railroad Co.*, 38 Ohio St. 682; *Correll v. Railroad Co.*, 38 Iowa, 120. He had left his team in the street, and was anxious to return to it. Defendant's watchman gave no warning of danger; and, in all the circumstances, we do not think his act in passing through the opening can properly be pronounced negligence, as a matter of law. Such a ruling can be made only where no other inference can fairly and reasonably be drawn from the facts in evidence.

5. There was abundant evidence that defendant was negligent in several particulars under the ordinances and general law, and we find no substantial error in the rulings on the admission of testimony. Defendant objected to the admission in evidence of the ordinance requiring gates and a watchman at the crossing in question. The absence of gates was not submitted by the court to the jury as bearing in any way on defendant's liability, but the conduct of the watchman had a decided relevancy to the issues tried. The objection was to the whole section of the ordinance, of which a part was thus clearly relevant. Had defendant requested an instruction to disregard the portion now claimed to be irrelevant, a different question would be presented, but no such request was made. We think there was no error in the ruling of the court on this point. The case appears to have been tried fairly and carefully. We affirm the judgment, all concurring, except *BRACE, J.*, absent.

CAMPBELL et al. v. CITY OF KANSAS.

(Supreme Court of Missouri. June 30, 1890.)

DEDICATION—CEMETERY—ABANDONMENT—EVIDENCE.

1. A square was marked "donated for grave-yard" on an original plat, not signed or acknowledged by the proprietors of a town-site, but filed with the recorder of titles by one of them, who soon after used it at a public sale of lots. The plat, and the use of the land for interments, were acquiesced in by the proprietors. *Held* sufficient evidence of a dedication *in pais*.

2. The donors of land dedicated to a city for a grave-yard have, while the public use lasts, no right to a concurrent possession subject to a reasonable use by the public, and cannot maintain ejectment against the city to recover such a possession.

3. Land dedicated to a city for a cemetery, which has no longer the character and name of a grave-yard, but is used as a public park, reverts to the donor, who may recover in ejectment against the city, which in defense denies the abandonment.

4. In such case the question will not be considered whether the land can be appropriated and used for other charitable purposes, germane to the original one, in accordance with the equitable doctrine of *cy pres*.

5. In 1857 land, in a city, dedicated and used as a cemetery was by ordinance "vacated for grave-yard purposes." In 1860 the council, by published notice, required all who had friends buried there to move the remains. Many removals were made, but the majority of the remains were left to be taken away by the city. In 1869 it was used by the work-house force, breaking rock. In 1870 earth was

taken from it, and used to fill a street. In 1877 the city engineer was instructed by ordinance "to grade the old grave-yard, and get it into shape for a public park." This was done the next year. The grading went below all the graves, except, perhaps, a few in the low part, on which four to ten feet of earth were placed. Trees were planted, grass grown, and walks laid out. It was named and recognized by the city as a park. No visible grave or monument remained. During the final grading, in 1878, the removal of remains exhumed was stopped, and the bones of from 11 to 84 bodies reinterred, in small boxes, as near the places from which taken as possible. Small stones, bearing numbers but no names, were at these points either put five or six inches under ground, or they had sunk to that depth at the time of the trial, shortly before which the location of many of them was brought to light, by agents of the city, by "prospecting" through the park with a sharp iron rod. *Held* sufficient evidence of abandonment.

BRACE, J., dissenting.

Appeal from circuit court, Johnson county; Noah M. Givan, Judge.

This is a suit in ejectment, brought in April, 1884, by John Campbell and some 80 other plaintiffs, as owners in common, against the City of Kansas, for recovery of a block of ground situated in said city, between Oak and Locust streets and Missouri and Independence avenues. The petition is in the usual form, alleging the right of possession in plaintiffs, and their ouster and dispossession by defendant. The answer, along with a general denial, contains averments of some evidential facts, admissible under the denial, to the effect that the land sued for was dedicated to the public use for grave-yard purposes, by the original proprietors of the "old town, Kansas City," in 1847; that, ever since the dedication, it has been used for grave-yard purposes; and that it is a grave-yard still. The plaintiffs, in reply, after denying generally, allege that in April, 1884, the defendant filed an answer to a certain suit in the Jackson county circuit court, brought by one Nathaniel Grant, wherein the City of Kansas, defendant therein, averred that by ordinance of October 30, 1857, the land in controversy was vacated for grave-yard uses, and "that since October 30, 1857, said land has not been used for or as a grave-yard," by reason whereof it is claimed that defendant is now estopped from asserting anything to the contrary. As no judgment is pleaded, there could be no estoppel. As an adverse admission, the evidence was received. The case was taken by change of venue to the circuit court of Johnson county, where it was tried for the third time; this last trial being before his honor, Judge GIVAN, of that circuit. The trial resulted in a verdict and judgment in favor of plaintiffs, from which the defendant prosecutes its present appeal.

In order to understand the issues of law which come before us, it will be necessary to state briefly, in a general way, the leading features of the case as developed at the trial. It appears that the original proprietors of the land whereon stands Kansas City made three plats of the town-site,—one in 1839, before full acquisition of title; another in 1846,

which covered only about half of the town-site; and a third one in June, 1847, which included and superseded the two previous ones, and which alone includes the land in controversy. The plat of 1847 discloses additional lots laid off for sale just north of the land in controversy and east of the lots formerly platted. It also includes, contiguous to these additional city lots, certain parcels of land, ranging from one to four acres each in extent, and numbered from 1 to 32, inclusive. The names of the respective proprietors appear on these lots as if with reference to a contemplated or accomplished partition between them, excepting lot numbered 21, which is marked on the plat as "donated for grave-yard." This plat was made by Mr. John C. McCoy, a surveyor, and a witness in the case, who was one of the original proprietors of the town-site, under whom plaintiffs claim title. It does not appear to have been signed or acknowledged by any of the proprietors. Neither was it recorded at the time, or marked "Filed," although it was deposited with the recorder of titles in 1849. Prior to 1849 there was no statute requiring town-plats to be recorded. After the statute was passed containing this requirement, this plat seems to have been recorded. At the sale which followed the making of the plat, it was exhibited to the purchasers; and deeds were made in conformity with it, and by reference to it. Prior to 1847 a very few burials had taken place on a high knoll or ridge which lay near the north-western corner of the square, extending into the street on the north side, which was not distinguished from the ground in controversy by any visible boundary at that time. After the ground was platted, in 1847, the inhabitants of the town and the vicinity continued to bury in this land, mostly on the western half, which was higher than the eastern portion, making use of the unimproved streets on the north and west for the same purpose. The burials could not have been very numerous, as the town had only about 100 inhabitants in 1847, and less than five hundred in 1857, when interments in it ceased. On the 30th October, 1857, the city council passed an ordinance vacating the land in controversy for grave-yard purposes. It subsequently notified, by newspaper publication, the relatives of persons buried there, to remove their remains. The evidence relating to what was done with the land since 1857 is very voluminous, and need not be stated here in detail. In a general way, it may be stated that the city took exclusive possession of the land; that no further burials in it took place, except, perhaps, the burial of an infant; that it graded the streets surrounding it; that it leveled it off, and used it as a place for the work-house force to break rocks upon for macadamizing the street; that it graded the land, which was of an uneven surface, lying above the grade in some places from 8 to 17 feet, and below it in others; that it fenced it in, laid walks across it, with turn-stiles at the cor-

ners; that it planted it in trees, sowed it in grass, and lighted it at night; that it recognized and treated it as a park; that, by reason of its ordinances and improvements, nothing remains in or about it to indicate that it is a grave-yard. In all this the public has acquiesced.

C. O. Tichenor and W. J. Ward, for appellant. Scaritt & Scaritt, Gates & Wallace, Noble & Orrick, and H. A. Loevy, for respondents.

MARTIN, Special J., (after stating the facts as above.) 1. It appears from the evidence that Robert Campbell, William Gillis, Fry P. McGee, John C. McCoy, Henry Jobe, Jacob Ragan, and William B. Evans, as early as 1838, acquired a body of about 325 acres of land, in which is included the site of Kansas City. They became owners in common, in fee-simple, and the plaintiffs claim the land in controversy as their heirs or assigns. The right of the plaintiff to have in this suit all which the original proprietors would be entitled to were they suing, is not denied in the arguments before us. It is clear from the testimony in the record that the original proprietors never devoted this land to the use of a grave-yard by any instrument of writing, in the form of a deed or plat, sufficient to comply with the requirements of the law relating to the transfer of interests in real estate. It therefore follows that the legal fee must remain still in the original proprietors or their legal representatives. But the actual use of the land may be devoted to public purposes without deed or writing of any character. Proof of such devotion may consist of acts *in pais* going to show that the owners intended to donate the use for a public purpose, and that the public has accepted and used it for that purpose. The estate thus parted with does not extend beyond the use of the land, leaving the technical legal fee in the donors, which, however, must be held by them for the donated use as long as that use continues. While the plat of 1847 could not operate to pass the fee-simple of this land to the public, or to any trustee of the public, it constitutes an important and controlling fact in the evidence to establish a dedication of the use of the land as claimed by the defendant. The donation of the land was marked on the original plat of 1847, which was made by one of the proprietors, and was used by him at the public sale which took place soon thereafter. The public accepted the use thus indicated by burying their dead on the land for about 10 years. The plat, and the use of the land as indicated by the plat, were acquiesced in by all the proprietors. These facts constitute the best evidence possible of a dedication *in pais* to the public, which dispenses with the necessity of written instruments, as well as the existence of a grantee or trustee. Such I understand to be the established law of this state on the subject of dedications of land to public use. *Becker v. St. Charles*, 87 Mo. 13; *Putnam v. Walker*,

Id. 600; Rutherford v. Taylor, 38 Mo. 315; Price v. Thompson, 48 Mo. 365; Reed v. Board Education of Edina, 73 Mo. 304.

2. In their argument the learned counsel for the plaintiffs contended that, notwithstanding a dedication of this land to the public for the purposes of sepulture, the owners of the fee ought to recover actual possession thereof during a continuance of the use for which it was dedicated; not, perhaps, an exclusive possession, as against the public or the municipal guardian of the public, but as co-tenant with it, or subject to the reasonable use of it by the public. To sustain their position, cases are cited in which it has been held that the donors of land dedicated to public uses are entitled to actual possession for the purpose of exercising any rights of property in the land which are not inconsistent with the use for which it was dedicated. I am convinced that the cases cited have little or no application to the case at bar. They proceed upon the assumption that, after dedication to the particular use contained in the dedication, there may remain other beneficial uses for the enjoyment of the donors which could not in any manner interfere with or prejudice the use for which the dedication was made. In the case at bar the donors have devoted the whole use of this land for the purpose of continuous burials, and as a place for the repose and memory of the dead. In my judgment, no conceivable right of private beneficial enjoyment could remain in the donors, as owners of the fee, which would not be inconsistent with the right of sepulture to which they have devoted it. Crops, for their gain and sustenance, could not be grown upon its surface, nor could dwellings for their shelter and enjoyment, be erected within its limits, without interfering with the solemn use, the sanctity and repose, implied in the purpose of the dedication. The sunshine and laughter of inhabited dwellings, as well as the "toil and endeavor" of business pursuits, are out of place in cemeteries of the dead. According to our law governing the subject of ejectment, the plaintiff cannot prevail unless he has the immediate right of possession at the commencement of his action. As long as the rights of sepulture parted with in the donation are outstanding in the public, the plaintiffs have no right to recover the use of the land for any enjoyment or purpose of their own. Hunter v. Trustees, 6 Hill, 407. The city, as trustee and representative of the public, has the right of actual possession for the purposes of the dedication, and the donors have no other rights than such as any inhabitant of the city may use and possess. I am satisfied that the court below was right in declining to adopt the opposite view of the case as presented by counsel before us, and denied by that court in its rulings.

3. Having reached the conclusion that the plaintiffs dedicated the exclusive use of the land in controversy to the public for the purpose of a grave-yard, it is proper next to con-

sider whether the use thus dedicated is a perpetual one, and left no possibility of a reverter to the original donors, or their legal representatives. If it be true that the use parted with is perpetual and eternal, then it is a matter of no consequence to the plaintiffs what the public or the City of Kansas, as its representative, has done with the land; for no abuse and no abandonment could restore it to the original donors of the plaintiffs representing them. Their interest would be nothing more than the interest of any other inhabitant of the city or its vicinity to enforce the protection and preservation of the land for the uses of a grave-yard forever. If the dedication left no possibility of a reverter, then it will not be necessary to consider any other questions in the case. The literature of religion and piety has clothed trusts of the kind in controversy with attributes of perpetuity which I am satisfied cannot be sustained by science, history, or the best-considered decisions of the courts. This sentiment, based on piety and common reverence, will be found expressed in the *dicta* of decisions, rather than adopted in the result of the judgments; and, even when most earnestly expressed, it is usually accompanied with qualifying phrases which make against the principle of absolute perpetuity. In Brendle v. Congregation, 33 Pa. St. 422, the judge, in rendering his opinion, says: "We hold that the ground once given for the interment of a body is appropriated forever to that body. It is not only the *domus ultima* but the *domus aterna*, so far as eternal can be applied to man or terrestrial things. Nothing but the most pressing public necessity should ever cause the rest of the dead to be disturbed." All expressions declaring an eternal and perpetual use should be accepted with qualifications which arise from the nature of the subject-matter, and from necessities of the public good. No human body committed to the earth preserves forever either identity or trace of form. No monument placed above it is proof against the corroding touch of time. In the progress of the ages, both body and monument fade away. The temporary nature of the tenement we live in is more truthfully expressed in the verse of a living poet:

"The house was builded of the earth,
And shall fall again to ground."

If every portion of ground which has been made a burial place for man should be devoted in perpetuity for burial uses, the most populous and cultivated districts of the world, where millions upon millions of the human race have sunk into the earth in the countless ages of the past, would have to be abandoned as a dwelling-place or means of support to the living inhabitants of the present day. The devotion of land to any particular use must be subject to the changes and vicissitudes which time may bring to it. The use of a grave-yard is twofold,—for the purpose of continuous burials, and for the pur-

pose of preserving the remains and memory of those who have been buried. The original uses can be continued only by the public continuing to bury, or by continuing to protect the remains already buried, and to preserve the identity and memory of the persons who have left them. It can hardly be said that there is anything compulsory on the public to do this, although desecration can be prevented at the instance of any one. The public may cease to bury in the dedicated ground whenever it pleases. It may also refuse or neglect to either erect or preserve any monuments to indicate the identity of those already buried, or to give and continue to the place the character and name of a grave-yard. When this happens the original use terminates, and the fee vests in the original donors, or their legal representatives, free from it. It would be unjust that the public should retain the use for any other purpose than the one for which it was dedicated.

There are also certain rights of sovereignty to which all land devoted to burial purposes must be subject. I allude to the right of eminent domain, and the right to pass all reasonable laws and regulations for the health and welfare of the living. A constitutional exercise of these rights may terminate the use of a grave-yard for all the purposes for which it was donated. In *Kincaid's Appeal*, 66 Pa. St. 411, Mr. Justice SHARSWOOD recognized the validity of an act of the legislature which authorized the disinterment and removal of bodies from a grave-yard. He says: "We cannot doubt that it is competent for the legislature to authorize or to delegate that power [of disinterment] to the municipalities. It is a police power necessary to the public health and comfort. As they can authorize the removal of any other thing which they may deem a nuisance by a summary proceeding, without a jury trial, so they can authorize and direct the removal of dead bodies from any ground, and the consequent vacation of it as a burying-ground. * * * As to those recently interred, the necessity, with a view to public health and comfort, of removing them, is as apparent as the prohibition of future interments. With those which have become entirely decomposed, leaving only the bones, that necessity may not be so urgent; but of that the legislature are the exclusive judges. They may direct the removal in such manner and upon such terms as to them may seem wisest and best, having due regard to that feeling of reverence and attachment which all men naturally have to the spot where the ashes of their departed ancestors and friends repose, and the strong desire that, if possible, they should not be disturbed. Even these feelings, however, must yield to the higher consideration of the public good." In *Gilbert v. Buzzard* the court says: "It has been argued that the ground once given to the interment of a body is appropriated forever to that body. * * * The time must come when posthumous remains must mingle with, and

compose a part of, the soil in which they have been deposited. The legal doctrine, certainly, is that the common cemetery is not *res unus ætatis*, the exclusive property of one generation, but is likewise the common property of the living, and of generations yet unborn, and subject only to temporary appropriation." 3 Phillim. Ecc. R. 335. Language of the courts indicating the temporary nature of grave-yard uses will be found in the following cases: *Windt v. German Reformed Church*, 4 Sandf. Ch. 471; *Partridge v. First Independent Church of Baltimore*, 39 Md. 631; *Page v. Symonds*, 63 N. H. 19; *Sohier v. Trinity Church*, 109 Mass. 21.

An interesting question bearing on the right of reverter, and arising out of the law of charitable uses, has been suggested in the opinions of courts cited by counsel before us, rather than in the points made and elaborated by them. When land is donated for a mere public use, such as highways, streets, wharves, parks, and landing places, the use of the land reverts to the donor upon discontinuance or abandonment of the particular use for which it was donated. This is the result according to the authorities governing the modern law of dedication. *Washb. Easem.* 200; *Hooker v. Turnpike Road Co.*, 12 Wend. 370; *Austin v. Cambridgeport Parish*, 21 Pick. 223; *Beardslee v. French*, 7 Conn. 125; 3 Kent, Comm. (6th Ed.) 448; *Jacksonville v. Railway Co.*, 67 Ill. 543. Land may be dedicated to pious and charitable purposes, as well as for public ways, commons, and other easements in the nature of ways. *Pearsall v. Post*, 20 Wend. 111. Now it seems to us that the dedication in this case falls fairly enough within the general definition of "charitable and pious purposes." *Commissioners v. Church*, 30 Kan. 620, 1 Pac. Rep. 109. Such uses, we know, are more often free from the incidents of reversion and resulting trusts than subject to them. We have seen that the rule "once a grave-yard always a grave-yard" cannot be maintained in the face of modern law. The question closely allied to it is whether, after the land donated for a charitable purpose, such as a grave-yard, ceases lawfully to be devoted to that use, or becomes impossible to be so devoted, must it remain with the public, or the representative of the public, subject to be appropriated and used for other charitable purposes germane to the original one for which it was donated, in accordance with the equitable doctrine of *cy pres*, which has been to some extent recognized in the decisions of this state. I do not deem it necessary to consider the general principles upon which a court of equity will determine whether the charitable intention of a donor has come to an end, or whether it may be continued in a changed or modified form, so as to cut off all rights of reversion. The courts in this country have very generally ignored or denied the existence of the doctrine of *cy pres* as bearing upon donations or dedications of

land made for particular charitable uses, such as grave-yards and schools. *Society v. Dugan*, 5 Atl. Rep. 420; *Reed v. Stouffer*, 56 Md. 254; *Hunter v. Trustees Sandy Hill*, 6 Hill, 414; *Weisenberg v. Truman*, 58 Cal. 70; *Carter v. Portland*, 4 Or. 348; *Appeal of Gumbert*, (Pa.) 1 Atl. Rep. 438; *Schlessinger v. Mallard*, (Cal.) 11 Pac. Rep. 728; *Venable v. Coffman*, 2 W. Va. 310; *Still v. Trusts*, 16 Barb. 112; *Brown v. Church*, 23 Pa. St. 495; *Foster v. Dodd*, 17 Law T. (N. S.) 614; *Washb. Easem.*, 200; *Kirk v. King*, 3 Pa. St. 436. In the case of *Board v. Edson*, 18 Ohio St. 226, it appears that land had been donated, or rather dedicated by plat, "for school purposes, and on which to erect school-houses." This donation undoubtedly fell within the classification of "charitable dedications." It was accepted and used by the public for school purposes for many years. In the course of time the land became useless for school purposes on account of the proximity of a railroad. The board of education filed a bill setting out these facts, and asking to have the lots sold, and the proceeds applied to purchase other property to be devoted to the same purpose. On a demurrer to the bill by the representatives of the original dedicators, it was dismissed. The court declared: "Should the sole uses to which property has been dedicated become impossible of execution, the property would revert to the dedicators or their representatives. Is it competent for a court of equity, without the consent of the dedicators, to extinguish forever this right of reversion by ordering a sale of the property, and assuming to execute the trust *cy pres*, by transferring it to the proceeds of the sale? We think judicial power cannot legitimately be so far extended." In the case of *Rutherford v. Taylor*, 38 Mo. 315, Judge WAGNER seems to regard dedications of land "to any lawful use, whether public, pious, or charitable," as all alike, so far as the rights of the donor are concerned. He treats the donor's rights as resting solely on the law of estoppel *in pais*, precluding the rights of the donor during continuance of the use for which it was dedicated. I may add here that the right of retention as a possible incident to this dedication does not come fairly before us on the record of the case. No court of equity has assumed to order a sale of the land in controversy for the purpose of purchasing another grave-yard. Neither does the city assume to retain the land for the purpose of appropriating it to any kindred use with the dedication. If it be a fact that it permits it to be used as a park or place of recreation for the comfort or amusement of the living, the use could not be justified as an application of the doctrine of *cy pres*. But the city, in its answer, denies any diversion, and expressly alleges a continuance of the original use for which it was dedicated. It claims in its answer, and in the arguments of its counsel, that the place is still a grave-yard. Under these circumstances, I think this court is relieved

from the task of determining whether this dedication is subject to the doctrine of *cy pres*. It is not called upon by the state of the record to authoritatively dispose of such a question. My conclusion is that the plaintiffs in the case made in this record must prevail if the use of the land for a grave-yard has been discontinued and abandoned by the public and its representatives. Upon any lawful cessation of the use, the title reverts.

4. This brings us to the issue of fact made between the parties to the suit, the principal issue of the controversy, which was submitted to the jury, and decided in favor of the plaintiffs. It is not an issue for this court to determine. As an appellate tribunal, it can only decide whether the issue of discontinuance, and abandonment of the use, was submitted to the jury on proper instructions of law to guide them, and whether their finding of the issue is supported by substantial evidence tending to prove the issue as found by them. The question was submitted on the following instructions: "(1) The court instructs the jury that, to constitute abandonment of a grave-yard, it is not sufficient that burials therein have ceased or been prohibited. So long as it is kept and preserved as a resting place for the dead, with anything to indicate the existence of graves, or so long as it is known or recognized by the public as a grave-yard, it is not abandoned. On the other hand, it may contain the remains of the dead, and yet be abandoned. If no interments have for a long time been made, and cannot be made, therein, and, in addition thereto, the public, and those interested in its use, have failed to keep and preserve it as a resting place for the dead, and have permitted it to be thrown out to the commons, the graves to be worn away, grave-stones and monuments to be destroyed, and the graves to lose their identity, and if it has been so treated and used or neglected by the public as to entirely lose its identity as a grave-yard, and is no longer known, recognized, and respected by the public as a grave-yard, then it has been abandoned, or if the public, and those interested in its use as a grave-yard, have permanently appropriated it to a use or uses entirely inconsistent with its use as a grave-yard, in such a way as to show an intention of permanently ceasing to use it as a grave-yard, and it has become impossible to use it as a grave-yard, then it has been abandoned; and in determining the question of abandonment the jury should take into consideration all the facts and circumstances given in evidence. (2) Although you may believe from the evidence that the land in controversy was dedicated, at the time and in the manner as alleged in defendant's answer, to the public for its use as a grave-yard, and that the public, for a number of years after such dedication, used the said land for such purpose, if you further believe from the evidence that the public, and those interested in the use of said land as a grave-yard, had before the commencement of this

suit abandoned the same as a grave-yard, and that the same was not at the commencement of this suit a grave-yard, and was in possession of defendant, then you should find for the plaintiff." I have considered these instructions very carefully; and, although they may be open to the criticism of repetition and redundancy, I am satisfied that they gave the jury to understand very clearly that the plaintiffs were not entitled to recover unless the jury was satisfied from the evidence that the original uses for which the land had been dedicated had been discontinued and abandoned before commencement of the suit.

In order to determine whether there was evidence to sustain the finding of the jury on this issue, it will be necessary for me to recall briefly the evidence proving, or tending to prove, what was done, or permitted to be done, with the old grave-yard both by the city and the public at large. The dedication in 1847, took place before incorporation of the present city. When the city was incorporated, in 1852, its limits included the grave-yard. It is distant now only a few blocks from police head-quarters. On the 14th May, 1855, it was resolved by the city council that the location of this grave-yard was too near the business thoroughfares of the city, and that immediate steps should be taken for the purchase of other grounds for burial purposes. On the 30th October, 1857, an ordinance was passed accepting the proposition of the Union Cemetery Association to sell the city five acres for a potter's field. By the second section of the ordinance the land in controversy was "vacated for grave-yard uses," and a penalty ranging from \$25 to \$100 was imposed on any one who should enter therein the body of any person whomsoever. In its capacity as trustee and guardian of the rights of the public in this grave-yard, the city had no power to change or destroy its use. *Trustees v. Council*, 33 N. J. Law 19; *Mo. Sess. Acts 1875*, pp. 204, 205; *City of Hannibal v. Draper*, 15 Mo. 634. But, as an arm of the civil government, it was vested with full police power, as early as 1853, "to make regulations to secure the general health of the inhabitants, and prevent and remove nuisances." This general grant of power has been usually accepted as sufficient to authorize the prohibition of burials, and discontinuance of grave-yards, in the populous districts of cities. *Bogert v. Indianapolis*, 13 Ind. 134; *City Council v. Baptist Church*, 4 Strob. 306; *Coates v. New York*, 7 Cow. 585; *Austin v. Murray*, 16 Pick. 127. The prohibition of future burials destroys at once the interest of the public generally in a grave-yard. Only those members of the public who have relatives buried there could have any special interest in it,—an interest to preserve the remains and monuments of the dead. *Kincaid's Appeal*, 66 Pa. St. 411; *Gumbert's Appeal*, 110 Pa. St. 496, 1 Atl. Rep. 438; *State v. Wilson*, 94 N. C. 1015. The effect of such a prohibition in discon-

tinuing the land entirely for grave-yard purposes would be soon worked out by the lapse of time. Its effect would be more marked upon a grave-yard like the one in controversy than upon an old cemetery filled with graves and costly monuments. It will be observed that the ordinance does not consist only in a positive prohibition of future burials. The import of its language bearing upon the discontinuance of this ground as a grave-yard is unqualified, and assumes to vacate the ground for all grave-yard uses. The language contemplates and authorizes disinterment, if that should be necessary to complete the vacation of the land for grave-yard uses. The subsequent action of the city council and city authorities is in strict accord with this construction of the ordinance. In August, 1866, the city council, by published notice, required all persons who had relatives and friends buried within the square to remove them. The evidence shows that this was very generally done. The city undertaker, while engaged in removing the remains of the unknown to the potter's field, says that he removed to other places remains which were claimed by friends and relatives. Many removals took place under the direction and supervision of relatives and friends of the dead. But notwithstanding the notice of removal, and the actual removal by relatives, the majority of the remains were left to be removed by the city.

Originally the land in controversy was part of a high knoll or ridge running almost north and south. Its highest elevation was near the north-west corner. From this point, it sloped gently towards the south and east, also slightly towards the west, which was bounded on the original plat by Oak street. Locust street, which bounds the square on the east, was graded in 1868 or 1869 by raising it several feet above the square in certain points with earth obtained from the square. The embankment resulted in a pond on the square which subsequently was filled with earth from the square. In 1869 some grading was done on Oak street, and then, or during the gradings which followed, the square was used at times by the city, with its work-house force, breaking rocks for the streets. In 1870 and 1871 a portion of the north side of the square was taken to fill up Fifth street, which was in the vicinity. In 1872 came the grading of Missouri avenue, which bounds it on the north. The grade ranged from five to seven feet below the surface of the square. In 1872 or 1874 the further grading of Oak street took place. The grades on Oak street and Missouri avenue left the square many feet above the grade. In the course of time the embankments left by the grades sloughed off, leaving in many places the remains and coffins of the dead exposed to view. In 1878 or 1879 the city completed the grading of the square, reducing its high parts, and bringing up its low parts to a level with the surrounding streets. It is claimed on the part of the defendant that this was necessitated

by the grading of Oak street and Missouri avenue, which left the unsightly banks of the square open to public comment and criticism. On the part of plaintiffs, it is claimed that this final grading of the whole square was in pursuance of a resolution of the city council passed in June, 1877, which reads as follows: "Be it resolved by the common council of the City of Kansas that the city engineer be instructed to employ the work-house force, when not otherwise engaged, to grade the old graveyard, and get it in shape for a public park." There is much evidence in the record tending to prove that the grading of the square went below all the graves in it except, perhaps, a few buried in the low parts of the square on the eastern slope, upon which from four to ten feet of earth have been placed. According to the evidence of the city undertaker, who had a contract from year to year for the removal of remains, and who received a compensation therefor at the rate of five dollars a skull, all the remains in the square encountered in the gradings prior to 1878 were removed either by him or friends of those who could be identified. In this testimony he is corroborated by other witnesses. The undertaker did not attend the final grading in 1878, and what was done with the remains then exhumed will be noticed presently. After the final grading the ground was in other respects improved and ornamented as already stated. Trees were planted, grass sown, walks laid out through it, and it was lighted for the convenience of the public. It has been used for public entertainments, accompanied with music and feasting. It is named and recognized by the city as a park. No visible grave or monument to perpetuate the memory of the dead is discernible to the visitor. It is used and recognized by the public, as well as the city, as a park for the living, and not as a grave-yard for the dead. The public has acquiesced in the change.

It would not be proper for me to close this opinion without some notice of the facts and acts which the defendant pretends are sufficient to preserve this land as a resting place for the repose of the dead, and for perpetuating their memory. During the final grading in 1878 the city authorities discontinued the removal of the remains exhumed, and caused the bones to be gathered up by the work-house force engaged in the grading, and reinterred as near the place from which they were taken as possible. This was done in small pine boxes, procured from a planing-mill, about ten inches wide and deep, and from two to three feet long. Some of the witnesses say that no attempt at preserving the separate identity of the remains was made. Skulls and bones which had no connection with each other in life were frequently thrown with mould into the same box. Other witnesses testify that the individuality of the remains was preserved in the reinterment except in some cases, where a great many remains were found in one grave. There is a conflict of evidence as to

the number of these pine boxes containing unknown bones and mouldering earth, the plaintiffs fixing the number at 11, while the defendant claims there must have been 84. There is evidence tending to show that, when the boxes were buried, stakes were driven so as to indicate their location, and that afterwards small stones, 8 by 10 or 12 inches in surface, took the place of the stakes. These stones had no names on them, but were numbered. They were either placed 5 or 6 inches under the earth or they had sunk to that depth before the trial of this case, as many witnesses testify that they never saw them in the square. Shortly before the trial at Warrensburg, the existence and location of many of these stones, under instructions from defendant's agents, were ascertained and brought to light by "prospecting" through the square with a sharp iron rod. Some of them which were thus found have been uncovered. One of the stones is said to be in the line of a walk which had been uncovered for some time, possibly in laying out the walk. It is claimed that Mr. Reinhart, a witness for defendant, has identified the grave of a brother 14 years old, buried some thirty odd years ago. I have read his evidence carefully, and find in it too much doubt and uncertainty to justify the conclusion he swears to. When the public was removing remains from the ground before it was graded, Mr. Reinhart went to the grave-yard for the purpose of ascertaining the location of his brother's remains, with a view to their removal. He admits that he could not then find the grave. After the grading, he finds in the ground a broken piece of stone, without name or number, which he claims to identify as a part of the base of the tombstone of his brother; and from this he infers that his brother's grave is there or near by. He never uncovered the surface to see what was below. It is from evidence relating to those reinterments that the defendant insists that this ground is still preserved for the uses of a grave-yard. There is evidence tending to show that the reinterments made in 1878 were directed by the city authorities for the sole purpose of preventing a reverter of the land. This was advised by the city engineer as early as 1873, and there were persons present at the reinterments of 1878 who testify that the city engineer and other city officers admitted that such was the purpose still. The defendant's evidence relating to those reinterments went to the jury for what it was worth. It was fairly susceptible of the construction that it was not a genuine movement in the way of repentance, as ingeniously claimed by defendant's counsel, to preserve the remains and memory of the dead, but as a sham and a fraud on the donors and their representatives. The jury must have found that there was nothing in it which could operate as a revocation of the ordinance, notice, and previous acts of the city vacating the ground "for grave-yard uses." They must

have been satisfied that the use of this land for the purpose of a grave-yard could not be continued for ages to come by such a transparent device and weak invention. As this finding is sustained by competent and abundant evidence, it ought not to be disturbed by this court.

It may well be that the donors of this land never actually contemplated any return of it to themselves or their representatives. It is not at all probable that they foresaw the marvelous growth and sudden splendor of the city which has sprung to life around the old grave-yard as if evoked from airy nothing by the wand of some mighty magician. But their gift was made, necessarily, subject to the unforeseen changes in the womb of time, and the demand of a higher public weal.

5. It has been argued by counsel for defendant that, as the donors of this land sold other parcels on the showing of the map or plat which dedicated it to the public, they must have received value for their dedication in the increased price of the sales, and that they are estopped from claiming a return of the land. It may well be that the dedication of highways and parks furnishes a valuable inducement to purchasers of surrounding property. But I do not think that the proximity of, or convenient access to, a grave-yard can be reasonably classed among the inducing causes of the sale of real estate. One witness in this case testifies that he was deterred from buying by reason of the existence of this old grave-yard. I do not think that easy and convenient access to cemeteries can be regarded as an inducement which would add any appreciable value to the sale of contiguous property. Upon the whole, I am persuaded that the verdict and judgment are for the right parties, and should be affirmed, and it is so ordered.

RAY, C. J., and SHERWOOD and BARCLAY, JJ., concur. BRACE, J., dissents. BLACK, J., not sitting.

MEYER *et al.* v. NICKERSON.

(Supreme Court of Missouri. June 2, 1890.)

HOMESTEAD—LEVY OF EXECUTION.

1. The homestead law of Missouri provides that, where execution is levied on a tract of land exceeding in value the amount allowed for a homestead, the debtor may designate and choose the part to be exempt, but, in case he refuses to designate such part, the sheriff shall designate three disinterested appraisers, duly sworn to a discharge of their duties, who shall fix the boundaries of the homestead, and the sheriff shall then proceed with the levy on the remainder. Defendant claimed the entire 80 acres owned and occupied by him as a homestead, and neglected to designate any part of it as exempt. The sheriff then appointed appraisers, who set off 45 acres, including the dwelling, which they estimated to be of the full value allowed for a homestead; and the sheriff then proceeded with the levy on the remainder. *Held*, on motion to quash the levy, that defendant's neglect to make a selection was a refusal, and that it was not necessary for the sheriff thereafter to give him any notice of his right of exemption, as provided in Rev. St. Mo. 1879, § 2847,

in case of levy on certain kinds of property, not including homesteads.

2. It was not necessary that the appraisers should set off with the homestead any part of the woodland, which was on the part furthest from the dwelling.

Error to circuit court, Chariton county; G. D. BURGESS, Judge.

A. W. Mullins, *Crawley & Son*, and A. W. Johnson, for plaintiff in error. *Lander & Ellington*, for defendants in error.

RAY, C. J. This controversy concerns mainly the homestead of the plaintiff in error, Nickerson. Meyer & Bro., the defendants in error, at the April term, 1885, of the Chariton circuit court, recovered a judgment against said Nickerson for \$609.80, upon which execution was issued on May 19, 1885, and delivered to the sheriff of said county, and made returnable to the October term of said court. On the 1st day of September, 1885, the sheriff levied said execution upon 80 acres of land in said county belonging to said Nickerson to satisfy said judgment in favor of said Meyer & Bro. Said Nickerson on September 15th gave notice in writing to the sheriff, claiming the whole 80-acre tract as his homestead; and on the 28th day of September, nearly a month after the date of the levy, and about two weeks after defendant's said notice to the sheriff, the sheriff appointed three appraisers, who on said day set off to Nickerson as his homestead, out of the 80 acres levied upon, the 40-acre homestead, containing the dwelling-house and appurtenances, together with 5 acres in the corner of the other tract, and adjoining the home tract, valuing the 45 acres at \$1,500, the limit of value fixed by the statute. The sheriff, as appears by his return, thereupon released the said 45 acres so set apart as a homestead by the appraisers, but held his levy upon the remaining 35 acres, and advertised the same for sale under said execution. At the October term of said circuit court, at which said sale was to be made, and before the day of sale, the defendant in the execution filed his motion to quash the levy and proceedings of the appraisers because of the neglect of the sheriff to notify and apprise him of his right to designate and choose the part of the said tracts to which his homestead exemption should apply, and for the failure of the commissioners or appraisers to go upon the land before appraising and locating the various parcels, and making their said report to the sheriff, and for setting off the homestead in such manner as to deprive him of any part of the timber on the 80-acre tract. The trial court at said October term heard and overruled the motion to quash the levy, and allowed the sale of the 35 acres to proceed; and at the sale thereof one of said execution creditors became the purchaser. After a fruitless motion for a rehearing, said Nickerson, defendant in the execution, filed his bill of exceptions, and sued out the present writ of error.

The act in respect to homesteads is, as

counsel say, a beneficent and humane one, and, by the great weight of the more modern decisions, is to be fairly and liberally construed so as to give due effect to the intention and spirit of the act. The right conferred upon the debtor to designate and choose the part to which the exemption shall apply is nevertheless a legal and statutory right or personal privilege given by the statute as an incident of the homestead estate. Where, as is the case here, the given tract exceeds the limit of value prescribed by the statute, the theory of the statute is that the right to designate and choose the part to be exempt is a valuable right—privilege—which the debtor will, or at least may, exercise for his own convenience and advantage, subject, of course, to the limitation as to value. The law perhaps presupposes that the debtor will choose or designate what he wants, but provides for the contingency if he does not. He does not, it is true, waive or forfeit his estate or right of homestead by any neglect or refusal to designate or choose the part he will take as a homestead; but a refusal to so designate and choose authorizes the officer to proceed to set off the homestead in the manner pointed out in the statute. The learned counsel for plaintiff in error seem to contend that the sheriff cannot proceed to appoint appraisers, etc., until there has been a direct and express refusal on the part of the debtor to designate and choose; but the term as employed in the act is, we apprehend, not to be construed in such a restricted sense. If the debtor will not at the proper time, or in a reasonable time, under the circumstances of the case, choose or designate the part he will take, this is, we think, a refusal so to do, within the meaning of the act, as otherwise he could by mere silence and inaction block the entire proceeding, and prevent the officer from executing the writ, although the property or estate he held and occupied might manifestly be largely in excess of the value to which the statute limits the homestead exemption. In the case before us, the 80-acre tract, as is conceded, exceeded considerably in value the limit of the statute. Some of the witnesses put the value at \$3,000 or over, and the defendant in the execution put it in his testimony at \$2,200 for the whole tract; that is, he valued the home 40 at \$1,200, and the other 40-acre tract at \$1,000. The sheriff, as we have seen, made his levy upon the whole tract on the 1st of September, at which time, it seems, he advised the defendant to see his lawyer about his homestead. As before stated, the defendant in the execution, on September 15th, by notice in writing to the sheriff, claimed the whole 80-acre tract as his homestead. Defendant did not thereafter modify his claim to the whole 80 acres, and did not at any time or in any manner designate or choose any part of the 80 acres to which the homestead exemption should apply. The sheriff then, on the 28th of September, appointed the appraisers, who thereupon fixed the location

and boundaries of the homestead as we have seen. Why, then, is not this showing so made a real and substantial compliance with the terms and spirit of the homestead enactment in question? Counsel for plaintiff in error say, because it was the duty of the officer, after having the whole tract appraised, to apprise the defendant in the execution that it exceeded in value the statutory limit, and to apprise him of his right to select the part he desired to be exempt, and to permit him to then make such selection. The act in respect to executions (section 2347, Rev. St. 1879) provides for and devolves a duty of this sort in the given case upon the officer making the specified levies, but the homestead act contains no provision of a similar import. The homestead law, as we have already intimated, devolves upon the debtor the duty, in the first instance, of choosing and designating to the officer the parcels he desires to hold as his homestead and exempt from the levy; and, if he refuses so to do, then the law directs the sheriff to appoint appraisers, and devolves upon them the duty to fix the location and boundaries of the homestead. The law will not suffer his refusal or neglect to choose to affect his right, or the right of the family, to a homestead. Whether he claims his homestead or not is immaterial. But, if he does not exercise the right of choice which the law gives him either at the time the levy is made, or in a reasonable time thereafter, or at any time, as is the case here, then the sheriff must resort to the other prescribed mode, by appointing appraisers, upon whom the statute then casts the duty of fixing the location and boundaries of the homestead. The protection which the law then provides, to make effective the limitation of value, in the interest of the creditor, and to secure the homestead, properly admeasured, located, and bounded, to the debtor and his family, is in the action of three disinterested appraisers duly sworn to a faithful discharge of their duties, and not, as in the execution law, by devolving the duty of apprising the debtor of his rights as to attachment and execution upon the officer. Upon the grounds indicated, we think this first point should be ruled against the claim of plaintiff in error in this behalf.

Nor do we think we can reach a result favorable to the second claim of plaintiff in error, that the proceedings and report of the appraisers should have been set aside because they did not allot or set off to the defendant in the execution any part of the timber land. This was one of the advantages the debtor might have secured by the exercise of his right to choose and designate the parcels he desired to constitute his homestead. But, as the appraisers have set off the home tract, with the dwelling-house, appurtenances, etc., which is the most valuable of the two tracts, and 5 acres additional in the other 40, and adjoining the home 40, the two allotments being thus compact, and of the value fixed

by the statute, we do not see how their report, approved by the trial court after hearing the testimony for and against it, can be disturbed in this court for failure to assign a part of the timber to the debtor. We can see nothing oppressive in so fixing and locating the boundaries of the homestead. The assignment contains, as already stated, the dwelling-house and appurtenances, and a compact, adjoining body of land, of the full value prescribed by the statute. The debtor made no claim and gave no notice, either to the officer or the appraisers, of his desire for a part of the timber. The 12 acres of timber land does not adjoin the home tract, but is situated on the north side of the remaining 35 acres levied on. The homestead law is to be liberally administered, so as to give effect to its humane provision, and we see no reason to doubt that this has been done in the case at bar.

Something is said to the effect that the testimony of certain witnesses shows that the land set off by the appraisers was not worth exceeding \$1,300 clear of incumbrances. This is so, but the testimony of other witnesses, and the report of the appraisers, show the value to be \$1,500. So, that, upon a conflict of evidence of this sort, the finding of the trial court is binding upon us. This leads to an affirmance of the judgment of the trial court, and it is accordingly so ordered. All concur, except BRACE, J., absent.

CRAIG et al. v. VAN BEBBER et al.

(Supreme Court of Missouri. June 2, 1890.)

INFANCY — DISAFFIRMANCE OF DEED — HUSBAND AND WIFE.

1. When a minor conveys land, and, after attaining majority, brings an action of ejectment to recover it, it is not necessary to set out in the petition a disaffirmance of the conveyance.

2. In such an action, when it appears that the minor has no other property, he may recover the land without returning so much of the purchase money as has been paid.

3. An offer, after attaining majority, to execute a confirmatory deed on the payment of the balance of the purchase money, is not a ratification.

4. Under Code Mo. § 3295, which provides that a conveyance by a husband, during coverture, of any interest in his wife's real estate, shall be invalid unless jointly executed by husband and wife, and by her duly acknowledged, when the wife was an infant at the time of the conveyance, it is void as to the husband as well as to her.

Appeal from circuit court, Linn county;
HARRY LANDER, Special Judge.

W. J. Patterson and Silver & Brown, for appellants. H. K. West and A. W. Mullins, for respondents.

BLACK, J. This is an action of ejectment for 100 acres of land, commenced by Ella Craig and her husband, Daniel Craig, against Van Bebbber, Tully, and Sprankle. The plaintiff Ella Craig inherited the land from her father; and she and her husband conveyed the same to Henderson Tabor by a deed dated the 28th July, 1884, for the consideration of \$1,463. Of this amount, Tabor

paid in cash \$350, and executed to them his four notes, due in one, two, three, and four years, for the balance of the purchase price, and secured the same by a deed of trust on the land. The sale was made through an agent, and the agreement was that the plaintiffs should have the first deed of trust. It seems however, that Tabor gave a deed of trust on the land to secure a debt of \$800, which was by some manipulation made prior in point of time to the one given the plaintiffs for purchase money. This prior deed of trust was made by Tabor to one J. B. Watkins as trustee. By virtue of authority set out in the deed of trust, Watkins constituted W. J. Patterson his attorney in fact to act for and in his behalf. Patterson, as such attorney in fact for Watkins, advertised and sold the property to defendant Sprankle on the 8th October, 1886. The other defendants are the tenants of Sprankle. The plaintiff Ella Craig was a minor, 16 years of age, when she and her husband executed the deed to Henderson Tabor. The notes executed by Tabor are now in the possession of plaintiffs, and have not been paid. Mrs. Craig became 18 years of age on the 18th day of March, 1886; and this suit was commenced in November, 1886, to disaffirm the deed made by her while a minor. Plaintiffs did not offer to refund the \$350. The evidence offered to show a ratification is, in substance, this: As soon as the plaintiffs learned that their deed of trust was a second lien instead of the first, they demanded a first deed of trust, according to their contract; but their demand was refused. They also demanded payment of the notes, which was refused. They executed a new deed after the wife became of age, and offered to deliver it, provided the notes were paid or secured by a first deed of trust, but upon no other condition. The plaintiff David Craig, being asked if any suit had been brought for the collection of the notes, said: "I think there has been,— at Linneus, I think." It does not appear when the suit was brought, or what became of it. The notes, it is agreed, are in the possession of plaintiffs.

1. The point made here, and by a refused instruction, that the plaintiffs should have in terms set out in their petition and pleaded disaffirmance of the deed, is not well taken. Where a minor executes a deed of conveyance of land, and after attaining majority conveys the same land to a third person, the second deed is a disaffirmance of the first. Peterson v. Laik, 24 Mo. 541. So, too, the deed executed while a minor may be avoided by a suit in ejectment after majority. Vasse v. Smith, 1 Hare & W. Lead. Cas. (5th Ed.) 317; Tied. Real Prop. § 793. A petition which is in the ordinary form of an action of ejectment is sufficient.

2. The defendants asked, but the court refused to give, the following declaration of law: "The infancy of Ella Craig does not entitle plaintiff to recover, as no offer or tender was made by them to return to Sprankle

funds or consideration received by Ella Craig, arising from the sale and conveyance of the land by her to Tabor." The theory of this instruction is that plaintiffs were bound to make a tender to Sprankle for the \$850 paid them by Henderson Tabor, the grantee in the deed which the plaintiffs seek to avoid. Where the contract has been executed by the infant, and has been in whole or in part executed by the adult, and the infant, upon coming of age, repudiates the transaction, he must return the property or consideration received. This general rule has often been stated without any qualification whatever. But the weight of authority is that the rule can only apply where the infant has the property or consideration at the time he attains full age. If he has wasted or squandered the consideration or property during infancy, then he can repudiate the contract without making a tender. Tyler, Inf. (2d Ed.) § 37; Green v. Green, 69 N. Y. 553; Chandler v. Simmons, 97 Mass. 508; Reynolds v. McCurry, 100 Ill. 856; Brandon v. Brown, 106 Ill. 519; Price v. Furman, 27 Vt. 268; Walsh v. Young, 110 Mass. 896. The privilege of repudiating a contract is accorded an infant because of the indiscretion incident to his immaturity; and, if he were required to restore an equivalent where he has wasted or squandered the property or consideration received, the privilege would be of no avail when most needed. Kerr v. Bell, 44 Mo. 120; Highley v. Barron, 49 Mo. 103; and Baker v. Kennett, 54 Mo. 82, are cited as affirming the general rule before stated without any exception; and some expressions used would seem to lead to that result. But a careful consideration of the facts of these cases will show that there was no occasion for considering the exception. The remarks there made must be read and understood in the light of the facts before the court. We entertain no doubt but the rule, with the qualification before stated, is the correct one. The instruction is therefore faulty, and especially so in view of the evidence that Mrs. Craig did not have any money or property save the land in question. The notes are in the hands of the plaintiffs, and the fact of disaffirmance will discharge the maker; for the law is well settled that the infant, having repudiated his or her deed, cannot recover the unpaid purchase price.

8. The evidence fails to make out a *prima facie* case of ratification. There is no evidence that Mrs. Craig, or even her husband, received any part of the purchase price after she attained her majority. She and her husband did offer to execute and deliver a confirmatory deed upon being paid the balance of the purchase price, namely, \$1,113, or upon receiving a first deed of trust upon the land securing that amount; but it did not suit the purposes of Tabor, or any other of the interested parties, to comply with that condition. A mere acknowledgment that a debt exists, or that a contract has been made, will

not constitute a ratification. Baker v. Kennett, supra. There must be an intention to affirm the deed. A deed of confirmation is not necessary, but the act relied upon must be of such a nature as to show a clear intention to confirm the deed. An offer to make a deed of ratification upon the condition that the unpaid purchase price is paid or secured is no evidence of a confirmation. It rather shows a disposition to disaffirm, should the proposed condition not be performed.

4. This suit was brought for the very purpose of disaffirming the deed made by Mrs. Craig, and she was a proper and a necessary party plaintiff. Her husband is but a nominal party to the suit. But it is insisted that the wife cannot recover because the husband is entitled to the possession of her land, and that he cannot recover because, by joining her in the deed, he parted with his possession and right of possession. Mrs. Craig held the land in question as her general property under section 3295 of the married woman's act. That section declares that a conveyance made by the husband, during coverture, of any interest in such real estate, shall be invalid unless the deed is executed jointly by the wife and husband, and by her duly acknowledged. This statute, it has been held again and again, very materially modifies the common-law marital rights of the husband in the lands belonging to the wife. It is, so far as he is concerned, a disabling statute, so that he is utterly powerless to charge or convey the land, or the rents, issues, or products thereof, except by a deed jointly executed to himself and wife. Mueller v. Kaessmann, 84 Mo. 323; Gitchell v. Messmer, 87 Mo. 139; Gilliland v. Gilliland, 96 Mo. 522, 10 S. W. Rep. 139; Wilson v. Albert, 89 Mo. 537, 1 S. W. Rep. 209. If the deed jointly executed by husband and wife is invalid as to the wife, because not properly acknowledged by her, or because her signature has been procured by fraud, then it is ineffectual to convey the husband's limited marital interest. Goff v. Roberts, 72 Mo. 571; Bartlett v. O'Donoghue, Id. 563; Hoskinson v. Adkins, 77 Mo. 538; Hord v. Taubman, 79 Mo. 101. These authorities show that a conveyance by husband and wife of the lands of the wife, to be valid as against the husband, must be valid as against the wife. Now it is true that in the cases cited the deeds were worthless from the beginning, while here the deed is voidable only; but we do not see that this makes any difference. When the deed is disaffirmed because of the minority of the wife, it becomes worthless as to the husband. As said in the case last cited, the title can only be transferred by an indivisible integer, or not at all. So, too, if the deed be avoided as to the wife, it is avoided as to the husband. It must stand or fall as a whole. The law of this case is with the plaintiffs, and the judgment is affirmed.

BRACE, J., absent. The other judges concur.

GILL et al. v. BUCKNER et al.

(Court of Appeals of Kentucky. June 25, 1890.)

JUDICIAL SALE—ESTATE CONVEYED.

1. Where one has purchased a dower interest in land, and already owns an undivided interest in the remainder dependent thereon, a sale under a decree of "his undivided interest in the dower" passes his remainder.

2. Where he was a party to the suit in which such undivided interest was sold, it being included in the decree by an amendment, and received pay therefor, without taking any steps to correct the decree, it will be presumed, after the lapse of 30 years, that he consented to the amendment, and he cannot question the purchaser's title.

Appeal from chancery court, Bracken county.

"Not to be officially reported."

R. K. Smith, for appellants. *H. P. Willis*, for appellees.

BENNETT, J. In 1830, Thomas Buckner and Matilda Buckner, his wife, the father and mother of the appellants, and of the appellee William Buckner and Mrs. Ambrose, (formerly Buckner,) conveyed to John Hanson, Sr., father of said Matilda, the tract of land, a part of which is now in controversy. Not long afterwards the said Hanson died testate. He devised said tract of land to his son, G. G. Hanson. In the case of *Hanson v. Power*, 8 Dana, 91, in which the conveyance of John Hanson, Sr., was attacked as being voluntary, consequently fraudulent as to creditors, etc., it was sought to set said conveyance aside; also the devise to G. G. Hanson. It was decided in that case that the conveyance was not voluntary, and was valid, even as against creditors, and that the devise required the devisee to execute bond that he would convey said land to Mrs. Buckner and her children. This finding of fact by the court is authoritative, and binds G. G. Hanson, and those claiming under him. According to this finding of fact, said land was devised to G. G. Hanson in trust for the benefit of Mrs. Buckner and the children above named. He thereafter, pursuant to said trust duty, conveyed said land to Mrs. Buckner and said four children; one-third thereof to Mrs. Buckner for life, and the "residue to said children in equal portions." Thereafter, said Buckner having died, and his widow having married Jett, the latter procured in the county court the allotment of dower to Mrs. Jett, and the division of the balance of the land in equal parts among the Buckner children. While the power of the county court to make this allotment and division is exceedingly questionable, yet Mrs. Jett and said children had the right to the allotment and division in the manner of one-third to the widow for life, and the residue to the children in fee, in equal portions; and the action of the county court in making the allotment and division, though under its power to allot dower, etc., was not void, and may be regarded at this late day as binding. The land having been devised to G. G. Hanson in trust for said parties, he had no implied reversionary right in the life-interest; there-

fore there is no ground for the contention that he holds the reversionary right in the said life-interest. Said Jett and wife sold the said life-estate, except a portion thereof that had been previously sold under execution to John Wheeler. Said Wheeler thereafter sold the same to the appellant, John Buckner. The appellant Mrs. Gill did not sell her one-fourth remainder right in said life-interest to said Buckner. She never signed the deed of conveyance. But, William Buckner and Mrs. Ambrose having sold their respective remainder interests in said life-estate to Henry Wyatt, they are not entitled to recover in this action. It appears that Henry Wyatt bought all the interests in said estate allotted to the Buckner heirs in the county court division, and Mr. Blades bought some of the purchase-money notes; and separate suits were instituted by John Buckner (he having sold his interests to said Wyatt) and Blades against said Wyatt to enforce their liens on the parcels of land so sold for the payment of the purchase money, and the said parcels were sold to satisfy said purchase money, and Blades became the purchaser of all of said parcels. Now, the question is, was the said remainder interest of the appellant John Buckner included in said sale? If it was included, he cannot recover; if it was not included, he can recover.

If the appellant, John Buckner, conveyed his interest to said Wyatt by deed or bond for a title, the same is not copied in this record. His petition alleges that 85 acres were sold to said Wyatt. But the decree directs that said 85-acre and 10-acre tracts be sold. They were sold, and Blades was the purchaser. Thereafter the decree was amended so as to set aside the sale of the 10 acres, and to sell in its stead "so much of the undivided interest in the dower, formerly allotted to Matilda Jett, as was sold by the complainant Buckner to the defendant Wyatt, as is sufficient to satisfy the complainant's debt," etc. It is contended that the expression, "the undivided interest in the dower," etc., refers to the life-estate that the appellant owned, and not to the remainder interest therein. But the language used, aided by the attendant circumstances, does not admit of this interpretation. The dower estate had been set apart by metes and bounds. It was a separate and distinct estate from the other portion of the tract. The appellant Buckner owned all of it, not an undivided part of it; but he did own one undivided remainder interest therein. The expression, "undivided interest in the dower," etc., as explained by the surrounding circumstances, means the remainder interest in the dower property. The amended decree says that appellant Buckner sold this interest to Wyatt. Blades became the purchaser of it, and paid said appellant for it. The sale was confirmed, and Blades took possession of the said interest. And although the pleadings, as far as is shown by this record, do not set up this interest as having been sold to Wyatt, and there-

are no title papers filed showing a sale of any of the appellant's interest to Wyatt, the amended decree says that he sold his undivided interest in the dower, etc., to Wyatt. The said appellant was a party to this action, and he never took any steps to correct the amended decree, if the same was erroneous, but received pay for said interest, and let Blades take possession of this interest, and hold it as his own for over 80 years. Under these circumstances, the appellant must be conclusively presumed to have authorized the filing of the amended decree, and the sale thereunder, and, having done so, he cannot now question the purchaser's right to said interest. Blades bought all the other interests at the sale made in the action of himself against Henry Wyatt, except Mrs. Gill's remainder interest. She did not join with her husband in the conveyance of said remainder interest, and, the life-tenant having died in 1884, the statute of limitations does not bar her right. The judgment is affirmed as to all of the appellants except Mrs. Gill and her husband. As to the last two it is reversed, and the cause is remanded, with directions for further proceedings consistent with this opinion.

BYRNE *et al.* v. HENDERSON *et al.*, (two cases.)

(Court of Appeals of Kentucky. May 23, 1890.)

JUDICIAL SALES—INADEQUATE PRICE.

Where land sold under a decree is appraised and sold for two-thirds of its value, and a report of the sale filed and confirmed, the sale will not be set aside upon a showing by affidavits that the land was sold for less than its actual value, where no advanced bid, or offer to pay the debt, has been made.

Appeal from circuit court, Franklin county.

"Not to be officially reported."

An action to recover personal judgment against defendants for money paid by plaintiffs' intestate to redeem defendants' land from sale under execution, and also to have the land sold to satisfy plaintiffs' judgment.

W. H. Julian, for appellants. L. Hord, for appellees.

PRYOR, J. The property was sold in this case under the judgment of the chancellor, having been first appraised as required by law, and brought two-thirds of its appraised value. The report of sale was filed on the 15th of October, 1888. The sale was confirmed on the 19th of the month; and on the 22d an exception, for the first time, was filed, upon the single ground that the property sold for less than its value. Several affidavits were filed, showing that the property was worth double the sum for which it was sold, but no one offered to make an advanced bid. The property had been appraised by disinterested parties, brought two-thirds of its value as appraised, and there is no reason for disturbing the sale. Affidavits were presented, as might be done in nearly every

case, showing the inadequacy of price, but no one offered to give more for the property; nor has the appellant, at any time during the pendency of the action under which the property was sold; offered to pay the debt, nor did she proffer to pay it when the motion to set aside the sale was made. Nor do we think the original judgment under which the sale was made was erroneous.

It is claimed by the appellant that the intestate of the appellee purchased that property in trust for the appellant; that it was about to be sold for her debt, and he agreed to buy it for her, and hold the title for two years, giving her the privilege to redeem it; that she paid him \$10 as a consideration. The agreement is rather singular, and scarcely reasonable; and, while the action of Henderson, who is now dead, was instituted before the two years expired, there was an interval of two years and four months from the date of his purchase to the date of the judgment under which this sale was made, and no payment, or offer of payment, made by the appellant. Henderson is now dead, and much of the testimony as to the agreement with him is incompetent, and made to appear alone by the appellant and her attorney. We think the chancellor did not err in rendering the judgment; and, if the appellant is or was a married woman, as appears, the contract was not binding on her, but affords no reason why Henderson should be molested in his rights, when every opportunity was afforded the appellant to redeem, either by herself or those interested for her. The judgment below is affirmed.

WASHINGTON COUNTY COURT v. McKEE.

(Court of Appeals of Kentucky. May 24, 1890.)

COUNTIES—ASSUMPTION OF ATTORNEY'S FEES DUE FROM TAX-PAYERS—INTEREST.

Where the county court, under legislative authority, assumes the liability of tax-payers for attorney's fees incurred in a suit by the tax-payers to defeat the collection of a tax on a subscription to railroad stock, and levies a tax for the payment of such fee, it cannot refuse to pay interest on the debt so assumed, on the ground that it is an ordinary appropriation not arising from contract.

Appeal from circuit court, Washington county.

"Not to be officially reported."

C. C. McChord and John W. Lewis, for appellant. W. P. D. Bush and W. B. Harrison, for appellee.

PRYOR, J. The county court of Washington county subscribed \$300,000 to the capital stock of the Cumberland & Ohio Railroad Company. After this subscription was made, John W. Burton and others, tax-payers of that county, for themselves and the tax-payers generally, instituted proceedings assailing the validity of the subscription, and succeeded in defeating the collection of the tax. They employed George R. McKee and other counsel in the case, and agreed to pay McKee, the attorney, the sum of \$6,000 for his serv-

ices. This liability having been incurred for the benefit of all the tax-payers, the legislature authorized the county court to pay this indebtedness, or rather to assume the liability, and to impose a tax on the people for that purpose; the tax not to exceed 10 cents on the hundred dollars, and to be levied annually until paid. The county court was also empowered, if it saw proper, to pay the debt out of the funds then on hand, or, with the consent of the attorneys, to issue its bonds payable to them, with interest from date, the interest not to exceed 7 per cent. The county court saw proper to make the levy, instead of issuing the bonds, or of paying the debt out of the funds then in the county treasury; and, if the views of counsel representing the court are to prevail, it was better to make the levy, as, in that event, the county could postpone payment without any liability for interest upon the debt. The county paid the principal after a certain lapse of time, but declined to pay the interest, amounting to several hundred dollars, upon the ground that it was an ordinary appropriation by the county in the discharge of its governmental or ministerial duty, and no interest could be collected.

The ordinary appropriations for working roads, supporting the poor, etc., and such as arise from no contract, but by reason of the control of the county over its funds, and the subject to which they are to be applied, bear no interest; but the case before us is entirely dissimilar. The county court in this instance made an order assuming the liability of Burton and others to George R. McKee for \$6,000, and in doing so assumed to pay the principal and interest. It was a debt the county felt it should assume as an act of justice to the tax-payers, who had made themselves individually liable to the attorney; and, when agreeing to pay this debt, the mere fact that it had failed to agree to pay interest is no reason why interest should not accrue. If the county court, under legislative enactments, had agreed to pay the \$6,000 for the services at a certain date, can there be any reason why interest should not follow the debt from its maturity until paid? We can perceive none. The county court, through the people, had imposed upon it an act that was independent of such duties as ordinarily pertain to it, and required the county to become a stockholder in a railroad company, and in doing so it stood upon the same footing as other stockholders, if the subscription was binding; and, when it assumed to pay the debts of those incurred in defeating the subscription, it became liable just as the tax-payers were when they were released, and the county accepted in their stead; and the county is liable for the interest from the time the money was due and payable to McKee by those who had agreed to pay it. The assumption or agreement to pay the debt was voluntary on the part of the county, and there is no reason why McKee, who held the obligation of parties perfectly solvent, should

release them, and take the county for the principal, and abandon his right to the interest. The court below having given judgment for the interest, it is now affirmed.

KENTUCKY FLOUR Co.'s ASSIGNEE v. MERCHANTS' NAT. BANK.

(Court of Appeals of Kentucky. May 24, 1890.)

RIGHTS OF CREDITORS—SET-OFF—DEBT DUE FROM DEPOSITOR.

A bank has the equitable right to set off, against deposits made with it by an insolvent before making an assignment for the benefit of creditors, a debt due it from the insolvent which at the time of the assignment was not yet due.

Appeal from Louisville law and equity court.

"To be officially reported."

Thos. B. Fairleigh and Fairleigh & Straus, for appellant. *Brown, Humphrey & Davis*, for appellee.

HOLT, J. The Kentucky Flour Company, on June 15, 1888, made a general assignment for the benefit of its creditors. Among them was the appellee, the Merchants' National Bank, to the amount of nearly \$30,000. It had in its hands at the time, arising from cash deposits made by the flour company on and before the day of the assignment, and from commercial paper left by it with the bank for collection, \$3,433.79; and the assignee sues to recover this sum. The bank claims the right to credit it upon its debt. The facts above stated appear from the petition. It is by no means certain whether, upon its averments, the debt owing to the bank should be considered as having been due, or not due, at the time of the assignment. We will, however, with a view to a full consideration of the question, but with some doubt, assume, as contended by the appellant's counsel, that the petition shows it had not then matured. The lower court dismissed the petition upon demurrer.

The question before us is whether a bank can apply deposits, made with it by one who subsequently makes an assignment for the benefit of his creditors, as a credit upon a debt owing to it by the insolvent, but which had not matured at the time of the assignment. Courts of equity in this state applied the doctrine of equitable set-off prior to the existence of our statute. It was found to be necessary to complete justice in cases where some fact existed impairing the efficacy of the legal remedy. Grounds must exist for its application, and insolvency has long been recognized as one of them. It is urged that equality among creditors is equity, and that to allow the bank to apply the deposit upon the indebtedness to it would defeat an equitable distribution of the insolvent's estate. It is true that equality in such a case is the policy of the law, but it would be inequitable to extend it so far as to disregard existing equities. It would be unconscientious for an insolvent to coerce the payment of his claim

from one to whom he is indebted in a larger sum, although the debt of the latter might not be due. The insolvent should not, *ex æquo et bono*, have such a right. In the case of *Chenault v. Bush*, 84 Ky. 528, 2 S. W. Rep. 160, two parties executed a joint obligation. Before its maturity, one of them made an assignment for the benefit of his creditors. After the assignment the other joint obligor paid the entire debt. In an action against him by the assignee upon a note executed by him to the assignor, it was held that he could set off one-half the joint debt paid by him. Here the claim of the party asking the set-off had not matured at the time of the assignment. A right of set-off would, however, have existed as against the assignor in the event of no assignment; and the assignee merely took the estate, for the benefit of the creditors, subject to all existing equities and discounts. He is not an assignee for value, but a volunteer, and any claim of the insolvent upon a party coming to his hands is subject to the same right of set-off which would have existed against it if no assignment had been made.

It is contended, however, that a bank stands in a different attitude from a mere individual, because its depositor would have the right to check out his deposit at any time prior to the assignment, and the bank would have no right to refuse it upon the ground that he was owing it an unmatured debt. If this be so,—and it doubtless would be in case checks were given to third parties,—yet we fail to see how it can affect the question here, inasmuch as the money was not withdrawn from the bank. It is true this seems to have been the ground upon which the case of *Beckwith v. Bank*, 9 N. Y. 211, was determined; but the opinion in that case is meager in argument, and, so far as reason is given, it is unsatisfactory. In the case of *Jordan v. Bank*, 74 N. Y. 467, cited by counsel, no ground for equitable set-off was presented. The opinion expressly says so. It is unquestionably the law that, as between individuals, the right of equitable set-off exists, although the debt had not matured at the time of the insolvency. Ordinarily, of course, a debt not due cannot be set off against one already due. To allow it would be to change the contract, and advance the time of payment. But, where the party asserting the due debt is a non-resident or becomes insolvent, then either of these conditions, *ipso facto*, gives to the other party the right of equitable set-off, although his debt had not matured when his debtor became insolvent, or the condition arose giving the right of equitable set-off. In the application of the rule there should be no difference between an individual and a bank. There is no ground for a distinction. The bank is merely a debtor to its depositor. It is true the debt is payable on demand, but, if the money be not withdrawn, and the depositor becomes insolvent, the right of equitable set-off exists, just as in case of co-existing demands between individuals; and,

in case the depositor assigns for the benefit of his creditors, his assignee takes the estate subject to any equities which existed against the assignor at the time of the assignment.

It is said, however, that such a rule will lead to inequitable preferences, and, in effect, destroy the efficacy of what is generally known as the "Statute of 1856," relative to a preference of a creditor. We think the alarm of counsel is groundless. If a deposit were made with a bank in contemplation of insolvency, and with a design to prefer it, those being the grounds upon which that statute declares the entire estate of the debtor, including that transferred, shall inure for the benefit of his creditors generally, a state of case would be presented not now before us. We cannot presume this is such a case, because here the company was evidently engaged in a considerable business, having numerous transactions with its bank, and the deposit in question is a comparatively small one. This question is not presented by the petition, and it would be improper, therefore, to intimate any opinion as to it. Judgment affirmed.

JONES v. WORCHER *et al.*

(Court of Appeals of Kentucky. June 8, 1890.)

HUSBAND AND WIFE—LIABILITY OF HUSBAND—WIFE'S DEBTS.

1. Where the petition in *assumpsit* for goods sold and delivered to a married woman, for sale and use in a millinery store conducted by her, avers that the husband promised to pay for them, evidence of such a promise by him, though it was not in writing, is admissible.

2. Defendant testified that his wife carried on business against his will; that he had notified those with whom she dealt that he would not be responsible for her debts, but had not notified plaintiffs, because he did not know they were dealing with her; that he had put no means in the business, and derived no benefit from it; and that it was not necessary for the support of his family. It appeared that he had given his wife a house and lot, and joined her in a mortgage thereon to enable her to buy the establishment. The wife had carried on the business for nearly two years, during which time the family lived above the store. A disinterested witness testified that the husband had promised to pay plaintiff's claim. *Held*, that the evidence was sufficient to justify the finding that the husband had so assented to his wife's carrying on the business as to make him responsible for her debts in relation to it.

3. An exception that "the verdict is contrary to law" is too vague and general to entitle it to consideration by the appellate court.

Appeal from court of common pleas, Jefferson county.

"To be officially reported."

Fontaine T. Fox, for appellant. *A. E. Willson*, for appellees.

HOLT, J. No exception was taken by the appellant, Arthur Jones, to the instructions given to the jury, nor to the refusal of the court to give those asked by him. The only grounds upon which a new trial was asked are: "(1) The verdict is not sustained by sufficient evidence; (2) the verdict is contrary to law."

This court has repeatedly decided that a mere statement that the finding is contrary to

law is too general to admit of consideration. It calls the attention of the court to no particular error; and the lower court should not be required, upon such an indefinite statement, to spend its time, and possibly exhaust its patience, in reviewing its action during the entire trial, to see if any step has been taken in the wrong direction. Fairness to it, as well as the interest of litigants and the public, requires that the complaining party should indicate, at least with such certainty as is reasonably calculated to call the attention of the court to it, the particular error upon which he bases his complaint.

The single question, therefore, presented by this record upon this appeal is whether there is any evidence to support the verdict.

The petition is in form *assumpsit* for the balance of the price of a bill of merchandise sold the appellant by the appellees. It avers that it was sold and delivered at his request, and that he promised to pay for it. The evidence discloses that the goods were delivered to the wife of the appellant for sale and use in a millinery store conducted by her. The answer of the appellant contains a denial of the averments of the petition, and then avers, in substance, that the goods were sold to his wife without his knowledge or consent; that they were not necessities for her or the family; that the credit was given to her; and that he was in no way interested in the purchase, and derived no benefit from it. The reply denies these averments, and in a second paragraph avers that the appellant knew his wife was carrying on the millinery business; that he at times advanced money therefor, and was informed of the purchases by her from the appellees after they were made, ratified them, and promised to pay the debt. The lower court sustained a demurrer to this portion of the reply, upon the ground that it was a departure from the appellee's original pleading. Whether it did so properly, or upon the proper ground, it is unnecessary to determine. It seems to us, however, that the real objection to this paragraph of the reply is that it details what the pleader expected would be shown by the evidence.

Upon the trial a disinterested witness testified that the appellant had promised to pay the account. It is urged that this evidence was inadmissible, inasmuch as the court had rejected the second paragraph of the reply; and that it was in any event unavailing, as, if true, it was a promise to pay the debt of the wife, another party, and, not being in writing, was within the statute of frauds, and not binding upon the appellant. The averment of the petition that the appellant had promised to pay the account made this testimony competent. No further pleading was necessary to render it admissible. Whether it was his debt, was the issue. This was affirmed upon the one side, and denied upon the other. This testimony elucidated this issue. It tended to show how the parties to the suit had regarded it. It is true, the appellant testified that he had never made any

such promise. The relative weight, however, to be given to these two witnesses was a matter for the jury.

The counsel for the appellant contends that the question at issue is whether a husband is liable for a debt made by the wife when trading as a milliner with her own means, and against the will of her husband; she not having been made a *feme sola*, as authorized by the statute. In the discussion of this question he has cited many decisions, and supported the negative view of the question with many reasons, which evince both careful research and consideration. In doing so it is improperly assumed, however, that the case is entirely one-sided as to the facts. It is assumed that the evidence of the appellant is absolutely true in all respects, and that there is no contradictory evidence, and no counter-circumstances which to any extent support the finding of the jury. Herein consists, in our opinion, the mistake of counsel. Undoubtedly, the power of the wife to bind the husband rests upon the ground of agency, either express or implied. As to the purchase of necessities for the family, and in matters relating to the household, such a power or agency is implied from the relation of husband and wife, merely. To this extent she is *ipso facto* his agent, because she is his wife. Thus far the authority is presumed from their relation to each other. The power is limited, however, to the duties and necessities of this relation. When this boundary is passed, an agency upon her part for him must be shown, in order to bind him, just as if she did not occupy the relation of wife to him. Such an agency may, however, be shown by express authority, or it may, of course, be implied from his acts and conduct. It is true, the appellant testifies that his wife was carrying on the business with her own means, and against his will; that he had notified those with whom she dealt, so far as they were known to him, that he would not be responsible for the debts she might create; that he had not so notified the appellees, as he did not know that she was dealing with them; that he never put any means into the business, and derived no benefit from it; and that its being carried on was not necessary to the support of his family. Upon the other hand, it appears, however, that he gave to his wife a house and lot; that he united with her in a mortgage of it to obtain the means to buy the millinery establishment; that he received the money so obtained, placed it in bank to his own credit, and then checked it out, and gave it to her to purchase the store. It also appears that the wife, who was not a *feme sola*, had carried on the business for nearly two years, and perhaps longer,—the family, in the mean time, living over the store; and that the appellees knew she was a married woman, because one of the firm had met her husband. Moreover, as already stated, there was testimony tending to show that he had promised to pay the debt. The wife could incur no personal liability by con-

tract, as she was not a *feme sole*. It was a question of fact whether he had assented to her carrying on the business,—thus making it, in fact, his own,—and whether the purchases, although made through her, were in fact his own, by reason of his authorizing her by his conduct to make them. There was evidence *pro et con* upon the question. In determining it, the jury had a right to consider not only the appellant's testimony, but any counter-circumstances. The pleadings are sufficient to support the verdict; and upon the state of case above indicated, the only question presented being whether the evidence authorized the verdict, the judgment must be, and it is, affirmed.

GRAY *et al.* v. MARSHALL.

(Court of Appeals of Kentucky. June 8, 1890.)

HUSBAND AND WIFE—LIABILITY OF WIFE'S LAND FOR FAMILY NECESSARIES.

1. Though a deed executed by a married woman, without joining her husband, in consideration that the grantee will support her, cannot divest her of the legal title, yet, where the grantee has gone into possession under such deed, he is entitled, in an action by the grantor's heirs to recover the land, to be recompensed for the support of the grantor and her husband, the taxes paid by him, and the value of his improvements, and to have the same declared a charge on the land. Such expenses are for necessities, within the meaning of Gen. St. Ky. c. 52, art. 2, § 2, which provides that the wife's real estate shall be liable for debts contracted by her after marriage, for necessities for herself or any member of her family, when such contract is in writing, signed by her.

2. The answer in such case, seeking to make such expenses a charge on the land, presents an equitable defense, making it proper to transfer the cause to equity.

3. The relief demanded in such answer does not involve the settlement of the deceased grantor's estate.

Appeal from circuit court, Floyd county.

"Not to be officially reported."

R. S. Friend, R. H. Weddington, and J. C. Wickliffe, for appellants. Thomas H. Hines and James Goble, for appellee.

LEWIS, C. J. Appellants, heirs at law of Polly Ann Meadows, brought this action to recover of appellee a tract of land which the decedent attempted in 1877 to convey to him, while a married woman, her husband not uniting in the deed. As defense, appellee stated in his answer the deed was made in consideration of his agreement to take care of and support her as long as she staid at his house; and such was, in substance, the consideration recited in the instrument. That she and her husband, both being helpless, had been supported by him about one year previous to date of the deed, and continued afterwards to be so taken care of and supported at his residence,—she for six, and he for two, years. He alleged that he had erected lasting and valuable improvements on the land, and also paid taxes assessed against it. The lower court correctly adjudged the deed did not have the effect to divest her of the legal title, but that appellee was entitled to recover for

supporting her five, and her husband two, years; and also \$140, value of improvements; and \$33, taxes; making \$773; from which was deducted \$351.31 for rents, and \$50 for coal taken off the land, leaving \$371.71, for which, with interest, it was adjudged a lien existed on the land, and sale thereof was directed. If the alleged indebtedness to appellee by Polly Ann Meadows be a charge on the tract of land, an equitable defense to the action was clearly presented in the answer, and it was not error to transfer the action to equity, where alone could the relief sought be afforded. Section 2, art. 2, c. 52, Gen. St., provides that real estate of the wife shall be liable for such debt or responsibility contracted by her after marriage, on account of necessities for herself, or any member of her family, her husband included, as shall be evidenced by writing signed by her. We do not see to what the term "necessaries" can in legal contemplation be more appropriately applied than to the actual sustenance, sheltering, and clothing received by Polly Ann Meadows and her husband from appellee. Nor do we see how better evidence in writing of such debt or responsibility could be afforded than is done by the deed which she signed and acknowledged. The improvements seem to have been necessary; increased the vendible value of the land; and having been made apparently in good faith, and with the knowledge and consent of both husband and wife, must, in accordance with former rulings of this court, be likewise considered a charge upon the land, as also taxes paid by appellee. *Thomas v. Thomas*, 16 B. Mon. 420; *Hawkins v. Brown*, 80 Ky. 186. To allow appellants to recover the land, under the circumstances of this case, free from any charge for support of the decedent when she was in a helpless condition, or for cost of valuable improvements, or taxes paid, would be not merely inequitable, but contrary to the reason of the statute, as heretofore interpreted by this court. The relief asked by appellee did not involve a settlement of the estate of the decedent, and, even if he could have been required to make affidavit and proof of his demands, appellants, by failing to apply for a sale at the proper time, must be regarded as having waived the right, and cannot now defeat recovery upon such ground. We think appellee held and was entitled to enforcement of a lien on the land for the amount allowed by the lower court, and judgment directing a sale for that purpose is affirmed.

HOLMES v. HERRINGER *et al.*

(Court of Appeals of Kentucky. June 5, 1890.)

EJECTMENT—INSTRUCTIONS—DISPUTED BOUNDARY.

In ejectment, where the matter in dispute is the location of the boundary line, an instruction that the jury should find for plaintiff, unless they found that defendant had possession of the land in dispute for a given length of time, is erroneous, where there is no evidence that defendant ever inclosed any of the land, since, in contemplation of

law, both parties are in possession up to the dividing line; and it is prejudicial to defendant in assuming that plaintiff had title to the land in dispute, while there is no question of title in the case.

On petition for rehearing. For former opinion, see ante, 859.

"Not to be officially reported."

John D. Ellis and Reiley & Reiley, for appellant. *F. M. Hill*, for appellees.

LEWIS, C. J. In the opinion, an instruction which, as now suggested by counsel, was actually refused, was considered by this court as having been given, and made the ground, partly, for reversing the judgment. The instruction given is as follows: "The jury should find for the plaintiff as to the land in controversy unless they find from the evidence that the defendant, and those under whom he claims, had been in the actual possession of the land, or some part thereof, by themselves or their tenants, with claim of ownership up to a defined boundary, openly and continuously, for fifteen years or more before the 10th day of August, 1886, in which case the jury should find for the defendant as to the whole or such part of the land, as the case may be, governed by the proof as hereinbefore stated." Instead of requiring the plaintiff to prove title to the land in dispute, as would have been the case if the instruction quoted in the opinion had been—as we by mistake stated was—given, the one just quoted assumes the plaintiff did have title, which was prejudicial to the defendant; for, as stated in the opinion, there is no question of title between the parties. But the instruction given was also erroneous and prejudicial to the plaintiff, because it required or authorized the jury to find for the defendant upon the hypothesis he had possession of the land in dispute 15 years before commencement of the action, when it is clear that no possession except by actual inclosure could avail either party; for both had, in legal contemplation, possession up to the dividing line, wherever that may be, and as the record now stands the true location of that line is the only question for the jury to inquire about. There is no evidence the defendant had any part of the disputed land inclosed anything like 15 years, and the jury must have been, by the instruction, induced to believe possession by the defendant of that part of his tract not in dispute extended even to the place where he claims the dividing line to be, whether it be there or not. Petition for rehearing overruled.

RAZOR v. DOWAN.

(Court of Appeals of Kentucky. June 5, 1890.)

HOMESTEAD—RELINQUISHMENT BY WIFE—ACKNOWLEDGMENT.

1. A mortgage executed by husband and wife, and duly acknowledged by her, which stipulates that they relinquish all rights of dower and homestead in the land mortgaged, effectually divests her of any homestead right in the land, though the

clerk's certificate of acknowledgment only recites that she relinquished her dower.

2. Under Gen. St. Ky. c. 81, § 17, providing that, except in an action against an officer or his sureties, no certificate of the officer shall be called in question in the absence of a charge of fraud or mistake, allegations of a married woman, in a suit to foreclose a mortgage, denying the matters set up in the certificate of acknowledgment by the county clerk, cannot be considered.

Appeal from circuit court, Rowan county.

"Not to be officially reported."

Clarke & Saulsberry, for appellant. *R. Gudyell*, for appellee.

LEWIS, C. J. James W. Razor and E. J. Razor, being indebted to appellee, executed a mortgage on two tracts of land to secure payment; appellant, Mary E. Razor, wife of the first named, joining in the execution. But, to the action brought after death of her husband to enforce the lien, she filed answer claiming and asking set apart to her a homestead; and the only question now before us is whether the lower court erred in sustaining the general demurrer to it. The answer does not, as her counsel argues, contain a denial of execution of the mortgage by her; for, although she alleges the object and purport of it was not at the time understood by her, she admits her signature thereto is genuine. The other allegations relate to the examination of and acknowledgment by her required in such case, and, being in conflict with the certificate of the county clerk appended to the mortgage, must, in the absence of a charge of fraud or mistake, be disregarded; for it is expressly provided in section 17, c. 81, Gen. St., that, "unless in a direct proceeding against himself or his sureties, no fact officially stated by an officer in respect of a matter about which he is by law required to make a statement in writing, either in the form of a certificate, * * * shall be called in question except upon the allegation of fraud in the party benefited thereby, or mistake on the part of the officer." After making the statement in his certificate that the mortgage was produced to him, and acknowledged by James W. Razor, Mary E. Razor, and E. J. Razor to be their act and deed, the clerk further certifies that "the said Mary E. Razor, wife of James W. Razor, relinquished her right to dower to the above lands." According to former decisions of this court, a certificate of that form would raise the implication that, as only her right of dower was in terms relinquished, her homestead right was intended to be retained by her, and not parted with; but in the body of the mortgage is the following stipulation: "And it is also distinctly understood by the party of the first part that all our right to either or both homestead and dower in and to the above-described lands, which is hereby conveyed, as also waived." Consequently the mortgage as thus written, having been duly acknowledged by appellant to be her act and deed, had the effect to divest her effectually of both homestead and dower right, independent and in spite of the formal state-

ment in the latter part of the clerk's certificate that she had relinquished her dower right, merely. Judgment affirmed.

WELLS v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 5, 1890.)

CRIMINAL LAW—CONTINUANCE.

In a prosecution for murder, defendant, whose trial was set for the term of court at which he was indicted, made affidavit that H., the principal witness for the state, and the only third party who saw the killing, told an absent witness that not until deceased had told defendant that he must fight, and had struck defendant with a barrel-head, cutting him severely, did the latter draw a pistol and shoot deceased. Affiant said that H. had refused to talk with his attorney, and that he could procure the attendance of the absent witness at the next term of court. Held that, the affidavit showing that defendant had used proper diligence, a continuance should have been granted to enable the defendant to secure such witness.

Appeal from circuit court, Henderson county.

"To be officially reported."

John Young Brown, for appellant. *P. W. Hardin*, for the Commonwealth.

HOLT, J. The appellant, James Wells, who is but 16 years old, has, upon a charge of murder, been convicted of manslaughter for the killing of Eugene Connell, who was 5 years his senior, and his punishment fixed at 12 years' confinement in the penitentiary. The trouble occurred over a ring, which the deceased had given to a young lady, and which she had loaned to the accused. The killing took place on April 6, 1890. He was indicted on April 14, 1890, brought into court from the jail to answer the charge on that day, and the case set for trial on April 19, 1890; he being remanded to jail in the mean time. Upon the last-named day his counsel asked a continuance of the case upon the ground that he had been constantly confined in jail, and indicted at that term of the court, and that the principal witness for the commonwealth had refused to talk with them. The court informed them that these reasons were insufficient; and they, recognizing, doubtless, that they could not successfully complain of its opinion, then, and without objection to its being filed, offered the affidavit of the accused, and again asked a continuance. It states: "Hillery Moffett is not present. Spa. was issued for this witness, and placed in the hands of the sheriff of Henderson Co. yesterday, as soon as it was learned by affiant or his attorneys what could be proved by him. He is a resident of Daviess Co., Ky., but has been in Henderson for several weeks, and is now in said county, as affiant verily believes. The spa. is returned not found. The witness is not absent by consent or procurement of affiant. Affiant says that he can prove by said witness that he had a conversation with Geo. Howard, who is the principal witness for the prosecution, and who was present and saw the difficulty between affiant and Connell

after the coroner's inquest was held, and said Howard stated that affiant did not draw his pistol till after Connell had told affiant that he had to fight, and had struck him with part of a barrel-head, knocking his hat off and badly cutting his head; and that then, and not till then, did affiant draw and fire his pistol at Connell. Affiant says that what he can prove by said witness is true. Affiant says the witness Howard has persistently refused to talk with his attorneys, and that his said attorneys have had no opportunity to talk to the other witnesses for the commonwealth. Affiant says that he can procure attendance of said witness at next term of this court, and this application is not for delay." The court then inquired of the accused and his counsel if they could give any information of the whereabouts of the witness. There was no response. Then the court inquired twice if there was any one in the court-room who knew the witness or his whereabouts. No answer was returned. The counsel for the accused, for the purpose, as they said, of removing suspicion, then asked a certain person if he knew the witness, and he replied that he did, and had seen him a few days before. The court then, over the objection of the appellant, swore this person, and he further stated that he did not know where the witness lived. At this point the state's attorney said that the witness Howard knew Moffett, but did not live near him, and had had no talk with him. Howard repeated this, and the objection of the accused to the statements of both was sustained. All this took place in open court, and in the presence of the regular panel of jurors. The attorney for the commonwealth declined to consent that the affidavit might be read as evidence upon the trial, and the court refused a continuance. Whether this was error is the only question presented by the appeal.

The evidence introduced upon the trial shows that the only person immediately present at the difficulty, save the participants, was George Howard. He was introduced upon the trial as a witness by the commonwealth. He testified: "Connell walked up to Wells and said: 'Hello, there, Jim; do you want to fight?' Wells replied: 'I don't care if I do.' Connell then called him 'a son of a bitch.' Wells drew his pistol, and presented it in Connell's face, and said: 'Don't you call me that; don't you call me that.' Connell looked at him, stooped down, and picked up a piece of barrel-head, and struck him. Then immediately Wells fired two shots." Manifestly, this testimony was more unfavorable to the accused than the version of the affair which, according to the affidavit for a continuance, had been given by the witness to the desired and absent witness, Moffett. The evidence of the latter would, according to the affidavit, have been a contradiction of it. A leading criminal author says: "The general rule is that a continuance will be granted on an affidavit setting

forth the absence of a material witness for the defense, and alleging that his attendance will be procured at the next court, and that due diligence has been used in attempting to procure his attendance." § Whart. Crim. Law, § 3021. The affidavit of the accused disclosed diligence, the materiality of the testimony of the absent witness, and that his attendance could probably be obtained at the next term of the court. It is true, one accused of crime may be tried at the term of court when the indictment is found; but it has always been the practice, and it is one in the interest of justice and fairness, to then exercise greater liberality towards a party who asks a continuance than at subsequent terms of court, when he has certainly had ample opportunity to prepare for trial. In this instance the accused did the best he could, under the circumstances. The tragedy had taken place but a few days previous to his trial. He had been confined in jail. It was impossible for him to ascertain what the testimony of the witness for the state would be. He had made an effort to ascertain, and the witness refused to talk. The accused knew he was a witness for the commonwealth, and that his evidence would likely be material, as he was an eye-witness to the difficulty. He could not know what the witness would testify, and he therefore did all possible by stating in his affidavit for the continuance what the witness had told another party, and which was favorable to the accused. The question of the continuance was to be determined upon the affidavit of the appellant. Counter-affidavits were inadmissible. It is true, this rule should not be so restricted as to prevent the trial judge, where he has reasonable ground, from all the circumstances, to believe that an imposition is being attempted, or a ruse being practiced, from ascertaining whether the belief is well founded. In this case the circumstances did not reasonably warrant such a supposition, and in our opinion the appellant presented such a state of case as entitled him to a continuance. An error of the lower court in this respect is, under our Code of Practice, ground for a reversal. *Morgan v. Com.*, 14 Bush, 106.

We have refrained from discussing the evidence in the case at length, as it is not necessary to a determination of the question involved, and would be improper, in view of the fact that there is to be a retrial of the case. Judgment reversed, and cause remanded for a new trial.

CARGILL v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 7, 1890.)

ABDUCTION—INDICTMENT—EVIDENCE.

1. An indictment under Gen. St. Ky. 1883, c. 29, art. 4, § 9, for detaining a woman against her will, with intent carnally to know her, may follow the words of the statute, and need not state the manner of detention.

2. On a trial for detaining a woman with intent carnally to know her, she testified that the ac-

cused had often tempted her virtue. Asked by the defense why she had not made complaint, she said because his wife (her aunt) had had so much trouble about him. *Held*, that it was error to allow her to detail his sexual offenses with other women, in response to questions by the state.

3. A conviction will be set aside where counsel for the state persisted in asking improper and prejudicial questions, and was allowed to cross-examine the accused as to other offenses, though he was told that he need not answer, and the closing speech to the jury was of an extraordinary and reprehensible character, and it is evident that there has not been a fair and impartial trial.

Appeal from circuit court, Graves county.
"Not to be officially reported."

Smith & Robbins and *Dawson Smith*, for appellant.

PRYOR, J. The appellant was indicted in the Graves circuit court, charged with the unlawful detention of Lillian Yarbrough, a female, against her will, with the intention to have carnal knowledge with her, etc. This is an offense created by statute, (Gen. St. Ky. 1883, c. 29, art. 4, § 9,) and, on a demurrer to the indictment, it is contended by counsel for the defense that it was necessary to aver the manner of the detention, so as to enable the accused to answer the charge; that, without a specific statement of the facts, it is left with the pleader to determine in his own mind what amounts to a detention, and the accused left without information as to an essential requisite of the offense. While, in some instances, it is not good pleading to follow the language of a statute that creates the offense, we are disposed to adjudge that the averment in the indictment that the woman was detained is the averment of a fact, and particularly when the *gravamen* of the offense is his purpose, against her will, to have sexual intercourse with her. That the detention must be something more than mere persuasion, or an expression of desire to gratify the animal passion, is evident; but still the general charge of detention, for the specific purpose to be accomplished by it, is sufficient to apprise the defendant of the offense, and the acts constituting it. The demurrer was therefore properly overruled.

It seems from the testimony of the principal witness that the defendant had made frequent attempts to have intercourse with her, running through a period of several months; and, having been asked by counsel for the defense why she had not made known to her kindred this conduct on the part of the defendant sooner, she replied that it was because the wife of the defendant, who was her aunt, had been troubled so much about her husband. The attorney for the state then required the witness to state what it was that troubled the defendant's wife; and the witness, over the objections of counsel for the defense, proceeded to detail the conduct of the defendant with other women; that he had to leave the county, and his home was broken up, etc. The question propounded by the defense was entirely legitimate, and called for no statement in regard to the action of the defendant with other women; and while, if

made in answer to the interrogatory propounded, its effect on the jury might have been attributed to the defense alone, when no such response was made, it was prejudicial to the accused, and not warranted by any act of his counsel, to permit the attorney for the state to place before the jury the wrongs, if any, the accused had perpetrated on other women. The question should not have been answered, but the objections made by the defense at once sustained.

The attorney for the state again proceeded to ask the witness if the defendant had not been indicted for detaining a woman by the name of Jones, and was compelled to flee the country on account of it. Before the question was fully propounded, the counsel for the defense interposed his objection. The attorney for the state should have been at once stopped, and prevented from asking the question. It had the effect to prejudice the jury, and must have been asked for that purpose; and the fact that the court refused to permit the question to be answered did not remove the effect it might and probably did have on their minds. The court also permitted questions to be asked of the defendant as to his intercourse with other women, and the penalty imposed upon him for his action, but at the same time told the jury they were not to consider these collateral matters, and to witness that he need not answer. The trial judge cannot always determine the propriety of a question until it is fully propounded; but often, when the attorney persists in asking questions that are clearly incompetent, the court, before counsel has gone far enough to require the answer, or to produce the effect desired on the jury, must see that the question is clearly incompetent, and should interpose, that a fair trial, or one at least according to the forms of law, may be had.

After permitting counsel for the state to ask the female witness a question with reference to the defendant's conduct with other women, as soon as the defendant was placed before him for cross-examination "he asks him if he did not leave the county because he was indicted for detaining a woman by the name of Jones, and had to leave the county until he could buy off her father." This entire question was permitted to be propounded, although the defense was interposing to prevent it. The witness was again asked: "Did you not pay to Mrs. Johnson three hundred dollars for detaining her daughter?" This mode of conducting what was termed the "cross-examination" was allowed by the court, and the objection by the defense availed only to the extent of inducing the judge to say to the witness that he was not to answer the question.

Besides, in the bill of exceptions, the conduct of the attorney for the state in his closing speech to the jury was of the most extraordinary and reprehensible character. His blasphemous language to the jury in the presence of the judge, whose duty it was to see that the accused had a fair trial, blackens this

record, into which it is copied, conducing, evidently, to unnerve the judge and the jury; the entire trial being a mere travesty on the administration of justice. The accused had been taken into custody, and was held for trial by the strong arm of law; and, although he may be a man of bad character, when entering the temple of justice to answer for the commission of the alleged offense he was entitled to the protection of the law, and this means a fair and an impartial trial. This he has not had. The judgment of conviction is therefore reversed, and the cause remanded for a new trial, and for proceedings consistent with this opinion.

BARDSTOWN & G. R. TURNPIKE CO. v. RODMAN *et al.*

(*Court of Appeals of Kentucky. June 7, 1890.*)

TURNPIKE COMPANIES—POWERS OF DIRECTORS—CHANGE OF TOLL-HOUSES.

1. The president and directors of a turnpike company authorized by statute to move any of its gates as they may deem right, and for the interest of the road, cannot, as long as they act in good faith, be restrained from the exercise of the power, and the sale of the abandoned toll-houses, at the suit of the stockholders.

2. Under Gen. St. Ky. 1883, c. 110, § 1, providing that a turnpike company may sell land acquired to its use to the abutting owners, but to none other, a sale to others by the directors will not be restrained at the instance of the stockholders.

Appeal from circuit court, Nelson county.
"To be officially reported."

J. D. Wickliffe, J. W. Thomas, and G. S. Fulton, for appellant. *John S. Kelley*, for appellee.

PRYOR, J. This action is by some of the stockholders of the Bardstown & Green River Turnpike Road Company against that company, its president and directors, to enjoin the latter from making an improper use of the corporate property, charging waste and other mismanagement of the corporate funds. It seems that the board of directors thought proper to remove a toll-gate upon its road, known as "Gate No. 1," to the north side of the Beech fork of Salt river; also to remove one of its gates, No. 2, to the land of Dr. Elliot next to Newhaven. They also desired to sell a toll-house near Muldraugh's Hill, in La Rue county, on the same pike. It is insisted that there was no necessity for changing the toll-gates, or for selling the toll-house in La Rue county, and that the location of the toll gates and houses as they stood before the contemplated removal afforded all the facilities for collecting the toll, and that no reason existed for making the change. The testimony shows clearly that a change of the gates nearer to Bardstown and Newhaven, as contemplated by the board of directors, would catch the travel of neighborhoods that have used the road for a long time without paying toll, and, whether just or not to these localities, the company, through its directors, have the right, by express legislative enactment,

to make the change. In the session of 1887 and 1888 the legislature passed an act authorizing the company "to remove any of its gates, and establish them at such points as they may deem right, and for the best interest of the road." This board of directors, under this authority, removed, or proposed to remove, the gates. They have been guilty of no fraud, or made any disposition of the corporate property except for the purposes of the road; and the stockholders have no right to substitute their judgment for that of the board of directors for no other reason than that the removal of the gates, in their opinion, was unwise. This power is confided to the directory, and, so long as they act in good faith, neither the chancellor nor the stockholders can or should interfere with their action. If dissatisfied with the present board, a new one should be elected. The remedy is with the stockholders, in the selection of the board of directors; and the chancellor ought not to have interfered to prevent the removal of the gates. They propose to purchase the land of Dr. Elliott, and the deed would have been made but for the injunction in this case. Besides, the authority to remove the gates would carry with it the right to provide a house in which the gate-keeper could live. This is only a question of difference as to where the toll-gates should be located, and of this the board of directors must be the judge.

And, as to the sale of the toll-house, if not necessary, in the opinion of the board, to own it or to keep a toll-gate at that place, there is no reason why it should not be sold. The directors did not exceed their powers in determining that a change of location for the toll house and gates was proper, or that a sale of the toll-house in La Rue would prove beneficial to the company. They had the power under the charter to remove the gates, and to sell the toll-house. There is no fraud alleged, or bad faith shown, and, in the exercise of a judgment that belongs to them, they should be allowed to act.

Our attention has been called to the provision of the General Statutes requiring the company, where it has acquired land for its use, to make disposition of it, if it desires to sell, to the owner of the adjoining land, and prohibiting the building at the toll-gate from being used as a residence by any other person than the toll-gate keeper. Gen. St. Ky. 1883, c. 110, §1. This provision was doubtless enacted for the benefit of the owner of the adjoining land, and to enable him to repurchase when the use of the acquired property is abandoned by the company. He is not complaining in this case; and, if the company is restrained from selling this property in La Rue, it necessitates an expenditure of the means of the company to build other toll-houses, and leaving the one in La Rue county unoccupied.

It may not be wise to remove the gates, or to sell the abandoned toll-house; but of this the board of directors must judge, and not the chancellor. We perceive no reason for the

injunction. The judgment is therefore reversed and remanded, with directions to dismiss the petition.

SOUTHWICK v. GRENZENBACH et al.

(Court of Appeals of Kentucky. June 10, 1890.)

PARTITION—PARTIES—SALE.

1. In an action by some of the devisees of a certain lot against the other devisees to have the lot sold on the ground of its indivisibility, the owners of an undivided interest, which had been mortgaged by the devisee, were properly made defendants. Afterwards an amended petition was filed, making the mortgagee a defendant, and he answered, consenting to the sale. Held that, the sale having been ordered on the ground set up, the purchaser could not have the sale set aside because the answer of the mortgagee was not made a cross-petition against the owners of the mortgaged interest, and they were not brought before the court upon it.

2. As the sale was sought by the devisees simply for the purpose of division, no appraisal was necessary.

3. The purchaser could not object that the inchoate right of dower of a wife, who joined in a deed of the land more than 50 years before, did not pass because the deed was not recorded in the proper time, and that therefore the title was defective; it appearing that the deed was eventually recorded, and that the laws in force at the time of the execution of the deed provided that deeds recorded at any time should thenceforth be as effectual as if recorded in the proper time.

Appeal from Louisville law and equity court.

"Not to be officially reported."

Barnett, Miller & Barnett, for appellant.
O'Neal, Jackson & Phelps, for appellees.

HOLT, J. A portion of the devisees of Valentine Grenzenbach brought this action against the others for a sale of a lot devised by him to them, upon the ground of its indivisibility. Under the decree of sale which was obtained, the appellant, Charles Southwick, became the purchaser; and, failing to comply with the terms of the sale, he was cited by rule to show cause why he should not do so. His response presents many grounds for his non-compliance. They were overruled, and he has appealed. It is unnecessary to consider all of them. Only those mainly urged, and which seem to us to be the principal objections to the sale, will be noticed.

One of the devisees died after mortgaging her undivided interest. It passed to her two children, who were named as defendants in the petition, and as being over 14 years of age. A summons, so describing them, was issued, and properly served upon them. Owing to their then age, the service of process, under our Code of Practice, was only required to be upon them. Their father was also a defendant, however, named as such in the same summons, and it was also served upon him. A guardian *ad litem* was, after the service of the summons, appointed for them, and he filed his answer. After all this had occurred, and various other steps had been taken in the action, an amended petition was filed, making the mortgagee of the

undivided interest a party defendant. He answered, consenting to the sale, setting up his debt, and asking that it be paid out of that portion of the proceeds of the sale pertaining to the interest mortgaged to him. It is now urged that the sale should be set aside because the answer of the mortgagee was not made a cross-petition against the owners of the mortgaged interest, and they brought before the court upon it. This objection cannot avail. The ground of the suit was the indivisibility of the property. This was proven, and the sale was therefore authorized; the devisees having been properly brought before the court upon the petition. The judgment orders the sale upon this ground. Moreover, it properly protects the interest of all parties concerned in the proceeds of the sale; and, whether so or not, the purchaser could not complain upon this score, the mortgagee having consented to the sale, and the object of the amended petition being to provide merely for the payment of his debt out of the proceeds.

It is also urged that the property was not appraised. One sale had previously been made, and by consent set aside. Prior to it the property had been appraised. Some 15 months intervened between the two sales. It is unnecessary to consider, however, whether, owing to the lapse of time, another appraisal would have been necessary if it had been a sale for debt. It was not. It was being sold for the purpose of division at the instance of its owners, and no appraisal was therefore required. *Wooldridge v. Jacob's Guardian*, 79 Ky. 250; *Graves v. Long*, 87 Ky. 441.¹ In a conveyance of the property made in 1837 by a remote vendor, his wife had joined and acknowledged the deed; but it was not recorded or lodged for record for nearly two years thereafter. It is urged that her inchoate right of dower did not therefore pass, and that the title is defective. As she was then a married woman, and over a half a century has since elapsed, it is not probable that she is yet alive. There is nothing in the record tending to show whether she is now living or dead. Section 4, art. 1, c. 71, of the General Statutes, providing that the period within which an action for the recovery of real estate may be brought shall in no case be extended by reason of any death, or the existence of any disability, beyond 30 years from the time of the accrual of the right to sue, does not conclude the right of the widow to sue after the lapse of 30 years from the time of the conveyance, without regard to when the husband may have died. The right of a remainder-man to sue does not accrue until the termination of the particular estate. So, too, the widow cannot sue until the death of the husband. Hence the statute *supra* is not decisive of the point urged.

Waiving, however, any presumption which might be held to arise from the long lapse of

time, this objection to the title is not well taken upon another ground. The deed of 1837, in its effect and force, is governed by the statute law then in force in this state. Section 23, c. 24, Rev. St., which took effect in 1852, provided that deeds which had been or might be legally executed, but not recorded or lodged for record in proper time, might be proven and recorded, and be as effectual thenceforth as if they had been recorded in proper time; but "this section shall not apply to the deed of a married woman, unless reacknowledged by her, and recorded thereafter in proper time." The clause in quotation is omitted from our present statute, nor does the exception as to a *feme covert* appear to have been embraced in our statute in force prior to 1852. The law then in existence provided, as to all persons, that where deeds had been, or might be thereafter, proven or acknowledged, but not lodged for record in proper time, they might be recorded, and should thenceforth be as effectual for all purposes as if they had been recorded in proper time. 1 Moreh. & B. St. 453.

The record does not show that Mauzy, another prior vendor, had a wife at the time of the conveyance by him; nor does it contain, so far as we find after a careful examination, anything showing any right by any "Mrs. Jarvis," or that any such person ever lived, or even a reference in any deed or otherwise to any claim by any such person. So far as the record is concerned, she is altogether mythical.

Five years had elapsed from the death of the testator before this suit was brought. There is nothing in the record tending to show that his estate had not been settled, or that the property in question is needful for the payment of his debts. Certainly, the appellant's title is not, therefore, in danger, even if it be true.

The petition avers that the daughter, Margaret Grenzenbach, died single and intestate since her father's death, and the judgment of sale fully and definitely describes the property. We see no reason for reversing the judgment of the lower court, and it is therefore affirmed.

EGGEN v. HUSTON.

(Court of Appeals of Kentucky. June 12, 1890.)

USURY—ACTION TO RECOVER BACK—NEW CONTRACT.

1. The maker of a note, which had been running for several years, at the time of the payee's death gave his legatee a new one in its place, which he paid. He sued the legatee to recover usurious interest paid to his testator, the original payee. *Held*, that plaintiff could recover, as the illegal interest had been added to the new note, instead of being deducted from the old, and to that extent defendant had collected more than he was entitled to.

2. The action is not against the estate of the original payee, but solely against his legatee; and the affidavit and proof required by Gen. St. Ky. p. 451, § 35, of demands against the estate of deceased persons, is not required.

Appeal from circuit court, Spencer county.
 "Not to be officially reported."

Gen. St. Ky. p. 631, c. 71, § 4, provides that usurious interest may be recovered by action brought within one year after paying it. Chapter 39, p. 451, § 35, provides that all demands against the estate of a decedent shall be verified by affidavit.

Gilbert & Reasor, for appellant. *J. A. Fulton* and *A. P. Harcourt*, for appellee.

LEWIS, C. J. March 3, 1863, appellant gave his note for \$1,000 to M. E. Huston, the consideration being borrowed money, and executed mortgage on land to secure payment. Yearly interest was paid on the note to March 3, 1873, a few days after which date M. E. Huston died, when appellee, as his residuary devisee, became entitled to the note. But March 3, 1874, it was canceled, and the mortgage released, and in lieu thereof a new note for \$1,000, bearing interest at the rate of 10 per cent. per annum, was given to appellee, and another mortgage executed on the same land to secure it. At the same time a note for \$70 was given for interest on the original note for the year beginning March 3, 1873, and ending March 3, 1874. The last-mentioned note, for \$1,000 and interest, was paid off and canceled in October, 1887; and in April, 1888, this action was brought to recover the amount of interest paid in excess of the legal rate, which, it is alleged, was, from 1863 to 1874, at the rate of 8 per cent. per annum. But upon motion the lower court made an order "that so much of the petition as seeks to recover of or charge defendant for such sums in the way of usury as may have been actually paid to M. E. Huston, defendant's testator, be stricken from the petition, and suppressed."

Inasmuch as the stipulated rate of 10 per cent. was authorized by statute existing March 3, 1874, when the last note for \$1,000 was given, it is manifest the effect of that order of court was to defeat any recovery whatever by the plaintiff, except possibly such usury as may have been in the note for \$70 mentioned; and the question, therefore, to consider, is whether such order was proper. In *Fitzpatrick v. Apperson's Ex'x*, 79 Ky. 272, it was held that the mere change of the payee, or even of a part of the obligors, is not a payment of the usury, but the creation of a new contract; and, if the usury on the old debt be carried into the new contract so as to constitute any part of the sum agreed to be paid by it, on the plea of the debtor the usury should be extracted. And in *Rudd v. Bank*, MS. opinion, (May 26, 1880,) it was held that, "to the extent that usury is embraced in the debt, and so long as it can be traced, the new obligation given in discharge of the old indebtedness is without consideration." It does not make any difference how change of the payee occurs,—whether by assignment for valuable consideration, or, as in this case, by devise,—to the extent a note, when sued on, whether by the original holder

or a devisee or assignee, contains usury, or to the extent usury on an old debt becomes part of a new note in the hands of an heir or devisee, recovery may be abated and lessened. The same principle was reiterated in *Kendall v. Crouch*, 11 S. W. Rep. 587, where it was said payments made on a note will always be, at election of the debtor, treated as payments of legal interest, and *pro tanto* of the principle, however they may have been applied by the creditor; and such election may be made when the note is sued on, by pleading usury; or, within one year after the note has been paid off and canceled, the debtor may sue for and recover the usury back.

It was not necessary for the plaintiff in this case to make affidavit and proof required by statute of demands against estates of deceased persons, because the claim of the plaintiff is not a demand against the estate of M. E. Huston, deceased. What the plaintiff is here seeking to recover is the amount of the note paid by him in excess of that for which there was a legal consideration; for, to the extent usury paid on the old became part of the new note, appellee had collected of appellant what he was not entitled to, and the latter has the right to recover it back from him, and can look to no other person or source for it. Consequently the demand is against him alone. There is evidence tending to show there was usury paid on the old note, which, if properly applied, would lessen the amount appellee had a right to recover on the new note; but how much, it is not necessary to now decide, as it may be more properly ascertained by reference to a commissioner. The judgment is reversed, and cause remanded for proceedings according to this opinion.

BOSWORTH v. CITY OF MT. STERLING.

(Court of Appeals of Kentucky. June 12, 1890.)

ADVERSE POSSESSION—STREETS.

1. Act 1873, (Gen. St. Ky. 637,) requiring written notice from the person in possession of any street or alley to the town council that his possession is adverse, in order to start the running of the statute of limitations, applies to those in possession of any street at the time of its passage, if the possession had not then ripened into title.

2. A city cannot recover a strip of land inclosed and occupied by defendants for 20 years, during which time the city had paved in front of the strip, and made no claim to it, recognizing defendant's title.

Appeal from circuit court, Montgomery county.

"Not to be officially reported."

Lewis Apperson and *Wm. H. Holt*, for appellant. *Ed. C. Orear*, for appellee.

PRYOR, J. This action was instituted by the city of Mt. Sterling against *Sallie D. Bosworth* and others to recover a small strip of land in the possession of the defendants, and which is alleged constituted a part of one of the streets of that city, and had been without right inclosed by the defendants. The case was brought and tried in a court of eq-

ulty, and judgment rendered for the city. The testimony conduces to show that the strip of land in dispute had been originally a part of one of the streets; and, on the other hand, it appears that the defendants, and those from whom they derived title, had inclosed that land as a part of the lot adjoining, and have used, possessed, and claimed it as their own for the period of 20 years. The statute of limitation was pleaded as a defense to the action. After the defendants had been in the possession of this ground, with an actual inclosure, for the period of 11 years, claiming it as their own, the act upon which the recovery was based was enacted by the legislature. This act was passed in December, 1873, and is found under the title of "Limitation of Actions." Gen. St. 637. The substance of this statute is that limitation "shall not begin to run in respect to actions by any town or city for the recovery of any street, alley, or other public easement, or any part of either, * * * until the trustees or the council or the corporation * * * have been notified in writing by the party in possession, or about to take possession, to the effect that such possession will be adverse to the right or title of such town or city." The possession is deemed amicable until the notice is given.

Under the title "Construction of Statutes," it is provided that no part of this revision is retrospective, unless expressly so declared. Id. c. 21, § 14. It is insisted for the appellant that, the entry having been made prior to the adoption of the General Statutes, that the provision in reference to limitation has no application to this case, and to determine otherwise would affect an existing right. The statute applies to the party in possession, as well as to one about to take possession; and, besides, there can be no retrospective operation of the statute had, because no right had vested; and the title, if such is the case, being in the city, the latter could have recovered the possession of what rightfully belonged to it. The possession had not ripened into a title when the statute was enacted; and, if the title was in the city, no right of the appellant was affected by it. The pleadings, however, in this case deny title in the city, and from the character of the proof before us it seems that the city did not even know the location of its street, or the particular boundary, from the year 1862 until this action was instituted, some 20 years after the vendors of the party now in possession had inclosed what is now claimed to be a part of the street; and to adjudge title in the plaintiff leaves the dwelling of the defendant on the line of the street with no front; and this, after pavements had been made under the supervision of the street commissioner, and with no claim to apprise purchasers of the nature of the title. There is the testimony of one witness who says that years ago, when the strip of land was inclosed, the party then in possession stated that its occupation was only temporary; but

on cross-examination he seems to have been mistaken as to the locality. With this testimony in, and while the doctrine of estoppel should not be applied so as to aid the defense of the statute, we are disposed to adjudge that the boundary line is where the defendant's fence runs. Its recognition for 20 years is sufficient to counteract the testimony for the city in this regard. The judgment is therefore reversed, with directions to dismiss the petition.

HOLT, J., not sitting.

CARTER v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 12, 1890.)

CREDIBILITY OF WITNESS.

On trial for murder, where witnesses for the state in their chief examination disclose the fact that they were bawds at the time of the occurrence to which they are testifying, and defendant on cross-examination elicits and emphasizes the same fact, it is competent for the commonwealth, in support of their credibility, to introduce evidence that the women have since abandoned their evil ways, and are leading respectable lives.

Appeal from circuit court, Graves county.
"To be officially reported."

Smith & Robbins, for appellant. P. W. Hardin, for the Commonwealth.

BENNETT, J. Mollie Miller and Nannie Sawyer, two bawds, occupied a house together near Mayfield, Ky. They received, at all hours, men at this house. About sundown on the 5th day of October, 1888, Trafford, in a drunken condition, visited said females at this house, and proposed to spend the night with one of them; but they disagreed as to the price. Not long after the appearance of Trafford at said house, the appellant and two other men came,—not all together, however. While this crowd was there, Trafford exhibited his money. He was very drunk. The appellant said to one of the men that he had caught a sucker,—referring to Trafford,—and he would pull him. After awhile Trafford left the house, and the appellant, in a few minutes afterwards, also left. About a half or three-quarters of an hour afterwards, the appellant returned to the house, and stated to these women that he had killed Trafford, and exhibited the money which he said he had taken from Trafford's person. The next morning Trafford's body was found, early, in the woods. He had been killed in the manner as described by the appellant to these women. The loaded stick with which Trafford had been struck was found by his side. The appellant, according to the testimony of Mrs. Lewis, was seen with this stick the evening before. The appellant was convicted of the crime of murdering Trafford, and his punishment fixed at death.

These female witnesses, in their examination in chief, stated, in connection with their account of the events leading to the tragedy, that they were at the time inmates of a bawdy-

house. The appellant, by his cross-examination, elicited the same fact. Thereupon the commonwealth introduced proof to the effect that since said time they had abandoned that life, and were then conducting themselves as respectable women. The credibility of a witness may be attacked by proof of his bad moral character. The fact that these females were, at the time of the occurrence, bawds, was a proper subject of inquiry by the appellant, as an attack upon their general moral character, in order to effect their credibility as witnesses. This having been done by the appellant, it gave the commonwealth the right to show that they had abandoned their evil practices, and at the time of trial were respectable women. The fact that their bad moral character was elicited on cross-examination, and was merely a repetition of what the witnesses had previously voluntarily said, makes no difference. The effect of the cross-examination was to give prominence to the fact of the bad character of these parties, and the purpose, evidently, was to assail their characters. It was like joining in the pursuit of a person. The person thus joining could not excuse himself upon the ground that others were pursuing, or that the individual was himself running. Here the witnesses had, in telling the story of the tragedy, to refer to their own degradation. The appellant on cross-examination seizes hold of that fact, evidently for the purpose of emphasizing the fact of their degraded condition, in order to affect their credibility. He certainly joined in the pursuit. There was no proof tending to show that the appellant in any way encouraged the two witnesses to absent themselves. The proof of the fact that they did absent themselves was therefore incompetent, but it did not prejudice the substantial rights of the appellant. The judgment is affirmed.

COLLIVER v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 12, 1890.)

FORGERY—FORMER JEOPARDY.

On a trial for forging an order for the payment of money, evidence that defendant had increased the amount for which it was drawn by the insertion of an additional figure will sustain a conviction under an indictment charging him with forging the entire instrument; and, after a withdrawal of the case from the jury, defendant cannot again be tried under another indictment charging him with having forged the order by increasing its amount.

Appeal from circuit court, Montgomery county.

"To be officially reported."

Cornelison & McKee, for appellant. *P. W. Hardin*, for the Commonwealth.

BENNETT, J. This is an appeal by the appellant from judgment sentencing him to confinement in the penitentiary for the crime of forging, etc. The only ground relied on for reversal is that the court refused to sus-

tain the appellant's plea of twice in jeopardy for the same offense. The instrument of writing said to have been forged by the appellant is as follows: "Mr. J. C. King, pay to bearer \$1.75 cents till to-morrow evening, & oblige, DAN. HALLERIN." The first indictment charged that the appellant forged and counterfeited the entire body of this instrument, as well as that of the signature thereto. To this indictment a plea of not guilty was entered, and a jury was selected and sworn to try the issue; and, the proof having been heard in part, the court, over the objections of the appellant, withdrew the case from the trial jury, and referred it to another grand jury, which found a new indictment, charging the appellant, in substance, with having committed the crime of forgery by writing the figure "1" just before the figures "75," so as to make the order read "\$1.75 cents," instead of "75 cents," for which sum it was given. The alleged alteration in the particular last mention was an actual occurrence. These two indictments set out substantially the same offense. The facts alleged in the second indictment, and proven on the trial, were competent evidence under the first indictment, and were sufficient to have sustained a verdict of guilty under said indictment. It was alleged in the first indictment that the whole order was forged; but it turned out that only a part of it was forged, to-wit, the insertion of the figure "1," as representing one dollar; thereby making the order read "\$1.75 cents," instead of "75 cents." This fact, under the allegation (in the first indictment) that the order was forged for the whole amount, could have been proven; and the proof of this fact would have authorized a verdict of guilty. Therefore the appellant was twice put in jeopardy for the same offense, which is not allowable. The judgment is reversed, with directions to grant a new trial and dismiss the indictment.

CAVANAUGH v. BRITT.

(Court of Appeals of Kentucky. June 17, 1890.)

LIMITATION OF ACTIONS—FRAUD—PLEADING.

1. Under Gen. St. Ky. c. 71, art. 3, § 6, providing that an action for relief against fraud or mistake must be commenced within 5 years after the discovery thereof, and shall be barred in any event after 10 years from the time of making the fraudulent contract, an action to set aside a conveyance as fraudulent, and to subject the property to the payment of a judgment against the grantor, will be barred after 5 years from the time when, by the exercise of reasonable diligence, he should have discovered the fraud.

2. Under Gen. St. Ky. c. 71, art. 4, § 21, providing that, where an act necessary to save a right is suspended by lawful restraint, the duration thereof shall not be estimated in the application of any statute of limitations, the superseding of a judgment on appeal suspends the running of the statute of limitations against an action to set aside a fraudulent deed and enforce the judgment against the property conveyed thereby.

3. It is not an abuse of discretion for the lower court to reject a pleading tendering a new issue after the pleadings have been made up, where it

appears that the fact pleaded was known to appellee before the action was commenced.

Appeal from the Louisville law and equity court.

"To be officially reported."

H. M. Lane, for appellant. *Andrew A. Haggin* and *John R. Doughan*, for appellee.

HOLT, J. The appellee, Joseph Britt, obtained a judgment in the Jefferson court of common pleas on May 1, 1872, against John Cavanaugh, the husband of the appellee, Catharine Cavanaugh. An appeal was taken to this court, and the judgment superseded. The appeal was dismissed in 1878. The mandate of this court was filed in the lower court on April 6, 1878; an execution sued out upon the judgment, and returned, "No property," on May 2, 1878. November 5, 1878, the husband made a conveyance of all his property to the appellant. It was a sweeping transfer. No property was described. It conveyed, or at least attempted to convey, to her, all the property of her husband, of every description. The recited consideration is love and affection. This action was brought by the appellee on December 7, 1887, to set aside the deed as not only voluntary, but actually fraudulent, and to subject to the payment of the judgment four lots of land which the debtor owned at the time of its rendition, and which are now claimed by the appellant under the deed from her husband.

Several defenses are pleaded. Among them is payment. There is no evidence however, to support this plea. Also, that there was not only a good, but a valuable, consideration for the deed. It is evident, however, that, if not actually fraudulent, it was constructively so, as to the existing creditors of the grantor, and at best but a voluntary conveyance.

The grantee also relies upon not only the five, but the ten, years statute of limitation as to actions seeking relief for fraud; and whether the conveyance to her is protected by the lapse of time is the only real question in the case. Under our statute, an action for relief upon the ground of fraud or mistake must be commenced within five years after the cause of action accrues; and section 6, art. 3, c. 71, Gen. St., says: "In actions for relief for fraud or mistake, or damages for either, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake; but no such action shall be brought ten years after the time of making the contract, or the perpetration of the fraud." The five-years provision of the statute merely perfects the first clause of this section, and fixes the limitation as five years from the discovery of the fraud; or, as construed by this court, as five years from the time when the creditor, in the exercise of ordinary diligence, should have discovered it. *Dye v. Holland*, 4 Bush, 635. The legislature has seen fit—and wisely, no doubt—to also provide that an action to annul a

conveyance as fraudulent as to antecedent creditors is barred in ten years after its execution, regardless of the time when the creditor may discover the fraud. This applies to constructive, as well as actual, frauds. It was intended to quiet old transactions, and to fix a time beyond which the parties should not contend as to when the fraud was discovered. It would be unreasonable to suppose, however, that it intended, when it so limited the time, that the creditor should be barred of his action at the end of it, if, during that period, some other provision of law had prevented him from bringing it. In the case now before us the debtor superseded the judgment. It remained so until April, 1878. This deprived the appellee of the right to bring any action looking to the collection, or even the protection, of his judgment. The superseding of it prevented any step in that direction. This condition resulted from the act of the debtor, who was a necessary party to any suit to annul his conveyance. The law gave him the right to thus stop his creditor from proceeding to collect his demand; and it would be unreasonable to permit him to exercise this right, and then allow one holding under a fraudulent conveyance from him to claim that the time during which the right to sue had been thus suspended should be estimated as a part of the limitation. This would bar the creditor of a right by lapse of time, when, during the same time, he was forbidden by law from exercising the right, and would have been in contempt of court if he had attempted to do so. It was decided in *Johnson v. Williams*, 82 Ky. 45, that, after a judgment has been obtained and superseded by the debtor, the creditor has no right to bring an action upon it, and protect it by suing out an attachment against the debtor's property. He cannot harass the debtor with another suit while the judgment is thus suspended, and the right to it in question. This being so, it is not supposable that such a solecism exists in the law as to say that one must exercise a right within a certain period, or he shall be barred from doing so, when, during that same time, it forbids the exercise of the right. Moreover, section 21, art. 4, c. 71, Gen. St., provides: "In all cases where the doing of an act necessary to save any right or benefit is restrained or suspended by injunction, or other lawful restraint, vacancy in office, absence of an officer, or his refusal to act, the time covered by the injunction, restraint, vacancy, absence, or refusal to act shall not be estimated in the application of any statute of limitation." In the case of *Phillips v. Shipp*, 81 Ky. 436, to which we have been referred, the judgment sought to be enforced against property in the hands of a voluntary grantee had not been superseded.

While, however, ten years had not elapsed before the bringing of this action during which the appellee could have brought it, yet over nine years had; and, the limitation

of five years being aptly pleaded, the burden rested upon the appellee, by proper pleading, and evidence in support of it if denied, to avoid the effect of the plea. His reply merely avers that he did not discover the fraud until within five years before the bringing of the action. His testimony only goes that far, and according to the repeated ruling of this court it is insufficient. In such a case it is incumbent upon him to reply, not only that he did not discover the fraud within five years before the institution of his action, but that the exercise of ordinary diligence upon his part would not have led to the discovery; and, if his replication be denied, he must, by testimony, present a state of case showing that the exercise of such diligence by him would have been of no avail. *Zackay's Adm'r v. Hicks*, 7 Ky. Law Rep. 755; *Cotton v. Brown*, 4 S. W. Rep. 294; *Woods v. James*, 9 S. W. Rep. 513.

While the recording of the conveyance may not have operated as constructive notice to the appellee of its existence, he being an antecedent creditor, yet it is a circumstance which may be considered in determining when the discovery of the fraud might, by the exercise of ordinary care, have been made. A creditor has the right to regard the condition of his debtor when the debt was created as continuing; but he has no right to shut his eyes, and then say that he did not discover the fraud until within five years before the bringing of his action. If so, then his negligence would often work great hardship to voluntary, but innocent, grantees. If the circumstances surrounding him are sufficient to lead one of prudent mind, in the exercise of ordinary diligence, to discover the changed financial condition of his debtor, then he is required to exercise that diligence within a certain time, or hold his peace. In this instance the creditor resided in the county where the deed was made, at the time of its execution. It is true, he moved to another county, not very distant, not long after; but he returned in 1882, and yet his action was not brought until five years thereafter. He had a return of *nulla bona* as early as 1878, and his long delay implies laches upon his part, which his own testimony in no way excuses. Opportunity should not, therefore, be given for an effort to cure the defective pleading.

The appellee complains, by a cross-appeal, of the rejection by the lower court of an amended petition assailing the conveyance to the appellant as void for want of description of the property conveyed. It was tendered after the pleadings had been fully made up, and was based upon a fact known to the appellee when he brought his action. This court cannot, therefore, hold that the court below abused its discretion, even conceding the sufficiency of the proposed pleading. The judgment is affirmed upon the cross-appeal, and reversed upon the main appeal, with directions to dismiss the appellee's petition.

VANMETER v. VANMETER'S ASSIGNEE.

(Court of Appeals of Kentucky. June 14, 1890.)

HOMESTEAD—NATURE AND EXTENT OF RIGHT.

Under Gen. St. Ky. c. 38, § 9, exempting from forced sale, as a homestead, a debtor's land, including the dwelling-house and appurtenances, not exceeding \$1,000 in value, a debtor who occupies his wife's land as a homestead, in which he has an estate by the curtesy exceeding \$1,000 in value, cannot claim, in addition, a homestead in adjoining land to which he has title in fee.

Appeal from circuit court, Clark county.

"Not to be officially reported."

Leeland Hathaway, for appellant. *I. N. Cardwell*, for appellee.

BENNETT, J. The appellant assigned all his estate to W. Miller for the equal benefit of his creditors, reserving to himself a right of homestead, etc. He owned 110 acres of land in fee, and his wife owned 150 acres of land adjoining this 110 acres; he owning a curtesy right therein which was worth more than \$1,000. On this land the appellant lived; and had his homestead, at the time of the assignment. He claimed a homestead in his own tract of land, in addition to his right in his wife's land; but the court would not allot it to him, upon the ground that, as he owned a life-interest in his wife's land which was worth as much as \$1,000, and as he was living on said land as a home, he could not claim a homestead in his own adjoining tract, upon which he did not live.

The object of the law¹ was to exempt from forced sale, etc., a debtor's homestead, not exceeding \$1,000 in value, to enable him to support and care for his dependent family. In this case the appellant owned two freehold estates,—the one a life-estate, the other an estate in fee. The former he lived upon as a home, and his right to live upon it for life as a home was as absolute as was his right to live upon the latter for life. It is his right to a homestead for the support of his family, and, after his death, his widow and infant children's right, that the law contemplates. Here the appellant's right is secured during his life, and at his death the widow, in right of herself and dependent family, is entitled to a homestead. So all the rights, as appears from existing facts, that the law contemplates, are secured. The contingencies suggested that may alter these rights may never arise. It is not presumed that they will. The case must be determined by existing facts. According to these facts, the appellant's rights under the homestead law are amply secured. If we allowed ourselves to adjudicate upon the basis of what might hereafter occur, why not allow a man without a family a homestead upon the supposition that he might thereafter have one? If one's life-estate was worth thousands of dollars, as is not unfrequently the case, which he occupied as a homestead, and he owned in fee only

¹ Gen. St. Ky. c. 38, § 9, exempts from forced sale, as a homestead, the debtor's land, including the dwelling-house and appurtenances, not exceeding \$1,000 in value.

\$1,000 worth of land adjoining his homestead, would it be right to exempt the latter tract from the payment of his debts? We think not. To allow this, the homestead law would be an engine of oppression, instead of a benefit to the unfortunate and helpless. The judgment is affirmed.

STATE v. KIRK.

(Supreme Court of Arkansas. May 31, 1890.)

STATUTORY CONSTRUCTION—IMPLIED REPEAL.

Mansf. Dig. Ark. § 1755, (part of Act Feb. 11, 1875, "An act prescribing and defining the duties of justices of the peace in certain cases," the prime object of which is to give information to grand juries,) provides that justices shall make a detailed statement of all cases tried by them. Section 5862 (part of the revenue act of 1883) requires a report of such cases only as resulted in the imposition of a fine or forfeiture. This act contains no express repeal of the former law, and at the time the former law was passed, (*Gantt's Dig. Ark. § 5291*.) a provision of the revenue law identical with section 5862 was in force. *Held*, that section 5862 did not repeal section 1755.

Appeal from circuit court, Garland county; J. B. WOOD, Judge.

W. E. Atkinson, Atty. Gen., and T. D. Crawford, for the State.

COCKRILL, C. J. Section 1755, *Mansf. Dig.*, requires a detailed statement of all misdemeanors tried by justices of the peace to be made by them twice a year. Section 5862, which was subsequently passed, requires a report from justices of the peace and other magistrates only of such cases as have resulted in the imposition of a fine or forfeiture. A violation of the first act was made a misdemeanor punishable by a fine of not less than \$25 nor more than \$50, while a violation of the second is punished by a fine of not more than \$500. *Id.* § 5872. Kirk was indicted for failure to comply with section 1755. The proof showed that he filed a report conforming to the requirement of section 5862, but not answering to the demands of section 1755. The court ruled, in effect, that the second section repealed the first. Kirk was acquitted, and the state has appealed.

The question is, is the section on which the indictment is based in force? Section 1755 is a part of the act of February 11, 1875, entitled "An act prescribing and defining the duties of justices of the peace in certain cases." Section 5862 is a provision of the revenue act of 1883. The act contains no express repeal of the former law, and its provisions are not inconsistent with the terms of that law. The only argument that can be adduced in favor of the repeal is that the new law covers the field of the old, and was intended as a substitute for it. But the rule of construction which works a repeal in such cases is invoked only when there is an unmistakable intent manifested on the part of the legislature to make the new act contain all the law on the subject. *Pulaski Co. v. Downer*, 10 Ark. 588; *Davies v. Holland*, 43 Ark. 425. A consideration of the second act

furnishes no conclusive evidence that it was intended as a substitute for the first. The aim of the two acts is not the same. The title and subject-matter of each indicate this. The prime object of the first is to apprise grand juries of petty violations of law, of which inferior tribunals have taken cognizance, so that they may not waste time and be at the expense of reinvestigating the same offenses; while the provisions of the act of 1883 were designed to protect the revenue. *Knox v. State*, 45 Ark. 500. In the passage of the last act the legislative mind was not directed to the subject of facilitating the work of the grand jury, but to fiscal affairs. The inference is strong, therefore, that the provision in question was not intended to interfere with previous legislation, not in the line of raising or preserving revenue. Other sections of the revenue act of 1883 have been appealed to in other cases as repealing provisions of prior laws upon the same subjects, but in each case where the last act did not contradict the prior law it was ruled there was no repeal by implication. *Blackwell v. State*, *Id.* 90; *Zerger v. Quilling*, 48 Ark. 157, 2 S. W. Rep. 662; *Chamberlain v. State*, 50 Ark. 132, 6 S. W. Rep. 524. The reasoning of those cases is against the repeal in this. Moreover, the revenue law in force when the act of 1875 was passed, contained a provision identical in import with section 5862 of *Mansfield's Digest*, (see *Gantt's Dig. § 5291*;) yet the legislature enacted section 1755, which, it is to be presumed, would not have been done if the law then in force demanded of justices of the peace all that it was deemed necessary to require of them in regard to the subject treated. Reverse the judgment, and remand the cause.

STATE v. LEWIS.

(Supreme Court of Arkansas. June 7, 1890.)

JUSTICE OF THE PEACE—NONFEASANCE IN OFFICE—INDICTMENT.

1. *Mansf. Dig. Ark. § 5922*, provides that the county court shall appoint a justice of the peace, who shall apportion the persons in the township liable to work the roads; and section 5925, that any justice who shall refuse to accept and discharge the duties of such appointment shall be fined in the county court. *Held*, that an indictment at common law for non-feasance in office, in failing to make the apportionment, charging that the accused was the apportioning justice, having been appointed and duly notified, is fatally defective unless it also show an acceptance of the appointment.

2. Under section 5925, the justice has a choice between paying the penalty, and accepting the appointment, and no absolute duty to accept is imposed.

Error to circuit court, Drew county; C. D. WOOD, Judge.

Indictment at common law, for nonfeasance in office, against a justice appointed, under *Mansf. Dig. Ark. § 5922*, to apportion those in the township liable to work the roads. The indictment charged that he was the apportioning justice, having been appointed and notified, and that he failed to make the apportionment. Section 5925 provides that, if

any justice "shall refuse to accept such appointment and discharge the duties thereof, he shall be fined by the county court in any sum not less than ten dollars."

W. E. Atkinson, Atty. Gen., and T. D. Crawford, for appellant.

COCKRILL, C. J. The duty of apportioning hands to work highways is not imposed by statute upon justices of the peace in general. The county court is required by section 5922, Mansf. Dig., to designate one for each township to perform the duty. Section 5925, which is from the same act as 5922, contemplates that there shall be an acceptance of the appointment as apportioning justice, as in the case of road overseers, and authorizes a punishment by the county court as for contempt for a refusal to accept the appointment. The acceptance may be informal, and may be manifested by any act on the part of the justice indicating the intention to take upon himself the duty imposed. *State v. Stroope*, 20 Ark. 202; *Chiles v. State*, 45 Ark. 143. But, until he accepts, he is not an apportioning justice, and cannot, therefore, be punished for a neglect of the duty imposed upon one accepting the appointment as such. The indictment is defective because it does not charge an acceptance of the appointment. Affirm.

AMBLETON et al. v. DYER.

(Supreme Court of Arkansas. May 3, 1890.)

ADMINISTRATORS—SETTLEMENTS AND ACCOUNTING—LIABILITY FOR MISCONDUCT.

1. In an action by the heirs of an estate to surcharge and falsify the accounts of the administrator, it appeared that in his first annual settlement the administrator charged himself with \$229.88 rents collected, and took credit for \$101.80 paid to the widow as her share. The evidence did not show the exact amount of the rents collected. *Held* that, as the widow was only entitled to one-third of the rents, it would be presumed that they amounted to three times what was paid her; hence the account should be charged with \$75.57 additional.

2. This error was not corrected; and shortly after the second annual settlement the administrator applied for an order of sale of the realty to pay allowed claims, which, had the account been properly stated, could have been paid out of the personalty. *Held*, that there was no necessity for such sale, nor for keeping open the administration, and that all expenses thereafter incurred, including administrator's commissions, should be disallowed.

3. On final settlement the administrator took credit for \$436.59, and took a receipt from the widow as guardian of the minor children; but it appeared that he paid her no money at that time, and had only advanced her before then, in supplies and money, for the use of the children, \$140.35. *Held*, that the credit was improper except as to \$140.35.

4. The land sold to pay the debts of the estate brought \$400; but the purchaser failed to pay for it, and conveyed it to the administrator, who sold it for \$475. *Held*, that he was liable to the estate for the amount he obtained for the land.

5. The administrator is not entitled to credit for taxes paid on the land after its sale.

6. Pending the administration, the widow, as guardian of the minor children, obtained an order of sale of their land, and conveyed one tract to the administrator, receiving her own paper in payment,

and he subsequently conveyed it to a third person. *Held*, that the wards could recover the purchase price from the administrator.

7. She also sold him another tract, of which he took possession, but for which he never paid, and the sale was never approved. *Held*, that the wards could recover their interest in the tract.

Appeal from circuit court, Yell county; **G. S. CUNNINGHAM, Judge.**

W. D. Jacoway, for appellants. H. S. Carter and Robert Toomer, for appellee.

HEMINGWAY, J. This cause comes before us upon appeal from the Yell circuit court, in chancery. As presented, it involves three distinct controversies between the different parties to the suit. The suit was commenced by the heirs at law of A. Ambleton against A. J. Dyer, as administrator of his estate, to set aside his final settlement in the probate court, and to surcharge and falsify his accounts; also to recover the value of a tract of land bought by Dyer at a sale made by M. A. Ambleton as guardian of the plaintiffs, who were then owning, under the order of the probate court; and also to recover the interests of two of the minors in another tract of land, which had been struck off to Dyer at a sale by their guardian, but the sale of which had never been confirmed by the court, and to recover rents for the last mentioned tract. After the cause had been submitted, Dyer filed what he called a "cross-complaint," making M. A. Ambleton a defendant, the object of which was to foreclose a mortgage executed by her on her own land as security for a debt to Dyer. She appeared, answered, and went to trial on the merits of the case against her.

The evidence is voluminous, unsatisfactory in many respects, and confused. A discussion of it would be profitless. We content ourselves by stating what we find to be the facts, in so far as it is necessary to establish the rights of the parties. A. Ambleton, a citizen of Yell county, died intestate on the 27th day of July, 1872, the owner of real and personal property, leaving, him surviving, his widow, M. A. Ambleton, and four children,—Maletie, (since intermarried with Daniel Dacus,) Mary J., John B., and George,—all then of tender years. The defendant, Dyer, was the family physician of the deceased, and attended him in his last illness. On the 7th October, 1872, he and the widow obtained letters of administration upon the estate in the Yell probate court, and duly qualified. The lands of the estate comprised a stone-house in Dardanelle, a tract of 40 acres, known as the "Fourche Tract," one of 120 acres, known as the "Petit Jean Tract," and another of 200 acres, known as the "Mountain Place." The personalty comprised farm animals and implements, household effects, and choses in action. On the 31st day of October, 1872, all the personal effects were sold, except choses in action, a few articles afterwards found, and live-stock of the value of \$108, taken by the widow. The amount of the sale aggregated \$549.72,

of which the widow purchased \$348.67 in value. Some time in 1874 the administrators fled their first account current. It showed that there had been allowed against the estate claims aggregating \$272.12, of which \$116 was due Dyer. They charged themselves with personally aggregating \$934.19, and claimed credit for disbursements by \$684.14, leaving a balance due from them of \$250.05. Credits were claimed on account of dower, turned over to the widow for \$68.20 in money, \$348.67 being the amount of her purchases at the sale, and \$101.80 as a part of her share of the rents collected. It contained a charge for the rents collected of \$229.88, and the voucher for the credit of \$101.80 asked, disclosed that it was paid to the widow as above recited. As the widow was entitled to only one-third of the rents, it is obvious that the amount charged was too small. How much rent had been collected is not made clear by the proof, but it must have been at least three times as much as was paid to the widow on that account. As the amount charged is \$75.57 less than three times the amount paid the widow, that sum should be added to the cash charged in the account. The administrators did not charge themselves with the \$108 worth of personally delivered to the widow, nor take credit for it, in that settlement. It should have been charged there; and, if legally turned over to her, a corresponding credit should have been taken. In view of the extent of the estate, it may be doubted if she was entitled to it; but she received it, and used it for the benefit of plaintiffs, and they are not in an attitude to complain of its disposition. It should have been charged, and, we think, also credited. If it had been done, the subsequent improper credit with no counter-charge could not have been made. The account was approved as rendered. Correcting it in the manner above indicated, it would have shown a balance in the hands of the administrators of \$325.62,—more than sufficient to have paid off all claims ever allowed. On the 15th of January, 1875, a second account current was presented, which was subsequently approved. It contained no error except that brought down from the first.

On the 27th day of March, 1875, the administrators presented to the probate court an application to sell the Fourche and Petit Jean tracts to pay debts, showing the amount of claims unpaid, \$192.14, and the amount of personal assets in their hands, \$209.91, which did not include the sum of \$75.57, which, as we have stated, was improperly omitted from the debits of the first account. The petition alleged that most of the assets were notes; but the administrators only charged themselves with three notes, aggregating \$106.12, and Dyer admits that he collected the largest of them. He had received for rents, \$203.60; for one note, \$43; and for goods sold Gray, \$60; aggregating \$306.60, and not including what they had paid the widow. That he had collected other sums is

established, and it is therefore evident that he had in his hands enough personally to pay all claims against the estate when the petition to sell was presented. But the order of sale was made. On the 9th of November, 1875, the lands were offered for sale, and Daniel Dacus purchased the Fourche tract for \$30; but the Petit Jean tract was not sold, no one offering the requisite part of its appraised value. On the 12th of April, 1876, the administrators made report as above, and asked for an order to sell the Dardanelle store to pay the balance of the debts. An order of sale was accordingly granted. On the 9th of October, 1876, the administrators reported that they had sold the store on the 16th of June, 1876, to James K. Perry, for \$400, and the sale was confirmed. Perry never paid for it, but a deed was made to him, and he conveyed to Dyer. Dyer subsequently sold it for \$475. On the 13th of January, 1876, a third account current was filed. It was infected with the vice of the first, and took a credit for costs in procuring a sale of the land, which was not a proper charge against the estate, for the reason hereafter explained. It showed a balance in the hands of the administrators of \$255.78. At that time the Fourche tract had been sold for \$30, of which no charge was made; and it, added to the amount omitted from the first account, would swell the balance in this account to \$331.35, without deducting the charge of \$7. It was approved. On the 13th day of July, 1877, the administrators filed their fourth annual account, charging themselves with \$696.99, and crediting themselves by \$182.48, showing a balance against them of \$514.58. On the 10th of July, 1878, they filed their fifth and final account, wherein they charged themselves with the sum of \$560.26, and asked credit by the sum of \$621.30, which was approved October 16, 1878. Among the credits is the sum of \$436.59 paid Mrs. Ambleton as guardian and \$10 interest thereon. They paid Mrs. Ambleton no money. He had advanced to her, at various times from October, 1872, to February, 1877, moneys and supplies amounting to \$140.35, and had other claims against her. She receipted him as guardian for \$436.59 upon his satisfying the account and some other claims; the \$108 worth of personally turned over to her being charged against the estate here. The articles embraced in the account seem to have been used for the support of Mrs. Ambleton and the plaintiffs. The other claims do not appear to have been incurred for the benefit of the plaintiffs. He included in the account an item of \$5 for leather taken by her at the sale at its appraised value, but it seems to have been credited in the first settlement. So the two items above should be stricken out, and a credit entered for \$140.35. In obtaining improper credits, and omitting proper charges, the administrators perpetrated a fraud on the courts and these plaintiffs that entitles them to have the settlement set aside, and the account restated. There was no rea-

son to continue the administration open after the 27th of March, 1875; for the accounts show that there was enough in the hands of Dyer on the 15th of January preceding to settle all claims against the estate. All costs of administration after that time, including commissions, were unnecessarily incurred, and should be stricken from the account. There was no necessity to sell the real estate to pay debts, and no costs incident thereto should be allowed. As the sale of the Dardanelle property was unnecessary, and procured by the fraudulent representations of the administrators, Dyer should be charged with the amount he realized for it, \$475, as of the 16th of January, 1877. They failed to charge themselves with \$30, the purchase price of the Fourche tract; and this should be done as of the 9th of November, 1875. No allowance should be made for payment of taxes on either tract after its sale.

Dyer seems to have assumed almost the exclusive management of the estate. Although Mrs. Ambleton joined in presenting accounts, and in applications to sell land, the proof shows that Dyer prepared the papers, or had it done, and she signed them, and that he made all affidavits that were made; but she paid taxes on the land amounting to \$56, for which they obtained credit in the first settlement, and she collected, of debts due the estate, different amounts. The sum so collected was used in paying the taxes above, and in repairing and improving the lands of the estate, and thereby went for the benefit of plaintiffs. As Dyer will be charged with all of it, and has been credited only by the taxes, we think he should now receive an additional credit of the difference between what she collected, and the amount already credited as above. When a correct statement of the account is made, each of the children of the intestate will be entitled to a judgment against Dyer for one-fourth of the sum shown due.

While the administration was pending, Mrs. Ambleton procured letters of guardianship of the minor plaintiffs, Mary, John B., and George. She was insolvent, and gave bond with insolvent sureties, as it is alleged. She obtained an order, and on the 6th day of December, 1879, sold the interest of her wards in Petit Jean to Dyer for \$150, due 12 months after date. She executed a deed to Dyer, but received no money in payment, assuming to collect the sum bid in her individual paper. That she could not do. Dyer has sold the lands to a third party, and plaintiffs last named ask a personal judgment against him for the sum bid by him. Never having been paid for the land, they are entitled to collect the price bid,—that is, \$150, (\$50 each,) with interest from December 6, 1880. Subsequently, Mrs. Ambleton, as guardian of John B. and George,—Mary having attained her majority,—procured an order to sell their interest in the Mountain farm, and accordingly, on the 18th of August, 1883, sold it to Dyer, who was placed in pos-

session. The purchase money was never paid, and the sale was never approved by the court. But he acquired possession, and the minors ask possession of their half interest in the land, and the rents and profits. They are entitled to judgment for their interest in the land, and also for rents from January 1st, 1884. The proof shows that the rental value of the land was \$60 per annum; and the plaintiffs John B. and George, being each the owner of one-fourth of the land, are each entitled to rents at the rate of \$15 per annum, to be computed annually on the 1st of January of each year, the first installment becoming due January 1, 1885, and each installment to bear interest at the rate of 6 per cent. per annum after maturity.

It is manifest that the claim against Dyer for lands sold by the guardian had no connection with the claim against him as administrator, and that the guardian should have brought the suit; but the parties went into a trial upon both matters, and we have therefore considered them as presented. The issues raised on Dyer's cross-bill were entirely foreign to the controversy as it then stood. The plaintiffs moved to strike it out. Under the rules of good practice and orderly procedure, the motion should have been sustained. But the only prejudice it could have caused the plaintiffs was delay, and against that we are powerless to protect them at this time. When Mrs. Ambleton, the defendant in the cross-bill, was brought in, she proceeded to a trial on the merits, and we will so dispose of it on appeal. Dyer is entitled in that branch of the case to a judgment against Mrs. Ambleton for the amount of her note dated May 15, 1883, less the amount which the proof shows was paid thereon in the sale of the interests of the adult owners of the Mountain farm, and to a foreclosure of the mortgage.

The judgment will be reversed, and the cause remanded, with directions as follows: (1) To restate the account of Dyer as administrator upon the facts herein found, and according to the principles herein stated; (2) to fix the amount due Dyer upon the mortgage of Mrs. Ambleton; (3) to render several judgments in favor of the different parties according to their respective rights; (4) if the claim allowed in Dyer's favor against the estate was not paid, he should have a credit for it in his account. The circuit court will make its finding as to that, and, if necessary, may receive further proof. He should have no allowance for any expense growing out of the administration after the 24th day of April, 1875, and all such items in his account with the probate court should be stricken out. The court may hear further proof, if necessary, to determine what credits were allowed for such expense. The findings that we have made will be taken as final; but if, in stating the account or in making calculations, it shall become essential to ascertain facts upon which we have made no finding, it may be done. We open the

proof upon the two points above indicated because they are material, escaped the attention of the court and counsel at the hearing below, and the evidence taken does not satisfactorily disclose the rights of the parties in respect thereof.

ARKANSAS & L. RY. CO. v. SMITH.

(*Supreme Court of Arkansas*. May 17, 1890.)

CARRIERS—FREIGHT CHARGES—EXTORTION.

A shipper to whom a railway company falsely represented that the rate charged him was the through rate agreed upon by the connecting lines, cannot recover the difference between the rate agreed on by the companies and that charged him, on the ground that the false representations and the payment of the higher rate constitute extortion.

Appeal from circuit court, Clark county; R. D. HEARN, Judge.

A. B. & R. B. Williams, D. W. Jones, and Thos. B. Martin, for appellant. *Feazel & Rodgers*, for appellee.

COCKRILL, C. J. Smith, the shipper, was not a party to the contract between the railways, in which they adjusted the through rate for the carriage of cotton; and he did not ship his cotton upon the expectation that it would be carried at the rate which the carriers had agreed should be apportioned between them for the service rendered. He can base no right of recovery, therefore, upon a violation of the contract. It was no concern of his how the carriers apportioned between themselves the amount charged for through freight. *Owen v. Railway Co.*, 83 Mo. 454. If one received a greater portion of the charge agreed upon for the carriage than its share, or laid an additional charge upon the shipper without sharing the profit with the connecting line, it would be no injury to the shipper, unless the charge demanded of him was unreasonable for the service rendered by one or both contracting lines. In that event the suit would be for extortion in demanding unreasonable charges. But the cause was not tried upon the theory of an unreasonable charge. The gist of the action, argues the appellee here, was that the appellant extorted from him 25 cents a bale on all cotton shipped by him, by falsely representing that the rate agreed upon by it and its connecting line of railway was \$3.75 per bale on cotton to St. Louis, when in fact the joint rate was only \$3.50 per bale. But there is no proof tending to show injury by reason of the false representation. Fraud, without injury, affords no ground of redress in a suit for damages. If the appellant, by false representations, had led the appellee to believe that the rate had been advanced over the line of the connecting railway, and thereby induced him to ship by its line, and pay it more for transportation than the service would have cost him by some other route or means of transportation, he should recover the excess paid to the appellant, whether the charge was great enough to amount technically to extortion or not, because it would have been procured from him by fraud. The cause was tried, however, upon the theory that the false representations and payment of the higher rate on the strength of it constituted extortion, without further proof. That was error.

Reverse the judgment, and remand the cause for a new trial.

SMITH v. HOWELL et al.

(*Supreme Court of Arkansas*. May 17, 1890.)

RELINQUISHMENT OF DOWER—EFFECT OF THE CONVEYANCE.

A man executed a mortgage without joining his wife. He then gave a deed of trust on the same land, in which his wife joined and relinquished her dower right. The mortgagee foreclosed, and bought in the land for half of his debt. The grantee in the trust-deed sought to subject the dower interest relinquished in his conveyance to the payment of his debt. Held, that the wife's relinquishment of dower is not a conveyance of it, and is inoperative to convey any interest if the deed containing it fails.

Appeal from circuit court, Crittenden county; J. E. RIDDIOK, Judge.

J. H. Howell was the owner in fee of an undivided one-half of certain lands in Crittenden county, Ark. He conveyed the lands by mortgage to Robert Pickett, one of the defendants, a party in interest. In this mortgage Virginia Howell, his wife, did not join. Afterwards Howell conveyed the same land in trust to appellant, W. M. Smith, executor, to secure an indebtedness in the deed of trust described. Virginia, his wife, joined with him in the conveyance to Smith, releasing her dower interest in that conveyance. Pickett foreclosed his mortgage, and became the purchaser for less than half his debt secured by the mortgage. In July, 1888, Howell died, leaving his wife, defendant Virginia. Plaintiff seeks to subject the dower to the payment of his debt. "Defendants demur, because the complaint does not state the facts sufficient to constitute a cause of action." Demurrer sustained, bill dismissed, and plaintiff appealed.

W. G. Weatherford, for appellant. *W. M. Randolph*, for appellees.

HEMINGWAY, J. It is provided by the statutes of Arkansas that a married woman may relinquish her dower in any real estate of her husband by joining with him in a deed of conveyance thereof. *Mansf. Dig.* § 649. Under this statute it has been ruled that a married woman could relinquish dower only by joining her husband in a conveyance to a third person; and that an instrument executed by her alone, whereby she undertook to relinquish dower to a third person, or to her husband, would be inoperative. *Witter v. Biscoe*, 13 Ark. 423; *Pillow v. Wade*, 31 Ark. 678. The inchoate right of dower during the life-time of the husband is not an estate in land. It is not even a vested right, but "a mere intangible, inchoate, contingent ex-

pectancy." The law regards it as in the nature of an incumbrance on the husband's title, and the statute cited provides a means whereby he may convey his title free from the incumbrance. She joins not to alienate any estate, but to release a future contingent right. The grantee must look alone to the husband's conveyance for his title. The relinquishment can be invoked for no purpose but to aid the title passed by his deed which contains it; therefore, when that title fails, the relinquishment becomes inoperative. Such is the rule of the court of appeals of New York in construing the statute of that state, from which our law regulating the right of dower was taken. *Hinchliffe v. Shea*, 103 N. Y. 153, 8 N. E. Rep. 477; *Witthaus v. Schack*, 105 N. Y. 332, 11 N. E. Rep. 649; 2 Scrib. Dower, c. 12, § 49; *Stinson v. Sumner*, 9 Mass. 143; *Douglass v. McCoy*, 5 Ohio, 523; *Blain v. Harrison*, 11 Ill. 384. This court has never considered the effect of a wife's statutory relinquishment, where the grant of the husband had been defeated; but where the widow, before assignment, had attempted to transfer her right of dower, it was held that, while she might relinquish it to the heirs at law, or to one holding the legal title under the husband, and thus bar her right to recover dower, yet she could not transfer her claim of dower so as to vest in any other person the right of action therefor. *Carnall v. Wilson*, 21 Ark. 62. In the subsequent case of *Jacoway v. McGarrah*, Id. 347, the rule was approved, and it was further held that the transfer of the widow's claim would not be good even in equity, for the reason she had no transferable interest. If the doctrine of that case be correct, about which we are not now called to inquire, it leads to an approval of the doctrine held by the cases cited from New York, as to the effect of the married woman's statutory relinquishment. We think the court of appeals correctly interprets the purpose of that statute, and the judgment of the circuit court was, therefore, correct.

Affirmed.

HECHT v. SCORAGGS.

(Supreme Court of Arkansas. May 17, 1890.)

PRINCIPAL AND SURETY—DEATH OF SURETY—CONTRIBUTION.

A surety's liability on an administrator's bond conditioned to faithfully administer the estate, does not terminate with his death; and for subsequent defaults of the principal the surviving surety may enforce contribution by judgment against an heir who has inherited from the deceased surety property exceeding in value the amount to be contributed.

Appeal from circuit court, Randolph county; J. W. BUTLER, Judge.

J. C. Hawthorne, for appellant. J. M. Moore, for appellee.

HEMINGWAY, J. The statute requires every person to whom letters of administration have been granted to execute a bond

with two or more sufficient securities, to be approved by the clerk. The general tenor of the condition is that the administrator shall well and truly administer, according to law, all and singular the goods and chattels, rights and credits of the deceased, which come to the hands, possession, or knowledge of the administrator, and shall well and truly do and perform all matters and things touching the administration that are or may be prescribed by law, or enjoined on the administrator by the order, sentence, or decree of any court of competent jurisdiction. The obligation of the surety in this bond, is not limited by its terms to any period of time, but extends to the entire term of the administration; but the learned judge who tried this cause below seems to have considered that it was limited to breaches that occurred in the life-time of the surety. There is no law that so provides. The statute provides that, if any surety has become or is likely to become insolvent, or has died, or removed from the state, the court may require a new bond to be given, (Mansf. Dig. § 34); but these are all contingencies that affect merely the financial sufficiency of the bond, and authorize but do not require the giving of a new one, and it could not be argued that either insolvency or removal effected a release from liability thereafter accruing. Why should the death of a surety have such an effect? Where the contract of the decedent is personal, and contemplates in its performance the skill and service of the promising party, it is held that the contract does not survive. The rule may be illustrated by the contract of an artist to paint a picture or execute an engraving; or the contract of a surgeon to perform an operation. In such cases the skill and service of the promising property is the essence of the contract, and it cannot be supposed that the deceased was promising such skill or service for his administrator. But a contract to pay money survives, although it falls due after the death of the obligor. An administrator's bond is but a promise to pay money in the future. True it is conditional, and no time of payment is fixed; but the contingency upon which the payment shall be made is declared, and there is no limitation placed upon the undertaking, except a compliance with its conditions. The surety could bind his legal representatives, and, by the terms of the contract under consideration, did so. Id. § 3898; *Moore v. Wallis*, 18 Ala. 458; *Brandt, Sur.* § 113; *Insurance Co. v. Davies*, 40 Iowa, 469; *White's Ex'rs v. Com.*, 39 Pa. St. 167; *Hightower v. Moore*, 46 Ala. 387; *Green v. Young*, 8 Greenl. 14; *Knotts v. Butler*, 10 Rich. Eq. 143; *Gordon v. Calvert*, 2 Sim. 253.

It follows that the court erred in holding that the obligation of James Russell did not survive against his legal representatives. The appellant, having paid on account of a breach of the condition of the bond various sums, to-wit: February 23, 1887, \$137.97; April 16, 1887, \$713.38; February 19, 1881,

\$350.51; and on the 14th of May, 1887, \$718.88; and the principal in the bond as well as the third surety being insolvent, is entitled to contribution against the estate of Russell, his co-surety, in half those amounts, with interest from the dates they were paid, at 6 per cent. per annum. The estate of Russell was fully administered before the liability was fixed or the money paid, and lands exceeding in value the amount claimed for contribution passed to the appellee under his will. The appellant is therefore entitled to a judgment against appellee for the amount claimed as above, to be charged as a lien on the lands devised.

The judgment of the circuit court will be reversed and remanded, with directions to enter judgment in accordance with this opinion.

ST. LOUIS, I. M. & S. RY. CO. v. RAMSEY
et al.

(Supreme Court of Arkansas. May 24, 1890.)

RIPARIAN RIGHTS—ACCRETIONS—NAVIGABLE WATER.

1. The owner of land on the margin of a navigable stream, holding under a grant from the United States, does not take to the middle of the stream, but to high-water mark, which is determined by the change in the vegetation and the character of the soil, and the beds of all navigable streams, though the tide does not ebb and flow in them, belong to the state.

2. Plaintiffs had a patent to land on the bank of a navigable stream. In front of the land lay a gravel bar. The proof showed that 25 years ago the river ran close to the bank, and over the place where the bar now is; that below the bank there is a second bottom; that beyond and six feet below is the gravel bar, and then the water; that the bar had formed slowly for years; that it is not above ordinary high water; that it is 6 or 8 feet below low water, but that 10 to 15 feet is an ordinary high-water rise; that any year the water, at some time, rises 15 to 22 feet; that at ordinary high water steam-boats can pass over the bar; that there are no trees or soil on the bar; that water often rises over it in a single night. *Held*, that the bar was not an accretion to plaintiff's land, but part of the bed of the river.

Appeal from circuit court, Independence county; J. W. BUTLER, Judge.

Dodge & Johnson, for appellant. *H. S. Coleman* and *J. C. Yancey*, for appellees.

HUGHES, J. Appellees, being the owners, as tenants in common by inheritance from an ancestor, who derived title under a patent from the United States government, of the north-west fractional part of section 21, township 18 N., range 6 W., on the bank of and bordering on White river, in Independence county, containing, according to the patent, 22.59 acres, the patent for which bears date 12th of December, 1823, brought suit against the railway company to recover the value of 3,658 car-loads of gravel, which the appellant took from a gravel bar which the appellees alleged in their complaint was lying immediately adjacent to and between the high bank and the water in the main channel of White river. They alleged that this bar had formed against the bank by long

years of accretion, and that it is not now part of the main or ordinary channel of the river, but that it has become a part of their said tract of land by accretion, and lies immediately in front of the same, between the banks of said stream. The appellant answered, admitting the location, as described, of the tract of land, and the taking of the gravel from the bar, but denied that the gravel bar was a part of the tract of land owned by the plaintiff. The proof showed that the gravel bar was not a part of the N. W. fractional one-fourth of section 21, township 18 N., range 6 W., but that it laid "in the river bed, in front of the tract of land;" that 25 years ago the bed of White river ran where the gravel bar now is; that before that time the river ran along the edge of the bank; that the gravel bar had formed slowly for years; that it is not above the ordinary stage of high water, and is bare at low water, and that a rise in the river from 6 to 8 feet would cover it; that from 10 to 15 feet is an ordinary high-water rise, and would leave the gravel bar from 5 to eight feet under water; that no trees or soil grow on the bar; that the position is this: *First*, there is a high bank, then a second bottom, then a gravel bar, and then the water; that the second bottom is five or six feet higher than the bar; that any year, at some time, the water in the river rises from 15 to 22 feet; that in ordinary high water steam-boats can pass right on the gravel bar in controversy; that there is a snag between the gravel bar and the bank, in which minnows have often been caught; that the water often rises over this gravel bar in one night. The cause was submitted to a jury upon the evidence and instructions of the court, and there was a verdict for appellees, which, upon motion by appellant for a new trial, the court refused to disturb; whereupon appellant, having saved exceptions to the giving and refusing of instructions by the court, appealed.

The main question to be determined is how far the ownership of the appellees in the land between the banks of the river, in front of their tract, extends, by virtue of their ownership of the land upon the bank of the river, under the patent from the government of the United States. At common law, "as a general principle, the soil of ancient navigable rivers, where there is a flux and reflux of the sea, belongs to the crown, and that of other streams to the subject,—that is, to the owners of the adjacent grounds, to each respectively, as far as the middle of the stream." Wool. Waters, 44. The ebb and flow of the tide in a river was at common law the most usual test of its navigability, but was not a conclusive test. *Id.* 40. The soil under navigable streams, at common law, belonged to the king as *parens patrie*, for the same reason that the waters did; that is, as a trust for the public use and benefit. *Id.* cc. 1, 2; Ang. Tide-Waters, 19-67; Hale, De Jure Mar. in 6 Cow. 539; Chapman v. Kimball, 9 Conn. 38. Many of the states of the United States

have held to the common-law test of the navigability of rivers, and to the doctrine that only those rivers are navigable, in a legal sense, in which the tide ebbs and flows; and there has been much discussion and conflict of authority upon this question, a majority in number, perhaps, of the courts of last resort maintaining the common-law doctrine. But the more reasonable test, as we conceive of the navigability of a river, is its use as a navigable stream, or its capability of being used as such. The ebb and flow of the tide is merely an arbitrary test, since many waters where the tide flows are not in fact navigable, and many, especially on this continent, where it does not flow, are navigable. "It is navigability in fact that forms the foundation for navigability in law." *McManus v. Carmichael*, 3 Iowa, 1; *The Genesee Chief v. Fitzhugh*, 12 How. 443. While in England the ebb and flow of the tide is the most convenient, certain, and usual test of the navigability of rivers, as the tide in fact does ebb and flow in all the navigable rivers, it is wholly inapplicable in this country, where there are large fresh-water rivers, thousands of miles long, flowing almost across the entire continent, bearing upon their bosom the commerce of the outside world in part, as well as of the continent. The largest river in England, the Severn, is only about 300 miles, and the Thames is only about 200 miles, in length. If we apply the principle of the common law, that the soil under the navigable waters belongs to the sovereign for the benefit and use of the public, and are not governed by the common-law test of the navigability of streams, but by their navigability in fact, we are constrained to maintain that the true doctrine is that the beds of navigable rivers belong to the government, notwithstanding that the tide does not ebb and flow in them. In *Pollard v. Hagan*, 3 How. 213, it is held that "the shores of navigable waters and the soils under them were not granted by the constitution of the United States, but were reserved to the states, respectively; and the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states;" and Mr. Justice McKINLEY, delivering the opinion of the court, at page 229, says: "Then to Alabama belong the navigable waters and the soils under them, in controversy in this case, subject to the rights surrendered by the constitution to the United States;" and, on page 230, he says: "To give to the United States the right to transfer to a citizen the title to the shores, and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers." *Goodtitle v. Kibbe*, 9 How. 471, affirms the doctrine of this case, and holds that the title to the soil in navigable waters, below high-water mark, is in the state. In the case of *McManus v. Carmi-*

chael, supra, the court said: By the acts of the United States relating to the survey and sale of the public lands, (see act of May 18, 1796, etc.) also the laws establishing the general land-office, it is well known that the whole bed of navigable rivers is excepted from the surveys, and that the lands of the United States are sold with reference to the plats and field-notes of the survey. It is also held in the same case that the rule that grants are to be construed most strongly against the grantor does not apply to public grants; but that the government, being but a trustee for the public, its grants are to be construed strictly. This is familiar law. In *Middleton v. Pritchard*, 3 Scam. 510, Mr. Justice WILSON, in a dissenting opinion, says, in regard to the sale of lands by the government: "The land authorized to be sold, and the mode of selling it, is prescribed by law, and all sales in violation of that are void. * * * These surveys and plats are the guides of the land-officers in making their sales. They have no authority to sell a single acre that has not been surveyed." In *Barney v. Keokuk*, 94 U. S. 324, Mr. Justice BRADLEY, in discussing this question, says, on page 336: "In this country, as a general thing, all waters are deemed navigable which are really so;" and, on page 338, he says: "In our view of the subject, the correct principles were laid down in *Martin v. Waddell*, 16 Pet. 367; *Pollard v. Hagan*, 3 How. 212; and *Goodtitle v. Kibbe*, 9 How. 471. These cases relate to tide-water, it is true, but they enunciate principles which are equally applicable to all navigable waters; and since this court, in the case of *The Genesee Chief*, 12 How. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states, by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the state in which the lands were situated."

But it is necessary to a full understanding of the rights of a riparian owner, and of the public, in the lands between the banks of a river, to determine the legal meaning of the phrase, "high water." It does not mean, as has been sometimes supposed, the line reached by the great annual rises, regardless of the character of the lands subject at such times to be overflowed. But, as decided in the case of *Houghton v. Railroad Co.*, 47 Iowa, 370; "High-water mark, then, as the line between the riparian proprietor and the public, is to be regarded as co-ordinate with the limit of

the river bed." Whatever difficulty there may be in determining it in places, this doubtless may be said: "What the river does not occupy long enough to wrest from vegetation, so far as to destroy its value for agriculture, is not river bed." In *Howard v. Ingersoll*, 13 How. 381, Mr. Justice CURTIS gave a satisfactory definition of the bank and bed of a river. He says: "The banks of a river are those elevations of land which confine the waters, when they rise out of the bed; and the bed is that soil so usually covered by water as to be distinguishable from the banks by the character of the soil or vegetation, or both, produced by the common presence and action of flowing water. But neither the line of ordinary high-water mark, nor of ordinary low-water mark, nor of a middle stage of water, can be assumed as the line dividing the bed from the banks. This line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself. Whether this line between the bed and the banks will be found above or below, or at a middle stage of water, must depend upon the character of the stream. * * * But in all cases the bed of a river is a natural object, and is to be sought for, not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearances they present; the banks being fast land on which vegetation, appropriate to such lands in the particular locality, grows, wherever the bank is not too steep to permit such growth, and the bed being soil of a different character and having no vegetation, or only such as exists when commonly submerged in water." The owner of land on the margin of a navigable stream in this state, holding under a grant from the United States government, does not take *ad medium flum aquæ*, but to high-water mark, as limited and defined above, and the beds of all navigable rivers in the state belong to the state in trust for the use of the public.

Was the gravel bar an accretion to appellee's land? Accretion to land on a stream navigable or unnavigable belongs to the owner of the land; therefore, if appellees' contention that this bar has become a part of his land by accretion has been maintained, the judgment of the circuit court is correct. *Warren v. Chambers*, 25 Ark. 120; *New Orleans v. U. S.*, 10 Pet. 662; *Jones v. Soulard*, 24 How. 41; *Saulet v. Shepherd*, 4 Wall. 502; 1 Amer. & Eng. Enc. Law. § 5, p. 137, and cases cited. Accretion is the increase of real estate, by the addition of portions of soil by gradual deposition through the operation of natural causes, to that already in possession of the owner. The term "alluvion" is applied to the deposit itself, while accretion rather denotes the act. 3 Washb. Real Prop. 60, 61;

Bouv. Law Dict. tit. "Accretion;" *Woolr. Waters*, lateral page 29. *Fleta* says: "We acquire a right to things, according to the law of nations, by accession. That which a stream has added to our land by alluvion, for instance, belongs to us by virtue of the same law. *Liber 3, c. 2, § 6.* Does the testimony in this case show that the gravel bar is alluvion, added to the land of the appellees by accretion? We think not. On the contrary the evidence shows that the gravel bar is a part of the bed of White river, within the above definition.

Reversed and remanded.

STATE v. SUMPTER.

(*Supreme Court of Arkansas. May 10, 1890.*)

INNKEEPERS—LICENSES.

Mansf. Dig. Ark. § 753, conferring upon municipal corporations power "to regulate hotels and other houses of public entertainment," does not render sections 6416, 1850, requiring tavern-keepers to procure licenses from the county court, and making the omission to do so a misdemeanor, punishable by a fine, inoperative in such cities, and ordinances in conflict therewith are void to the extent of their inconsistency.

Appeal from circuit court, Garland county; J. B. WOOD, Judge.

Appellee was indicted in Garland county circuit court for keeping a public tavern without having procured a license from the county court. The case was submitted to the court upon an agreed state of facts: "That the defendant kept a house of entertainment within the incorporate limits of the City of Hot Springs, Garland county, Arkansas, without a license from the county court of said county therefor. This house was advertised by a sign attached to it, bearing the inscription, 'Sumpter;' also in newspapers by a card announcing its location, and stating that the house was open for the accommodation of the public. This house could entertain more than fifteen guests. That it was open principally for visitors to the springs, and visitors did stop and were entertained there. The defendant refused all persons who might come that did not suit him for guests. That for more than one year next prior to the filing of the indictment herein the city of Hot Springs was duly incorporated under the laws of the state of Arkansas, and was a city of the first class, and had a valid ordinance regulating hotels and boarding-houses within its corporate limits, and in conformity with section 753 of *Mansfield's Digest of the Statutes of Arkansas*, and said ordinance was in full force during all of the period of one year next prior to the filing of the indictment herein, a copy of said ordinance, pertaining to the regulation of hotels and other houses of public entertainment, being filed herewith and made part hereof. That defendant has paid to the said city of Hot Springs the full amount required of him by said ordinance, and obtained a license therefrom to run said hotel or tavern for and during the full period of one year

next prior to the said filing of the indictment herein. That defendant did not run, nor was he interested in the running of, any other hotel or tavern in said county during the period aforesaid except the said 'Sumpter House.' The court, sitting as a jury, found the defendant not guilty. The appellant filed a motion for a new trial, upon the ground that the finding and judgment of the court herein was contrary to the law and the agreed statement of facts. The motion was overruled, and the state has appealed.

W. E. Atkinson, Atty. Gen., and T. D. Crawford, for appellant.

BATTLE, J. Section 6416, Mansf. Dig., provides that all persons keeping a public tavern, whether they retail spirituous or vinous liquors or not, shall first procure a license for that purpose from the county court of the county; and section 1859 provides: "If any persons shall violate any of the provisions of the law requiring tavern-keepers to procure license, for which no specific penalty is provided, such person shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined in any sum not exceeding fifty dollars." These provisions were held in *Bostick v. State*, 47 Ark. 126, to be constitutional and still in force. It is true, power has been conferred on municipal corporations "to regulate hotels and other houses for public entertainment," but this power is not exclusive, or inconsistent with the statute requiring all persons keeping public taverns to procure license from the county court. That statute still remains in force, and all ordinances in conflict with it are void to the extent of the inconsistency, if not entirely so. Const. 1874, art. 12, § 4. The finding of the circuit court was contrary to the agreed statement of facts. The judgment of the circuit court is therefore reversed, and this cause is remanded for a new trial.

ARMSTRONG v. TRUITT, (two cases.)

(*Supreme Court of Arkansas. May 17, 1890.*)

COUNTY — ALLOWANCE — APPEAL — PUBLIC BUILDINGS.

1. An award of a contract to build a county jail is not an "allowance," within the meaning of Const. Ark. 1874, art. 7, § 51, which extends to citizens and resident tax-payers the right to appeal from allowances made for or against counties, cities, or towns.

2. Under Mansf. Dig. Ark. §§ 1091-1103, relating to the building of court-houses and county jails under the direction of the court, and the supervision of commissioners appointed by it, and which provide that the court shall order the payment of installments as they fall due to contractors, but that no payment shall be made except upon the certificate of the commissioners that a due proportion of the agreement has been performed, the court has no power to order the payment of a sum stipulated to be payable upon the filing of the bond, and in advance of the performance of any part of the contract.

Appeal from circuit court, Conway county; *G. S. CUNNINGHAM, Judge.*

E. B. Henry, for appellant. Ratcliffe & Fletcher, for appellee.

BATTLE, J. These two cases were submitted by consent upon the same abstracts and briefs, and considered by this court at the same time. In the first case it appears the county court of Conway county ordered a jail to be built, awarded the contract to R. S. Truitt, he being declared the lowest bidder, and ordered him to enter into bond for the faithful performance thereof. The contract was reduced to writing, and presented to the court for approval. Thereupon, Carroll Armstrong, a citizen, resident, and tax-payer of Conway county, appeared, and, for several reasons, objected to its approval. His objection was overruled, and the contract was approved, and he appealed to the circuit court. In the circuit court his appeal was dismissed, and he appealed to this court.

In the other case the county court of Conway county, at its July term, 1888, on the 7th of September, 1888, made the following order: "Now, on this day, it appearing to this court that the contractor for building the jail for Conway county, R. S. Truitt, has filed his bond as such contractor, and in accordance with the contract, that, upon the filing and approval of said bond, that said contractor should have issued to him one thousand dollars, it is therefore considered, ordered, and adjudged by the court that the clerk draw his warrant on the treasury of Conway county in favor of R. S. Truitt, payable out of jail funds, for one thousand dollars." And Carroll Armstrong appealed from it to the circuit court, which, "after hearing the testimony of witnesses and argument of counsel," affirmed the order of the county court, and rendered judgment for costs against Armstrong. Without filing a motion for a new trial or bill of exceptions, he appealed to this court.

The appeals in the two cases are separate and distinct, and will be so considered.

In the first case, Armstrong was not a party, and could not take an appeal as a party aggrieved. The order appealed from was not an allowance, but an acceptance by the county court of the offer of Truitt to build a jail, and nothing more. Hence Armstrong had no right to appeal from it, under the constitution, as a citizen, resident, or tax-payer, and could not appeal in any capacity. Const. 1874, art. 7, § 51; *Moffit v. State*, 40 Ind. 217.

In the latter case the order appealed from was an allowance against the county. There is nothing in the record here to indicate the nature or purpose of the allowance except the order of the county court. From that it appears that it was made at the time the contract to build the jail was consummated by the filing and approval of the bond of Truitt; that both were made at the same time. Assuming that the order is correct as to facts, it conclusively appears that no part of the contract was performed when it was made, and that the amount thereby allowed was intended to be paid before anything was done under the contract. No other reasonable

interpretation can be placed upon it. As an order for such a payment, it was affirmed by the circuit court, and could not have been affirmed in any other way. The whole record conclusively shows that the allowance was for an advance payment. Did the circuit court err in affirming it?

The statutes of this state provide that, when any county court shall make an order for the erection of a court-house or jail, it shall appoint some suitable person as commissioner of public buildings, whose duty it shall be, among other things, to prepare and submit to the county court a plan of the building to be erected, the dimensions thereof, and the materials of which it is to be composed, with an estimate of the probable costs thereof, and, when any plan shall be approved by the court, to advertise for proposals for erecting such building, and to contract with the person who will agree to do the work on the lowest and best terms, not exceeding the amount appropriated for the purpose by the court; to take from the contractor a bond to the county, with sufficient security, for the performance of the work at such time and in such manner as shall be agreed on, and "to superintend and direct the execution of the work, and to see that the materials employed are good, and the work executed according to contract, and to make report of the progress and condition thereof from time to time to the county court." They further provide: "When any installment shall become due to the contractor according to contract, such court shall make an order that the same be paid out of the county treasury," and that "no such order shall be made except on the certificate of the commissioner that a due proportion of the work has been completed and executed according to the contract." Mansf. Dig. §§ 1091-1103. The effect of this legislation is to prohibit the county court from making an order for the payment of any sum on any amount contracted to be paid for the building of a court-house or jail before any part of the contract is performed. The allowance in question is in violation of the statute, and the circuit court erred in affirming it. *Shirk v. Pulaski Co.*, 4 Dill. 209; *Desha Co. v. Newman*, 33 Ark. 795; *Goyne v. Ashley Co.*, 31 Ark. 552. See *State v. Hinkle*, 37 Ark. 540.

The judgment in the first case dismissing the appeal is affirmed, and the judgment affirming the allowance in the other is reversed, and the cause is remanded for a new trial.

CRABTREE *et al.* v. BRADBURY *et al.*

(Supreme Court of Arkansas. May 31, 1890.)

CANCELLATION OF DEED—SUFFICIENCY OF EVIDENCE.

1. Where there is a substantial conflict in the testimony, the findings of the chancellor will not be disturbed.

2. A deed obtained by fraud and misrepresentation is void, *ab initio*, and will be canceled on showing in equity.

Appeal from circuit court, Sebastian county; R. W. McFARLANE, Special Judge. *Duval & Cravens*, for appellants. *J. B. McDonough*, for appellees.

HUGHES, J. The appellees, children and grandchildren and heirs at law of J. R. Bradbury, deceased, who was the father, also, of the appellant, L. Crabtree, brought this suit in equity to have canceled a deed of conveyance executed by J. R. Bradbury to L. P. Crabtree for a tract of land described therein, upon the grounds that, through fraud, imposition, and deceit, L. P. Crabtree had obtained the deed. They allege that Crabtree, intending a fraud, promised to trade places or exchange lands with Bradbury, and never intended to make the exchange, and failed to convey his own place, knowing that Bradbury, who was old, would soon die, and leave all the land in Crabtree's name. They also allege that Crabtree offered and pretended to give cattle in the Indian Territory, valued at \$1,200, in exchange for the Bradbury land; and that Crabtree pretended that Bradbury made a deed of the land to him to pay a debt which he pretended Bradbury owed him, and which the appellees aver he did not owe. The deed is exhibited with the complaint, and appears to have been duly executed, and was recorded 5th of April, 1886. The consideration expressed in the deed is \$1,200. L. P. Crabtree alone answered the complaint. He admitted the execution of the deed by Bradbury to him. Denies all fraud, and that he procured the execution of the deed, and alleges that it was executed when he was absent, and that he knew nothing about it until it was delivered to him by Bradbury after its execution. Denies that he offered any cattle as a consideration, or that he offered any other lands in exchange for the land Bradbury conveyed to him. Alleges there was a good and valuable consideration for the execution of the deed, but admits that the \$1,200, the amount of the consideration expressed in Bradbury's deed, was never paid or promised. Avers that Bradbury estimated the services, trouble, and outlay of money, past, present, and future, for him by defendant to be equal to that amount; that Bradbury stayed at appellant's house a year and a half before he died; that, when he came to live at appellant's house, Bradbury told him that if he died first appellant should have all he had, and that if appellant should die first he (Bradbury) would take care of his wife and children. At the hearing the court found that the deed was obtained through fraud and misrepresentation, decreed its cancellation, and gave judgment against appellant L. P. Crabtree for \$125 for the use of the land. Crabtree appealed.

There was conflict in the testimony of the case,—that for appellants tending to show that the land conveyed to Crabtree by the deed in controversy was a gift; that for appellees tending to show that the theory of the complaint was correct. Without discussion of

it, we deem it sufficient to say that there was evidence to warrant the court in finding that appellant L. P. Crabtree obtained the deed from Bradbury through a pretended purchase of the land conveyed thereby, with the preconceived intention and determination not to pay for it; and this was a fraud for which the deed should have been canceled. Taylor v. Mississippi Mills, 47 Ark. 247, 1 S. W. Rep. 283. Fraud avoids a contract *ab initio*, both at law and in equity, and gives the defrauded party the right utterly to reject the contract. Merritt v. Robinson, 35 Ark. 483; Strayhorn v. Giles, 22 Ark. 517; Kerr, Fraud & M. 338 et seq; Bigelow, Frauds, 73-75.

Under the rule laid down in Gaty v. Holcomb, 44 Ark. 216, we ought not to disturb the finding and decree of the chancellor, and have no inclination to do so. There is certainly no preponderance of evidence against them, but the evidence is sufficient to sustain them. The decree is affirmed.

EAST END ST. RY. CO. v. DOYLE.

(Supreme Court of Tennessee. May 8, 1890.)

EMINENT DOMAIN—DUMMY RAILROAD—COMPENSATION—CONSTITUTIONAL LAW.

1. The construction along a city street, to a point five miles in the country, of a railroad whose cars are propelled by a dummy steam-engine, and whose trains carry passengers only, and stop at all street crossings, is an additional servitude upon the street, for which the owner of the fee is entitled to compensation.

2. Under Const. Tenn. art. 1, § 21, which forbids the taking of private property for public use without just compensation, the fact that a railroad is constructed along a city street under a charter from the state, and a contract with the city and county, does not deprive the owner of the fee of his right to compensation therefor.

Error to circuit court, Shelby county; L. H. ESTES, Judge.

Myers & Sneed and Turley & Wright, for plaintiff in error. *P. P. Edmondson and J. P. Houston*, for defendant in error.

CALDWELL, J. Action by Doyle, an abutting lot-owner, to recover damages from the East End Dummy Railway Company for the alleged wrongful and unlawful construction and operation of its railway line along and upon the highway in front of his property. Verdict and judgment for plaintiff, and appeal in error by defendant.

On the trial below the defendant requested the trial judge to instruct the jury as follows: "If the jury find that the defendant constructed its road through a part of the city to a point five miles into the country, in accordance with its contract with the city and county, its cars being propelled by steam-motor, and used only for carrying passengers, stopping at street crossings to take on passengers, then the court charges you that its construction is not an additional servitude upon the streets or public roads from that contemplated in the dedication." The court

refused to give this instruction, and his action in that behalf is assigned as error.

This presents the question reserved in the Smith Case, 87 Tenn. 626, 11 S. W. Rep. 709, namely, whether a railway whose cars are propelled by a dummy steam-engine, and used for passengers only, is a burden or servitude on a public street or highway in addition to that contemplated in the original dedication of the land to public use. The reservation was made in that case because the plaintiff therein did not own the ultimate fee in the street, and was not, therefore, in an attitude to be affected by a decision of the question. For reasons stated in that case and in the Bingham Case, to be hereafter cited, an abutting land-owner whose line is in the side, and not the center, of the public highway, is not entitled to compensation for the imposition of an additional burden on the ultimate fee. Not owning the fee, he can justly claim no compensation for its impairment by a new burden imposed upon it. That is a matter for the owner of the estate out of which the public easement was originally carved, and not for the abutting owner, whose title-papers take him only to the side of the highway, as was true in the Bingham and Smith Cases. In the present case the plaintiff's line is in the center of the highway, and to that line he owns the ultimate fee; that is, he has such ownership of the soil that he may resume absolute possession and dominion of it to the center of the highway whenever the original use for which the highway was set apart shall be finally abandoned. The appropriation vested the public with only such part of his fee-simple estate as was necessary to the full enjoyment of the use then in contemplation. Consequently, anything which diverts the highway from that use, or applies it to another or different use, is the imposition of an additional burden on the reserved estate of the owner, and constitutes a taking of his property for which he may demand and receive just compensation. So, then, the proposition contained in the request for special instruction is a material one in this case, and should have been given or refused, as it may be sound or unsound in law.

It is well settled that an ordinary steam or commercial railway is, and that an ordinary street railway operated with horses is not, an additional servitude on the ultimate fee in the public street or highway; the former being a new and different use, while the latter is but an improved and consistent mode of enjoying the original or ordinary use. Railroad Co. v. Bingham, 87 Tenn. 522, 11 S. W. Rep. 705; Smith v. Railroad Co., 87 Tenn. 626, 11 S. W. Rep. 709, and authorities cited. The distinction between the use by the commercial railway, and that by the horse railway, is so wide and plain that it needs no further comment or illustration. Confessedly, the railway involved in this case is on the line between the two; the equivalent of neither, but partaking largely of the nature

of both. Like those upon the commercial railway, its cars are propelled by a steam-engine, with its unavoidable smoke, noise, and vibration, though in a less degree; and, like the horse-car line, it transports passengers only, stopping at short intervals upon the highway to take them on and let them off, while the commercial railway carries both passengers and other freight, receiving and discharging them at regular depots further apart. The size, weight, and speed of appellant's trains, consisting usually of a small "boxed" engine and two coaches, are much less than those of the commercial railway trains; but, at the same time, its trains are much longer, heavier, and more rapid in transit than the ordinary horse-car. Alike, the commercial railway, and that operated by the appellant, are obvious hindrances to other modes of travel and traffic rightfully enjoyed upon the public highway. Alike, they endanger the lives and property of individuals, for whom, in the aggregate, the original dedication or condemnation was made. There is a difference, it is true; but the difference is in the degree, and not in the kind, of interruption and peril. From the very nature of the case, it is perfectly manifest to our minds that the presence of appellant's track and trains is entirely inconsistent with, and a perpetual embarrassment to, the ordinary use of the public highway. It is utterly impossible to operate such a railway with such trains without greatly obstructing, and rendering more dangerous, other business and travel usually seen, and always allowable, on a public highway. To the extent of this obstruction, and this increase of danger by its appropriation of the highway for its own purposes, there is necessarily a diversion from and inconsistency with the original use; and to that extent the construction and operation of appellant's road is the imposition of an additional servitude upon the ultimate fee of the owners of the soil in the public highway. This does not mean that the trains of appellant are to be banished as unauthorized by law, but simply that their presence and operation in the public highway is an additional burden on the ultimate fee, for which the owner is entitled to compensation.

The charter from the state, and contract with the city and county, authorize the proper construction and use of this railway; but they do not purport to warrant the appropriation of the owner's property without paying him therefor. Even if such was their purport and intent, that could not alter the case, and would afford no sufficient answer to the plaintiff's demand, because the constitution forbids the taking of private property for public use without just compensation. Const. art. 1, § 21. The instruction requested was properly refused. Counsel for appellant have called our attention to the case of *Newell v. Railway Co.*, 85 Minn. 112, 27 N. W. Rep. 839, which we find to be an authority for the proposition requested, and in con-

flict with the conclusion reached in this opinion. Not agreeing to the reasoning in that case, and the decision of a sister state being at most only persuasive authority, we prefer not to follow it. We have carefully considered the several other assignments of error. None of them are well taken. Let the judgment be affirmed.

STATE v. ELVINS.

(*Supreme Court of Missouri. June 30, 1890.*)

ASSAULT WITH INTENT TO KILL—INDICTMENT—EVIDENCE—VERDICT.

1. An indictment charging that the accused feloniously, and with malice aforethought, assaulted and shot at a person named therein, with a Winchester rifle loaded with powder and leaden bullets, with intent to kill and murder, sufficiently charges an assault, with a deadly weapon, with intent to kill, under Rev. St. Mo. § 1262.

2. Evidence that the accused became engaged in an altercation with the proprietor of a saloon, which terminated in his being ejected therefrom; that he thereupon procured a Winchester rifle, returned, and shot at the proprietor,—is sufficient to sustain a conviction for assault, with a deadly weapon, with intent to kill.

3. The making of the statement by the prosecuting attorney in his closing argument, "Gentlemen, you know these assaults with intent to kill are becoming too common in this country, and in south-east Missouri," furnishes no ground for reversal of a judgment convicting the defendant of such an assault.

4. A verdict of "Guilty as charged in the indictment" is proper in form without specifying the degree of the offense, as required by Rev. St. Mo. § 1267, where the offense found is inferior to that charged.

Appeal from circuit court, St. Francois county; JAMES D. FOX, Judge.

Indictment under section 1262, Rev. St. 1879, omitting formal parts, as follows: "That Ralph Elvins, on the — day of March, 1886, at and in the county of St. Francois and state of Missouri, in and upon one Barney Flynn, feloniously, on purpose, and of his malice aforethought, did make an assault, and did then and there, on purpose, and of his malice aforethought, feloniously shoot at him, the said Barney Flynn, with a certain Winchester rifle loaded with powder and leaden balls, which he, the said Ralph Elvins, then and there held in both his hands, with intent then and there the said Barney Flynn, on purpose and of his malice aforethought, feloniously to kill and murder, against the peace and dignity of the state. MERRILL PIPKIN, Prosecuting Attorney." The testimony shows that about 11 o'clock on the night of the 18th of March, 1886, defendant became engaged in a difficulty in Barney Flynn's saloon, in St. Francois county, Mo., with a man by the name of Edwards, and also attempted to raise a disturbance with some other parties, who were in the saloon playing cards at the time. Flynn, the saloon-keeper, in trying to keep him quiet, became engaged in an altercation with him, and finally put him out of the saloon, and closed the door. After he was put outside, Seward Burke, one of the witnesses, tried to get him to go home, but he insisted on going

up town. In speaking to him about the trouble he had had, Burke said to him, "He might have killed you, and you might have killed him;" and then defendant said, "If that is the case, I will go down home, and get my Winchester." He then went home, got his Winchester rifle, came back to the saloon, pushed open the door, and, putting his gun in at the opening, shot at Barney Flynn once or twice. Flynn had been told by Burke that defendant had gone to get his Winchester; and, when he returned, he had his gun ready to defend himself, and both shot at about the same time. The trial resulted in the defendant being found guilty, and his punishment assessed at three years' imprisonment in the penitentiary. Being sentenced accordingly, he appeals to this court.

Weber & Bush, for appellant. *Merrill Pipkin*, Atty. Gen., for the State.

SHERWOOD, J. There was no appearance of counsel for defendant in this court, either by brief or otherwise; but, complying with our statutory duty, we have carefully read the record to see if reversible error occurred during the trial of the cause, or in proceedings subsequent thereto, with the following results:

1. The indictment to which objection was taken by motion in arrest is in all respects sufficient, and in accordance with approved precedents.

2. The testimony fully sustains the verdict; and testimony was perfectly competent to show how the quarrel began, and all that was said and done about it by defendant up to the time when, a few minutes thereafter, he fired the shot which caused the present accusation. Such testimony was part of the *res gesta*; and, besides, it went to show the state of feeling defendant had towards Flynn. *State v. Forsythe*, 89 Mo. 667, 1 S. W. Rep. 834; *State v. Emery*, 76 Mo. 348; *State v. McNally*, 87 Mo. 644, and cases cited. But testimony offered on behalf of the defendant that he was a fine shot had no bearing or relevancy whatever.

3. There were no exceptions saved to the giving of any instructions; and they need not be considered for that reason, as exceptions to the action of a trial court stand upon the same plane in criminal cases as in civil, as the statute provides and this court has oftentimes decided. But, nevertheless, we have read them, and find them, speaking in a general way, to lay down the law in a manner frequently approved by this court in this class of cases; and the instruction in relation to self-defense was in accordance with the rulings of this court in a number of instances. *State v. Gilmore*, 95 Mo. 554, 8 S. W. Rep. 359, 912; *State v. Partlow*, 90 Mo. 608, 4 S. W. Rep. 14; *State v. Berkley*, 92 Mo. 41, 4 S. W. Rep. 24; *State v. Parker*, 96 Mo. 382, 9 S. W. Rep. 728; *State v. Herrell*, 97 Mo. 105, 10 S. W. Rep. 387. There is no ground of complaint, therefore, on this score.

4. The remarks of the prosecuting attor-

ney in the closing argument, to which objection was made, were these: "Gentlemen, you know that these assaults with intent to kill are becoming too common in this country, and in south-east Missouri." There was nothing in this language meriting any rebuke whatever. It was strictly within the line of legitimate argument.

5. Lastly, the verdict of the jury was: "We, the jury, find the defendant, Ralph Elvins, guilty as he stands charged in the indictment, and assess his punishment at imprisonment in the penitentiary for the term of three years. GEO. L. COOLEY, Foreman." This verdict was proper in form, under the provisions of section 1927, Rev. St. 1879, which only requires that the verdict should specify the degree of the offense where it is inferior to that charged in the indictment. *State v. Matrassey*, 47 Mo. 295; *State v. Step-toe*, 65 Mo. 640. Therefore, judgment affirmed. All concur but BAROLAY, J., absent.

STATE v. MCNAMARA.

(Supreme Court of Missouri. Feb. 10, 1890.)

ASSAULT WITH INTENT TO KILL—INDICTMENT—EVIDENCE—VERDICT.

1. An indictment presented without the names of witnesses indorsed may properly, by order of court, be returned to the grand jury to supply the omission, and entered on the following day.

2. An angry dispute arose at a school meeting between one whose vote was challenged and the challenger, and the latter and his brother were rushing towards the voter, and in the direction of defendant, who was chairman, when defendant drew and raised his revolver, and a third brother, sitting near, came up behind and threw his arms around him, pressing his arms down. Defendant partially freed himself, and, throwing his hand over his shoulder, and looking back, fired. He testified that he feared an attack from one of the brothers, who was drawing off his coat, when he received a blow in the back of the head, and was grasped from behind. Held, that whether he had reasonable cause to believe he was in immediate danger was properly left to the jury. SHERWOOD, J., dissenting.

3. An instruction that, "if the jury, from all the evidence, have any doubt of defendant's guilt, and further believe from the evidence that defendant has for a long time and now possesses a good moral character for peace, sobriety, and honesty, then such fact of good character, coupled with the presumption of innocence, is sufficient upon which to find a verdict of not guilty," is properly refused.

4. It is not error to neglect to give a proper instruction as to evidence of good character, though an improper one was asked and refused, and the statutes require the court to declare the law applicable to the case. SHERWOOD, J., dissenting.

5. Statement by counsel that "the only object of the law in allowing evidence of defendant's good character is to show that a man did not do the act, * * * and evidence of good character cannot do this defendant any good," will not require a reversal where the sentence, as shown by the bill of exceptions, indicates a probable omission, and counsel makes affidavit that he said that good character was not an excuse for the commission of crime; and in this case the evidence was clear that defendant did the shooting, and as there was no reasonable cause for his doing it, evidence of good character could not do him any good. SHERWOOD, J., dissenting.

6. A verdict for assault with intent to kill can-

not be impeached by affidavit of a juror that he intended a verdict for carrying concealed weapons.¹ 7. "Pertentary" instead of "penitentiary" in a verdict will not require a reversal.

Appeal from circuit court, Montgomery county.

Silver & Brown and John M. Barker, for appellant. *The Attorney General*, for the State.

BRACE, J. At the April term, 1887, of the circuit court of Montgomery county, the defendant was indicted, under section 1262, Rev. St. 1879, for shooting at one George W. Woods, "on purpose, and with malice aforethought," with a loaded pistol, with intent to kill, and at the same term was found guilty of assault with intent to kill under section 1263, and his punishment assessed at imprisonment in the penitentiary for two years. From the sentence and judgment on the verdict he appeals. The shooting took place at a school meeting in the district on the 5th of April, 1887, when an election was being held for school directors. Two ballots had been taken, which had resulted in a tie. The third was progressing, when a young man by the name of "Rodgers" going to vote, his vote was challenged by John Woods, a brother of George, whereupon an angry altercation ensued between them, and John Woods rushed toward Rodgers, followed by his brother Alexander, who was near him when the altercation commenced. While these two brothers were bearing down on Rodgers, and running, probably in a general direction, towards the place where the defendant was, he drew his pistol, a revolver, from his hip-pocket, brought it round to the front of his person with his right hand, caught it with his left, raised it, facing in the direction of the Woods brothers, when George Woods, who was in the rear of the defendant and near him, came up behind him, threw his arms around him, pressing defendant's arms to his side. The defendant by struggling got his right arm loose from George's embrace, raised it, bringing the pistol in his right hand over his left shoulder, and, turning his face in that direction, looked towards George's head and fired, the shot passing through George's cap. The defendant was then thrown to the floor, and

the revolver taken away from him. The evidence for the state tended to prove that nothing offensive had been done or said to the defendant by any one before he drew his revolver, and that George Woods had been sitting quietly near him up to the moment when he took hold of the defendant in the manner stated for the purpose of preventing him using it. The defendant testified that he drew his pistol, and placed himself in a defensive position, in apprehension of an attack from Alexander Woods, who was approaching him, and drawing off his coat, when he received a blow from some one on the back of his head; was immediately thereafter grabbed from behind; tried to look around, and, in the impulse of self-defense, threw up the pistol and fired.

1. The record shows that the indictment in this cause, which is in every respect a sufficient and formal one, was returned into court and entered on the 26th of April, 1887. Its validity, or that of the proceedings under it, is in no way affected by the fact that it was presented the day before; but, not having the names of the state's witnesses indorsed thereon, was not entered, but by order of the court returned to the grand jury for that reason, as the affidavit of the clerk tends to show.

2. The bill of exceptions was filed in vacation by leave of court, entered of record in term within the time allowed, and is part of the record for review. Sess. Acts 1885, p. 214. But in it we find no specific objections to the admission or rejection of evidence, nor any exceptions properly taken and saved to any ruling of the court thereupon.

3. The instructions given by the court are perhaps obnoxious to some of the verbal criticisms made upon them, but, on the whole, presented very fairly the issue between the state and the defendant on the offense of which he was found guilty, telling the jury, in substance, that if the defendant, in the heat of passion, shot at George Woods with the intention of killing him, the defendant was guilty of the offense defined in section 1263, unless such shooting was done under such circumstances as to be justified on the ground of self-defense, and requiring them to find all the necessary facts constituting the offense beyond a reasonable doubt, and to acquit if they had a reasonable doubt on the whole case. The instruction on self-defense was not erroneous, in that the question whether the defendant had reasonable cause to believe that he was in immediate danger was submitted to the jury, (*State v. Sloan*, 47 Mo. 604; *State v. Eaton*, 75 Mo. 587; *Nichols v. Winfrey*, 79 Mo. 544;) and in other particulars was such as has been approved by this court, (*State v. Thomas*, 78 Mo. 827.)

4. The defendant asked four instructions, all of which were refused. The second, third, and fourth were upon the ground of self-defense, and, in so far as they stated correct propositions of law applicable to the facts of the case, were as favorably stated for the defendant in the instructions given

¹The testimony of a juror is not admissible to show misconduct of the jury. *State v. Harper*, (N. C.) 7 S. E. Rep. 780; *State v. Morris*, (La.) 6 South. Rep. 639. But where a new trial is asked on the ground of certain alleged misconduct of the jury the affidavits of jurors denying the misconduct are admissible and conclusive. *People v. Goldenson*, (Cal.) 19 Pac. Rep. 161. Evidence of conversations between jurors, and threats made by them to each other, whether in or out of the jury-room, is inadmissible to impeach the verdict. *Com. v. White*, (Mass.) 16 N. E. Rep. 707. See, also, note, *Id.* But the Nebraska court has held that the general rule that affidavits of jurors will not be received in any case for the purpose of impeaching or avoiding their verdict is subject to an exception in regard to such overt acts as may be seen and heard by all the jurors. *Harris v. State*, 40 N. W. Rep. 317. Evidence of remarks made by a juror after the trial is not admissible to impeach the verdict. *State v. Rush*, (Mo.) 8 S. W. Rep. 221.

by the court on that branch of the case as in those asked; and for the refusal to give them he has no just cause of complaint. The first is as follows: "(1) If the jury, from all the evidence in this cause, have any doubt of the defendant's guilt, and further believe from the evidence that the defendant has for a long time and now possesses a good moral character for peace, sobriety, and honesty, then such fact of good character, coupled with the presumption of innocence which the law invokes, is sufficient upon which to find a verdict of not guilty, and the jury may then acquit the defendant." The court committed no error in refusing this instruction. The jury had no right to acquit the accused on any kind of doubt short of a reasonable doubt, whether the defendant was a man of good or bad character, and the court had no right to tell the jury that any doubt supplemented by proof of good character would authorize them to acquit. It was for the jury to determine, taking into consideration the evidence of defendant's good character in connection with all the other evidence in the case, whether there was such a reasonable doubt of his guilt as to authorize an acquittal.

It is contended, however, that, conceding that the court committed no error in refusing the instruction in the form asked, yet the defendant, having given evidence tending to establish his good character, it was the duty of the court to give a correct instruction on the subject, and that the court committed reversible error in neglecting to do so. It has been repeatedly held in this state that evidence of good character of defendant in criminal cases is always to be considered by the jury in making up their verdict as to the guilt or innocence of the accused. *State v. McMurphy*, 52 Mo. 251; *State v. Alexander*, 66 Mo. 148; *State v. Underwood*, 76 Mo. 630; *State v. McNally*, 87 Mo. 644. It has also as frequently been held that evidence of good character of the defendant is to be treated the same as any other evidence of fact in the case; "that no legitimate distinction can be taken between them." *State v. Alexander*, supra; *State v. McNally*, supra; *State v. Swain*, 68 Mo. 705. If this be so, it is difficult to see on principle why the fact of character should in any case be selected from other facts in the case, and made the subject of instructions. The practice of singling out any single fact, and calling the attention of the jury to it, as a subject for their consideration, thus giving it an undue prominence over other facts in the case would seem to be objectionable. *State v. Hundley*, 46 Mo. 414; *State v. Smith*, 53 Mo. 267. Nevertheless the practice of giving an instruction on the subject of character, when limited to a direction to the jury that the same may be taken into consideration in connection with all the other facts and circumstances in evidence in the case in determining the question of guilt, has frequently received the sanction of this court. Cases supra, and *State v. Jones*, 78 Mo. 278; *State v. Vansant*, 80.

Mo. 67. But we do not understand any of the cases to go to the extent of holding that the omission of the court to give an instruction upon the subject of character is ground for reversal. The extent to which they can be held to go is that, if the defendant asks for a proper instruction on that subject, he may have it given; if it is not a proper one, of course it must be refused. He has no cause of complaint that thereupon the court gives no instruction upon the subject. The law requiring the court to declare the law applicable to the case, whether proper instructions are asked for or not, does not comprehend such merely collateral matter. *State v. Brooks*, 92 Mo. 542, 5 S. W. Rep. 257, 330.

5. The closing argument for the state was made by Judge ELIJAH ROBINSON. Objections are urged to several remarks made by him in that argument, but the following is the only one properly saved for the consideration of this court in the bill of exceptions: "The only object of the law in allowing evidence of the defendant's good character is to show that a man did not do the act. Where there is a doubt about the act, only in such cases as these, [here selecting one of the jury as an example:] suppose you had a horse stolen, [or taken,] and that the horse is afterward found in my possession. I would then have the right to introduce evidence to show my good character in order to rebut the presumption that I had stolen or taken the horse, and evidence of good character cannot do this defendant any good." Reading this paragraph alone, disconnected from the line of argument in which it was used, some ground may be found for the contention that the jury might have been misled by the expression "did not do the act," coupled, as it is, in the manner stated in the sentence, with the statement, "and evidence of good character cannot do this defendant any good." The formation of the sentence, however, at once suggests that something must have been omitted, and, when read in the light of the affidavit of Judge ROBINSON, that what he actually said was that good character was not an excuse for the commission of crime, (illustrating as aforesaid,) and in this case the evidence was clear that McNamara had done the shooting, and that there was no reasonable cause for him having done it, the evidence of good character could not excuse him for it, or, as stated, "cannot do him any good," there will be found no such misrepresentation of law as to the weight which should be given to evidence of good character as would require the interference of the trial judge, or warrant a reversal upon the ground that the judge did not thereupon so interfere.

6. The affidavit of Juror Owens, that he intended by his verdict to find the defendant guilty of carrying concealed weapons, and not of shooting at George Woods, afforded no ground for a new trial. A juror cannot be permitted in this way to impeach his own verdict. *State v. Rush*, 95 Mo. 199, 8 S. W. Rep. 221, and cases cited.

Nor should the judgment be reversed because the jury in their verdict misspelled the word "penitentiary." The word, as spelled in this record, looks like "pertentiary," but no-one could for a moment mistake the meaning.

Finding no reversible error in the record of the trial of this cause, the judgment is affirmed.

SHERWOOD, J., (*dissenting*.) The defendant was indicted at the April term, 1887, of the Montgomery county circuit court for an assault with intent to kill one George Woods. He was tried at the same term and convicted, and his punishment assessed at two years' imprisonment in the penitentiary. He appealed from the judgment of the circuit court to this court. The indictment was returned to the lower court on the 26th day of April, 1887, and the trial had at the April adjourned term in June following. The alleged assault was made on the 5th April, 1887, at the annual school meeting of the district in which the defendant and George Woods resided. The defendant was a member of the board of directors and its president. The father of George Woods, the party charged to have been assaulted, was also a member of the board. The latter's term expired at that time, and two directors were to be elected at that meeting. Much feeling had been engendered in the district by previous efforts to divide it, and to move the school-house site. This feeling had assumed a personal character as between the defendant and the Woods family, father and sons. Other considerations more purely personal had caused coolness between the families. There was a contest at the school meeting over the election of two directors, and the opposing interests were known geographically as the northern and southern factions. There was a large attendance at the meeting. One director was elected, and two ballots had been taken in an effort to elect the second. During the progress of the third ballot, John or Alexander Woods, or both, challenged the vote of one John Rodgers, out of which grew an altercation resulting in an attack upon Rodgers by John Woods, or, as some witnesses say, by both John and Alexander Woods, in which Rodgers was knocked down and severely beaten. During the progress of this fight McNamara drew his pistol. Some witnesses testify that Alexander Woods, during the fight between Rodgers and his brother John, advanced in a threatening manner towards the defendant, taking off his coat as he went towards him. Others say that he proceeded in the direction of the defendant, but was in reality following his brother, who was bearing Rodgers back and past the defendant, while still other testimony is to the effect that he advanced upon McNamara, and, upon the latter drawing his pistol, he turned away and joined his brother John in his assault upon Rodgers. The witnesses uniformly agree

that defendant made no effort to use his pistol, but stood holding it in his hand. At this juncture the witnesses all concur in stating that George Woods approached the defendant from behind, and clasped his arms around the defendant, pinioning the latter's arms to his side. The defendant struggled until he succeeded in freeing one hand, and, turning partially around, he fired over his shoulder at his assailant, the bullet passing through the latter's cap, but doing him no injury. No witness saw George Woods strike the defendant before the shot was fired, but no one denies that he might have done so. One witness testifies that when the shot was fired he saw blood trickling down the back of defendant's head, and it is not disputed that there was blood on the back of his head at the close of the difficulty, and blood on the floor and the bench where he was standing when assaulted by George Woods, and that an ugly wound had been made on the back of his head by some instrument. One witness says it was a gash which could have been made with a knife. The defendant himself testifies that he received a blow or cut from some one before he was caught from behind. He did not know who held him. He believed it was George Woods. He tried to look around, and, in the impulse of self-preservation, fired the shot. And the testimony of the defendant discloses ample ground for being armed with the pistol; but whether he had such ground or not is immaterial, unless he were indicted for carrying concealed weapons. The evidence shows that defendant, after firing the shot, was borne to the floor by George Woods, his pistol was taken from him by the latter, and he and his brother Alexander beat the defendant into a dazed condition. Their father made them desist, and himself assisted the defendant to rise from the floor. After these two simultaneous difficulties had ceased, George Woods, not satisfied with the punishment he and his brother Alexander had inflicted upon McNamara, and the beating that his brother John had given Rodgers, himself became involved in an altercation with Rodgers. Each called the other a coward, and there is evidence that Woods advanced upon Rodgers, when the latter fired upon him, giving him a mortal wound, from which he died in a few minutes. There was no connection between McNamara and Rodgers, and neither of them had anything to do with the difficulty between the other and the Woods brothers, further than that Rodgers was voting with what was called by some witnesses the McNamara faction. Alexander Woods was very active in canvassing the district for some time before the meeting, and on the day before told the witness Thorley that if McNamara "did not drive a little slow there to-morrow, there might be a little fun." The defendant testified that he saw Rodgers challenged and knocked down, and Alexander Woods pulling off his coat and advancing towards him, (defendant,) when he

drew his pistol, and stood on the defensive, making no offensive demonstration. He was then struck from behind and clapped around the arms, when he fired back over his shoulder. While Alexander Woods denies making any demonstration against McNamara, and denies that he struck or beat him after he was knocked down by George Woods, and the other evidence for the state generally tends negatively to show that neither of the Woods brothers made any demonstration against the defendant previous to the firing of the shot by the latter, witnesses for the defense testify positively that Alexander was advancing threateningly upon McNamara, when the latter drew his pistol, apparently for the purpose of stopping the advance of Woods. It was shown that Alexander Woods was a man of medium size. George would weigh 175 or 180 pounds, and John 240 or 250 pounds, while McNamara, the defendant, was under the medium size, a little and an old man. George Woods was about 19 years of age, and not a voter at the school meeting. A number of witnesses testified to the good character of the defendant, which was not controverted.

The court refused the following instruction upon the subject of good character, asked by defendant: "If the jury, from all the evidence in this case, have any doubt of defendant's guilt, and further believe from the evidence that the defendant has for a long time and now possesses a good moral character for peace, sobriety, and honesty, then such fact of good character, coupled with the presumption of innocence which the law invokes, is sufficient upon which to find a verdict of not guilty, and the jury may then acquit the defendant." No instruction upon the subject of good character was given. The defendant in support of his motion for a new trial, filed the affidavit of William E. Owens, one of the jurors who tried the cause, in which he says that he found the defendant guilty of carrying a concealed weapon to the school meeting, and was induced to do so by the closing argument of Judge ROBINSON. The state called Owens for the purpose of explaining his affidavit, and at the close of a long and close oral examination, and after the whole of the affidavit had been read to him, he was asked the following question: "Now you have heard the whole of it read, I wish you would state whether you intended to convict McNamara for carrying concealed weapons to the school-house or not?" He answered: "Yes, sir; I did." The remarks made by counsel for the state will be quoted later on.

I have deemed it proper to make a statement of the testimony in this cause, because I do not regard the statement made in the majority opinion as a full and fair statement of the facts in evidence; and upon that evidence, of course, depends the question of defendant's guilt or innocence, and the question as to whether he was fairly tried. I have given what I deem a correct *résumé* of

that evidence as the basis for the following remarks:

1. The great preponderance of the testimony establishes to my entire satisfaction that Alexander Woods was the aggressor, and brought on the state of affairs which led to the firing of the shot by the defendant. Although the threats made by Alexander Woods on the day before, against the defendant, were not communicated to the latter, yet the fact that they were made was competent and very cogent evidence that Alexander Woods was the aggressor and promotor of the strife, and caused the defendant to draw his pistol for his own protection. The authorities in this state fully sustain the position as to the competency of such evidence. *State v. Alexander*, 66 Mo. 148, and cases cited; *State v. Downs*, 91 Mo. 19, 3 S.W. Rep. 219; *State v. McNally*, 87 Mo. 644; *State v. Sloan*, 47 Mo. 604. In the case last cited an approving quotation is made from *Campbell v. People*, 16 Ill. 17, where it is said, touching the inference to be drawn from previous threats as to who the aggressor was, that "if the deceased had made threats against the defendant, it would be a reasonable inference that he sought him for the purpose of executing those threats, and thus they would serve to characterize his conduct toward the prisoner at the time of their meeting and of the affray." And there is sufficient evidence to show that Alexander Woods, the threatener of the defendant, and George Woods, who seized the defendant from behind, were acting in concert, and were both the aggressors in the assault made on the defendant. It cannot be doubted that Alexander Woods' advancing on the defendant, and drawing his coat as he came, was only barked for the moment in his previously expressed purpose to make the defendant "drive a little slow" by the latter drawing his pistol, and standing in a posture of defense. But he made no attempt to use the pistol, as all the witnesses agree, and therefore the only conceivable purpose of George Woods in slipping up and "grabbing" McNamara from behind was to enable his brother Alexander, without danger of personal injury, to have "a little fun." This "fun" began by a violent cut or blow which George Woods dealt the defendant on the back of the head at the instant he seized him; and which blow split the defendant's scalp open, and caused the blood to flow freely; a wound of so severe a nature as to be plainly visible at the time of the trial, several months thereafter. That George Woods struck the blow cannot well be questioned, seeing that he and his brothers were the only ones engaged in promoting the disturbance which they themselves set in motion, and seeing, further, that George Woods was behind the defendant, and Alexander was not. And the "little fun" went on by the Woods brothers hurling the little old man on the floor, and there brutally beating him almost to the verge of his existence; beating him so unmercifully that even their own father in-

terfered, and rescued him from the murderous hands of his sons. But it is quite immaterial who struck the defendant on the back of the head. That he was so struck before he fired the shot, or made any attempt to do so, is abundantly shown by the testimony of a disinterested witness, and by the uncontradicted testimony of the defendant himself. He sees the vote of John Rodgers, who voted with him on the school question, and who had voted three times that morning without objection, challenged, and then Rodgers knocked down by John Woods; he sees Alexander Woods, with whom he was not on speaking terms, advancing towards him in an excited and threatening manner, and drawing his coat as he came; then the defendant drew his pistol as he had a right to do, but did not attempt to use it; then he was seized from behind, and struck a violent blow, and then, turning his head partially around, and unable to see who had seized him or who was his assailant, in the impulse of self-preservation, he threw up his pistol, and fired the shot, for firing which he has been tried, convicted, and branded as a felon. If these facts do not constitute a clear and indubitable case of self-defense, then I must confess my utter ignorance of the meaning of that term. If in the facts stated the elements of an abundant and plenary self-defense do not exist, then the sooner all expressions and definitions touching the "first law of nature" are eliminated as useless from our legal vocabularies the better. "When a person apprehends that some one is about to do him great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, he may safely act upon appearances, and even kill the assailant, if that be necessary to avoid the apprehended danger; and the killing will be justifiable, although it may afterward turn out that the appearances were false, and there was in fact neither design to do him serious injury nor danger that it would be done. He must decide at his peril, upon the force of the circumstances in which he is placed, for that is a matter which will be subject to judicial review. But he will not act at his peril of making that guilt, if appearances prove false, which would be innocence had they proved true." *State v. Sloan*, 47 Mo. 604, (an indictment for murder in the first degree.) In *State v. Palmer*, 88 Mo. 568, also a prosecution for murder in the first degree, where the deceased, unarmed, advanced upon the defendant in a threatening manner, whereupon the defendant threw a weight at him and killed him with it, this court said: "If the defendant acted, in a moment of apparently impending peril, it was not for him to nicely gauge the proper quantum of force necessary to repel the assault of the deceased." To the same effect are *Nichols v. Winfrey*, 79 Mo. 544; *Morgan v. Durfee*, 69 Mo. 469; *State v. Eaton*, 75 Mo. 591. All our reports speak in the same way on this point, and so

do the authorities elsewhere. Besides, it must not be forgotten that the defendant was a member of the board of school directors, and its president, and had been elected chairman of the annual meeting then assembled. He had a right, therefore, to be there, and to maintain order. That school-room was for the time being his dwelling-house, his domicile, his office. 2 Rev. St. 1889, §§ 7978, 7979, 7988. His duty commanded him to be there, and therefore he was in a better plight than an individual in ordinary circumstances requiring self-defense, since he was engaged in a lawful act, and when unduly assaulted he only did what the apparent necessity of the case demanded; and, whether justifiable or excusable, the verdict should have been for him. *Morgan v. Durfee*, 69 Mo. 469.

I am persuaded that no one with unbiased mind can carefully read this record without being constrained by the evidence alone to say that a great wrong has been done the defendant. What little evidence is to be found which bears against the defendant's innocence is of so slight, inconsequential, and negative nature, as to warrant the confident belief that the verdict of the jury was not the result of calm deliberation, but of prejudice, passion, or partiality. And this court uniformly interferes in such circumstances, even in civil actions. *Spohn v. Railroad Co.*, 87 Mo. 74; *Whitsett v. Ransom*, 79 Mo. 258; *Baker v. Stonebraker's Adm'r*, 36 Mo. 845; *Price v. Evans*, 49 Mo. 396; *Garrett v. Greenwell*, 92 Mo. 120, 4 S. W. Rep. 441. And in criminal causes we have never yet abdicated the right we possess, and the duty we owe the accused, to overturn verdicts which are not based upon the corner-stone of substantial justice. *State v. Packwood*, 26 Mo. 340; *State v. Burgdorf*, 53 Mo. 65; *State v. Mansfield*, 41 Mo. 470; *State v. Daubert*, 42 Mo. 239; *State v. Brosius*, 39 Mo. 534; *State v. Jaeger*, 66 Mo. 173; *State v. Castor*, 98 Mo. 242, 5 S. W. Rep. 906; *State v. Primm*, 98 Mo. 368, 11 S. W. Rep. 732. On this branch of the cause, therefore, I am in favor of reversing the judgment and discharging the prisoner; and I cannot but think that, had my associates scrutinized the evidence more closely, they would have reached the same conclusion.

2. But there are other reasons now to be presented—ample reasons—why the judgment herein should be reversed. I refer to the refusal of the court properly to instruct the jury, and to improper remarks made on behalf of the state. The defendant established by his neighbors a most excellent character as a quiet, peaceable man, and there was no testimony to the contrary. This evidence called for an instruction as to the probative force of the good character of the defendant, but no instruction at all was given on the subject, though an instruction on that point was asked by the defendant's counsel. This instruction was faulty, and was therefore properly refused; but it was the plain duty of the trial court, an improper instruction

having been asked, to have given a proper one on that subject. The reports of this court, with unvarying uniformity, announce the doctrine that, where an improper instruction is asked on behalf of the defense, upon the facts adduced in evidence, a proper one should be given in its stead. *State v. Matthews*, 20 Mo. 55; *State v. Jones*, 61 Mo. 232; *State v. Kilgore*, 70 Mo. 546; *State v. Lowe*, 93 Mo. 547, 5 S. W. Rep. 889; *State v. Young*, 12 S. W. Rep. 879; *State v. Hickam*, 95 Mo. *loc. cit.* 332, 8 S. W. Rep. 252, 257, 258, (BRACE, J.) "I cannot, in principle," said Mr. Justice PATTERSON, 'make any distinction between evidence of facts and evidence of character. The latter is equally laid before the jury as the former, as being relevant to the question of guilty or not guilty. The object of laying it before the jury is to induce them to believe, from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution, and it is strictly evidence in the case.' *Rex v. Stannard*, 7 Car. & P. 678. The admissibility of this evidence has sometimes been restricted to doubtful cases; but it is conceived that, if the evidence is at all relevant to the issue, it is not for the judge to decide, before the evidence is all exhibited, whether the case is in fact doubtful or not; nor indeed afterwards, the weight of the evidence being a question for the jury alone. His duty seems to be to leave the jury to decide, upon the whole evidence, whether an individual, whose character was previously unblemished, is or is not guilty of the crime of which he is accused." 3 Greenl. Ev. § 25. It is said, however, in the majority opinion, "But we do not understand any of the cases to go to the extent of holding that the omission of the court to give an instruction upon the subject of character is ground for reversal. The extent to which they can be held to go is that, if the defendant asks for a proper instruction on that subject, he may have it given; if it is not a proper one, of course it must be refused. He has no cause of complaint that thereupon the court gives no instruction upon the subject. The law requiring the court to declare the law applicable to the case, whether proper instructions are asked for or not, does not comprehend such merely collateral matter. *State v. Brooks*, 92 Mo. 542, 5 S. W. Rep. 257, 330." This statement is grossly erroneous in two particulars and for two reasons. In *State v. Swain*, 68 Mo. 615, an instruction as to good character had been asked by the defendant, but refused by the court, and such refusal, and the failure to give a proper instruction on that subject, was one of the grounds for reversal in that case. Now, if it be the law, as asserted by the authorities, and by this court in a number of instances, that evidence of fact and evidence of character rest upon the same basis; that there is no distinction to be taken between them; that

the jury, in making up their verdict as to the guilt or innocence of the accused, must consider good character "just like any other fact in the cause," (*State v. McNally*, 87 Mo. 644; *State v. Alexander*, 66 Mo. 148; *State v. Swain*, *supra*.)—why is it not as much a reversible error in the trial court to refuse to give a proper instruction as to good character, where an improper one is asked by the defendant, as it is to refuse to give a proper instruction on "any other fact in the cause?" And yet this court, as shown by cases already cited, has always ruled and invariably held that the asking of an improper instruction by the accused on the evidence—*i. e.* the facts in the cause and the failure of the trial court to give a proper one—was a conclusive and undebatable ground for reversal. How the duty of the trial court to give a proper instruction can be set in motion or called forth by the asking of an improper instruction, unless it be the duty of the trial court to give a proper instruction, whether asked or not, as the statute in plain terms provides, I leave this court to determine and settle to their own satisfaction, if they can.

Equally unfortunate and equally unfounded is the concluding portion of the statement already quoted: "The law requiring the court to declare the law applicable to the case, whether proper instructions are asked for or not, does not comprehend such merely collateral matter." *State v. Brooks*, 92 Mo. 542, 5 S. W. Rep. 257, 330. In the first place, evidence of good character is not a "collateral matter;" it is "just like any other fact in the cause." Authorities, *supra*. It is vital, it is essential, it is material. How then can it be termed "collateral." Its efficacy has been exhibited on many occasions, where but for its presence conviction of the crime charged must have resulted. TALFOURD, J., says: "It is a *petitio principii* to say that evidence as to character is entitled to weight only in doubtful cases, when really it is to make the case doubtful that such evidence is offered. In some instances, in which guilt would otherwise be established beyond reasonable doubt, evidence of good character may justly produce an acquittal." *Dickinson*, Quar. Sess. (6th Ed.) 563, cited in *Whart. Crim. Ev.* (9th Ed.) § 67. This view of the subject is well illustrated and expressed in *Heine v. Com.*, 91 Pa. St. 145, where GORDON, J., said: "Furthermore, the learned judge of the court below committed an error in saying to the jury: 'If a man is guilty, his previous good character has nothing to do with the case; but if you have doubt as to his guilt, then character steps in and aids in determining that doubt.' The effect of this was to give the evidence of good character no weight whatever, for, if the other testimony left in the minds of the jury a reasonable doubt of the defendant's guilt, this, of itself, without more, entitled him to an acquittal. Evidence of good character is not a mere makeweight, thrown in to assist in the production of a result that would happen at all

events, but it is positive evidence, and may, of itself, by the creation of a reasonable doubt, produce an acquittal." Now how can testimony of good character, which is "positive evidence," which has the power to combat, countervail, and overthrow the otherwise conclusive evidence of the prosecution, which may create "of itself" a reasonable doubt and thus "produce an acquittal," be deemed a "merely collateral matter?" The human mind must change its whole functions, structure, and organization before it can, from such premises, draw or accept such an unwarranted and unfounded conclusion. But *State v. Brooks* ("God save the mark") only decides that if no instruction at all is asked by the accused on a collateral matter, that then there will be no error in failing to give one on such subject; but it does not decide that if an improper instruction be asked on a collateral matter, that the trial court would not commit reversible error in failing to give a proper instruction; on the contrary, the clear ruling is the other way, for *Kilgore's Case*, 70 Mo. 546, is cited and quoted with approbation, where it is said: "If it [the instruction] had been asked in this case, it should have been given, or, if one objectionable in its phraseology had been asked and refused, the court should have given a proper instruction on the subject." So that even the *Brooks' Case* is no authority in support of the majority opinion here, but is directly against it; conceding, for the once, that evidence of good character is a "collateral matter," which, as already demonstrated, it is not, nor indeed can be.

3. Having successfully shown that the trial court erred in failing properly to instruct the jury as to the good character of the defendant, and the effect thereof, I now turn my attention to other errors. In his closing argument for the state, Judge Robinson said: "The only object of the law in allowing evidence of the defendant's good character is to show that a man did not do the act. Where there is a doubt about the act, only in such cases as these, [here selecting one of the jury as an example:] suppose you had a horse stolen, [or taken,] and that the horse is afterwards found in my possession, I would then have the right to introduce evidence to show my good character in order to rebut the presumption that I had taken or stolen the horse, and evidence of good character cannot do this defendant any good." During which argument counselor John M. Barker for defendant to the court objected to counselor Robinson as stating the law of the case to the jury, and asked the court to intercede its authority in that behalf for defendant, which request was unheeded, and counselor Robinson directed by the court to proceed with his argument, to which action of the court the defendant's counsel excepted at the time. Whereupon he continued, saying: "I think I understand the law as well as Mr. Barker." The affidavits or oral testimony in respect to such remarks cannot be heard to countervail

what the bill of exceptions recites as true, or to act as a substitute therefor, (*State v. Hayes*, 81 Mo. 574;) and I will not, therefore, consider them. Judge Robinson had recently been judge of that court, and of course "spoke as one having authority," and was doubtless listened to by the jury with a degree of attention proportionate to his former judicial position. His remarks must therefore have had great weight in swaying the minds of the jury; but, unfortunately for the cause of law and of justice, his remarks were only too well calculated to sway the minds of the jury in the wrong direction, and no doubt did so. From the quotations already made heretofore from the authorities, it will be readily perceived that those remarks as to the effect of evidence of good character were not law; and that the only effect of them was to deceive and mislead the jury, and cause them to regard the evidence of the good character of the defendant as incapable of doing him any good, so long as it was clear who fired the shot. But of course this left out of view the intent with which, and the circumstances in which, the shot was fired, and allowed the fact of a previously blameless life to have no weight with the jury and to go for nothing. And the trial court, instead of interposing its authority upon objection taken to such unwarranted remarks, not only refused to do so, but told Judge Robinson to proceed. This was equivalent to sanctioning the grievous error into which counsel had fallen, and thus duplicated the error which the trial court had already committed of failing to give a proper instruction as to good character. *State v. Rothschild*, 68 Mo. 52; *State v. Jaeger*, 66 Mo. 173; *State v. Martin*, 74 Mo. 547. This court has so often condemned the failure of trial courts properly to instruct the jury, and of the attempts made by prosecuting counsel to supplement such failure by instructions of their own, framed in the heat of argument, and contrary to law when addressing the jury, that it is only deemed necessary to cite some of those cases, where the judgments of conviction were reversed because of such like and other improper remarks. *State v. Reed*, 71 Mo. 200; *State v. Mahly*, 68 Mo. 315; *State v. Lee*, 66 Mo. 165; *State v. Kring*, 64 Mo. 591; *State v. Jackson*, 95 Mo. 623, 8 S. W. Rep. 749; *State v. Young*, 12 S. W. Rep. 879.

4. Under our repeated rulings, the affidavit or the testimony of William E. Owen was of course incompetent to impeach his verdict; but though incompetent for this purpose, yet it may serve to show how widely the jury were led astray by the closing argument for the prosecution. This, however, is a matter which might prove worthy of consideration by another department of the government; and, on rising from a perusal of this record, I am profoundly impressed with the idea that if, by reason of blunders committed by the trial court, and blunders affirmed by this court, whereby rank and palpable injustice has been done an innocent man, executive

clemency should ever interpose its beneficent hand in his behalf, it is in this case. I therefore dissent *in toto* from the majority opinion.

HILZ v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri. May 19, 1890.)

PLEADING AND PROOF—DEMURRER TO EVIDENCE—NEGLIGENCE.

1. In an action for death by wrongful act, defendant cannot object that the petition does not authorize the submission to the jury of the question whether the engine which ran over deceased was so far distant when he stepped on the track that those in charge ought to have seen him, where it asked an instruction involving the same question, and both parties introduced evidence on that issue.

2. Defendant waives his demurrer to plaintiff's evidence by introducing his own.

3. Deceased, going along a street crossing several railroad tracks, passed in front of one train, and stopped on the next track, watching a train on the track beyond, but did not look towards the engine which struck him. He was seen by several witnesses, who estimated his distance from the engine at from 25 to 150 feet. The engineer, fireman, and road-master were on the engine, and said it was backing 5 or 6 miles an hour; that they were looking in the direction they were moving, but did not see deceased, and thought he must have got on the track within 25 or 30 feet, when the view would have been obstructed by the tender and back-board. A postal clerk on one of the trains said deceased was 100 to 150 feet away, with nothing to prevent his being seen, and that he did not see the engineer or fireman until after the collision, and then only saw the engineer sitting on his seat as the engine passed, which was going 10 miles an hour. The crossing was usually much used at this hour. *Held* sufficient to sustain a verdict for plaintiff notwithstanding his contributory negligence.

Appeal from St. Louis circuit court; L. B. VALLIANT, Judge.

T. J. Portis and Bennett Pike, for appellant. D. P. Dyer, for respondent.

RAY, C. J. Plaintiff brought this action in the circuit court of the city of St. Louis to recover damages for the death of her husband, Conrad Hilz, who was run over and killed by an engine and tender of defendant at a certain crossing in said city formerly called "Pratt Avenue," but designated, we believe, at this time as "Jefferson," or "West Jefferson" avenue. She obtained a verdict and judgment for \$5,000, from which defendant has duly prosecuted this appeal.

A number of railroad tracks belonging to defendant and other railroads run east and west over said public crossing, which runs north and south. This crossing is depressed below the former grade of the street, and could not be used by vehicles on that account, but was used by pedestrians to a considerable extent, and particularly, it would seem, at that time in the evening, and especially by workmen employed at the oil company's works, which adjoined the railroad tracks immediately on the south. The husband of plaintiff, who worked at said oil-works, started north about 6 o'clock in the evening on said September 8, 1886, and passed over three of said tracks, running or hurrying

over the third track, on which a train belonging to the St. Louis & San Francisco Railroad was then approaching the crossing from the west, and then stood on the fourth track from the south to let a train on the fifth track, belonging to the Wabash Railroad, pass. Hilz was watching this Wabash train approaching from the west or north-west, and then very near the crossing, or as some of the witnesses say, was watching the San Francisco train, and did not see the engine and tender which came from the east, and which ran over and killed him.

It is not necessary to make any further statement, for the present, of said Hilz' movements and conduct on this occasion, as the trial court found that Hilz was guilty of contributory negligence, and so directed the jury. The case was tried upon that theory, and his contributory negligence was and is conceded in that court and in this. The petition, we may observe, contains a general allegation that the death resulted from the negligence and unskillfulness of defendant's agents and servants while managing and running the locomotive, and further states and sets up several provisions of the city ordinance alleged to have been violated, viz., the neglect of the watchman to display at said crossing the signal required by the ordinance, running the engine in excess of six miles an hour, failure to sound the bell, and failure to have a man stationed on the tender to give danger signals. The answer, besides the general denial, charges and sets up generally contributory negligence on the part of deceased husband. The testimony, we may observe, shows that the bell was ringing at the time, and there is no evidence to show that the watchman was delinquent, and neglected to display his flag as required by the ordinance. Section 26 of the ordinance, set out in the petition, providing in substance that, if any cars or locomotive propelled by steam be moving within the city limits, a man shall be stationed on top of the car furthest from the engine, was upon objection excluded, and no evidence was offered in that behalf. In respect to the remaining provision of the ordinance set up and counted upon, requiring the rate of speed to be not in excess of six miles per hour, the evidence is conflicting; the plaintiff's witnesses, or some of them, putting it at ten miles an hour, while defendant estimated it from four to six miles an hour. The only issues submitted to the jury were, substantially, whether or not the defendant's engine and tender were so far distant or east from said Hilz, when he stepped on the track, that the persons in charge thereof ought, in the exercise of ordinary care, to have discovered his peril, and have stopped in time to avoid injuring him. The instruction given by the court of its own motion, being the only instruction given in the cause, so shows. It is perhaps desirable and best to set the same out in full, which we do as follows: "The court instructs the jury that a person who steps on a railroad track over which engines and cars

are accustomed to pass is in duty bound to look up and down the track to see if any such cars or engines are approaching, and his failure to do so is negligence. In this case, the act of the deceased in stepping on defendant's track, on which the engine was backing, was a negligent act, and precludes a recovery, unless the evidence satisfies you that he stepped on said track when said engine was so far distant from him that the persons in charge of said engine ought, in the exercise of ordinary care, to have discovered him, and the peril he was in, and then have stopped, and thus avoided running over him. The question which the court submits to you is whether deceased stepped on the track when the engine was so far east of him that the persons in charge of the engine ought, in the exercise of ordinary care, to have discovered that he was in peril, and might then have stopped the engine in time to avoid injuring him. If you answer this question in the affirmative, find for plaintiff in the sum of \$5,000. If you find that he stepped on the track when the engine was so near to him that the persons in charge of the same, in the exercise of ordinary care, did not have opportunity to discover his peril, and stop before running over him, then find for the defendant." The point is made in this court for defendant that the petition does not authorize the submission of the issue so contained and submitted in said instruction. But, even if the objection would be sound and well taken in a proper case, the defendant, we apprehend, is in no position to urge the same in this court. Both parties, we think, tried the case upon the theory of this instruction. The defendant, it is true, excepted to the giving of this instruction; but so far as the question involved is concerned, instruction numbered 2, asked by defendant, is substantially the same. Again, there was no exception or objection on either side to the evidence offered in this behalf; but, while plaintiff sought to show, without objection by defendant, that Hilz was on the track while the engine was far enough distant to have been stopped in time by the exercise of ordinary care, defendant sought, by the cross-examination of plaintiff's witnesses, to show to the contrary, and also sought to show by the witnesses introduced in its own behalf. The cause having been so tried, both parties, by the evidence and instructions, having treated the issue as properly made, both parties having asked its determination and submission to the jury, the objection that there was no such issue, we think, cannot now be made. *Bettes v. Magoon*, 85 Mo. 580; *Thorpe v. Railroad Co.*, 89 Mo. 650, 2 S. W. Rep. 3; *Loomis v. Railway Co.*, 17 Mo. App. 340.

As to the objection that the plaintiff's testimony did not make a *prima facie* case, and that, therefore, the demurrer to the evidence should have been sustained, it is sufficient to say that defendant waived said objection by introducing its own evidence, and that the evidence in such cases will be con-

sidered as a whole in passing on objections of this character. Our recent decisions so hold. *Bowen v. Railway Co.*, 95 Mo. 268, 8 S. W. Rep. 280; *Guenther v. Railway Co.*, 95 Mo. 286, 8 S. W. Rep. 371; *McPherson v. Railway Co.*, 97 Mo. 253, 10 S. W. Rep. 846. The refusal, however, of a similar instruction asked at the close of the case, and the exception taken in that behalf, requires us to review the evidence taken as a whole, which we will now proceed to do.

As already stated, all the tracks, of which there were a number, at said crossing, are sunk or depressed some two or four feet below the former grade of the street, so that vehicles and teams could not use the same; and persons on foot descended to the plank road or way across the tracks for persons to cross on by means of three or four steps placed at the sides of the embankment. The accident happened at or a little after 6 o'clock P. M., and the watchman of defendant at that crossing testifies that more persons and engines pass over the crossing at this time of the day than at any other time. It seems to have been about the time for the arrival of a number of trains from the west. Two at least were coming in at just that time; and the engine and tender going west at that time had, it seems, drawn a train into the depot some five or ten minutes before, and was then being taken back to the shops or place used for storage of engines. One of these trains at least, as the evidence shows, was in the habit of stopping at the crossing at this time of day to let passengers get off, and did so on this occasion, and was standing there on the next track north, or was just in the act of starting up, when Hilz was struck. The engineer did not see Hilz at all before running over him. He so testifies. He says that the first indication he had of a man being struck was when he felt the engine going over him. The fireman and Michael Kelly, the roadmaster, who was also on the engine at the time, make the same statements in this behalf. But, while the servants on the engine did not see Hilz at any time before he was struck or run over, other parties, from their various positions, observed him both before he stepped onto the track, and while he was standing there. Several of these parties hallooed to Hilz, and waved their hands, endeavoring to attract his attention. The witness Hamm or Horn, as defendant's abstract has the name, who was at the time some 50 or 75 feet distant, and walking on the south side of the second track from the south, saw Hilz as he came to the track, and as he stopped and stood thereon, but did not see him, it seems, at the moment he was struck, owing to the San Francisco train coming in the way. He saw the engine coming from the east before he noticed Hilz, and the same passed him a little east of the crossing. The witness Redman, a postal clerk on the San Francisco train then arriving, who stood at the door in the forward part of the mail-car, looking out on the north side, saw Hilz cross the track on which

his train was then moving, less than 800 feet to the west, and step upon the next track north, and stand there a few seconds until struck, he being then, as he estimates, about 100 feet from Hilz. Bowen, the defendant's watchman, also witnessed the accident. He was standing at the time, he says, near his shanty, located on the south side of these tracks. Hilz, when he first saw him, was "standing between the east-bound and west-bound tracks of the Missouri Pacific Railway;" that is, as we understand it, between the third and fourth tracks. He saw Hilz step upon the track, and the danger he was in; and he and two other persons near him hallooed: "Look out! Look out there!" Ziegler, a private watchman of the Wabash Railway, was at the time coming out of the said shanty of the defendant's watchman just mentioned. He first noticed Hilz when he was between the second and third tracks, and shouted at him before he crossed the track on which the San Francisco train was coming in. The witness testifies he "made a break to pull Hilz away, but the 'Frisco was getting so close he could not make it."

So far, then, the facts are not disputed: That Hilz did not look to the east, and did not see or know of the approach of the engine, but was occupied the whole time watching one or the other of these two approaching trains from the west; that the engineer and other servants on the engine did not see Hilz at any time before he was struck; and that the witnesses mentioned, from their said respective positions, did see the said Hilz, and his dangerous situation, and tried to warn him of his peril. As the servants upon the engine did not see Hilz at all, either when near or upon the track, there was no effort made to stop or check the engine prior to the injury. This, also, is undisputed. But there is considerable variety and conflict in the evidence as to the distance of the engine from the crossing and said Hilz at the time the latter approached, and stepped upon and stood on the railroad track. The distance is variously estimated from 100 to 150 or 200 feet down to 20 or 25 feet. For example, Redman, the postal clerk, testifies that when Hilz stepped on the track the engine was 100 to 150 feet east of him. Hamm, who was to the east of the crossing, and between Hilz on the west and the engine on the east, and who was, we believe, walking west, and about 50 or 75 feet distant from Hilz, says in one place that when he last saw Hilz the engine was about 75 feet from the deceased, and again he says he saw Hilz standing on the south rail of the fourth Missouri Pacific track when the engine that struck him was about 50 feet away from him. Bowen testifies that, when he first saw Hilz standing between the tracks, the engine, he supposed, must have been 100 feet from him, and that when he stepped on the track the engine was 25 or 30 feet from him. The witness Ziegler testifies that when he first noticed Hilz he was between the second and

third tracks, and that the engine, when he first noticed it, was about 150 feet east of Hilz; and he first says that when Hilz stepped upon the track the engine was about 100 or 125 feet from him, but afterwards says the distance was 25 or 30 feet. Benjamin Nelson testifies he was 150 feet east of the crossing, going west, and walking between the third and fourth tracks, and that, when he first saw Hilz, he was "crossing in front of the San Francisco train on the run;" that the engine, at the time he saw Hilz, he thinks or judges, was not more than 50 or 75 feet from the crossing. These are all the witnesses testifying in this matter of the distance of the engine from Hilz, and the above is, we think, a fair summary of what they say on this point.

Perhaps this is an appropriate place, in our review and summary of the evidence, to notice the claim urged by counsel for defendant, that there is no testimony in the cause to show within what space the engine could have been stopped after Hilz got on the track, or after he could have been seen by the engineer in the exercise of reasonable care. The engineer testifies that he could have stopped if he had seen danger within 40 or 50 feet, at the rate of speed he was then running, which he estimates at about 5 or 6 miles an hour. He also states that, after running over Hilz, he stopped on that occasion in 40 or 50 feet. The fireman of the engine in question testifies that they stopped the engine "in 20 or 25 feet after he felt the engine going over the man."

But to proceed. Having sufficiently stated what the evidence shows to have been Hilz' conduct on this occasion, which was manifestly negligent, inasmuch as he seemed to have been watching one or the other of these trains on the other tracks without looking, at least to the east, along the track on which he was standing, when, as the evidence shows, he might have taken a safe position between the tracks, and, having seen that the engineer did not see him at any time, let us, in order for a complete view of the case, examine, as briefly as we can with fairness, what the evidence shows or tends to show the engineer and servants in control of the engine were doing at and just prior to the time of the injury, and their opportunities, if any, to discover the dangerous situation of Hilz, and ability thereafter to avoid running over him.

In behalf of plaintiff, E. C. Redman testifies that he had been postal clerk on railroads for five years, and was familiar with said crossing. He was, as before said, at the forward door on the north side of the mail-car, and estimates that his train, moving on the track next to and south of the one Hilz was on, was about 100 feet from Hilz when he stepped to the middle of the next track to the north. He then continues his testimony in part as follows: "He [meaning Hilz] was facing north-west,—more north than west. When he stepped on the track, [the outgoing

track of the Missouri Pacific,] this engine was 100 to 150 feet east of him. There was nothing in the way to prevent the engineer or fireman, or any one else who was on the lookout, from seeing this man. The track is a little bit curved, but not enough to prevent any one from seeing up and down the same. I was standing with my body half out of the door, holding on to a hand-rail, watching the trains, and I noticed the man standing there, and I saw the danger of the engine backing up; and I hollered and waved my hand, trying to get him to see me. He was noticing the Wabash train, I think, and did not see me at all; and he stood on the outgoing Missouri Pacific track, standing about the center of the track,—standing still; and it was not then, but in the course of a few seconds until he was struck and run over. When it struck him, the engine was backing very rapid, and it knocked him forward. I did not see either the engineer or fireman until after the engine had struck Hilz, and then I only saw the engineer sitting on his seat as the engine passed, so that he did not seem to even then know it,—that he had struck anything. He did not notice it. I was pointing,—hollering, and pointing down to the man; and people on the Wabash was pointing down, too. Some passengers on the Wabash were pointing at the man; and, as he passed over, something directed his attention. I do not know whether it was myself or some others. The engineer's head was not out of the cab window. He was on the south side of the engine. I was on the north side of my train, and he on the south side of his engine. It was an ordinary engine, only it was a large engine, a road-engine, with the usual tender. There was no one on the end or on top of the tender. They were going ten miles an hour, or about that rate of speed. * * * The Missouri Pacific did not slow up a particle before it struck Hilz. The engineer was still working steam when he passed us." John Fox, another postal clerk in the same car, but at the rear door, says the engine was running "quite rapidly, at about ten miles an hour;" but otherwise his testimony is, we think, not material.

James S. Leahy, the engineer, testifies, so far as we need now notice, that he was running, and in charge of, the engine at the time that it struck Conrad Hilz, husband of plaintiff; that the accident happened near the foot crossing of West Jefferson avenue; that he had gone into the Union depot with passenger train No. 2 at 6 o'clock P. M. on the day of the accident, and immediately detached his engine and tender, and was backing up west with them at the time of the accident, [which happened at about a quarter past 6 o'clock,] in order to put them in the shops, which are situated about three blocks west of said Jefferson avenue crossing; that he did not see the accident; that, at the time of and prior to the accident, he was standing upon the foot-board of the engine, in the cab, looking west, all the time after he was back-

ing up west from the Union depot; that the engine was going west with the tender in front, and that he could see any one on the track in front of the tender if such person was within 20 or 25 feet of the tender; that he was looking at the track as he was backing west all the time after he left the Union depot, and did not see any one on the track, did not see the deceased on the track, and that the first indication he had of this man's being struck was when he felt the engine going over him; that the engine, at the time of the accident, was going about six miles an hour. He further testifies on cross-examination, so far as material, that he saw the two trains,—that is, the Wabash and San Francisco trains,—but was not watching them particularly; that he was looking right up the track he was going on, and did not see Hilz on the track, or by the side of the track; that, if Hilz stepped on his track when the engine was within 10 or 12 feet of him, witness did not see him step there; that they have back-boards on the engines, that would be behind the engineer when the engine was running backwards; that Hilz may have come across the space between the tracks when the engine was at a greater distance from him than 10 or 12 feet, and that he, on account of the obstruction of the back-board, might not have seen him; that he does not believe that Hilz crossed the track the San Francisco train was on when the train was 150 feet away from him; that, if he had done so, witness would have seen him; that witness thinks that Hilz must have crossed the track, upon which the San Francisco train was, about 50 feet in front thereof, because at that distance witness might not have been able to see him on account of the back-board just mentioned; that witness was not watching the Wabash train to see if passengers were getting off of that train; that he did say before the coroner at the inquest that "he was watching the Wabash train, as it frequently happened that people jump off the train, and sometimes get hurt;" that he was looking at the train and at his track; that, at the time of making the above answer before the coroner, he was not thinking of the Wabash, but had the San Francisco train in mind, as people get off of that train, sometimes in front of an engine, when the same train is going 15 or 20 miles an hour; that his engine was going not to exceed 6 miles an hour at the time of the accident; that, if he had known of the danger, he could have stopped the engine within 45 or 50 feet; that he went 40 or 50 feet after running over Hilz; that, as soon as he felt something under the engine, he reversed it; that, without putting his head out of the window, he could see a man on the track ahead of him 25 or 30 feet from the tender; that he did not have his head out of the window at the time of the accident, but was standing on the foot-board, looking over the tender; that the first he saw of Hilz was after he stopped; that the accident happened at, or nearly at, the crossing; that, if he had

seen Hilz 100 or 150 feet west of his engine on the track, he would have avoided running over him by stopping his engine; and that Hilz must have got on the track in front of the backing engine after the tender and back-board obstructed his vision. H. C. Wheat, the fireman on said engine, testifies that the engine was going at a speed from 4 to 6 miles an hour; that he had his head out of the window on his side of the engine, ringing the bell; that he didn't see the accident; that he was in his proper place on the engine, looking west, but saw no man on the track in front of them; that he knew nothing of the accident till he felt the engine going over the deceased; that the engine then stopped within 20 or 25 feet. On cross-examination, witness said that he was looking to the west, and could see the track for six or seven hundred yards before he got to the crossing, and could see all the tracks, but saw no one walking on the Missouri Pacific north and south tracks; that the tender in front of the backing engine upon which he was would get within 40 feet of the crossing before the sight of a man standing on the crossing would be cut off; that, if a man was on the north side of the track, the tender would not hide him from view; that he knows no more as to how Hilz got on the track than the counsel for plaintiff did. James Bowen, the watchman at the crossing, among other things states that when the deceased was standing between the two tracks the Missouri Pacific engine was at least 100 feet away; that, when he stepped upon the track in front of the Missouri Pacific engine, the engine was not more than 25 or 30 feet from him; that he thinks that there was nothing in the way to prevent Hilz from seeing the engine, or the engineer from seeing Hilz, when Hilz was standing between the tracks, and the engine was 100 feet away; that when Hilz went onto the track the engine was 25 or 30 feet away, and Hilz stopped there,—never turned the position of his head, which was turned towards the San Francisco train.

Mr. Ziegler says, as previously stated, that, when he first saw Hilz, he was between the second and third tracks, and that the engine, when he first noticed it, was about 150 feet east of Hilz. As before seen, his statements are not harmonious as to the distance of the engine when Hilz stepped on the track, as he answers the first inquiry in that behalf saying that he judges the distance about 100 or 125 feet, but in reply to the very next question says it was 25 or 30 feet. On cross-examination he says the deceased stopped a minute or little more between the third and fourth tracks,—that is, the one on which the San Francisco train was going east, and the one on which the engine was going west,—and that at this time the engine was 100 or 150 feet from him; that there was nothing to prevent him, while he was standing between the tracks, from seeing the Missouri Pacific engine, and nothing to prevent the engineer on said engine from seeing deceased,

if he had put his head out of the window and looked. Charles Fuchs states that he did not notice any one at the crossing when Hilz was hurt; that a man standing where Hilz was hurt, looking down the Missouri Pacific track, could have seen the engine 150 yards away; and that he supposes that the engineer could have seen a man standing there. Benjamin Nelson, who locates himself about 150 feet east of the crossing, and who was between the third and fourth or "in-bound and out-bound tracks" of defendant, testifies that when he first saw Hilz he was crossing in front of the San Francisco train "on the run;" that witness could not tell how far the engine was from Hilz then, as the engine was between him and the San Francisco train; that the Missouri Pacific engine had passed witness,—the witness going west, and the engine in the same direction; that the engine, at the time he saw Hilz, he thinks, was not more than 50 or 75 feet from the crossing; that he saw Hilz run to get out of the way of the San Francisco train, and step up onto the west-bound track. Michael Kelly, the road-master, testifies that he was on the engine at the time, standing on the gangway between the engineer and fireman; that he was looking west all the time they were going, and would have seen any one on the track unless he was pretty near to the engine; that he could not see a man on the track plainly at a less distance than 250 feet, but the engineer could see one at about 100 feet; that, if a man had been standing on the track 100 feet ahead of the engine, or that distance on the south side of the track, there was nothing to prevent the engineer from seeing him, if he had looked. This witness, as well as the engineer, says the engine was running five or six miles an hour, that being the usual rate at that hour, as he says, on account of the number of people.

The above summary, which is somewhat extended, and perhaps tedious, gives the substance of the evidence as we gather the same from the abstracts furnished us and the record in the cause. Taken as a whole, it makes, we think, a case of conflicting evidence for the jury. The case is, we apprehend, different in essential features from, for example, the case of *Barker v. Railroad Co.*, 98 Mo. 50, 11 S. W. Rep. 254, and other cases of that type. In that case the deceased was a trespasser making a foot-path of the railroad track, and the facts and circumstances are such that we held that the company owed the deceased no duty to be on the watch for him, and was only bound not to wantonly, willfully, or with gross negligence injure him. Here the evidence, reasonably construed, shows that the deceased was run over at a public crossing in the city; that at least one train, usually arriving at that hour, stopped at this crossing to let passengers off; that the increase of persons, largely workmen at the oil-works adjacent to the tracks, using said crossing at that hour, was such that the engines were expected to, and usually did, run

at reduced speed on that account. These facts being before us, we may remark that, with respect to such localities in cities, the law manifestly requires affirmative and active watchfulness on the part of those operating steam-engines, and charges them with the duty of keeping a proper lookout for persons using the highway. Parties operating such engines must do so, we apprehend, upon the theory that collisions and accidents are liable to happen at public crossings in general use in cities like St. Louis; and they ought to be vigilant and ready to avoid impending dangers, if they can reasonably do so. This increased care the law exacts out of tenderness for human life, which is more largely or frequently exposed at such places than at other localities. If, then, the law charges those in control of such dangerous agencies with the duty of active vigilance at such places, then the fact that they did not see the person injured will not in such cases necessarily exonerate the corporation from liability. If such failure to so discover him was the result of the omission of that measure of duty which the law requires, in view of the locality, circumstances, and dangers to be anticipated, and the due observance thereof would have enabled the persons in control of dangerous agencies of this sort to have avoided the injury by the use of reasonable care, then and in such case such omission and want of reasonable care is, under the law, held the proximate cause of the injury; and liability for the resulting damage may then exist notwithstanding the negligence of the person injured. *Bell v. Railroad Co.*, 72 Mo. 50, and cases cited; *Frick v. Railroad Co.*, 75 Mo. 595; *Harlan v. Railroad Co.*, 65 Mo. 22; *Guenther v. Railway Co.*, 95 Mo. 286, 8 S. W. Rep. 371; *Dunkman v. Railway Co.*, 95 Mo. 232, 4 S. W. Rep. 670; *Sullivan v. Railway Co.*, 97 Mo. 113, 10 S. W. Rep. 852; *Bergman v. Railway Co.*, 88 Mo. 678, 1 S. W. Rep. 384; *Welsh v. Railroad Co.*, 81 Mo. 466; *Bell v. Railroad Co.*, 86 Mo. 599.

With these principles in view, it may, we think, be fairly claimed and contended, upon the evidence before us, that the failure of the servants and employes on the engine to discover the deceased, and to avoid the injury, was due to their negligent omission to keep a proper lookout along the track in the direction in which they were moving at the time. The fact that several others, some of whom were not charged with any duty to the deceased, saw him, and attempted to warn him, makes it seem somewhat remarkable that none of these servants on the engine, who were under obligation to watch the public crossings for just such occurrences, did not observe him at any time before the collision occurred. This feature in the evidence, together with what the engineer said he testified to before the coroner, makes it seem probable that the engineer's attention, also, as well as that of the deceased, was drawn off at the critical moment by one or both of said trains which he was meeting and about to pass, at the

time. But, whether this be so or not, the testimony of Redman, the postal clerk, and the main witness for plaintiff, if believed by the jury, would justify the finding of the issue submitted to them by the court in plaintiff's favor. We have already set out the material portions of his evidence, but will again quote a few statements therefrom at this time, to show again its bearing in some important respects. He says: "There was nothing in the way to prevent the engineer or fireman, or any one else who was on the lookout, from seeing this man. The track is a little bit curved, but not enough to prevent any one from seeing up and down the same." Again he says that when "Hilz stepped on the track the engine was 100 to 150 feet east of him." If this evidence was true,—and it was competent, and its credibility was for the jury,—then the engine could have been readily stopped in time, if it could be stopped in 40 or 45 feet, which the engineer testifies could be done, and was done on that occasion, after the striking and running over the deceased. Again the witness states he did not see the engineer or fireman until after the collision, and adds: "And then I only saw the engineer sitting on his seat as the engine passed, so he did not seem to even know it,—that he had struck anything. He did not notice it. I was hallooing and pointing down to the man, and people on the Wabash were pointing at the man, and, as he passed over, something directed his attention. I do not know whether it was myself or some others. The engineer's head was not out of the cab window. They were going ten miles an hour, or about that rate of speed." Again he says: "The engine did not slow up a particle before it struck Hilz. The engineer was still working steam when he passed us." The natural and plain import of the testimony of this witness, if believed, is that the engineer was not keeping any lookout, and that, if he had been, he would have seen deceased time enough to avoid injuring him. This evidence is corroborated, we think, by some parts of the evidence given by the witnesses Bowen, Ziegler, and Fuchs, heretofore mentioned, while some parts of their testimony, as well as the testimony of other witnesses in the cause, may be, and we think are, just to the contrary. The evidence on both sides is perhaps somewhat inharmonious, and is manifestly conflicting, as to these features of the case. The theory of the evidence for defendant, as shown at the trial, so far as this branch of the case is concerned, was that the engine was running at a lawful rate of speed, and the deceased stepped onto the railroad track when the engine was distant from him only some 25 or 30 feet, and for that reason could not be seen by the engineer, whose view at that distance would be obstructed by the tender or back-board, and that, even if seen, the engineer, with the prompt use of all the appliances at his command, could not in so short a space have prevented the injury. If true, this was a good and sufficient

defense. But the plaintiff's theory was that the engine was traveling at an unlawful rate of speed, and that the distance between the deceased and the engine was 100 feet or more, and that the engine could have been stopped in less space than then intervened; that there was nothing to obstruct the view, or to prevent the engineer seeing the dangerous situation and imminent peril of deceased, if he had been in proper position, and properly attentive; and that the exercise of such reasonable care as the law required, in view of the circumstances and surroundings, would have enabled the servants in control of the engine to have seen the danger in time, and to have avoided running over the deceased. If this was so, then the negligence of the deceased in being upon the track, however censurable, was not, in legal contemplation, the proximate cause of the injury. There was, as clearly appears, evidence *pro* and *con*, and in support of both of these views. The whole subject, in both aspects, was involved and embraced in the inquiry submitted to the jury in said instruction, given by the court of its own motion. Without prolonging the discussion further, we think that the objection that the finding is without evidence is untenable, and we so rule and hold. This leads to an affirmance of the judgment of the trial court, and it is accordingly so ordered, in which BLACK and BARCLAY, JJ., concur.

SHERWOOD and BRACE, JJ., concur in the result.

TYREE et al. v. BINGHAM et al.

(Supreme Court of Missouri. May 19, 1890.)

BENEVOLENT SOCIETIES—MISUSE OF FRANCHISE—REMEDIES.

Members contributing to a charitable corporation organized to provide a home for the orphans and widows of Confederate soldiers from Missouri, not being peculiarly interested in nor trustees of the fund, cannot maintain an action against the corporation and its officers for non-user or misuse of the franchise, and for a receiver to distribute the fund among the beneficiaries, the proper remedy being, under Rev. St. Mo. § 984, by *quo warranto* by the attorney general or circuit attorney on the relation of any person desiring to prosecute; and it is not enough that the attorney general is made defendant on his refusal to become party plaintiff, it not appearing that any written complaint was ever made to him as required by that section.

Appeal from circuit court, Jackson county; TURNER A. GILL, Judge.

W. J. Ward and C. O. Tichenor, for appellants. Karnes, Holmes & Kranthoff, Scammon & Stubenranch, Dobson, Douglas & Trimble, and Bingham, Adams & Taylor, for respondents.

BRACE, J. This is an appeal from the judgment of the circuit court of Jackson county, sustaining the demurrer of defendant Bingham to plaintiffs' second amended petition, and dismissing the same. The defendants are Martha A. Bingham, the Widows' and Orphans' Home Society of Missouri, and B.

G. Boone, attorney general. The second amended petition states that the attorney general is made a party defendant, because he has refused to become a party plaintiff. Its material allegations are as follows: "That on the 21st day of March, 1867, the said Widows' and Orphans' Home Society of Missouri was duly incorporated, under the laws of said state, as a benevolent and charitable association, the objects and purposes of which were, to 'provide a home for the orphans and widows of Confederate soldiers from Missouri, who perished in the late war, and to provide the means of feeding, clothing, and imparting moral, religious, and intellectual instructions to the same, with suitable and proper training in all the domestic and mechanical arts, as well as to provide for their thorough literary training; and by all practical means to insure their comfort and well being;' that said association, at the time of its incorporation, was composed of thirty members, the following named plaintiffs being a part of the said thirty,—that is, Laura Holmes, William Holmes, John B. Wornall, Rebecca Maupin, Sarah T. Ruckle, and Julia Lester; and that plaintiffs, Sarah Tyree, Emily A. Carroll, Julia E. Simpson, and T. B. Lester, afterwards became members of said association, under its laws and regulations regarding membership; that said named plaintiffs are still members of said society; that the articles of association of said society provided that a board of managers should be elected to conduct its business, consisting of thirty ladies chosen from the members, nine of whom should reside in Kansas City, and the majority of said nine residents of Kansas City should constitute a quorum to transact business. Said articles of association further provided that each subscriber thereto, by the payment of one dollar monthly to the funds of the society, should be a member, either male or female; but no male member should be eligible to any place or office in the management of the same, except as trustee, or as member of the advisory committee, and male members should not be allowed to vote. Said plaintiffs further state that the said society and the members thereof, immediately after its incorporation, in order to execute the purposes of its organization, received and collected from its members the monthly payments provided for in said articles of association, as aforesaid, and through its corresponding secretary, and its officers and agents, whom it sent throughout the state of Missouri, solicited and received large contributions in clothing, money, lumber, fuel, provisions, drugs, and medicines, from the churches, Sunday-schools, and various charitable and benevolent persons, not only in said state, but in the different parts of the United States; that said society also collected and received a large amount of money by establishing a dining-hall at the annual fairs at Kansas City, Mo., where meals and victuals were furnished by the society, for pay, to the visitors at such fairs, the provisions and supplies used on such occasions having been donated

to said society by the citizens of Kansas City and vicinity; that with a part of the money thus collected by said society it purchased the following described real estate situate in Jackson county, in the state of Missouri, to-wit: The north-west quarter of the south-east quarter of section seventeen, (17,) in the township forty-nine, (49,) range thirty-three, (33,) and erected thereon buildings and other improvements for the accommodation and comfort of the widows and orphans aforesaid. Said society used also a part of the funds so collected, as well as a part of the clothing and other donations to it, in supporting and caring for those who were received and cared for by said society at different times, from the time of the incorporation of said society until about March 12, 1874, when the state of Missouri expended large sums of money in erecting buildings upon said property, to-wit, the sum of twenty-six thousand dollars, and fourteen thousand dollars more was expended by the state in furnishing said buildings and other personal property to be used in and about said property." The petition then alleges, in substance, that the defendant Mrs. Bingham, from the organization of said society, was one of its principal officers; that on the 11th day of November, 1877, through her influence over the members of said society, she induced it to execute a deed of trust in her favor for \$1,500 upon said real estate, and afterwards, on the 4th day of June, 1878, induced said society to execute a second deed of trust in her favor for \$1,530; that said sums and interest thereon becoming due and remaining unpaid she caused the same to be sold by the trustee, on or about the 26th of May, 1881; that at such sale said property brought the sum of \$25,175, and that, after payment of the claims of the said defendant, there remained in the hands of the trustee the sum of \$20,890.97; that at the time of the sale of the said real estate the said defendant Bingham was treasurer of said society, and, as such, on the day after such sale, received from the trustee said remainder, and afterwards, in the month of June, in the same year, the said money was voted to her as a gift by said society; that as soon as the members of said society had voted said money to the defendant Bingham they immediately declared said society disbanded, and adjourned, and from that day there has been no meeting of said society; that with a part of the money so received by the said defendant Bingham she purchased certain real estate in the City of Kansas, described in the petition; that said defendant, by fraud and undue influence exercised upon said society through a majority of its members, managers, and officers, caused such donation of said fund to be made to her; that the purposes for which the gifts to said society were made can be still carried out, as there are now living many widows of Confederate soldiers of Missouri who perished in the late war; and prays the court to compel said defendant Bingham to account for said sum so donated to her by

said society, together with its proceeds and interest, and that said described real estate in which it is alleged a part of said fund was invested by said defendant Bingham be declared the property of said society; that judgment be rendered against said defendant Bingham for the amount of said fund, over and above the amount expended for said property; that a receiver be appointed for all of said funds and property, with instructions to pay the same to the widows of the Confederate soldiers of Missouri, there being no orphans now, and for general relief.

The question raised by the demurrer, decided by the trial court, and argued here on appeal is, does the petition state a cause of action in favor of the plaintiffs against the defendant Bingham? The Widows' and Orphans' Home Society of Missouri was incorporated under an act approved March 19, 1866, (Sess. Acts, 1866, p. 69.) The entity created by an incorporation under this act in contemplation of law is a private corporation for such charitable or benevolent purposes as are set out in the articles of association. The character of the corporation in this case, as it appears from the allegations of the petition, is in conformity with this ideal. The object and aim of this association was to raise a fund to be appropriated to the benefit of a particular class of persons in existence, limited in number, capable of definite ascertainment, and who never had and probably never would become a charge upon the state. There is nothing in the terms of the law creating this corporation, in its articles of association, so far as disclosed by the petition, the character of its beneficiaries, or the methods adopted for securing to them the benefits of such organization, that would warrant its classification as a public charity. As a private corporation for charitable purposes, the relation that the state and attorney general sustained to it, when this suit was commenced, is defined by statute. By section 984, Rev. St., 1879, such corporation may be proceeded against by *quo warranto* "by the attorney general or circuit attorney, at the relation of any person desiring to prosecute the same, to inquire into any alleged unlawful acts of or misuser or non-user of its franchise by such corporation," and "if, in any such proceedings, judgment of forfeiture or dissolution be rendered against such corporation, it shall be lawful for the court to provide by such judgment for the vesting of the property of such corporation, upon such dissolution or forfeiture, in a receiver or receivers to be appointed by the court, and in his or their successors in office." The receiver thus appointed is authorized to administer upon the assets of such corporation, and, after payment of its debts, to distribute the remainder "among the persons who were members of such corporation at the time of such dissolution or forfeiture, or their legal representatives respectively in equal shares, unless for good cause shown the court shall otherwise order;" provided, however, that "if, upon the

dissolution or forfeiture, * * * It shall appear that any property vested in said corporation was held by it upon trust for any charitable purpose, * * * such property * * * shall not be distributed * * * but shall * * * be vested in one or more trustees for the charitable purpose for which such corporation held the same." This law made it the duty of the attorney general, or circuit attorney, upon written complaint made to him upon the affidavit of any credible person showing reasonable cause, to institute such proceedings. It does not appear from the allegations of the petition that any such complaint was ever made to the attorney general in regard to the corporation in question, or that he has ever become officially charged with any duty in respect thereof, and it is not perceived how making him a party defendant can in any way affect the nature of this proceeding, or the rights of the parties. The aid of the state to wind up the affairs of this corporation and distribute its assets among its beneficiaries is not invoked, but, instead, the plaintiffs, as members of the corporation, and contributors to the fund, claim the right to call upon a court of equity to exercise its powers for that purpose independent of the state, and in face of the refusal of its representative, upon their mere request and upon their representation of the facts, to lend his countenance to the support of the proceeding. The power of the state, the creator of this corporation for benevolent purposes, is not invoked, nor has it ever been invoked in the manner provided by law to secure to its beneficiaries the charitable fund raised for them.

The controversy in its present shape is between private citizens, in respect of private rights, and is governed by the general law regulating civil actions between private citizens. For the protection of those rights, whether formerly of legal or equitable cognizance, there is but one form of action; and every such action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue in his own name without joining with him the person for whose benefit the suit is prosecuted. The petition fails to disclose any beneficial interest in the plaintiffs in the fund sought to be recovered in this action; in fact counsel for plaintiffs frankly admit in their brief that "they do not claim to own the fund or any interest in the same, or that it can be theirs under any circumstances." No statute authorizes such a suit in their name; and if this action can be maintained by them, it is because they are "the trustees of an express trust." The trustee of an express trust, as defined by statute, is "a person with whom or in whose name a contract is made for the benefit of another." Rev. St. 1879, § 3463. According to the averments of the petition the widows of Confederate soldiers from Missouri who perished in the late war are the

sole beneficiaries of the trust fund raised for them by the voluntary contribution of those who sympathized with their situation, and who were desirous of conferring upon them a benefit by means of this corporation. The mode selected by these plaintiffs and others to make their contributions to such fund was to become members of the corporation created under the laws of the state, and to pay it certain monthly dues for that purpose. Others contributed in indefinite amounts, in money, directly, or in money raised by "tables at fairs," "entertainments," and such means as are frequently used to appeal to the benevolent instincts of a generous and prosperous people in behalf of a class of citizens who have been unfortunate. To the fund thus raised there is nothing in the petition that suggests the idea that the amount contributed by the plaintiffs in the way of monthly dues, or otherwise, was relatively so large as compared with the contributions of others as to give any color to the claim made for them by counsel that they, as founders of this charity and the donors of its funds, have some right of a visitatorial character that a court of equity ought to protect. As donors they stand upon the same plane in a court of equity with hundreds of others, who in the same and in other ways contributed to this same purpose. As donors to the fund they have no pecuniary interest in it. As members of the corporation no contract was made with them, or in their names, for the benefit of another. The donations were made to the corporation. With the corporation the contract was made for the benefit of the widows and orphans of the Confederate soldiers of Missouri who died in the late war.

That the fund was a charitable fund there is no question. That a court of equity will lend its powers to discover and secure it for the purposes for which it was donated, whenever it is called upon to do so by the proper parties, there can be no doubt. The Widows' and Orphans' Home Society of Missouri became the trustee of that fund, capable in law and equity of suing for, recovering, and managing it for the purposes of the trust. That for such misuser as is set out in the petition it could be called to account by the attorney general by virtue of the statute cited, and the interest of the beneficiaries protected by a receiver appointed in the *quo warranto* proceeding, who by suit could invoke the aid of a court of equity to protect that fund for their benefit against the trustee, or those dealing with it, no one will question. But that the plaintiffs are not trustees of that fund in their individual character, simply because they were members of the corporation, and could not be called upon by any person interested in it to respond for its misappropriation by others than themselves, is equally clear. And it follows that, not being trustees of and having no interest in the fund, except the sentimental one that every person who contributed to it may be presumed to have, that it should be applied to the purpose for

which it was contributed, they have no such interest in the fund, and sustain no such relation to it, as to give them a cause of action for its misappropriation. There is, of course, no analogy between the position of the plaintiffs in this case as members of a benevolent corporation without capital stock, and organized purely for the benefit of others, and the position of stockholders of a corporation organized for business purposes, with capital stock, and who, by reason of their pecuniary interest in the corporate property, may, in certain contingencies, by action protect such interest, and who have a right to sue, not because they are trustees, but because they have a pecuniary interest in the assets of the corporation. The state of facts set forth in the petition shows a cause of action in the trustee corporation in the beneficiaries of the trust fund, and state of facts which would authorize the state to proceed by *quo warranto* for the dissolution of the corporation and the appointment of a receiver by whom that fund could be recovered and appropriated to the beneficiaries of the trust. But the plaintiffs, not being trustees of that trust fund, nor having any interest in the subject-matter of the action, it is not seen how their suit can be maintained, and the court committed no error in sustaining the demurrer. Judgment affirmed.

All concur, except BLACK, J., not sitting.

KLOTZ v. PERTEET.

(Supreme Court of Missouri. June 16, 1890.)

APPEAL—EXCEPTIONS—MOTION FOR NEW TRIAL.

1. Errors assigned cannot be considered where motion for new trial was not made.

2. A bill of exceptions which the trial judge refused to sign, but certified was not true, and which was not signed by the by-standers, is not a bill within Rev. St. Mo. § 3635 *et seq.*

3. Refusal of trial by jury is only reviewable on exception.

4. Refusal of change of venue is reviewable only on exception.

Appeal from circuit court, Butler county; J. G. WEAR, Judge.

Petition for partition by Eli Klotz against Ewell Pertee. Defendant appeals.

C. D. Yancey, for appellant. Silver & Brown, for respondent.

RAY, C. J. This is a suit in partition, (petition in usual form,) commenced originally in the circuit court of Reynolds county, but taken by change of venue, on the application of plaintiff, to the circuit court of Butler county. The case was tried by the court without a jury, and the issues found for plaintiff. The court found that the property could not be divided in kind, ordered a sale thereof, and approved the report of sale, and entered a final judgment partitioning the proceeds among the parties in interest. When the cause was regularly called for trial, the pleadings and issues being duly made up, the parties announced themselves ready for

trial, and defendant thereupon demanded a jury to try the issues, and, after argument as to the right of defendant so to have a jury, the court refused same, holding that the suit in partition was properly triable by the court, and not by a jury. Objection was then made by counsel for defendant that the court ought not to try the case, and remarks, not necessary to now set out, were made in this behalf by counsel and by the court, after which the court directed the plaintiff to call his testimony, and a witness was called and appeared on the stand to be sworn for the cause, when counsel for defendant, with leave of court, held a brief consultation with his client, and thereupon filed a petition and affidavit for change of venue, upon the ground of the bias and prejudice of the judge, and that he had expressed an opinion in the cause. The case was, it seems, set for trial on the first day of the term, and was passed on that day because of the absence of both parties and their attorneys, and was again passed on the second day at the request of defendant's counsel; and the petition and affidavit for change of venue, as we have seen, were thus filed on the third day of the term, and were by the court then refused, whereupon the defendant abandoned the case, and tendered his bill of exceptions both as to the action of the court in refusing a jury, and in refusing the application for change of venue. The trial judge certified that the bill of exceptions presented to him was not a true bill, and then certifies thereon what the proceedings were, setting them out, and further certifying that the court had never known defendant, who lived in a different county, not in his circuit, and that the affidavit was not true. There is no bill of exceptions signed by the by-standers, and the bill as tendered by the defendant was not signed by the judge, but, on the contrary, certified to be untrue, as previously stated, and was subsequently on motion stricken from the files.

The principal errors assigned, and the only ones insisted upon in the printed argument, are the said refusal to submit the issues of fact to a jury, and the refusal to grant the change of venue upon defendant's said application therefor. But these questions are not before us, for several reasons. In the first place, the transcript nowhere shows, either in the bill of exceptions or elsewhere, that any motion for new trial was filed in the cause. We cannot, in the absence of a motion for new trial, consider the errors assigned, even if they are preserved in the bill of exceptions. *Railway Co. v. Carlisle*, 94 Mo. 166, 7 S. W. Rep. 102, and cases cited.

Again, the alleged bill of exceptions tendered by defendant, not having been signed either by the judge or by the by-standers, is not a bill of exceptions within the meaning of the law. See sections 3635, 3638, 3640, *et seq.*

Moreover, the bill of exceptions, signed by the judge and filed in the cause, does not show

any exception to the action of the court in refusing a jury. A ruling in that behalf is a matter of exception, and, if the exception is not properly saved, the ruling is not subject or open to review in this court. *Ward v. Quinlvin*, 65 Mo. 453.

And, further, the bill of exceptions which the judge signs does not contain the application for change of venue, nor any pretense at setting it out, or its substance, nor does it show that defendant took any exception to the court's action in overruling the same. The only objection or exception which said bill shows was to the action of the court in permitting testimony to be given in the cause. The action of the court upon the application for change of venue is also a matter of exception. *Stearns v. Railway Co.*, 94 Mo. 317, 7 S. W. Rep. 270; *Keen v. Schnedler*, 92 Mo. 516, 2 S. W. Rep. 312. In the present state of the record, in the absence of exceptions properly preserved, and in the absence of a motion for new trial, the errors of the court complained of, if they are such, are not before us for decision. Only the record proper is now before us, and as no errors are pointed out therein, and as we find none in that behalf, we must affirm the judgment, which is accordingly so ordered. *Railway Co. v. Carlisle*, 94 Mo. 166, 7 S. W. Rep. 102, and cases cited. All concur.

STATE v. GRIMES.

(Supreme Court of Missouri. June 16, 1890.)

MALICIOUS MISCHIEF—EVIDENCE.

Testimony of the owner describing his cow, and that he found her shot behind defendant's fence, with that of others that defendant shot at a cow of that description which was in his inclosure, but jumped out after the shot and died, sustains a verdict for maliciously killing the cow, under Rev. St. Mo. 1879, § 1874.

Appeal from circuit court, Butler county; J. G. WEAR, Judge.

J. C. Sheppard and C. D. Yancey, for appellant. The Attorney General, for the State.

BRACE, J. The defendant was indicted and convicted under section 1874, Rev. St. 1879, for maliciously killing a cow, the property of Denny Lucas, and his punishment assessed at imprisonment in the county jail for six months, and to pay a fine of \$50. The bill of exceptions contains nothing but the evidence and the motions in arrest and for a new trial, and no exceptions were saved to any action of the court except the overruling of said motions. The indictment is in good form. No error appears upon the face of the record proper, and the motion in arrest was properly overruled.

No question arises on the record as to the action of the court in regard to instructions, as no exceptions were saved to its action in respect thereof, nor was any such action assigned as ground for new trial, or preserved in the bill of exceptions. The only question in the case is, does the evidence support the verdict? It will only be necessary to set out

the material evidence in chief of some of the state's witnesses to show that there was ample testimony to take the case to the jury. Its general tenor and force was not varied by the cross-examination. Denny Lucas testified: "I owned a cow on the 8th of August last. This is the cow that was shot. She was a sort of sorrel color, with a heart in her forehead. Red and white, spotted, pretty good sized cow. The cow did not come up, and I sent a boy to hunt her. I went next morning back of defendant Grimes' fence, and the cow was there, dead. I saw drops of blood on her hair. Her bag was cut through. The cow I found dead was the same cow I have described. This was August 11, 1886." Robert N. Mabrey testified: "I live in Poplar Bluff. Know defendant. I knew him August 8, 1886. I saw him on that day,—the 8th day of August, 1886. This was Sunday morning that I saw him. I know Denny Lucas. I did not know a cow that belonged to Lucas at this time. I saw defendant standing in an acre lot. I saw a cow in the lot. She was a medium-sized red cow, with a lime-colored stripe running down her back; had short horns, and a bell on. I was about one hundred yards from her. She was in defendant's inclosure. Grimes was there, with a gun in his hand. I heard a shot; saw smoke; saw the cow run; saw smoke about fourteen feet from the ground. The cow was running pretty peart when I saw her. She was going south-west. I never saw the cow any more." Mrs. Green testified: "On 10th of August I saw cow standing in Grimes' yard. I saw him come out of his house and shoot the cow about 12 o'clock. This was Tuesday. She was a red and white cow; a good big cow. I suppose she had horns. I never paid much attention to her. She went down on the outside of the fence. The boy drove her in the direction she was found. She stood on the outside of the fence about fifteen minutes. The boy then drove her off, and she reeled and staggered as he drove her off, as if about to fall. I was on my front porch. The cow ran and got over the fence when he shot. * * * I did not know this was Lucas' cow." Hughey Green testified: "I know defendant, Casey Grimes. Have known him three or four years. I saw him last August. Saw him on Sunday and Tuesday, the 8th and 10th August last. I saw defendant a little after twelve o'clock. I saw him going home, and saw him after he got home. He went in the house, got his gun; and shot Lucas' cow. I did not know whose cow it was at first. I had seen Lucas' cow before. I knew Lucas' cow. She was a red and white spotted cow. I do not remember whether she wore a bell or not. Grimes and the cow were about nine feet apart when he shot her. I was on our front porch. She struggled around in the yard, and then got outside and struggled round, and then Bill Grimes drove her off, and she died down by the fence. Grimes then went in the house. Bill Grimes

came in in fifteen or twenty minutes, and drove her off. I saw this cow next day dead, down in the direction of where Wm. Grimes drove her. This was the same cow I saw Grimes shoot at. Mr. Lucas said it was his cow. I looked at the cow. She was shot in the left side. She was burnt with powder, and blood was all over her on left side."

The judgment is affirmed. All concur.

STATE v. GUEST.

(*Supreme Court of Missouri. June 16, 1890.*)

LARCENY—EVIDENCE.

Testimony of the house-owner that defendant, who had previously boarded there, returned and spent the night, going in the morning to the room where he had slept, and leaving by the back door, and that in the evening the man with whom he had slept said he missed some clothes, and went after defendant, and brought back the clothes and defendant, who, when asked why he took them said he did not know, coupled with that of the man who went with the owner after his clothes, that defendant when found had them on, and, when asked why he took them, said he did not want to go to his father's with his old, dirty clothes on, sustains a verdict of larceny from the house.

Appeal from circuit court, Howell county; J. F. HALE, Judge.

W. N. Evans and J. H. Winningham, for appellant. *The Attorney General*, for the State.

BRACE, J. The defendant was convicted of larceny from a dwelling-house, and sentenced to the penitentiary for two years. The indictment charged him "with stealing one suit of clothes of the value of \$15, and one silver ring of the value of \$8, the goods and chattels of B. E. McLaughlin, then and there being contained in the dwelling-house of one Reese Beavers." The following is all the evidence in the case: R. Beavers testified: "I live at Horton, in Howell county, Mo. Know John Guest and B. E. McLaughlin. About one year ago, Guest and McLaughlin came to my house to get board. I took them both. They were at work in the logging business. Guest was at work for McLaughlin. About six months ago, Guest left, and went somewhere else to work, and McLaughlin remained at my house. About the 19th day of February, 1887, John Guest came back to my house, and said he wanted to stay all night with me. I told him he could stay, and he and McLaughlin both stayed in the same room,—the room that McLaughlin had occupied all the time. Next morning the defendant, John Guest, went out with McLaughlin, and McLaughlin hitched up his team, and went to work. Then Guest came back, and went into the room where he and McLaughlin had slept the night before, and soon after I went in after him; but he had gone out at the back door, and I did not see him any more that day. I did not know that anything was missing until McLaughlin came home that night, when he claimed he had missed his clothes. McLaughlin that night went after Guest, and came back with

him next day. Guest did not have on the clothes of McLaughlin when they came back, but McLaughlin had them under his arm; and, when Guest was asked why he took the clothes, he said he did not know. I do not know of my own knowledge that the clothing was taken without the knowledge or consent of the owner, McLaughlin; neither do I know whether they were taken out of my dwelling-house or not by Guest. I had seen the clothing in the house the day before they were said to have been taken, but don't know of my own knowledge when they were taken, or by whom. The house I speak of is my dwelling-house in Horton, Howell county, Mo." James Bohannon testified: "I live at Horton, in Howell county, Mo. I know John Guest and B. E. McLaughlin. About 8 o'clock on the night of the 19th of February, 1887, I started from Horton with B. E. McLaughlin, and about 28 miles from there, the next day, about noon, I found Guest in Douglas county. He had on a suit of clothes that I knew were some clothes McLaughlin had owned, and also a finger ring that I had seen McLaughlin with; and the initial letters of McLaughlin's name had been about rubbed off of the ring. When McLaughlin asked Guest why he took the clothes, he [Guest] said: 'I did not want to go to my father's with my old, dirty clothes on. I wanted to look a little better than that.' Guest did not have the ring with him when we first saw him, but, when asked about it, said it was at his father's, and went and got it, and gave it to McLaughlin. The suit of clothes were worth about \$14, and the finger ring worth about \$2.50, but McLaughlin claimed it cost him \$8. I did not hear Guest say where he got the ring or the clothes, and I don't know of my own knowledge that he got them in the dwelling-house of Mr. Beavers or in Howell county. Neither do I know that he took them without the consent of the owner, McLaughlin."

The only question in the case worthy of consideration is whether the evidence is sufficient to support the verdict, and we are all of the opinion that it is. Therefore the judgment is affirmed.

BRAY v. CONRAD.

(*Supreme Court of Missouri. June 30, 1890.*)

DEED—QUITCLAIM—DOWER RIGHT.

A wife having joined her husband in a deed of trust releasing her dower, and having taken after his death an assignment of the debt secured, her deed, made in consideration of its payment, releasing and quitclaiming the land to a vendee at a sale by the husband's administrator, conveys all interests pledged for the payment of the debt, including her dower.

Appeal from circuit court, Barton county; D. P. STREATON, Judge.

John B. Cole, for appellant. *Buler & Timmonds*, for respondent.

BRACE, J. This is an action for the assignment of dower, and damages for the de-

forcement thereof, in 40 acres of land in Barton county, Mo. The action was tried before the court without a jury. Judgment for defendant, and the plaintiff appeals.

Nathan Bray died in 1879 seised in fee-simple of the premises, leaving plaintiff, his widow, surviving him. Previous to his death, in the year 1876, he executed a deed of trust upon a large body of land which he owned, including this 40-acre tract, to secure a debt to one Allen, in which his wife, the plaintiff, joined, releasing her dower for the purposes of said trust. This debt remained unpaid at his death, and plaintiff became the owner and assignee thereof by purchase after his death. At a sale of real estate by the administrator of Nathan Bray, deceased, R. B. Conrad became the purchaser of the premises for the sum of \$163.50, that being the amount of his bid at such sale, and on the 8th of November, 1880, received the administrator's deed therefor. On the 17th of December, 1880, the plaintiff executed and delivered to said Conrad the following deed to the premises:

"Whereas, Nathan Bray and Martha Bray, his wife, by their deed dated the 1st day of June, 1876, did convey to Henry C. Wilson, as their trustee for Norman O. Allen, by way of mortgage, the property hereinafter described, to secure the part payment of the debt in said deed described; and whereas, the said R. B. Conrad has paid to Martha Bray, the present owner of the said debt so secured, the sum of one hundred and sixty-three dollars and fifty cents (\$163.50:) Now, therefore, know all men by these presents, that I, Martha Bray, in consideration of partial satisfaction of said debt, do release and quitclaim unto the said R. B. Conrad, his heirs and assigns, the property in said deed described as follows, to-wit, the north-east quarter of the south-west quarter of section No. seventeen, township No. thirty-three, range thirty-two west, containing in all forty acres, more or less. Witness my hand and seal this 17th day of December, 1880. [Signed] MARTHA BRAY. [Seal.]"

"State of Missouri, county of Greene—ss.: Be it remembered that on the 17th day of December, 1880, before the undersigned, a notary public within and for the county of Greene, personally came Martha Bray, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as a party thereto, and acknowledged the same to be her act and deed for the purpose therein mentioned, and said Martha Bray, further declared to be single and unmarried. [Signed] MOLANE JONES, Notary Public. [Seal.]"

The consideration for this deed was the amount of his bid at the sale, paid by Conrad to the administrator, and applied by the administrator on the debt due the plaintiff as assignee of the Allen debt, all of which was finally paid out of the assets of Nathan Bray's estate. Conrad died in 1881 testate, and by his will devised the premises to the

defendant, who was in possession when this suit was commenced. The evidence tended to prove that the land sold for its full value at the administrator's sale.

There is nothing in the evidence, outside of the deed, to show any act or declaration of the plaintiff by which she should be estopped from asserting her right of dower. There was no merger of her interest as doweress and as assignee of her husband's mortgage, and the only question in the case is as to the construction of her deed; she insisting that by it she only released the land from her trust debt, and the defendant contending that by it she conveyed her dower interest as well.

The defendant, by his purchase at the administrator's sale, acquired only the interest of the deceased husband in the premises, i. e., the right to redeem the land by paying off the mortgage debt. The wife had pledged her then inchoate right of dower for the payment of that debt. What the amount of it was, does not appear, but the deed of trust covered several hundred acres of land. By the death of her husband, and her purchase of the mortgage debt, she became the owner of all the interest in the land that had been pledged for the payment of that debt. When this deed was made, she united in her own person the dual relation of owner of the debt for which her dower interest had been pledged, and of the dower interest also. In consideration of part satisfaction of that debt by the payment of \$163.50 on that debt so secured, she releases the land in said deed of trust described, to-wit, the premises; that is, she released the land from the debt to the extent of all the interest in the land that was pledged for its payment that she had power to release, and this included her dower interest. This is a consistent reading, upon the face of the whole instrument. To this extent only can the grant, which is broad enough in its terms to convey any and every interest she may have had in the premises, be limited by the language of the recitals. That she could have limited her release to the interest of her deceased husband, upon which she acquired a lien by her purchase of the mortgage debt, is beyond question; but she did not do so. And there is nothing in the recitals, or in the situation of the parties, their relation to, or the circumstances attendant upon, the transaction, which would warrant the court in excluding her dower interest from the terms of the release, when she did not choose to do so; the rule being that a deed will be construed to convey whatever interest or estate the grantor may have in land at the time of its execution, unless the deed shows the grantor's intention was to pass a less estate or interest. 2 Devl. Deeds, § 849. A quitclaim deed contains operative words of conveyance. *Wilson v. Albert*, 89 Mo. 537, 1 S. W. Rep. 209. And if, by the terms of her deed, she has left a doubt upon its face as to what were her intentions, the difficulty is one of her own creation, and the benefit of the doubt ought to be given to the grantees.

The judgment is for the right party, and is affirmed. All concur except BARCLAY, J., absent.

HOUSTON et al. v. KILLOUGH et al.

(Supreme Court of Texas. Feb. 18, 1890.)

VENDOR AND VENDEE—TITLE-BOND—ACTION TO CANCEL.

Where a bond for title recites a consideration as having been paid, the heirs of the grantor cannot enforce their title against those claiming under the bond without refunding the consideration, though the bond may be void as being in contravention of the law.

Commissioners' decision. Appeal from district court, Burleson county.

Leake, Shepard & Miller and Bassett, Muse & Muse, for appellants. *J. T. Swearingen*, for appellees.

HOBBY, J. In this case the court found from the evidence that David Clark, to whom the land in controversy was originally granted, in May, 1831, as a colonist, executed an agreement of sale of the same to Benjamin McDaniel on October 8, 1833. By the terms of the instrument, he bargained and sold to McDaniel the land "for the consideration, to me in hand paid, one hundred and fifty dollars." It also bound the said Clark, his heirs, etc., in the sum of \$1,000, to make a good title when the law permitted, etc. Clark died. Application was made in 1837, to the probate court of Washington county, setting forth the above executory agreement, and asking for an order requiring Clark's administratrix to make title in accordance with its terms. The court further found that between December 31, 1838, and February 28, 1842, an order was made by the said probate court directing the administratrix, Bersheba Clark, to execute a deed to Horatio Chriesman, who had acquired the bond for title, and that such deed was made. Appellants claim under the decree or order of the probate court directing the administratrix to execute the deed in pursuance of the bond for title. Appellees claim as devisees of Bersheba Clark, who was the wife of said Clark at the time of the grant to him, in May, 1831.

It is unnecessary to determine in this case whether the probate court of Washington had the power at that time to render the decree directing the execution of the deed by the administratrix, because, if it possessed no such authority under the law, the bond for title recites the payment of \$150 to Clark, and there is no offer made by the plaintiffs to return this amount, with interest. So, too, it may be conceded that the contract of Clark to convey to McDaniel, made in October, 1833, belongs to that class of contracts which the courts of this state have held was in contravention of the law then existing, and which could not be enforced. But it was also decided that the heirs of the grantee could not enforce their legal title against those claiming under such contract without refunding the consideration received by their ancestor.

Ledyard v. Brown, 27 Tex. 404, and cases cited. The bond reciting the payment of \$150 is proof of that fact. In the absence of any other evidence to the contrary, it would be presumed after this lapse of time. There can be no recovery by the plaintiffs, as the case is presented, unless the consideration, with interest, be refunded. We think the judgment should be reversed and remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment reversed and cause remanded.

GAINESVILLE NAT. BANK et al. v. BAMBERGER et al.

(Supreme Court of Texas. April 22, 1890.)

SALE—RESCISSION—FRAUDULENT REPRESENTATION—COMMERCIAL AGENCIES.

A false statement as to its financial condition, given by an insolvent firm to a mercantile agency, with a view to obtaining credit from third persons, is a statement of material facts, and not a mere expression of opinion; and a subscriber to such agency, who sells the firm goods on the faith of such statement, may cancel the sale, and recover the goods.

Commissioners' decision. Appeal from district court, Cooke county.

Potter, Potter & Eddleman, for appellants. *Stuart, Bailey & Harris and Lannis & McCans*, for appellees.

HOBBY, J. Two well-defined issues were submitted and litigated in this action of the trial of the right of property. The appellees, Bamberger, Bloom & Co., who were claimants of the property attached by appellants, contend—*First*, that in the spring of 1887 Goldstein & Melasky, who were the defendants in attachment, purchased the goods in controversy from them, and that the sale was made by them upon the faith of the representations of said Goldstein & Melasky as to their financial standing and solvency, communicated by Dun's Mercantile Agency of New York in August, 1886; that appellees were subscribers to said agency, and relied upon said representations, and save for them they would not have sold the goods; that the representations were false, and so known to be when made. It was contended, in the *second* place, that the goods were purchased at a time when the purchasers knew that they were insolvent, and unable to pay for the same, and that they did not intend at the time of the purchase to pay for them. To this is it urged in reply by appellants that, if a statement made to said agency can be construed to be a representation to subscribers, it should be shown that the party making such statement knew of the subscriber, and made the representations with a view of influencing such subscribers; and, further, that the representations referred to were but matters of opinion, and not the statement of facts; and that they should be made during the negotiation regarding the trade, or so connected therewith as to constitute a part

of the transaction. The facts upon which the appellees rely in this case, as establishing the existence of fraud, are that in July, 1885, the firm of Goldstein & Melasky, then engaged in business in Gainesville, Tex., made a statement, through Melasky, a member of the firm, to Dun's Mercantile Agency, to the effect that he brought into the firm \$17,000; that there was stock on hand to the amount of \$20,000, and \$11,000 in accounts. The indebtedness of the firm was represented to be about \$17,000, which included a private debt of \$2,000. Their assets above liabilities showing by this statement \$31,000. About a year subsequent to the above, in August, 1886, another statement is made by Melasky to said agency, in which he represents that there was then \$45,530 in stock, and \$29,670 in notes and open accounts, which were good; two dwellings in Gainesville worth \$10,000; and 113 acres of improved land, valued at \$10,000, constituting the assets. Their liabilities were represented to be about \$28,973, leaving an excess of assets amounting to \$66,227. Statements it seems were made annually to this agency purporting to show the financial *status* of Goldstein & Melasky. It further appears from the testimony that in August, 1886, Melasky called at the Commercial Agency of Dun, in New York, to explain a discrepancy in the former statement. This explanation is that the statement made by him in July, 1885, did not embrace his "personal real estate" of \$20,000, and the net profits of the business of the preceding year, amounting to \$15,000; which items, added to the \$31,000 shown by his July, 1885, statement, as the assets of the firm, would make the present surplus of \$66,000 above their liabilities.

Such were the representations made as to the financial *status* and the solvency of the firm of Goldstein & Melasky, upon which the proof shows the appellees relied in making the sale of the goods involved in this trial, and without which they would not have sold them. The testimony of Melasky is to the effect that he made these statements to the Commercial Agency of Dun for the purpose of obtaining credit, and that he knew at the time that these facts would be communicated to the subscribers of said agency. And appellees were subscribers to this agency, from which they derived to a great extent their information of the financial standing of the former. It is not necessary to reproduce in detail the estimates and calculations in evidence, which authorized the conclusion by the court of the falsity of the representations above mentioned. Melasky's evidence discloses the fact that, when he was in New York in the spring and summer of 1887, his firm was so pressed for money that he resorted to the process of "kiting," and which is not considered fair financial dealing among merchants. It consisted of his drawing drafts on his Texas house, for money to pay drafts in New York, and his Texas house

would pay the drafts by drawing on him in New York; he having no money in New York, and his house in Texas being similarly situated. It was shown about the time of the purchase of the goods the liabilities of Goldstein & Melasky were about \$78,000, and their assets about \$75,000. The dwelling-houses included in the statements made to the agency were not subject to execution. In the year 1887 it was proven that the firm was largely indebted to appellant, and rendered a statement showing their liabilities to be about \$30,000 less than their assets, upon the faith of which the bank loaned them money. This was eight or nine months subsequent the their report to the agency showing a surplus of \$66,000. This statement to the bank, it was testified by the president, was untrue. In the preceding fall 1886, a statement by Melasky to a Baltimore agency showed their assets to be between \$20,000 and \$30,000. In the summer of 1887 the stock of the firm was found to be \$20,000 short, but no explanation was made of how this occurred.

The evidence plainly shows that, but for the representations made by Melasky, the contract of sale would not have been consummated; and there is nothing in the proof which would justify the inference that the sale of the goods would have been made by appellers without these representations, upon which they relied. It follows, therefore, necessarily, that such being the effect of the statements made to the agency, they were material. *McAleer v. Horsey*, 35 Md. 439-452. The law governing the sale of personal property is well established, to the effect that the mere expression of an opinion as to values which proves to be incorrect or false does not come within the rule applicable to the fraudulent representation of a material fact. But the *status* of the debtor is a fact, and a representation as to the *status* is the declaration of a fact. 1 Benj. Sales, 562, note. In *Bradley v. Luce*, 99 Ill. 234, worthless stock was represented as worth a large sum, and mortgages on \$12,000 on land worth \$2,000 were represented as good. These statements were held clearly fraudulent. No inflexible rule can with accuracy define all of the circumstances in which the representations of fact or of matter of opinion may become fraudulent. 1 Benj. Sales, 562, note. But representations of the financial *status* and solvency of Goldstein & Melasky, under the circumstances in this case, were clearly statements of fact, and not mere expressions of opinion. It is not essential that the misrepresentations should have been directly made to the appellees by Goldstein & Melasky, and during the negotiations regarding the contract of sale, for them to avail in canceling such contract. As a general proposition, it may be correct, as contended by appellant, that a misrepresentation made to one person, and not with a view of revealing another, cannot be available to another who may have acted on it, to cancel a contract entered into by reason of it. But it is sound doctrine that a third person,

to whom they were not directly made, can maintain an action of deceit, and seek the cancellation of a contract, made by him, if it appear that the defendant's false representations were made with a direct intent that he should act upon them in the manner which occasioned the injury. *Eaton v. Avery*, 83 N. Y. 31. If the false representations be made with a view of reaching the third person to whom it is repeated, and for the purpose of influencing him, they will afford a cause of action. 2 Pom. Eq. Jur. § 879.

An illustration identical with this phase of the case will be found in the case of *Eaton v. Avery*, 83 N. Y. 31. The representations charged in the case cited, as in this case, were not made to the appellee directly, but to the Dun Commercial Agency, and by it communicated to appellees, who sold the goods relying upon the statements so made. It was in that case contended, as in this, that, assuming the representations to have been false, they were not sufficiently connected with the contract of sale. It was there held that it was not essential that the representations should be addressed to the party directly who seeks a remedy for having been deceived and defrauded by means thereof; that if they were false, and so known to be by the party making them, and were made with the intent that they should be communicated to and believed by persons interested in ascertaining the pecuniary responsibility of the firm, and with the intent to procure credit and defraud such persons thereby, and they were relied on by the seller, and the sale procured thereby, the plaintiff was entitled to recover. In the case last cited it was said: "A person furnishing information to such an agency, in relation to his own circumstances, means, and pecuniary responsibility, can have no other motive in so doing than to enable the agency to communicate such information to persons who may be interested in obtaining it, for their guidance in giving credit to the party; and if a merchant furnishes to such an agency a willfully false statement of his circumstances or pecuniary ability, with intent to obtain a standing and credit to which he knows he is not justly entitled, and thus to defraud whoever may resort to the agency, and, in reliance upon the false information there lodged, extend a credit to him, there is no reason why his liability to any party defrauded by those means should not be the same as if he had made the false representation directly to the party injured." Upon the other branch of the case, the known insolvency of Goldstein & Melasky at the time of the purchase of the goods, and their alleged intention not to pay for them, it is only necessary to say of it that it is a question of fact, to be found upon all the circumstances developed by the proof in this case, which we are not prepared to say was not sufficient to support the decree. If the sufficiency of the proof upon either of the issues we have discussed is contended by appellant, which we do not understand to be done in this

case, that "the mere insolvency of the purchaser, where no fraudulent intent exists, as also the mere fact that the purchaser has knowledge that his debts exceed his assets, though the fact be unknown and undisclosed to the vendor, will not vitiate the purchase," is certainly true. So, on the other hand, "an intention on the part of the purchaser of goods not to pay for them, existing at the time of purchase, and concealed from the vendor, is unquestionably such a fraud as will vitiate the contract." *Talcott v. Henderson*, 31 Ohio St. 164. There is no error in the judgment, and we think it should be affirmed.

STATTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

SAN ANTONIO NAT. BANK v. BLOCKER *et al.*

(*Supreme Court of Texas*. April 25, 1890.)

PLEDGE — HOLDING PARTNERSHIP ASSETS FOR INDIVIDUAL DEBTS.

A negotiable note deposited with a bank by a partnership to secure a firm debt, under an agreement that "any excess of collaterals upon this note shall be applicable to any other note or claim held by said bank against us, J. R. & S. J. Blocker," and signed, "J. R. & S. J. Blocker," such being the firm name, cannot be held by the bank as security for a note executed by one of the partners as principal, and the other partner and others as sureties.

Appeal from district court, Travis county.
Denman & Franklin and Peeler & Peeler, for appellant. *Macey & Fisher*, for appellees.

HENRY, J. The appellant instituted this suit to recover upon a promissory note for the sum of \$22,500, dated the 18th day of August, 1885, and payable on the 15th day of August, 1886. The note was payable to the order of W. B. Blocker, and by him indorsed to the San Antonio National Bank. It was a joint and several obligation, and was signed by the makers as follows: "J. R. BLOCKER. S. J. BLOCKER. E. MENIELLE. W. S. CARTHOTHERS." It was alleged by defendants, and proved, that J. R. Blocker was the principal, and that all of the other makers were sureties only. J. R. Blocker and S. J. Blocker were partners, and as such they owned a note against A. J., C. P., and J. M. Day for \$42,482.25, which was dated the 18th day of June, 1886, and was made payable to the partners, in their firm name of J. R. & S. J. Blocker, on or before the 1st day of September, 1886. Subsequent to the acquisition of the note in controversy by the San Antonio National Bank, it loaned to the firm of J. R. & S. J. Blocker \$20,000, for which they executed to said bank, by their firm name, — J. R. & S. J. Blocker, — their promissory note payable on the 1st day of September, 1886. At the date of the execution of said note, and for the purpose of securing its payment, the said firm of J. R. & S. J. Blocker deposited

said Day note with the bank as collateral security, and expressed in their note to the bank the terms of the agreement as follows: "\$20,000 Gold. San Antonio, Tex., ———, 1886. September 1st, 1886, after date, we promise to pay to the order of the San Antonio National Bank twenty thousand dollars, in United States gold coin of the present standard weight and fineness, for value received, negotiable and payable, without defalcation or discount, at the San Antonio National Bank, in the city of San Antonio, Texas, with interest at the rate of twelve per cent. per annum after maturity, having deposited in said San Antonio National Bank, as collateral security, a negotiable note executed by A. J. & C. M. Day and J. M. Day, payable to the order of J. R. & S. J. Blocker, Sept. 1st, 1886, with ten per cent. interest, at First National Bank of Austin, for \$45,-482.25, which we hereby authorize said bank, its president, cashier, or such other person as may be appointed by said bank, to sell, and for us and in our name to transfer said collateral, with or without notice, at public or private sale, at the option of said bank, its president, cashier, or other person appointed, in case of the non-performance of this promise; and at such sale said bank may become the purchaser of the whole or any portion of said property, applying the net proceeds, after deducting the expense of sale, to the payment of this note, including interest and special damages, if any, and accounting to us for the surplus, if any. In case of deficiency, we promise to pay to said bank the amount thereof forthwith, after such sale, with interest as above specified. The present cash market value of the above collateral security is ——— dollars; and it is understood and agreed, should there be any depreciation in the value of said security prior to the maturity of this note, such an amount of additional security shall be furnished as will be satisfactory to said San Antonio National Bank, and, should such additional security not be furnished within twenty-four hours after demand on us so to do, then and in that event said bank may proceed at once to sell, as above specified, the security herein named; and it is hereby agreed and understood that, if recourse is had to the collateral, any excess of collaterals upon this note shall be applicable to any other note or claim held by said bank against us, J. R. & S. J. Blocker, and, in case of exchange or addition to the collaterals above named, the provisions of this note shall extend to such new or additional collaterals. Should we fail to meet this note promptly at maturity, we further promise to pay the attorney's fees for the cost of collection, to-wit, ten per cent. [Signed] J. R. & S. J. BLOCKER." Before the maturity of the \$20,000 note, the Blockers had become insolvent, and the appellee Carothers had demanded of appellant that it should hold the Day note as collateral for its payment. On September 14, 1886, the makers of the Day note paid on their note to the First National Bank of San Antonio the

full amount then due upon said \$20,000 note, to which the payment was applied, and it was delivered to S. J. Blocker. On the same day, over the objection of Carothers, who was present, but with the consent of the other makers of the note now in controversy, the bank delivered to S. J. Blocker the Day note. The defendants Carothers and Menielle, by their answer, claimed that, by the terms of the contract between the bank and J. R. & S. J. Blocker, the bank had the right to hold the balance of the Day note after the discharge of the \$20,000 note, as a security for the payment of the note in controversy, and that, having such right, it, by the surrender of the collateral, discharged them. Judgment was rendered in favor of plaintiff against all of the defendants except Carothers, and in his favor discharging him.

We deem it unnecessary on this appeal to consider any question but the one raised by the following assignment: "The court erred in holding that said collateral could be applied by the plaintiff to the note herein sued on, when it appears from said contract of pledge that said collateral was deposited by a partnership to secure a partnership debt, and in no event could be applied, under the terms of said pledge, to any debt except one due by said partnership; and the note herein sued on is the individual note of J. R. Blocker and others, and not a partnership note of J. R. & S. J. Blocker." The rule is well established that a pledge or collateral cannot be held or used as a security for any debt or for any purposes save such as are covered by the agreement of the parties. James' Appeal, 89 Pa. St. 56. In *Coleb. Coll. Secur.* § 97, it is said: "In cases where negotiable securities have been pledged for the payment of a particular debt or obligation, the pledgee is not permitted, in the absence of a special agreement, to retain the same, after payment or discharge of such debt or obligation, as collateral security for other special or general indebtedness of the debtor." Unquestionably, if the bank had the right to hold the Day note as a security for the payment of the note in controversy, it was its duty to the sureties to do so; and in that case its surrender of the collateral without the consent of the sureties would have had the effect of discharging them. It is not claimed that the owners of the Day note consented to its being held as security for the payment of the note in controversy subsequent to the execution of the \$20,000 note, and the only question for decision is, does the agreement contained in that obligation embrace this note? We have no doubt but that such recourse was had to the collateral as to make it operative in favor of this note, if it is included in the terms of the agreement. The expression, "Any excess of collaterals upon this note shall be applicable to any other note or claim held by said bank against us, J. R. & S. J. Blocker," relates to such as might be held at the time when recourse was had, and is not limited to such as were held at the date of the

instrument. In other respects the language does not seem to require or to admit of construction. The note was executed for a partnership debt. The security given was a note executed to the partnership, and made payable to it by the firm name. The obligation was signed by the partners in their firm name, and in it the agreement was expressed and limited that the other debts for which the collateral could be used were to be claims held "against us," and, to make it still more certain, the word "us" was explained to apply to "J. R. & S. J. Blocker," the name of the firm. The note in controversy was then owned by the bank. If it had been intended to include it as an obligation to be secured by the collateral, it would have been easy to particularly describe it; and, if that was not done, then, as it was an individual and not a partnership obligation, it would seem, if it was intended to include it, that the mention of other obligations to be embraced by the security would not have been limited to such as were expressed by the partnership name. It is true that the note sued upon is the debt both of J. R. Blocker and S. J. Blocker, but it is the debt of one of them as principal, and of the other as his surety. The agreement that the collateral might be applied to other firm debts due to the bank by J. R. & S. J. Blocker cannot be held to apply to a debt due by one member only of the firm to the bank, so as to authorize the sale of the firm's assets to discharge the individual debt. The debt in controversy was as much the individual debt of J. R. Blocker, as between him and S. J. Blocker, as if he alone had been bound for it. The agreement of S. J. Blocker, as a member of the firm, that the collateral might be applied to other debts of the firm, to which it belonged as an asset, and for which he was bound as a principal, is a very different thing from an agreement for its application to a debt for which the firm was not bound at all, and for which he was bound only as one of three sureties, with a right of recourse against his co-sureties for two-thirds of the debt, and ultimate recourse against the principal for the whole of it. In the case of *Jarvis v. Rogers*, 15 Mass. 397, it is said: "If a debtor obtain of his creditor a loan of money on pledge, upon an express agreement that the pledge shall be restored on the repayment of the loan, the creditor cannot retain the pledge as security for a prior debt without violating the principles of good faith. Parties having a legal capacity to contract have a right to make such stipulations between themselves as they see fit, provided they do not contravene the law; and such stipulations are to be faithfully observed by the contracting parties. The law, in such case, will never make any new contract by implication."

Concluding that the contract with regard to the Day note did not authorize it to be held by appellant as collateral security for any but a firm debt of J. R. & S. J. Blocker, and it appearing, as the case is presented by the

record before us, that the note in controversy was not a firm debt, we are of opinion that the judgment should be reversed and the cause remanded.

**ARBUCKLE BROS. COFFEE CO. v. WENAR
et al.**

(Supreme Court of Texas. April 22, 1890.)

**FRAUDULENT CONVEYANCES—TITLE TAKEN IN NAME
OF THIRD PERSON—SUIT TO SUBJECT LAND.**

1. Where the title to land purchased by a judgment debtor is taken in the name of a third person, the judgment creditor may sue to transfer the title from such third person to the debtor, and subject the land to satisfy his judgment, though the judgment may not, for want of registration or otherwise, be a lien on the land.

2. In such case defendants cannot plead that since the suit was brought the land has been sold under execution. Such plea is only available to the purchaser at such sale, or his privies.

Commissioners' decision. Appeal from district, Cooke county.

Stuart, Bailey & Harris, for appellant.
Davis & Garnett, for appellees.

COLLARD, J. Plaintiff alleged that Wenar, against whom he had a judgment, purchased the land described in the petition from one Lindsay, and, to defraud plaintiff, his creditor, caused the deed to be made to Cohen. The prayer was to divest the title out of Cohen, and invest it in Wenar, and that the same be sold to satisfy plaintiff's judgment.

The court erred in sustaining exceptions to the petition. Notwithstanding the judgment did not bind the land as security for the debt, and there was no registration of the judgment under the statute creating a lien, (Rev. St. tit. 61, c. 1.) plaintiff, being a creditor of Wenar, had the right to a decree properly vesting the title, and to have the land subjected to his debt with the debts of other creditors, if any, who might come in and claim their *pro rata* of the proceeds of the sale; plaintiff's rights being, however, subject to those of any other creditor who had a lien by judgment or levy of execution, or to those of a purchaser under execution before or pending plaintiff's suit. In the case of *Cassaday v. Anderson*, Justice BONNER says: "As between two creditors, if one has already obtained his judgment, and instituted proceedings to set aside the fraudulent conveyance, this will give him priority of right to first have his debt satisfied out of the property; but it seems this priority does not extend to a simple contract creditor who may institute such a suit." 53 Tex. 537. The judgment here intended must be one with a lien on the property, in order to give the creditor preference over other creditors, or over a purchaser who buys at execution sale before or pending suit. In the *Cassaday Case*, Veal was but a simple contract creditor, suing, as such, to set aside a fraudulent conveyance, and to subject the land to the judgment to be obtained. He had no lien at the institution of the suit; and it was held that a purchaser at execution sale of another creditor,

pending Veal's suit, "vested the title prior to any lien in favor of Veal." The entire discussion, and the authorities cited and quoted, show that "the equitable proceeding to bind the property must be based upon a lien or legal seizure of the property." One of the cases cited is *Robinson v. Stewart*, 10 N. Y. 190, in which the court say: "The complainant had not acquired any lien at law, not having obtained any judgment against Wm. Stewart, [the debtor,] and was not, therefore, entitled to any priority over the other creditors. Equity requires that the fund be distributed among the creditors *pro rata*." And it was further held that the fraudulent vendee, being himself a creditor, was entitled to his *pro rata* of the fund. The other case cited to support that portion of the opinion above quoted is *Day v. Washburn*, 24 How. 355, 356, where it is held that a creditor at large who sues to set aside a fraudulent sale, not having a lien, is not entitled to priority over other creditors in the proceeds of the sale; adding: "It is only when he has obtained a judgment and execution * * * that a legal preference is acquired." This view that the judgment must be a lien upon the property at the institution of the suit, in order to give it priority over other creditors, or to have the effect of *lis pendens*, is also supported by the case of *Gaines v. Bank*, 64 Tex. 18. Plaintiff had a judgment, but no lien thereby on the property sought to be subjected to his debt; hence *lis pendens* would not apply in his favor as against a *bona fide* purchaser pending the suit under a legal and valid judgment and execution. But there is no doubt, under the authorities cited, and as was reiterated in a recent decision of the commission of appeals in the case of *Shirley v. Railroad Co.*, 10 S. W. Rep. 552, that plaintiff may maintain the suit. We regard the law as settled.

The court below sustained exceptions to the suit upon the ground that plaintiff had no lien. This was error. The plea of defendants that the property had been sold under execution since plaintiff's suit was brought was not heard by the court on its merits, or tested by the demurrer. Besides, it was not a good plea (if true) for defendants Cohen and Wenar. It would be available for the purchaser or his privies. The judgment should be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, the judgment reversed, and cause remanded.

TEMPLETON v. FALLS LAND & CATTLE CO.
et al.

(Supreme Court of Texas. April 22, 1890.)

ADMINISTRATION—ESTATE OF SOLDIER OF REPUBLIC.

1. A petition for letters of administration, by a person not related to deceased, recited that deceased was a transient person, and had no perma-

nent domicile in Texas, that he was entitled to land from the government, and that there were no kindred of deceased known to petitioner. Letters were granted, and land of deceased was sold by order of the court. The inventory showed that the land was acquired under a bounty warrant issued to deceased's estate for his faithful services "in the army of the republic, and having been massacred with Fannin at Goliad." Held that, since Pasch. Dig. Tex. art. 1898, (Act Tex. Jan. 14, 1841,) prohibited administration on the estate of such a soldier unless the person applying was next of kin, or had authority from the heirs or next of kin, the administration was a nullity.

2. The purchaser at the administrator's sale, the records showing want of jurisdiction, acquired no title.

Commissioners' decision. Appeal from district court, Wichita county.

W. W. Flood, for appellant. Coombs & Gano and Robt. E. Huff, for appellees.

HOBBS, J. Appellant, M. M. Templeton, in the usual form of trespass to try title, brought this suit against the Falls Land & Cattle Company, on the 16th of April, 1886, to recover a survey of land containing 1,920 acres, known as the "William Mayer Survey," located by virtue of bounty warrant No. 916, issued to said Mayer on September 2, 1851, for having served faithfully, etc., in the army of the republic of Texas, and having been massacred with Fannin at Goliad." Defendant Falls Land & Cattle Company pleaded not guilty, and made its warrantors, Fletcher Cowherd and Walker Cowherd, and its remoter warrantor, W. J. Keller, parties, asking for judgment over against them in case of recovery by appellant of the land. Fletcher Cowherd and Walker Cowherd pleaded not guilty, and asked for judgment against W. J. Keller as warrantor in case of judgment against them. W. J. Keller pleaded not guilty. Case was tried by the court without a jury, and judgment rendered for defendants, to which plaintiff excepted, and gave notice of appeal.

Appellant claimed the land in controversy by virtue of a quitclaim deed from one W. B. Baker, dated January 22, 1886, and deed to W. R. Baker from one J. H. H. Woodward as administrator of William Mayer, dated December 2, 1851, conveying the William Mayer certificate. Defendants claimed the land by virtue of various transfers reaching back to parties who claimed to be heirs of William Mayer; and appellant attacked some of the remoter deeds as forgeries, filing his affidavit that they were forgeries, but on cross-examination admitted that he knew nothing about the parties, but made affidavit simply from belief.

There is but one assignment of error in the case, which, together with the propositions thereunder, raise the issue as to the validity of the administration had upon the estate of William Mayer in Harris county, in 1851; the appellant, plaintiff below, contending that this administration was regular and valid when tested by the rules laid down by the supreme court in collateral proceedings. The appellees claim that the record of the probate

court of Harris county in the administration of the estate of William Mayer showing that it was unauthorized by law, and fraudulent, and that appellant, by his quitclaim deed from W. R. Baker, acquired no interest in the land. Plaintiff offered in evidence copy of patent dated July 23, 1868, to William Mayer, for 1,920 acres of land, by virtue of bounty warrant No. 916, issued to William Mayer by the adjutant general of the state, September 2, 1851; (2) certified copy of a petition of J. H. H. Woodward for letters of administration upon Mayer estate. This petition was filed June 19, 1851. It was addressed to the probate court of Harris county, and recited that "one William Mayer died in Texas several years since, intestate; that said decedent was a transient person, and had no permanent domicile in Texas; that he was entitled to lands and pay from the government of Texas; that, in order to make the same available, and to demand and collect the same, it will be necessary that an administrator be appointed; that there are no kindred of said decedent known to your petitioner in Texas; that he has been requested to open said estate." The inventory filed showed that the property consisted of the bounty warrant referred to. The application for the sale of property recited that the administrator had been at an expense of \$10 to obtain the property of the estate, and that more means would be required to obtain all the property, and that costs had accrued to the officers amounting to about \$40, and application was made to sell the said bounty warrant, and the land upon which the same may be located. A sale was made in obedience to an order of the court, in response to the foregoing application, and W. R. Baker became the purchaser for the sum of \$40. This sale was confirmed, and a deed was made by Woodward, the administrator, to the purchaser, and subsequently Baker executed a deed to appellant for the land. It is unnecessary to refer to the deeds offered in evidence by the defendants in support of their title, as there was no decree vesting title in them. The only question is as to the validity of the administration upon the estate of William Mayer, raised by the following assignment of error: "*First Assignment of Error.* The judgment rendered by the court herein was contrary to the law and the evidence, in these: Plaintiff showed title to the land in question by regular and straight chain of title from William Mayer, to whom the land in question was granted by the state, under valid administration upon his estate in probate court of Harris county, Tex., with proper appointment of administrator thereof, with order to sell the certificate, and land in question located by virtue thereof, and proper sale and confirmation thereof by said court, and valid administrator's deed to W. R. Baker, the purchaser thereof at such sale, and by regular deed from W. R. Baker to the plaintiff in this cause; and, under this evidence, plaintiff was entitled in law to the land sued for, and the judg-

ment of the court should have been that the plaintiff recover said lands."

If any rights accrue to a purchaser in good faith at a probate sale made under a grant of administration void for want of jurisdiction, none, unquestionably, can be acquired by virtue of a sale under an administration obtained in the face of statutory prohibition, and also in such manner as in law is deemed fraudulent, and of which facts, it may be added, the purchaser had, as in this case, actual notice. The title of the appellant—the plaintiff in the lower court—to the land involved in this action depends wholly upon the validity of the administration upon the estate of one William Mayer, obtained in Harris county by one J. H. Woodward in 1851, and under which administration a sale was made of the bounty warrant issued by the adjutant general to said Mayer, at which sale W. R. Baker, the clerk of the court, became the purchaser. On January 22, 1886, Baker conveyed by quitclaim deed the land to appellant, and also by general warranty deed since the institution of the suit. Defendants, appellees, claimed by virtue of various transfers reaching back to parties who claimed to be the heirs of William Mayer. Appellant attacked some of the remote deeds as forgeries; but, as no decree was entered vesting title in defendants, it is unnecessary to discuss their title. No doubt has ever been entertained by the courts of this state of the correctness of the rule well expressed in the thoroughly considered case of *Martin v. Robinson*, 67 Tex. 374, 8 S. W. Rep. 550, to the effect that "when a court of record, having such jurisdiction of the subject, has assumed to exercise it in a given case, all presumptions are in favor of the validity of its proceedings; and, if the record of such a court shows that the steps necessary to clothe it with power to act in the given case were taken, or if the record be silent upon this subject, then its judgment, order, or decree must be held conclusive in any other court of the same sovereignty, when collaterally called in question." This rule has been, we believe, uniformly recognized in its application to probate proceedings. It is also a well established rule, in this connection, that when the record of an administration proceeding discloses the fact that the court, in the exercise of its jurisdiction over the subject-matter, has transcended the limits prescribed, the presumption is repelled, and no order made therein affords protection to a purchaser. In other words, no presumption will be indulged to support the jurisdiction, or the regularity of the proceedings, when the records repel such presumption.

The record in the case before us discloses that the administration upon the estate of William Mayer was forbidden by the law then in force. The certificate or bounty warrant No. 916 was issued by the adjutant general on September 2, 1851. It is for 1,920 acres of land, and recites that it was issued to said Mayer for "having served faithfully, etc., in the army of the republic of Texas,

and having been massacred with Fannin at Goliad." He was therefore, necessarily, a member of the Georgia Battalion. By the provisions of the act of January 14, 1841, (Pasch. Dig. art. 1898,) administration was prohibited upon the estate of such deceased soldier unless the person applying was next of kin, or produced authority from the heirs of next of kin, of such deceased soldier, and authorizing him to take out letters of administration. It is not pretended that this was done. On the contrary, the petition shows that it was not. The petition for letters was addressed to the probate court of Harris county. It recited that "one William Mayer died in Texas several years since, intestate; that said decedent was a transient person, and had no permanent domicile in Texas; that he was entitled to lands and pay from the government of Texas; that, in order to make the same available, and to demand and collect the same, it will be necessary that an administrator be appointed; that there are no kindred of said decedent known to your petitioner in Texas; that he has been requested to open said estate," etc. The inventory filed showed that the property consisted of the bounty warrant mentioned. The foregoing application is, in all of its features, similar to that reported in the case of *Hearn v. Camp*, 18 Tex. 547, which was filed in the same county to obtain letters upon the estate of Daniel Tyler, and with reference to which Chief Justice HEMPHILL said: "The county court of Harris county clearly had no jurisdiction over the estate. The deceased had no property except in the county of Grimes; and, if he was a transient person, administration should have been taken out in the county in which he died, or in which was his principal property." The record shows that Mayer perished at Goliad in March, 1836. Administration was procured on his estate in June, 1851, more than 15 years subsequent to his death. It was, therefore, begun at a time when, evidently, all debts of the deceased were barred by limitation, and none were shown to exist. A similar grant, obtained a shorter period of time after the death of the intestate, was held to be without authority of law. *Wardrup v. Jones*, 23 Tex. 494. There was no necessity to obtain administration upon Mayer's estate to enforce his claim for pay due him from the government. The claim could have been enforced by his heirs.

Discussing the validity of an administration in most of its features similar to this, it was said by Justice MOORE in *Duncan v. Veal*, 49 Tex. 610: "In the absence of an averment and proof of some special necessity for the grant of letters, * * * it must be presumed that there was no occasion for it at the date of De Cordova's application." In the case cited, as in this, the intestate fell with "Fannin at Goliad, in 1836;" and application was made to open administration on his estate. "Without clear proof," the court say, "to the contrary, it should be pre-

sumed that there was no debts due by or to said intestate, or necessity for an administration upon his estate, after the lapse of so great a length of time from his death." The lapse of time in the present case is greater. The language of other parts of the opinion in the case last cited seems to be peculiarly applicable to the present. But a further discussion of this question we think unnecessary. The administration upon Mayer's estate comes clearly within that class of administrations which our supreme court has in numerous cases held to be invalid. *Hearn v. Camp*, supra; *Duncan v. Veal*, 49 Tex. 608; *Blair v. Cisneros*, 10 Tex. 46; *McMahan v. Rice*, 16 Tex. 337; *Wardrup v. Jones*, 23 Tex. 494; *Withers v. Patterson*, 27 Tex. 492; *Martin v. Robinson*, 67 Tex. 368, 3 S. W. Rep. 550. It also appears from the depositions of Erichson, the clerk of the county court of Harris county, that Woodward was the administrator of about 18 other estates in the probate court of that county at that time, and that the court acted upon the estates together; Mayer's being one of them.

We are of opinion that the administration upon the estate of Mayer was a nullity; that the records of the probate court disclosed that fact; that it was without jurisdiction; that the purchaser at the sale of the certificate took no title thereto, and was charged with notice of the fact that the court had no jurisdiction. We think the judgment should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

WATTS v. HOWARD.

(*Supreme Court of Texas*. April 25, 1890.)

TRESPASS TO TRY TITLE.

It is not competent, in trespass to try title, to show that the deed under which plaintiff claims was intended to embrace land not in fact included in the description.

Error from district court, Wise county.

W. H. Bullock and Carswell & Fuller, for appellant. *Patterson & Martin*, for appellees.

GAINES, J. This suit involves a question of boundary. One Abel Warren, being the owner of the Lee C. Smith original survey, agreed to sell to one A. T. Perkins a tract of 320 acres lying in its north-west corner. The land was surveyed in the shape of a parallelogram extending 950 *varas* from east to west and 1,900 *varas* from north to south, with corners well marked on the ground by bearing trees. The deed was made to Perkins describing the land according to this survey. It was subsequently ascertained that the surveyor made a mistake as to the true position of the N. W. corner of the south survey, which he intended to make his stationary point, and commenced about 85 *varas* west of that corner. Consequently the east line of the survey as ran by the surveyor, and as

marked on the ground and described in the deed to Perkins, was 85 *varas* further west than it should have been. A. T. Perkins conveyed the 320 acres of land to E. E. Perkins, describing it as it was described in his deed from Warren. E. E. Perkins sold 160 acres off the south end of the tract, the description calling to begin on the W. B. line of the Smith 950 *varas* south of his N. W. corner, and to run thence south 950 *varas*; thence east 950 *varas*; thence north 950 *varas*, to W. O. Moore's S. W. corner; and thence west to the beginning. The Moore survey referred to is 160 acres, in the form of a square, and is described as beginning at a point in the north boundary line of the original Smith survey, 950 *varas* east of its N. W. corner; and running south 950 *varas*, east 950 *varas*, north 950 *varas*, and thence west to the beginning. It is evident that between the land described in the deed from Warren to Perkins and that embraced in the deed to W. O. Moore there lies a strip about 85 *varas* wide. Subsequently Warren sold to one Condry a tract of land lying south of Moore's survey, and east of that sold to Perkins. The field-notes of this tract call to begin at the S. W. corner of the Moore survey, and describe its lines by course and distance, without designating either natural or artificial objects to fix the exact locality. The land in controversy is the strip lying between the southern prolongation of the west boundary line of the Moore and the east boundary of the survey made for Perkins, as actually surveyed and as described in the deed from Warren to him. The appellant was plaintiff in the court below. He claims that his land extends to the prolongation of the Moore line. The appellee who holds under Condry claims to the east line of the survey as actually run by the surveyor, who establish the courses described in the deed from Warren to Perkins. Starting from the S. W. corner of W. O. Moore's land, and following the courses and distances of the lines called for in the deed to Condry, that deed does not embrace the land in controversy. But the surveyor who ran the lines and made the field-notes which were subsequently incorporated in the conveyance testified that he did not find the Moore corner; that he supposed it to be on the east boundary line of the Perkins survey as actually run and marked on the ground; and that the place he took to be the Moore corner was on that line. According to this testimony, the land surveyed for Condry embraces the land in controversy. But the S. W. corner of the Moore, though not well marked, can be readily ascertained; and, there being no ambiguity or conflict in the calls which suggest a mistake, it may be doubted whether, in a proceeding of this character, it was competent to show by parol testimony that the surveyor made a mistake in calling for that corner. But, fortunately for the defendant, he is not called upon to show any title until the plaintiff has established a *prima facie*

right to the land for which he sues. It is clear that Warren intended to convey to Perkins all the land extending as far east as the Moore line. But it is equally clear that, on account of the surveyor's mistake, the field-notes of the deed described as the east boundary of the land conveyed a well-marked line lying 85 *varas* west of the west boundary of the Moore. The deed from Warren to Perkins, through which plaintiff claims, does not convey to the grantee the land in controversy; and it is not competent, in an action of trespass to try title, to show that it was intended to embrace land not in fact included in the description. If an action had been brought against Warren by Perkins for a reformation of the deed, the evidence introduced to show the mistake would have been sufficient to warrant a decree in his favor. The plaintiff's deed from E. E. Perkins is probably sufficient to have conveyed the land in controversy, if Perkins had had title. His difficulty is that the title still remains in Warren, who was agreed to be the common course; unless it passed by the deed from Warren to Condry, under which defendant claims. There is no error in the judgment, and it is affirmed.

KEYSER v. MEUSEBACH *et al.*

(Supreme Court of Texas. April 25, 1890.)

TRESPASS TO TRY TITLE—BOUNDARIES—SURVEYS—COSTS.

1. In trespass to try title, plaintiff contended that the L. survey, under which he claimed, commenced at the S. W. corner of the S. survey, (which was a fixed point,) and ran south; that the A. survey made at the same time, began at the same corner, and ran north instead of south, so as not to embrace the land in controversy. There were erasures in all the surveys, some showing one and some another direction. Two witnesses testified that they saw the A. survey before it was changed, and it then called for directions as claimed by defendants. The original survey of the L., calling for directions as claimed by plaintiff, had been cancelled, and a new survey, calling for directions as claimed by defendants, was filed, and the patent under which plaintiff claimed was issued thereon. The original survey called for the L. as beginning at the S. W. corner of the S., and the A. called for the same, so that, if the A. ran south as claimed by defendant, it would have conflicted with the L. The corrected survey of the L. called for the S. E. corner of the A. instead of the S. W. corner of the S. If the A. ran north, its S. E. corner and the S. W. corner of the S. would have been the same, and there would have been no necessity for the change. The change made the surveys as claimed by defendants. *Held*, that judgment was properly for defendants.

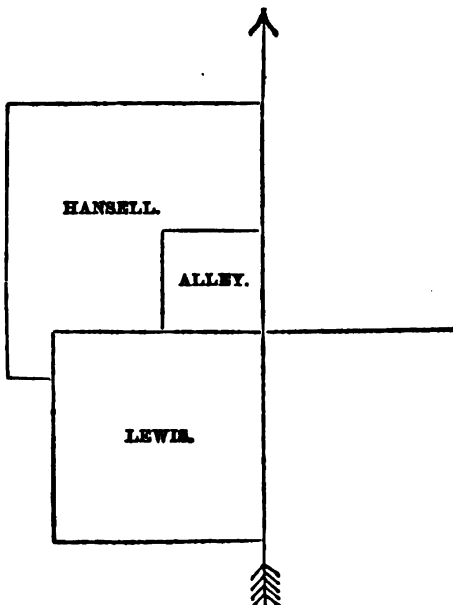
2. Where defendant, in trespass to try title, after pleading "not guilty," files an amended answer claiming only a part of the land sued for, and recovers such part, he will be adjudged to pay those costs only which accrued before the filing of the amended answer.

Appeal from district court, Mason county.
J. C. Matthews, for appellant. Hancock, Shelly & Hancock, for appellees.

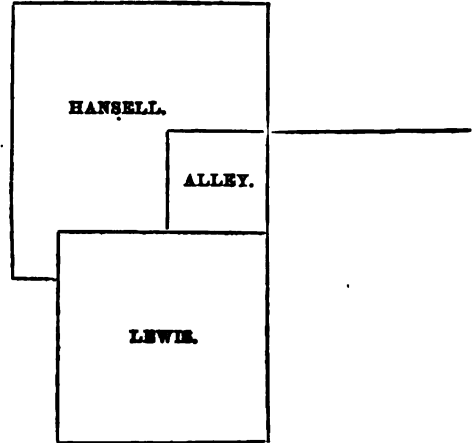
GAINES, J. This is an action of trespass to try title brought by appellant against appellees, and involves a question of boundary. The plaintiff claims under the John Lewis survey, and the defendants under the G. W.

Hansell. The north boundary of the Lewis and the south boundary of the Hansell surveys are involved; but since the plaintiff claims title to the Lewis only, and must recover upon the strength of his own title, the controversy resolves itself into the question of the true position of the north line of the latter survey. The Hansell, the Lewis, and the Alley surveys were all originally made at the same time, and by the same surveyor. The field-notes of the Lewis survey, as patented, called to begin at the S. E. corner of the Alley, but none of the corners are now marked upon the ground. They must be ascertained by the surrounding surveys. The field-notes of the Alley call to begin at the S. W. corner of the Silcriggs, which is an established corner. The difficulty of fixing the north boundary line of the Lewis grows out of a question as to the true location of the Alley survey. The plaintiff claims that the Alley should be located by beginning at the S. W. corner of the Silcriggs, and running thence north 1,000 *varas*; thence west 1,000 *varas*; thence south 1,000 *varas*; and thence east 1,000 *varas*, to the beginning. The defendants, on the other hand, claim that it is properly located by running from the S. W. corner of the Silcriggs south 1,000 *varas*; thence west 1,000 *varas*; thence north 1,000 *varas*; and thence east, to the beginning. Since the Lewis begins at the S. E. corner of the Alley, and lies south of that survey, it is apparent that the north line claimed by the plaintiff lies 1,000 *varas* further north than that claimed by the defendants. According to the line claimed by the plaintiff, the land in controversy is embraced in the Lewis survey; according to the line claimed by the defendants, it is excluded.

The following plot shows the relative location of the surveys above mentioned, as claimed by plaintiff:



—and the following shows their relative position as claimed by the defendants:



The first difficulty in determining the proper calls of the Hansell survey arises from certain erasures and interlineations in the original field-notes filed in the land-office. A photographic copy has been sent up with the record, and it shows that, commencing at the Silcriggs S. W. corner, the call for the first line was originally written, "north 1000 *varas*;" but that the word "north" was crossed out, and over it the word "south" was written, which was also crossed out. Under the two words so erased the word "south" was again written, and left unerased. In the call for the third line, the word "south" was originally written, but precisely corresponding changes were made, so that the call was left to read "north." When and why these changes were made, there is no direct evidence to show. The interlineations appear to have been written by the same hand that wrote the original, but apparently with a finer pen; from which it is to be inferred that they were not made at precisely the same time that the field-notes were originally written. But a certified copy of the record of the field-notes from the office of the surveyor of the Bexar land-district shows that they were recorded March 9, 1846, and that the changes had been made when they were so recorded. The patent to the Alley survey was introduced in evidence, and it shows the call for the first line to run north, and for the third line to run south. The original accompanies the transcript, and it clearly appears to have been altered. The words "north" and "south" are written over erasures. It was proved by two witnesses that they saw the patent many years ago, and that as then written the call for the first line was south, and that for the third was north. That such were the calls in the patent as issued is also shown by a certified copy of a record thereof, which was made upon the records of deeds of Gillespie county in September, 1884. The record of the Alley patent in the general land-office now also calls "north" for the direction of the first line, and "south" for that

of the third. But it was shown by the testimony of the commissioner that the calls for direction had been altered by erasing the original words, and writing the words "north" and "south" over the erasures, respectively.

If the surveyor, in 1845, when he ran the lines of this group of surveys, placed the Alley survey in the northern position,—that is to say, west of the Silcriggs,—it seems to us that, before he recorded the field-notes and forwarded them to the land-office, he deliberately changed them so as to locate the land south-west of the latter survey,—that is to say, in its southern position. We think there is no reason to doubt that the patent as originally issued placed the survey south-west, and not west, of the Silcriggs survey.

The original field-notes of the Lewis and of the Alley surveys were recorded in March, 1846, within a few days of each other. But the original field-notes of the Lewis were canceled in October, 1846, and corrected field-notes of that survey duly entered of record. The original field-notes called to begin at the S. W. corner of the Silcriggs,—the same which is now claimed by plaintiff as the beginning corner of the survey. The corrected field-notes did not mention the Silcriggs corner, but called to begin at the S. E. corner of Alley. There was no other change. The patent to the Lewis follows the corrected field-notes. If the S. W. corner of the Silcriggs, and the S. E. corner of the Alley, were the same, as plaintiff claims them to be, why the necessity of this correction in the field-notes of the Lewis? The conclusion is irresistible that, however the Alley may have been originally surveyed, at the time of the correction the S. E. corner of the Alley and the S. W. corner of the Silcriggs were regarded by the surveyor and the locator as being at different points. If the Alley survey occupied the position now claimed by plaintiff, namely, the northern position, then the two corners mentioned were the same; but, if it occupied the southern position, then the corners were not coincident; the S. E. corner of the Alley being 1,000 *varas* south of the S. W. corner of the Silcriggs. The S. E. corner of the Alley is either at the S. W. corner of the Silcriggs, or 1,000 *varas* south of that point. There is no evidence tending to show its location at any other place. It necessarily follows that the object of canceling the original field-notes, and the substitution of the corrected calls for the survey, was to place the beginning corner at a point 1,000 *varas* south of the S. W. corner of the Silcriggs, instead of locating it at that corner as originally called for. It is to be borne in mind that when this change was made the field-notes of the Alley were on record in the office of the surveyor of the land-district, and that the field-notes so received gave the survey its southern position. With the Alley in the southern position, and the Lewis calling for the S. W. corner of the Silcriggs as its beginning corner, there was clearly a con-

flict between the two surveys to the full extent of the Alley. This conflict was avoidable, by placing the beginning corner of the Lewis, not at the corner originally called for, but at a point 1,000 *varas* south of that corner, where the S. E. corner of the Alley was then called to be, and where it was supposed at least to be. That such was the intention is made more manifest by the fact that the call for the S. E. corner of the Alley, in the corrected field-notes of the Lewis, describes the corner by the bearing trees called for in the field-notes of the Alley, then upon record as marking that corner. None of the corners of the Lewis or Alley surveys can be identified by the objects called for in the patents, except the beginning corner of the Alley,—the S. W. of the Silcriggs. The position of the north line of the Lewis must be established by taking as its beginning point the place where the surveyor who corrected the field-notes supposed the S. E. corner of the Alley to be located. That he acted in making the correction upon the hypothesis that that corner was 1,000 *varas* south of the S. W. corner of the Silcriggs survey, the evidence shows beyond doubt. We are of opinion that the Alley patent, as originally issued, covers the land lying S. W. of the Silcriggs corner, although the lines as originally ran may have embraced the land lying west of that survey. But, should the evidence been less conclusive upon this question, it should not change the result of this case. The question in this case is, not where is the true location of the S. E. corner of the Alley survey, but where did the surveyor, who corrected the field-notes of the Lewis, understand it to be. That he understood it to be at a point 1,000 *varas* south of the S. W. corner of the Silcriggs we have no doubt. We are equally clear the N. E. corner of the Lewis must be located where he intended to place it, and that the true north line of the survey runs west from that point. The north line being so established, the Lewis survey embraces none of the land in controversy; and therefore the defendants were entitled to a judgment. The court below gave them a judgment, but reached its conclusion by a process of reasoning based upon a different conclusion of fact. The judgment being correct, we need not inquire whether the grounds upon which it is based are tenable or not.

It is complained that the court erred in excluding the report of one Clark, a surveyor appointed by the court to make a survey of the land. The report was not sworn to, and it was objected to both on that, and on the further ground that the evidence was immaterial. At the time of the trial Clark was dead, and the report was also offered as the declarations of a deceased surveyor. The report tended to show that, placing the Alley survey in its northern position, and taking the S. W. corner of the Silcriggs as the N. E. corner of the Lewis, the surveys all corresponded with each other, and left no vacant land between them, and that each survey

would have its full quantity; but that, placing the Alley in its southern position, there would be a large excess in the Hansell, and a deficiency in the Lewis, and that there would be an unappropriated land lying between the two surveys. We are of the opinion that the evidence excluded would not have authorized the court to render a different judgment, and that, therefore, the plaintiff has not been prejudiced by its exclusion. The same may be said of the testimony offered as to what the surveyor Clark testified on a former trial.

Neither do we think that any of the other testimony offered by plaintiff, and excluded by the court, should have led to a different result. The facts, if they be facts, that the distance called for in the eastern line of the Hansell does not reach the S. W. corner of the Silcriggs, that it was common reputation in the neighborhood that the Alley survey lay west of the Silcriggs; and that defendant Meusebach admitted that the Alley survey was so located, ought not to prevail against the documentary evidence as to the true location of the Lewis north boundary line.

It is also assigned that the court erred in rendering judgment against the plaintiff for all the costs of suit. The plaintiff brought suit for the entire Lewis survey, and the original answer of the defendant contained solely a plea of not guilty. After the first trial defendants filed an amended answer, claiming only a part of the land sued for by the plaintiff. Upon the trial they recovered the land claimed in the amended answer, but not all the land claimed in the petition. The amended answer, claiming only a part of the land sued for, was equivalent to a disclaimer of the remainder, (Rev. St. art. 4805;) and defendants, having recovered the land claimed in the amended answer, were entitled to recover all costs which accrued after the filing of that pleading, (Id. art. 4806.) But they should have been adjudged to pay all costs which accrued before that time. The judgment as to costs will be accordingly reformed, and in all other respects affirmed. The appellant, having failed to move in the court below for a correction of the judgment as to costs, will be adjudged to pay the costs of this court.

SNOWDEN *et al.* v. ESTELLE *et al.*

(Supreme Court of Texas. April 26, 1890.)

WHAT CONSTITUTES PAYMENT.

In the absence of an express agreement that the grantor of land under a verbal sale would accept as payment a claim which the grantee had against her husband for money loaned, the mere agreement that the husband would and should so pay it is not a payment of the purchase money.

Appeal from district court, McLennan county.

R. I. Monroe, for appellants. *Pearre & Boynton*, for appellees.

STAYTON, C. J. It is conceded that the land in controversy belonged to E. M. Estelle

through a parol partition between him and Snowden, who were, prior to partition, tenants in common. Snowden was improperly made a plaintiff, and it may be true that no judgment should have been rendered in favor of E. M. Estelle had the court not found in favor of Amy Estelle; for the action was based on a claim of joint ownership in Snowden and E. M. Estelle, while the title exhibited was in the latter alone. The right of Amy Estelle depends on a verbal sale of the land claimed to have been made to her by E. M. Estelle, which was followed by valuable improvements and possession. To make her claim available, in addition to the other necessary facts, it was incumbent on her to show that the purchase money was paid. That this was never done the judge who tried the cause expressly found. It seems to be claimed, however, that Sidney Estelle was indebted to her, and that it was understood that the sum he owed should be paid on the land, which was to become the property of Amy, his wife. If this was so, it would not justify the judgment rendered; for, in the absence of an express agreement to the effect that E. M. Estelle would accept as payment for the land the claim which Amy had on her husband for money loaned, the mere agreement that the husband would and should so pay it could not operate as a payment. The court did not find that any such agreement as would operate as payment was made, and there is nothing to sustain the judgment. If an agreement such as was suggested alone was made, and the payment actually made by Amy would discharge the balance of the purchase money agreed to be paid, then she is entitled to the land, but otherwise not. It may be that such equities exist that will entitle her to the land if she will pay the purchase money due. On trial, appellant cannot be permitted to recover the land without adjusting them. As the case is presented, no judgment could be rendered by this court that would certainly be just to all parties, and the judgment of the court below will be reversed, and the cause remanded, that all parties may have a full adjustment of their respective rights. It is so ordered.

WESTERN UNION TEL. CO. v. HEARN.

(Supreme Court of Texas. April 29, 1890.)

TELEGRAPH COMPANIES—MISTAKE IN MESSAGE—STIPULATION.

A stipulation by a telegraph company that it will not be liable for errors in an unrepeatable message is valid, and a verdict and judgment whereby plaintiff recovered \$25,000 for mistake in the transmission of such a message, sent under such stipulation, were erroneously rendered.

Commissioners' decision. Error from district court, Callahan county.

Stemmons & Field, for plaintiff in error.

ACKER, J. There was a deed of trust against the property of L. Hearn for \$25,000, which by its terms became due, at the option of the holder, upon default in the semi-annual payment of interest thereon for 10 days

after the maturity thereof. A payment of interest became due on the 1st day of December, 1886, which Hearn was unable to meet in full; and it was agreed that he should have until the 28th day of January, 1887, to pay the balance of \$500, or deposit it in bank. The money was deposited in bank on the 28th day of January, 1887; and the following message was prepared and signed by the cashier and delivered to Hearn, who promptly delivered it to the agent of the telegraph company at Baird, to be transmitted and delivered to E. E. Chase, the trustee and agent of the beneficiary of the deed of trust, at Fort Worth: 28th January, 1887. "To E. E. Chase, Fort Worth: Return note left by Hearn. Draw for five hundred dollars. A. G. WILLS, Cashier." The message, when delivered to Chase at Fort Worth, read as follows: "To E. E. Chase, Fort Worth: Return note left by Hearn. Order five hundred dollars. A. G. WILLS, Cashier." This suit was brought by Hearn to recover damages alleged to have resulted from the error committed in transmitting the message by substituting the word "order" for "draw." There was verdict and judgment for plaintiff for \$25,000, from which the defendant prosecutes this writ of error. There are several important questions raised by the assignments of error, but we will consider only one of them, as it controls the disposition of the case.

By the terms of the contract for the transmission of the message, it was expressly stipulated that the defendant company should not be liable for errors in transmission of un-repeated messages beyond the amount of tolls paid thereon. The message was not repeated. We think it should now be considered settled in this state that this limitation of liability by special contract is valid and binding, and that no recovery can be had for an error committed in transmitting an un-repeated message, unless it be shown by direct testimony, or by the facts and circumstances of the case, that the error was caused by the misconduct, fraud, or want of due care on the part of the company, its servants or agents. *Telegraph Co. v. Neill*, 57 Tex. 283; *Womack v. Telegraph Co.*, 58 Tex. 176; *Telegraph Co. v. Edsall*, 63 Tex. 668; *Railway Co. v. Wilson*, 69 Tex. 739, 7 S. W. Rep. 653. In the *Edsall Case* it is said that, in the absence of a special contract limiting liability, proof of the error would make a *prima facie* case of negligence, and put the company under the burden of showing that the error resulted from some excusable cause. The rule here announced will probably be of rare application, as telegraph companies require their patrons to subscribe to a special contract in every instance. We are of opinion that the judgment of the court below should be reversed, and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment reversed and the cause remanded.

AVERY et al. v. ZANDER et al.

(Supreme Court of Texas. May 6, 1890.)

ATTACHMENT—AFFIDAVIT—DEBTS NOT DUE—AMENDED PETITION.

1. Where the affidavit for an attachment alleges that defendant is indebted to plaintiff in a certain sum, but, though the petition shows that part of the debt was not due when the suit was brought, neither the petition nor affidavit states the amount due, and the amount to become due, the writ will be quashed, on motion.

2. In such case an amended petition, afterwards filed by leave of the court, showing the amount due, and the amount to become due, cannot help plaintiff.

Commissioners' decision. Appeal from district court, Lee county.

N. A. Rector and R. E. Harris, for appellants. Ed. R. Sinks, for appellees.

ACKER, J. B. F. Avery & Sons brought this suit January 19, 1886, against B. L. Zander & Co. on claims described in the petition as follows: A promissory note for \$619.13, dated September 15, 1885, due February 19, 1886; two promissory notes for \$670.45, each dated December 19, 1885, due, respectively, at four and six months after date; an open account for \$1,531.47, dated on or about December 29, 1885, alleged to have been for goods sold by plaintiffs to defendants at their special instance and request, and, "that defendants agreed to pay to plaintiffs the reasonable value of said goods." It was not alleged when the open account became due, but the petition concluded with the averment "that defendants are justly indebted to plaintiffs in the aggregate amount of thirty-four hundred and ninety-one and 50-100 dollars." It was not specifically alleged in the petition what part of the claims sued on were due, and what part were not due, but it is evident from the descriptions given of the several claims that none of them was due, unless it be the open account. At the time of filing this petition, the plaintiffs filed a separate affidavit, upon which the writ of attachment was issued against the estate of the defendants. This affidavit for attachment charged that the defendants were "justly indebted to plaintiffs in the sum of three thousand, four hundred and ninety-one and 50-100 dollars," but did not state how much of this sum was then due, and how much was to become due thereafter. On March 15, 1886, plaintiffs filed with the clerk of the court in vacation an amended petition, describing with greater particularity the claims sued on, and showing what part of the sum sued for was due, and what part not due, which was, by order of the court, filed on May 1, 1886, *nunc pro tunc*. The original petition and affidavit for attachment, filed at the same time, did not refer to each other. The defendants moved to quash the writ of attachment on the ground that it appeared from the original petition that a part of the amount sued for was not due at the commencement of the suit; but neither the petition nor affidavit stated the amount then due, and the amount to become due. The

motion was sustained, and the writ of attachment quashed, which ruling is assigned as error, and presents the only question in the case.

The case of *Sydnor v. Totham*, 6 Tex. 190, was a suit on several promissory notes, some of them not due at the institution of the suit, as shown by the petition. A writ of attachment was issued on the affidavit of the plaintiff, stating that the defendants were justly indebted to him in the aggregate amount of all the notes described in the petition. The writ of attachment was quashed, on motion of defendants, on the ground that the affidavit stated that the debt was due, when the record showed that part of it was not due, which was sustained on appeal; the court stating that the affidavit "ought to have shown the amount due at the time of filing the petition." The affidavit in this case is very like the affidavit in the case just cited; and the petition in this case, as in that, showed that at least a part of the amount sued for was not due at the institution of the suit. In *Cox v. Reinhardt*, 41 Tex. 593, after stating that suits may be brought by attachment on claims not due at the commencement of the suit, it was said: "But, when this is done, the petition and affidavit for attachment should show when the debt will be due, so that the action of the court may conform to the facts of the case. If the suit is brought as if it was for a debt past due, and it is so averred in the affidavit for the attachment, and such is not the fact, the affidavit will not justify or support the attachment, and it should be quashed." In this case, as in the case last cited, both the petition and the affidavit alleged that the defendants were justly indebted to the plaintiff in the aggregate amount of the claim sued on, as if they were all then due, without stating that any part of them were not due at the time of bringing the suit. See, also, *Evans v. Tucker*, 59 Tex. 249. We think these authorities conclusively sustain the ruling of the court in quashing the attachment.

But appellants contend that the amended petition cured the defects in the affidavit. This proposition cannot be sustained. The question here presented was settled adversely to appellants by the decision in *Marx v. Abramson*, 53 Tex. 264. We are of opinion that the judgment of the court below is correct, and should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

HOUSTON & T. C. RY. CO. v. SMITH *et ux.*
(Supreme Court of Texas. May 6, 1890.)

RAILROAD COMPANIES—INJURIES TO PERSONS ON TRACK—INSTRUCTIONS—EVIDENCE.

1. In an action against a railroad company for the wrongful death of a boy 16 years old, the only testimony as to the accident was that of the engineer in charge of the train, who testified that he was running at the usual speed when he first saw

deceased lying on his face on the track, about 15 or 20 yards ahead; that he immediately called for brakes, and reversed his engine, but, the rails being wet, the engine slid, and ran over deceased. The accident occurred in a cut where there was no crossing. There was evidence that a body lying on the track at that place could have been seen at a distance of from 150 to 300 yards, but the engineer testified that just before seeing the boy, he was looking at the train, which a rule of the company required him to watch. *Held*, that defendant was not negligent.

2. Deceased in lying on the track at a place where there was no crossing, and where he knew trains were accustomed to pass about that time, was guilty of contributory negligence.

3. The use of the expression, "such care as an ordinary man," or "an ordinary business man," would use, in an instruction defining the degree of diligence and care required of a railroad company to avoid liability on a charge of negligence, and in determining the question of contributory negligence, is improper.

4. A railroad company cannot be held liable for injuries to persons on its track, simply because the engineer in charge of its train could not have seen such person in time to prevent the injury.

5. Where a person, killed by a railroad train while on the track, was negligent in being there, and the employee in charge of the train could not by the use of ordinary care, after his peril was discovered, have prevented the accident, the railroad company is not liable.

Commissioners' decision. Error from district court, Travis county.

O. T. Holt, for plaintiff in error. *Sheeks & Sheeks*, for defendant in error.

ACKER, J. Cyrus Smith and his wife brought this suit against the Houston & Texas Central Railway Company to recover damages alleged to have been sustained by them from the death of their son, Plum Smith, a minor, 16 years old. It was alleged that the death was caused by the gross negligence of defendant, its agents and employees. The trial resulted in verdict and judgment for plaintiff Cyrus for \$500, from which this writ of error is prosecuted. The boy was run over by a locomotive, drawing a freight train of two cars and a caboose, about 6 o'clock in the morning. He had left his home about an hour before, to bring horses from the pasture. The engineer in charge of the locomotive was the only person who testified to having witnessed the accident, and the manner in which it occurred. He testified that he was running at the usual rate of speed, and when he first discovered the boy he was lying on his face about the middle of the track, and about 15 or 20 yards in front of the engine; that he immediately called for brakes, and reversed the engine, but the rails being wet and slippery, the wheels slid, and the engine ran over the boy; that the engine ran 27 or 28 yards after he saw the boy; that the engine alone passed over him, and he was found under the front truck of the front car. The boy was killed in a cut where there was no crossing. There was evidence going to show that a body lying on the track at that place could be seen for a distance of 150 to 300 yards in the direction from which the train came. It was proven that the regulations prescribed by defendant for the government of its employees required engineers,

while running trains, to look back frequently, and keep a watch on the trains. The engineer testified that he had been looking back at the train just before he looked forward and discovered the boy on the track.

The defendant requested the following special instructions: "The jury are charged that the defendant is not liable because the engineer could not have seen Plum Smith in time to prevent the injury; but it is liable if the engineer did see Smith before the accident, and did not use and exercise proper care to avoid striking or running over him. (2) If the deceased, Plum Smith, was guilty of negligence which resulted in his death, no recovery can be had, unless the persons in charge of the train were aware of his negligence, and, after discovering the deceased on the track, could by the exercise of proper care and diligence have avoided the injury." The court refused to give these instructions, and this is assigned as error. Upon the questions of negligence of the defendant, and contributory negligence of the deceased, the following charge was given: "If the jury find, by preponderance of evidence, that, at the time and place as alleged, (1) the deceased, Plum Smith, without fault on his part, (that is, while using such care as an ordinary man would use for his own safety under like circumstances,) was run over and killed by a train of the defendant; (2) that the employees of defendant in charge of the train were in fault in failing to use such care as an ordinary business man in like circumstances and employment would use, either in failing to see what ought to have been seen under the circumstances, taking the place and time and everything in testimony into consideration, or in failing to use such ordinary efforts to protect the deceased from harm as such ordinarily careful man would use under like circumstances." The expressions "ordinary man" and "ordinary business man," as used in this charge, in defining the degree of diligence and care required of a defendant to avoid liability on a charge of negligence, and also in determining the question of contributory negligence on the part of the person injured, has been several times condemned by this court. *City of Austin v. Ritz*, 72 Tex. 402, 9 S. W. Rep. 884; *Railway Co. v. Beatty*, 11 S. W. Rep. 858. The defendant certainly could not be held liable simply because the engineer in charge of its train could not have seen the deceased in time to prevent the injury. It is also well settled that if the deceased, by his own negligence, caused his death, because the employees in charge of the train, by the use of ordinary care after his peril was discovered by them, could not prevent it, then the plaintiff was not entitled to recover. *Railroad Co. v. Smith*, 52 Tex. 184; *Railroad Co. v. Symptkins*, 54 Tex. 622; *Railroad Co. v. McDonald*, 12 S. W. Rep. 860. We think the court erred in the charge given, and in refusing to give the special instructions requested.

It is also contended that the verdict and

judgment are contrary to the law and the evidence; and we think it must be so held. The evidence shows that the employees of defendant in charge of the train were in the discharge of their duties, and employed every available means to prevent the injury after the discovery of the peril of the deceased. It was certainly negligence on the part of the deceased to lie down on a railroad track, where, as the evidence shows he knew, trains were accustomed to pass about that time. It was not negligence for the employees of defendant not to look constantly in front of the engine at a place where there was no crossing, and where they had no reason to expect that persons would be on or along the track. That the negligence of the deceased contributed to his death, there can be no doubt, and we think the evidence fails to show negligence on the part of the defendant. We are of opinion that the judgment of the court below should be reversed, and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

STRICKLAND v. HARDWICKE *et al.*

(*Supreme Court of Texas. May 6, 1890.*)

ASSIGNABLE INTEREST—EXECUTION—EQUITY OF DEBTOR.

The equitable interest of defendant in execution in land after its sale under the execution, and his right to sue to set the sale aside, can be sold and conveyed by him.

Appeal from district court, Taylor county.

B. G. Hill and *A. J. Porter*, for appellant. *G. A. Kirkland*, for appellees.

HENRY, J. This suit was brought by appellant to set aside an execution sale of land on the grounds of irregularities and inadequacy of consideration. The defendant in execution, who was the owner of the land when it was sold, subsequently sold and conveyed it to appellant. The court sustained exceptions to the petition on the ground that the interest of the defendant in execution was not assignable, and that the plaintiff could not maintain a suit to set aside the execution sale, as a purchaser from and the assignee of the defendant in execution. In this we think there was error. The equitable interest of the defendant in the land after its sale, and his right to prosecute a suit to vacate the sale, could be sold and conveyed by him. *Railway Co. v. Freeman*, 57 Tex. 156; *Stewart v. Railroad Co.*, 62 Tex. 246. The judgment is reversed, and the cause is remanded.

ETTER v. DIGNOWITY *et al.*

(*Supreme Court of Texas. May 6, 1890.*)

APPEAL—OBJECTIONS WAIVED.

1. Where, in trespass to try title, defendant withdraws his answer, and files a disclaimer of

title to the land as described in plaintiffs' petition, after a report of survey made by order of the court has been filed, and does not object at the trial to the admission of the report in evidence, he cannot, on appeal, complain that the judgment against him, in addition to the description of the land contained in the petition, adds a more complete description taken from the surveyor's report.

2. Where, in such case, the disclaimer is filed after answering, judgment for costs is properly rendered against defendant.

Appeal from district court, Val Verde county.

J. M. Coleman, for appellant. *Joseph & Jacob W. Jones*, for appellees.

HENRY, J. This was an action of trespass to try title, brought by appellees. The petition described the land "as being the south one-half of garden lot No. 2, of one and one-half acres, in division E, in the town of Del Rio, in the county of Val Verde." The defendant appeared, and pleaded not guilty. An order of survey of the land was made, and a survey of it was reported and filed. After the report of the survey had been filed, the defendant withdrew his answer, and filed a disclaimer of title to the land as described in plaintiffs' petition. The cause was tried without a jury, and a judgment was rendered for the recovery of the land. The description of the land in the judgment, in addition to the description of it contained in plaintiffs' petition, added from the surveyor's report a description by courses and distances and physical objects. The disclaimer was filed on the same day that judgment was rendered, and on the following day the defendant filed his request for the court to file its conclusions of law and fact. The defendant filed a motion for new trial, not under oath or supported by affidavit, attacking the correctness of the report of survey.

The appellant complains of the judgment against him for costs, and of the judgment by a different description of the land from that contained in the petition, and because the judgment rendered fails to conform in every particular of description to the surveyor's report. In the case of *Storey v. Nichols*, 22 Tex. 93, it is said "that the withdrawing the pleas is an implied confession of judgment, having reference to the cause of action stated, or attempted to be stated, in the petition." After he had withdrawn his answer and disclaimed, defendant had the right to be heard at the trial to object to plaintiffs' introducing proof of title to land not claimed in their petition. Such objection was not made at the trial, nor was it properly made to appear by the motion for a new trial that the land described by the surveyor's report was not the identical land claimed in the petition. The surveyor's report was on file when defendant withdrew his answer and disclaimed. The survey was made with his knowledge, and with reference to being used as evidence on the trial of the cause. If the land described in the report was in fact the same land that was described in the petition, the fact that the report described it with

greater particularity was not a reason for its being excluded as evidence, even if it had been objected to at the proper time. The judgment indicates that it is for the same land described in the petition, and the defendant has not in a proper manner made it appear that an error was committed in that or in any other particular. The defendant, not having entered his disclaimer until after he had answered, was subject to the judgment for costs that was rendered against him.

The judgment is affirmed.

PEREGO v. WHITE et al.

(Supreme Court of Texas. May 6, 1890.)

TRESPASS TO TRY TITLE—COUNTY SCHOOL LANDS
—PRE-EMPTION—PLEADING.

1. Under Const. Tex. art. 7, § 6, providing that actual settlers on county school lands "shall be protected in the prior right of purchasing the same to the extent of their settlement, not to exceed 160 acres," a purchaser of such lands from a county, on which an actual settler is residing, who has not been afforded an opportunity to buy, takes it subject to the privilege of pre-emption by the settler, who, on tendering him, with reasonable promptness, the value of the land on which he has settled, estimated on the basis of the price paid the county for the whole tract, may demand a conveyance of 160 acres, or less, at his election.

2. In trespass to try title by the grantee of a purchaser from the county of school lands against one who was a settler thereon at the time of the sale by the county, to recover possession of the land, the settler cannot depend on a plea of not guilty. He must plead specially that he was an actual settler when the lands were sold, that he desired to purchase, and must offer to purchase on the terms of the sale by the county.

Appeal from district court, Clay county.

Trespass to try title by C. C. White and others against E. J. Perego and others. Const. Tex. art. 7, § 6, provides that actual settlers on county school lands "shall be protected in the prior right of purchasing the same to the extent of their settlement, not to exceed 160 acres."

L. T. Miller and *R. Cobb*, for appellant. *Stephens, Matlock & Herbert*, for appellees.

GAINES, J. Cherokee county sold and conveyed its school lands to Jones & Douglass, who conveyed them to Eustis & Eustis, who in turn sold and conveyed them to plaintiffs in the court below. The defendants below being settlers upon the lands, plaintiffs brought an action of trespass to try title against them, in order to recover possession. All the defendant settlers compromised their claims except appellant, who disclaimed as to all the land except a tract of 160 acres, and as to that went to trial upon a plea of not guilty, and a claim for compensation for improvements in good faith. The plaintiffs introduced in evidence a patent to Cherokee county of the survey embracing the land in controversy, and a regular chain of conveyances from the county down to themselves. The defendant was permitted to offer evidence to prove that he settled upon the land, and established a residence upon it, with a view to purchasing it before the county made

a sale. The court, however, disregarded this evidence in the charge to the jury, and instructed them that the plaintiffs had shown title to the land, and that they were entitled to a verdict. There was a verdict and judgment in accordance with the instruction.

In the case of *Baker v. Dunning*, ante, 617, (decided at the present term,) it was held that a settler upon school lands belonging to a county could not be deprived of his right of pre-emption by a sale to another without an offer to sell first having been made to him in good faith, and a rejection of the offer on his part. In that case the settler, after the sale by the county, made a tender of money and notes—based upon the terms of the sale already made—both to the county and the purchaser, and pleaded these facts as a ground of relief. The court decreed him the land upon condition that he should pay the purchaser the same price per acre that the land had been sold for by the county. The purchase money due the county being payable in installments, he was allowed to pay at corresponding intervals and in corresponding amounts. No complaint was made as to the specific relief granted, and we were not called upon to decide whether it was proper or not. In this case, however, we feel constrained to lay down a rule by which the rights of settlers in such cases must be determined. It would seem that the legislature has the power to provide a method by which the protection provided for by the constitution may be secured to actual settlers, and it would probably have prevented cases of hardship if the law-makers had intelligently expressed that power, and established a plain rule by which both the settlers would have been protected, and the rights of the counties preserved. This not having been done, we must ascertain the rights of the parties now before us by starting from well-established legal principles. "The constitution did not grant the land, only the right to acquire it upon terms to be fixed by the counties." *Land Co. v. Wood*, 71 Tex. 460, 9 S. W. Rep. 340. The legal title was in the county, and it had the right to sell and convey it to any purchaser; but it had no power to deprive the settler of his prior right to purchase at such time as it saw fit to sell. We think it follows, therefore, that a purchaser of school lands from a county upon which an actual settler is residing, who has not been afforded an opportunity to buy, takes it subject to the privilege of pre-emption, and that the settler, upon a tender with reasonable promptness of the value of the land upon which he has settled, estimated upon the basis of the price actually paid, or agreed to be paid, for the whole tract bought of the county, may demand a conveyance of 160 acres, or a less amount, as he may elect. His right to buy being superior to that of the purchaser, he is entitled to the same terms, both as to price and terms of payment, which the purchaser has obtained from the county. The price to be paid by him should bear the same

proportion to the price paid, or agreed to be paid, by the purchaser, which the actual value of the land claimed by him bears to the actual value of the whole tract. The decision in *Land Co. v. Wood*, above cited, is in accordance with these principles. In that case the settler went to trial upon a plea of not guilty, and a judgment in his favor was held to be erroneous. The cause was, however, remanded for the purpose of affording him an opportunity of pleading specially his equities, and of demanding affirmative relief. In this case the purchasers from Cherokee county acquired the legal title to the lands, subject to the right of appellant to purchase from him upon the same terms. This title has passed to the plaintiffs in this suit, subject to the same right of pre-emption. The defendant had no title by which he could defend the action upon a plea of not guilty. *Land Co. v. Wood*, supra. He should have pleaded that he was an actual settler upon the lands at the time they were sold by the county, and that he desired to purchase, and should in the suit, at least, have offered to purchase upon the terms upon which the county sold. Not having done this, upon the state of the pleadings the court properly instructed the jury to return a verdict against him. The judgment against him is the only proper judgment that could have been rendered under the pleadings and evidence, and, though we recognize the hardship of the case, we cannot reverse it. There being no error in the judgment it is affirmed.

MARTIN BROWN CO. v. PERRILL *et al.*

(Supreme Court of Texas. May 6, 1890.)

ATTACHMENTS—INTERVENTION—PROCEDURE—EVIDENCE—INSTRUCTIONS.

1. In a contest between an attaching creditor of a firm and other creditors, who have intervened, the books of the firm are not competent evidence on behalf of the intervenors.

2. Nor are the books made competent as declarations of the firm, on the ground that there was a conspiracy between the firm and the attaching creditor to defraud intervenors, until such conspiracy is proved.

3. After the refusal of the court to allow the books to be introduced in evidence, counsel for the intervenors cannot, in his argument to the jury, comment on the failure to introduce them.

4. Where bonds belonging to a married woman are received and sold by her husband as her trustee, and the money is loaned to a firm of which the husband is a member, the note being made payable to the husband as trustee for his wife, the firm is estopped to deny the trust.

5. In such case, on the firm's becoming insolvent, the wife may sue on the note in her own name.

6. In such case, intervening creditors of the firm, whose claims did not exist when the note was given, cannot complain of a judgment in favor of the wife, for interest on the money loaned the firm, on the ground that such interest belonged to the community estate, and was subject to the husband's debts.

7. An instruction, in such case, that, if the wife used or permitted the note to be used as a means of hindering and delaying creditors of the firm, or had knowledge of facts sufficient to put her, or the person acting for her, on notice of such use, then the jury should find for the intervenors, is properly refused as misleading, since the neces-

sary effect of suing out the attachment by the wife to collect the amount of the note was, in view of the difference between the assets of the firm and the debts, to hinder and delay the other creditors, and the instruction does not make it appear to the jury that the suing out of the attachment to collect the debt, and thus hindering creditors, does not avoid the attachment.

8. An instruction, in such case, that plaintiff, in suing out the attachment, must have acted so as not to "unjustly or wrongfully" injure the rights of other creditors, is properly refused, since it leaves it for the jury to say what plaintiff might lawfully do.

9. Since, under Rev. St. Tex. art. 2961, the defense of usury must be interposed by special plea under oath, intervening creditors of a firm whose property has been attached to collect a note due by the firm cannot object to the judgment in the attachment suit on the ground that usury was allowed on the note, where they have not specially pleaded usury.

10. In attachment by a creditor of a firm to collect a note due her, where intervening creditors have put in no defense, and the court has instructed the jury, after stating the issues between plaintiff and intervenors, that if they found that the note sued on represented a real debt, and that the attachment was sued out for the purpose of collecting it, and not of delaying and defrauding creditors of the firm, they should find for plaintiff a verdict, "We, the jury, render a verdict in favor of plaintiff," is a sufficient finding for plaintiff against intervenors for the whole demand claimed in her petition, and that the attachment was not fraudulently issued.

Appeal from district court, Hill county.

Wray & Stanley and B. D. Tarlton, for appellant. *S. C. Upshaw, Joseph Abbott, McKinnon & Carlton, and J. G. Abney*, for appellees.

GAINES, J. Maggie S. Perrill brought this suit against W. M. Perrill and P. F. Fox, partners doing business under the firm name of Perrill & Fox, to recover the amount due upon a promissory note extended by them to W. M. Perrill as her trustee. W. M. Perrill is her husband. She also caused a writ of attachment to issue, and to be levied upon a stock of goods belonging to the defendants. The goods were sold as perishable property, and the proceeds paid into court to await the determination of the suit. The appellants, the Martin Brown Company, and Mandeville, Boling, and Traylor, being creditors of the firm, also brought suits on their debts, and caused attachments to issue, and to be levied upon the stock of goods attached by Mrs. Perrill. Having obtained judgments on their respective claims, they intervened in this suit, alleging that the attachment of Mrs. Perrill was in fraud of their rights, and praying that the fund paid into court as the proceeds of the sale of the goods attached be appropriated to the payment of their demands. There was a verdict and judgment against them, and they have appealed to this court.

The grandfather of Mrs. Perrill died in North Carolina, having bequeathed to her a share of his estate. That bequest was contained in the following provision of the will: "The residue of my estate to be distributed according to law. The share of Maggie Bullock to be secured to her for life, with power to give it to her children, if any; if none,

then to give it to any of my descendants she may see proper." The Maggie Bullock named in the will is the appellee Mrs. Perrill. The executor of the will, having on hands certain bonds amounting to \$6,000, a part of her distributive share of the testator's estate, transmitted them to W. M. Perrill, her husband, who agreed to hold the fund as her trustee, and gave bond to the executor to secure a faithful administration of the trust. The bonds were subsequently sold, and the proceeds loaned to Perrill & Fox. On the 1st day June, 1886, for the principal and interest due on this loan, they executed the note upon which this suit was brought. It was payable to "W. M. Perrill, trustee for his wife." We think the court did not err in refusing to compel the defendant Fox, while on the stand, to produce the books of the firm which showed the partnership indebtedness in December, 1884. The controversy in the case was between Mrs. Perrill, the plaintiff, and the intervenors. The books of Perrill & Fox, though they may have been used as evidence against them upon any issue to which the entries therein would have been relevant, were not evidence against her. They could not have used the books to defeat her action, nor do their creditors, in a suit of this character, occupy any better position. It seems to be complained that there was a conspiracy between the plaintiff and the defendants to defraud the creditors of the latter, and that, therefore, the acts and declarations of each of these parties were evidence against the other. The effort of the intervenors was to establish such conspiracy, but there was no evidence adduced sufficient to authorize the court to determine even *prima facie* the existence of any such conspiracy in January, 1884. Such proof was a necessary predicate to the introduction of evidence of the acts or declarations of the defendants against the plaintiff.

The court having properly refused to require defendant Fox to produce the books of his firm, it was not error to restrain counsel for intervenors from commenting upon the failure to introduce them in evidence in his argument to the jury.

We do not consider it necessary to determine the legal effect of the clause in her grandfather's will, under which the plaintiff claimed the fund which was lent to defendants. Her husband received the bonds, and sold them as her trustee; and of him, as her trustee, they were borrowed by the partnership of which he was a member. The defendants are clearly estopped to deny the trust. *Portis v. Cummings*, 21 Tex. 265. It is true that, if the money had been lent by her husband as her trustee to third parties, he would have been the proper party to bring a suit for its recovery in the event of a default in the payment of the debt. But in this case, he being the payee of the note, and the firm of which he was a member being the makers, we think that, when suit became necessary to secure the debt, the wife

had the right to bring it in her own name. She was the sole existing beneficiary of the fund. The defendants had expressly agreed to repay it for her use. If the husband, as her trustee, could have sued his firm for the recovery of the debt, it would have been unreasonable to require her to await his action when it became evident that the firm was insolvent, and there was danger of losing the fund. Under such a state of facts, a rule which would deny her the right to sue for and recover the money would be an anomaly in our system of jurisprudence, in which legal and equitable demands are enforced through the same methods of procedure. It may be that the money should not be paid into her hands, but this should be no obstacle to her prosecuting the case to judgment. The court, in exercise of its equitable powers, has authority to direct that it shall be paid only to a trustee who shall have given bond to secure the administration of the fund in accordance with the terms of the bequest.

Appellants insist that the judgment is erroneous in so far as it allows plaintiff a recovery for the interest on the money derived from the sale of the bonds. It is settled law in this state that interest derived from a loan of money, the separate property of the wife, belongs to the community estate. *Braden v. Gose*, 57 Tex. 37. It is contended that the rule applies in this case, and that the interest was community property of Perrill and his wife, and subject to the payment of his debts, and that, therefore, there should have been no recovery for the interest as against his creditors. The court concur in the opinion that appellants' contention cannot be maintained, and we agree substantially in the result, that the judgment is in this particular correct. As to the grounds of that conclusion, we are not in accord. One opinion is that it is the income, and not the *corpus*, of the fund that was bequeathed to the plaintiff by her grandfather, and that, therefore, the interest on the money comes literally within the definition of "separate property," as given in the statute; that is to say, that the income of the fund is acquired directly "by devise." Rev. St. art. 2851. The other opinion is that when the husband borrows the money of the wife, and agrees to pay her interest, the effect of the contract is to make the interest her separate property. *Hall v. Hall*, 52 Tex. 294. When the note was given upon which the suit was brought, the debts due to intervenors did not exist, so that the immediate rights of creditors are not involved in the question.

The court charged the jury, in effect, that if the consideration of the note sued on by plaintiff was the community property of herself and husband, or if the debt was fictitious, they should find for intervenors. The jury were further instructed, in substance, that if the debt upon which the suit was brought was real, and belonged to the plaintiff as her separate property, and that if the attachment was sued out not only for the purpose of col-

lecting the debt, but also with the intent to hinder, delay, or defraud the creditors of Perrill & Fox, they should also find for intervenors. In these instructions there is nothing of which appellants have the right to complain. Nor is there any omission which rendered the additional charges asked by them, and refused by the court, either necessary or proper. The proposition in the fourth special instruction refused by the court, that if the plaintiff "used or permitted said note to be used as a means of hindering, delaying, or defrauding the creditors of Perrill & Fox, * * * and that plaintiff knew that such notes were so used, or about to be used, or had knowledge of facts sufficient to put her, or the person acting for her, upon notice of such use," then that the jury should find for intervenors, was calculated to mislead the jury. In view of the proportion between the amount of the claim and the value of the defendants' assets, a necessary effect of the suing out of the attachment, and the levy upon the stock of goods, was to hinder and delay the creditors of the firm. In *Blum v. Schram*, 58 Tex. 524, it was held that a debtor may confess a judgment in favor of his creditors, provided the purpose was merely to secure the debt, and not to defraud other creditors. The charges which were approved in that case gave the jury distinctly to understand that the mere fact that the confession of judgment tended to delay other creditors would not avoid the judgment, provided the intent was merely to secure the debt. A charge in any such case which does not clearly present this distinction is misleading, and should not be given.

The fifth special charge asked by intervenors was also properly refused. It is as follows. "The jury are instructed that it is not enough that plaintiff should have a valid demand against Perrill & Fox, and a right to sue and attach thereon as against them, but she must, in the collection of her demand, so act as not to unjustly or wrongfully injure the rights of other creditors, or to wrongfully hinder, delay, or defraud them in the collection of their demands. If, then, you believe from the evidence that plaintiff in person, or through her said husband, employed counsel in this case to institute suit against Perrill & Fox, and to sue out a writ of attachment, with intent to levy same upon partnership property of Perrill & Fox, and that she did sue out and levy said writ upon said property at the request, instigation, or for the benefit of said Perrill & Fox, or either of them, and that plaintiff, or the person acting for her, at the time, knew that she would thereby obtain an unjust preference over the other creditors of Perrill & Fox, and enable her to carve out of the partnership property of said Perrill & Fox more than sufficient to pay her debt, or to enable them to hinder, delay, or defraud the other creditors of Perrill & Fox, or any one of them, the preference lien they acquire will be void as to such creditors, and you will find for intervenors."

Much of this construction, we think, was calculated to mislead the jury. The proposition that plaintiff, in suing out her attachment, must "so act as not to unjustly and wrongfully injure the rights of other creditors," etc., is objectionable because the jury were left to conjecture what she might lawfully do. The meaning to be given to the words "unjustly" and "wrongfully" is not defined. The charge would also have authorized the jury to find the attachment void if they believed that defendant Perrill placed the note in the hands of the attorney for collection, contemplating that an attachment would be sued out to secure it, if they also believed that the attorney knew that the procedure would result in a sacrifice of the partnership property. What meaning could have been given to the phrase, "and enable her to carve out of the partnership property of Perrill & Fox more than sufficient to pay her debt," other than this, we do not see. The goods were sold, and the proceeds paid into the hands of the clerk of the court, and there was no evidence that anything else was contemplated. She could only get, in any event, the amount of her debt. If, as seems to us, the phrase was calculated to convey to the minds of the jury the idea that the fact that the attachment was likely to result in a sacrifice of the property of the defendants constituted, either of itself or in connection with other facts, a ground for holding it void, it was clearly improper. If it did not mean this, it had no applicability to the evidence, and for that reason the charge was properly refused.

It is further complained that the court erred in instructing the jury, in the event they found for plaintiff, to find for her not only the principal of the note, but also interest and attorney's fees. The evidence showed that the money was originally loaned at a usurious rate of interest, and there is no question but that, if the defendants had filed a plea of usury verified by affidavit, that plea should have prevailed. Waiving the question whether intervenors could have availed themselves of this defense, it is sufficient to say that they did not plead it. The defense of usury must be interposed by special plea under oath. Rev. St. art. 2981. The note stipulated that the makers should pay attorney's fees in the event suit should be brought for the recovery of the debt. Upon the institution of the suit, they became a part of the indebtedness. They were set up in the petition, and included in the amount for which the writ of attachment issued. Why the plaintiff was not entitled to recover them, if she recovered at all, we do not see.

The verdict of the jury was as follows: "We, the jury, render a verdict in favor of plaintiff. [Signed] J. D. KENNEDY, Foreman;" and it is insisted that this verdict was not responsive to all the issues presented by the pleading, and therefore did not warrant the judgment. The defendants interposed no defense to the action. The court, in its charge, after stating the issues between

the plaintiff and intervenors, instructed the jury, in effect, that if they found that if the note sued on represented a real debt, and that it was the separate property of the plaintiff, and that the attachment was sued out for the purpose of collecting the debt, and not of delaying and defrauding creditors, they should find for the plaintiff. On the other hand, they were charged to find for intervenors if the debt were fictitious, or did not belong to plaintiff, or if the attachment was sued out with intent to defraud creditors. In the light of these instructions, the meaning of the verdict is clear. It is a finding in favor of plaintiff against intervenors for the whole of the demand claimed in her petition, and that the writ of attachment was not fraudulently issued. There is no error in the judgment, and it is affirmed.

BERRY *et al.* v. DAVIS *et al.*

(Supreme Court of Texas. May 6, 1890.)

GARNISHMENT—JUDGMENT—JURISDICTION—COSTS—INTEREST.

1. Where the garnishee and the plaintiff are both residents of the state, and process is personally served on the garnishee, who admits an indebtedness to the defendant, the fact that the latter is a non-resident, and is cited only by publication, does not deprive the court of jurisdiction to render a judgment against the defendant that will bind the fund in the garnishee's hands.

2. A garnishee who permits costs to accumulate upon a judgment rendered against him cannot charge his creditor with such costs.

3. A debtor who has paid part of his debt in satisfaction of a judgment rendered against him as garnishee is liable for interest on the residue from the date of the judgment in garnishment.

4. Where a defendant admits indebtedness in a certain amount, of which he has made no tender before suit, it is error to render judgment for a less amount, and to apportion the costs.

Appeal from district court, Travis county. *Peeler & Peeler*, for appellants. *Sheeks & Sheeks*, for appellees.

STAYTON, C. J. Appellees were indebted to appellants in the sum of \$266.80 for merchandise, which was due on December 8, 1888. On October 13, 1888, Heidenheimer & Co. brought suit against appellants, in justice's court in Galveston county, to recover \$168.65 claimed to be due from them. In that proceeding a writ of garnishment was sued out and served on appellees, on which they answered they were indebted to appellants as claimed in this action. Appellants were residents and citizens of the state of Virginia; but appellees, as well as Heidenheimer & Co., were residents of Texas. Appellees, having answered as stated, and appellants having been cited by publication on March 18, 1889, a judgment was rendered in favor of Heidenheimer & Co. against appellees, as garnishees, for \$174.75 and costs of suit, all of which aggregated \$193.40. Execution issued on that judgment; and, to satisfy it, appellees, on April 5, 1889, paid \$210.70, which included judgment, interest, and costs. Appellants were not cited to an-

swer in the suit brought against them by Heidenheimer otherwise than by publication, and did not appear. This action was brought by appellants to recover from appellees the value of the merchandise sold, with interest from January 1, 1889, as though no part of it had been paid under the proceedings in garnishment referred to. In their pleadings, appellees set up the matters referred to in defense, so far, of the action, but admitted a balance of \$64.40 to be due; and, this tendered, a judgment was rendered in favor of appellants for \$56.10, and for \$10.85 as costs, but all other costs were adjudged against them.

It is admitted that the proceedings in garnishment were regular, but it is stated that the claim of Heidenheimer & Co. was on an unliquidated demand. There is no claim, however, that the debt which they sought to recover was not of such character as to make attachment or garnishment proper writs for its enforcement. It is claimed, however, that on service by publication only, the court had not jurisdiction to render a judgment in favor of Heidenheimer & Co. or against the garnishees. The court below held that the proceeding in garnishment was in the nature of a proceeding *in rem*, which gave the court jurisdiction to render a judgment against appellants, and the garnishees disposing of the fund in the hands of the latter; and in this, we think, there was no error. Appellees were residents of this state, and indebted to appellants; and in such cases it is held that, by garnishment on the debtor, judgment may be legally rendered against him that will bind the funds in his hands, although his creditor was a resident of another state, and not cited otherwise than by publication. The following cases will illustrate the application of the rule: *Brashear v. West*, 7 Pet. 620; *Mattingly v. Boyd*, 20 How. 128; *Sawyer v. Thompson*, 4 Post. (N. H.) 510; *Young v. Ross*, 11 Post. (N. H.) 201; *Tingley v. Bateman*, 10 Mass. 345; *Nye v. Liscombe*, 21 Pick. 264; *Erskine v. Staley*, 12 Leigh, 406; *Lovejoy v. Albee*, 33 Me. 417; *Wheat v. Railroad Co.*, 4 Kan. 370; *Jones v. Comings*, 6 N. H. 498; *Lawrence v. Smith*, 45 N. H. 538; *Baxter v. Vincent*, 6 Vt. 614; *Cronin v. Foster*, 13 R. I. 196. The rule was recognized in *Haggerty v. Ward*, 25 Tex. 144. In that case, however, the plaintiffs and defendant were both non-residents of the state, and there was no answer by the garnishee showing indebtedness, or other fact that would fix liability on him. Service on the defendant was only by publication, and *scire facias* to the garnishee was served in the same manner; and, under that state of facts, it was held that the court had not acquired jurisdiction to enter a judgment against the defendant subjecting anything that may have been in the hands of the garnishee to payment of the debt. In the case before us the garnishees were duly cited, resided in this state, and had answered showing their indebtedness to appellants in a sum

larger than necessary to satisfy the claim of Heidenheimer & Co., before judgment was rendered in favor of the latter.

Appellees having admitted an indebtedness of \$64.40, and tendered this, we see no good reason why the court below rendered judgment for a less sum, or apportioned the costs. If the balance due appellants had been tendered before this action was brought, then appellees should have been relieved from costs; but, as this was not done, they were liable for the costs of the suit.

It is claimed that appellants were entitled to more than appellees admitted to be due, and this arises, perhaps, out of a claim for interest. The claim of appellants would have borne interest from January 1, 1889. Appellees, however, would not be liable for interest after writ of garnishment was served upon them until judgment was rendered against them; for until that time they had no right to pay either party. When the writ of garnishment was served does not appear, but the inference from the record is that it was served before the claim bore interest. From March 18, 1889, appellees could legally have paid to appellants the balance due them; and that ought to bear interest from that date. If no interest had accrued when the garnishment was served, that balance was \$73.40 less the costs of the garnishment proceeding, and for that sum, with interest at the rate of 8 per cent. per annum until judgment, appellees were entitled.

If appellees permitted costs to accumulate under the judgment rendered against them in favor of Heidenheimer & Co., they are not entitled to that in settlement with appellants.

The facts are not stated in the record, which would enable this court to render a judgment such as should be, for it is evident that some costs accruing on the judgment in favor of Heidenheimer & Co. against appellees after its rendition must have been allowed to appellees. The judgment will be reversed, and the cause remanded, when the court below will be able to ascertain the facts necessary to the rendition of a proper judgment.

MEUSEBACH v. HALFF *et al.*

(*Supreme Court of Texas. May 6, 1890.*)

LIMITATION OF ACTIONS—ASSIGNMENTS FOR BENEFIT OF CREDITORS.

An assignment for the benefit of creditors does not suspend the running of the statute of limitations against a matured debt mentioned in the assignment during the time the estate remains in the hands of the assignee, since the assignment does not interrupt the creditor's right of action; but the statute will run against such debt from the date of the assignment.

Appeal from district court, Bexar county. *Geo. C. Altgelt*, for appellant. *Simpson & James*, for appellees.

STAYTON, C. J. This is an agreed case, from which it appears that appellees were the holders of notes now sued on, which had

matured prior to October 8, 1884. This action was brought February 13, 1889; and appellant pleaded limitation of four years in bar of the action, which the court below refused to sustain. To avoid the defense of the statute of limitation, it was shown that on October 8, 1884, appellant made an assignment under the statute of all his property for the benefit of his creditors, naming them, among whom were appellees. The deed of assignment also mentioned the notes sued on, and contained the following clause: "That the party of the second part [meaning the assignee] shall, by public or private sale, at his discretion, dispose of all property, collect, sue for, and effect compromises for, all debts due party of the first part, [meaning Meusebach,] which shall be at his discretion. He [meaning the assignee] shall also convert all assets into cash as speedily as it can be done by him, and, as soon as the proceeds are realized, after paying expenses attending the execution of this trust, pay the creditors off according to the list of creditors hereto attached, and made a part of this instrument, their respective demands, without any preference among them." It was further agreed "that, up to the date of the trial the assignee had not disposed of all the property of the assignor, nor converted same into cash; that in July, 1886, the assignee paid a dividend, which is credited in plaintiff's petition, and in the judgment rendered below. And it is further agreed that the sole issue of law arising on this appeal is whether or not the clause contained in the deed of assignment above quoted is, in connection with the above facts, sufficient to take plaintiff's debt out of the statute of limitations; the same being otherwise barred, and the plea of limitation having been duly interposed by appellant; and, if the same is not sufficient to that end, then the judgment may be reversed, and rendered for the appellant; otherwise the same may be affirmed."

The statutes provide that "there shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterwards, all actions or suits in court of the following description: (1) Actions for debt, where the indebtedness is evidenced by or founded upon any contract in writing." Rev. St. Tex. 1879, art. 3205. This statute is applicable to the case before us, and the action was clearly barred unless the facts above stated relieve it. It is unnecessary to consider whether the recognition of the debt, and provision made, through the assignment deed, to pay it, would operate as a sufficient acknowledgment of the debt to prevent the operation of the statute prior to the date of that instrument; for, if that be conceded, more than four years elapsed after that instrument was executed before this action was brought, and the action is clearly barred, unless, as contended by appellee, the provision of the instrument quoted prevented the running of the statute so long as the estate vesting in the assignee was not fully ad-

ministered. If payment of a part of a debt could be given the same effect as a new promise to pay, which may be implied from an unequivocal acknowledgment in writing of the justice of a debt, we see no reason why the direction to the assignee to pay, and his payments made from time to time, should not be given the same effect as though the payments had been made by the debtor directly. Payment of a part of a debt, however, under the statutes of this state, do not avoid the bar of the statute; nor are such payments the acknowledgment of the justice of the debt, or promise to pay it, which will have that effect. The purpose of the deed of assignment was to vest in the assignee, for the benefit of creditors, the property assigned; but we do not see how that can be construed into a subsequent promise to pay the debts, nor into a subsequent acknowledgment of their justice. It was a recognition at the time of the existence of such claims, and a direction to the assignee to apply the proceeds of the property conveyed to him to their payment, but nothing more. This in no manner suspended the right of appellees to sue upon their claims, although it may have taken from them the right to subject the property in the hands of the assignee, through execution, to their payment. The same causes of action made the foundation of this action had accrued before the assignment was made, and continued every hour afterwards; but, when four years elapsed after that instrument was executed, it is too clear that the statute gave appellant the right to urge limitation as a bar. The right of action was never suspended, but at all times might have been exercised, and judgment obtained under it enforced against any property of appellant not assigned, subject to the payment of his debts. The action was clearly barred, and judgment should have rendered for appellant; and the judgment will therefore be reversed, and here so rendered. It is so ordered.

PELICAN FIRE INS. CO. v. TROY CO-OP. ASS'N.

(Supreme Court of Texas. May 6, 1890.)

FIRE INSURANCE—ACTION ON POLICY—INSTRUCTIONS.

1. In an action on a policy of fire insurance which exempts the company from liability for fire caused by a hurricane, and provides that, if the insured building shall fall except as the result of a fire, the insurance shall cease, the jury should be instructed that the burden of proof is on the plaintiff to show by the preponderance of evidence that the fire was not caused by hurricane, or by the fall of the building.

2. Where such policy is attached as an exhibit to the petition, the jury should be instructed to find for the defendant if they believe from the evidence that the fire was caused by a hurricane, though the answer does not expressly allege that the fire was so caused, since that point is put in issue by the general denial.

Appeal from district court, Ball county.

Shepard & Miller, for appellant. *Monteith & Furman*, for appellee.

STAYTON, C. J. This action was brought by appellee on two policies of insurance covering risks on store-house and merchandise. The petition alleged the destruction of the property, and the policies were made exhibits. Each policy contained the following provisions: "(1) This company shall not be liable for any loss or damage by fire caused by means of a hurricane; (2) if the building shall fall except as the result of a fire, all insurance of this company on it or its contents shall immediately cease and determine." The fire occurred during, or immediately following, a severe hurricane, which, at least partially, blew the house down; and there was evidence tending strongly to show that the fire had its origin in the breaking of a lamp by falling timbers.

The provisions of the policy above noticed are exceptions to the general liability assumed by appellant, and the petition should have averred that the fire did not occur from one of the excepted causes. This was necessary to show a cause of action, for the company did not insure against loss resulting from a fire caused by a hurricane; nor were its policies binding at all for a loss caused by fire occurring after the fall of the house, unless the fall was caused by fire, for the parties had contracted that in that event the contract of insurance should not longer be operative. The answer alleged that the house had been blown down by hurricane before the fire occurred, but did not expressly allege that the fire was so caused, and that the company, for this reason, was not liable. The burden of proof was on the plaintiff to show not only that its property was destroyed by fire, but also to show that the loss occurred from a fire which the defendant had insured against. It is doubtful if the petition, even with the policies made exhibits, states a cause of action; but, if it did, it certainly could not be permitted to recover without proof necessary to support it. If the proof showed, or tended to show, with reasonable certainty, that the house was blown down, and afterwards destroyed by fire, it was the duty of the court, as was done, to submit to the jury whether the house fell from some other cause, and was afterwards, with contents, destroyed by fire. That question was submitted, and decided by the jury adversely to the defendant; and it is insisted that the court erred in refusing to grant a new trial on the ground that the evidence conclusively showed that the house was blown down, and afterwards destroyed by fire. There was much evidence tending to show such a state of facts; but, in view of the next matter to be noticed, it is not now necessary to pass on this question. If the proof, as it certainly did, tended to show that the fire was caused by hurricane, then the court should have submitted that issue to the jury.

Appellant asked the following instruction: "The policy in this case provides that the defendant shall not be liable for any loss or damage by fire caused by a hurricane. If

you believe from the evidence that the fire was caused by a hurricane, then you will find for the defendant. A hurricane is a storm or wind, of extraordinary violence, sufficient to throw down buildings,"—which was refused, although no charge on that subject had been given. Counsel for appellee justify the refusal of the court to give this charge on the ground that the pleadings of the defendant did not raise the issue. If appellee's petition stated a cause of action at all, it is because its averments amount to a statement that the property was destroyed by a fire which came within the risks assumed by appellant, and the general denial put that in issue; and the charge should have been given.

The court further erred in not instructing the jury that the burden of proof was upon the plaintiff to show by preponderance of evidence that the fire was not caused by the fall of the building, nor by hurricane. Such a charge was requested and refused, when there was evidence which made such a charge proper. The charge given informed the jury if they found "that the building, as such, was not destroyed by wind, but was destroyed by fire, then you will find for plaintiff." This was not the law of the case made by plaintiff's pleadings, if they made a case at all. The policies made parts of the petition showed what risk appellant assumed and what it did not, and there was much evidence tending to show that the loss occurred from causes which would not fix liability on appellant. For the reasons stated the judgment will be reversed, and the cause remanded.

FROST v. DEUTSCH et al.

(Supreme Court of Texas. May 9, 1890.)

FACTOR'S LIEN—CHATTEL MORTGAGE.

A merchant who has made advances on wool which he expects to buy acquires no right thereto, before its delivery to him, as against a mortgagee of the owner; the wool being all the time in possession of a third party.

Appeal from district court, Bexar county. *Ogden & Johnson*, for appellant. *Devine & Smith*, for appellees.

ACKER, J. Robert Clark owned a herd of sheep, and on the 10th day of August, 1881, placed them in possession of C. Buttran under a contract for five years, by the terms of which Buttran was required to defray all expenses of keeping the sheep, shearing and marketing the wool, which he was to deliver to Sam C. Bennett, at his warehouse in San Antonio, to be sold by him, and the proceeds equally divided between Clark and Buttran. In November, 1885, Bennett went out of business, having then advanced to Clark four or five hundred dollars; and, on the 11th day of that month, Buttran mortgaged the entire wool on the sheep to T. C. Frost, to secure the payment of about \$746 advanced by Frost to him, and for which he and Bennett executed their note to Frost. The mortgage to

Frost was never registered. On the 23d day of January, 1886, Clark executed his note to Deutsch & Co. for \$600, to secure the payment of which he at the same time executed a chattel mortgage on his half interest in the wool, which was duly registered, and of which Frost was actually notified. The wool was delivered to Frost, and he notified Deutsch & Co. of its receipt. He afterwards sold the wool for about \$776.33, and reported the sale to Deutsch & Co., but afterwards, on notice from Bennett, refused to pay Deutsch & Co. the proceeds of Clark's half interest in the wool. This suit was brought by Deutsch & Co. against Clark on his note and mortgage, and against Frost, to recover the proceeds of Clark's half interest in the wool. Clark answered, admitting the execution of the note and mortgage, and liability thereon, and joining in plaintiff's prayer for recovery against Frost. Frost answered, setting up the transaction between him and Buttran and Bennett, admitting the receipt and sale of the wool, and alleged that the proceeds were not sufficient to pay the amount which he had advanced to Buttran, and claimed that he was bound to account to Buttran, and indirectly to Bennett, for the entire proceeds of the wool. The trial without a jury resulted in a judgment against Clark for the amount of the note and interest, and against Frost for half of the proceeds of the wool and interest, from which Frost prosecutes this appeal.

The 12 assignments of error all relate to the failure of the court to make sundry findings and conclusions in support of the theory contended for by appellant, that Buttran's possession of the sheep at the time Clark executed the mortgage to plaintiff was notice of Bennett's right to the proceeds of Clark's half interest in the wool by virtue of his advancements to Clark, and that Frost was the factor of Buttran and Bennett, and was bound to account to them for the proceeds of the wool. These contentions, we think, might be appropriately disposed of by the statement that Bennett & Buttran were not parties to the suit. The only questions with which we have to deal relate to the respective rights of Frost and Deutsch & Co. Under the authority of *Wells v. Littlefield*, 59 Tex. 556, Buttran's possession of the sheep was doubtless notice to all persons of his rights and interests; but we do not think the proposition can be sustained that his possession was also notice of Bennett's claim to Clark's half interest in the wool. Buttran's interest under his contract with Clark was recognized, and not interfered with, by this suit. Bennett had no lien by contract, and could not have acquired a lien as a factor until the wool came into his possession as such, or into the possession of some one as his representative. 3 Wait, Act. & Def. 302. It is urged that Buttran was the representative of Bennett, and held the wool as such, but we think the facts fail to sustain that contention. Buttran held the wool for himself, and as agent for Clark, and Bennett could acquire no rights

as a factor until the wool was delivered into his possession. It is not claimed that Clark's mortgage to Deutsch & Co. was not in all respects valid. Being so, the wool when delivered to Frost was subject to it, and whatever rights and obligations he acquired and assumed by virtue of his possession as factor were subordinate to plaintiffs' rights under their mortgage. We are of opinion that the judgment of the court below is correct, and it is affirmed.

SHORNICKE *et al.* v. BENNETT.

(Supreme Court of Texas. May 9, 1890.)

APPEAL—REVIEW—ERRORS WAIVED.

1. Where a petition states a good cause of action, and the defendant makes default, he cannot object on appeal that the evidence was insufficient to sustain the judgment.
2. Objection to the admission of evidence cannot be made for the first time on appeal.

Appeal from district court, Jones county.
A. H. Kirby, for appellants. Cockrell & Cockrell, for appellee.

HENRY, J. This was an action of trespass to try title brought by the appellee against the appellants George Shornick and Sam Shornick, and other defendants who have not appealed. A judgment by default was rendered against appellants, which was made final against them and the other defendants upon a trial before the court without a jury, for the land in controversy, and costs of suit. The only errors assigned relate to the admission of certain evidence on the trial, and to the insufficiency of the evidence to sustain the judgment. Plaintiff's petition showed a good cause of action, which was admitted by the default. If there was error in admitting evidence at the trial, appellants, not having then objected to it, cannot be heard to do so now. The judgment is affirmed.

GULF, C. & S. F. RY. CO. v. DAWKINS.

(Supreme Court of Texas. May 9, 1890.)

MASTER AND SERVANT—LIABILITY FOR SERVANT'S NEGLIGENCE—INSTRUCTIONS.

1. In an action against a railroad company for personal injuries received by plaintiff while riding on a hand-car which was furnished by the company for the exclusive purpose of carrying its employees to and from their work, and on which such employees, without the knowledge of the company's officers or agents, were carrying the plaintiff on an errand in no way connected with the business of the company, it is reversible error to instruct the jury that it must appear from the evidence that plaintiff had notice of the company's rules against carrying passengers on such hand-car, and that the company could be bound by the acts of its servants done within the scope of their apparent authority, and that the jury might take into consideration the habitual disregard of the company's rules, by consent of its officers and agents, in determining whether such rules had been abandoned.
2. In such action it is error to refuse to instruct the jury that the burden of proof is on the plaintiff to show that such employees were acting within the scope of their authority, and that if they were at the time of the accident using the hand-car for private business of their own, in which

the company had no interest, then they were not acting within the scope of their authority.

Appeal from district court, Brown county.

Action by Dallas Dawkins against the Gulf, Colorado & Santa Fe Railway Company, for personal injuries. Plaintiff obtained judgment. Defendant appeals.

J. W. Terry, for appellant. *Harrell & Wilkinson*, for appellee.

HENRY, J. Appellee was seven years old at the time of his injury. His mother was in the employ of one Hennessy, who was in charge of a section of appellant's road. Hennessy was going to Brownwood on a hand-car belonging to the railroad company, and over its railway, to get and convey to Mrs. Dawkins, the mother of appellee, some property belonging to her; and appellee was taken along, with the consent of his mother, to point out the property. On the way, from some unexplained cause, unless it was from his falling asleep, appellee was thrown from the car and injured. The hand-car was provided by the railroad company for the purpose of carrying the employees of the company, and their tools, to and from the work of the men, and for no other purpose. The evidence shows that the employees of the defendant railroad company, who had charge of the hand-car, had frequently used it as a conveyance to Brownwood when going there upon their own business, and had often allowed persons not connected with the company to ride on it, but that the rules of the company forbade its being used for the transportation of passengers, and that no passenger fares were ever paid. Upon the verdict of a jury, judgment in favor of plaintiff for \$5,000 was rendered.

Appellant complains of charges given by the court in the following particulars: "(1) That it must appear from the evidence that plaintiff had notice of defendant's rules against passengers being carried on the hand-car; (2) that the defendant would be bound by the acts of its servants done within the scope of its apparent authority; (3) that when a railroad company has adopted rules forbidding the use of certain cars by passengers, but, by consent of officers or agents authorized to give consent, they are habitually disregarded, the jury are authorized to take such action of said company into consideration in determining whether or not such rules have been abandoned or relaxed by the company."

We do not think that any of these charges were warranted by the facts proven. It is clear that defendant was not engaged in carrying passengers on the hand-car, and that plaintiff did not occupy that relation to the defendant company. The effect of the charge first objected to was to make appellee's ignorance of defendant's rules upon the subject constitute him a passenger. There is nothing in the evidence tending to show that defendant had ever authorized its servants who had charge of the hand-car to transport passengers upon it; nor is it shown that any per-

son was ever carried upon it as a passenger within the knowledge of any agent of the company except those employees who had charge of it to do other work, and who were themselves, in the very act, guilty of a violation of the orders of the corporation. It is evident that the persons carried were not in any respect carried as passengers. There being nothing in the evidence to show that the carriage of plaintiff was apparently by the authority of the defendant, the jury should not have been charged as if there was.

As the evidence showed that the rules of the corporation forbade the use of hand-cars by passengers, and as there was no evidence tending to show that any officer or agent of the company except such as were intrusted with the car to do their own work, and who were themselves guilty of the violation of such orders, had notice of their violation, the court should have given the following instructions at the request of the defendant: "The burden of proof is on the plaintiff to show by a preponderance of evidence that, at the time of the negligent acts complained of, the foreman and sectionmen were acting within the scope of the authority conferred upon them by the defendant." "If you believe from the evidence that, at the time of the accident to the plaintiff, the section foreman and sectionmen were not engaged in performing any work of the defendant, or discharging any duty in the defendant's service, but that they were going to Brownwood on the private business of their own, and of Mary Dawkins, in which private business the defendant company had no interest or concern, and that the trip of the hand-car in question was exclusively for the purpose of transacting such private business, then you are instructed that Hennessy and the sectionmen were not acting in the scope of their employment, and that defendant is not liable for the negligence complained of, and you will find for the defendant." While the tender years of plaintiff would have excused him, if he had occupied the relation of a passenger to defendant, from the effects of his own contributory negligence, and all rules and regulations applicable to an adult, they cannot be allowed to have the effect of creating that relation. The transportation of passengers on hand-cars is known to be extrahazardous, and corporations who find it necessary to make use of them for other purposes must be permitted to decline the more hazardous employment. If, as in the case of *Prince v. Railway Co.*, 64 Tex. 146, it has no regulations against traveling on a hand-car, and the agents in charge of it violate no order when they permit persons to travel on it, and it is sometimes used for the transportation of passengers invited by proper agents to travel upon it, the corporation will be liable for injuries to a person riding as a passenger upon one, notwithstanding that mode of carrying passengers may not be in general use by it. The judgment is reversed, and the cause remanded.

DAWKINS v. GULF, C. & S. F. RY. CO.*(Supreme Court of Texas. May 9, 1890.)***MASTER AND SERVANT—LIABILITY FOR SERVANT'S NEGLIGENCE.**

The fact that railroad employes, while using a hand-car for their private business contrary to the rules of the company, allow a young child to ride on the car, whereby he is injured, does not make the company liable.

Appeal from district court, Brown county.

Harrell & Wilkinson, for appellant. *J. W. Terry*, for appellee.

HENRY, J. This suit involves the same facts as did the case of *Dallas Dawkins* against the same defendant, ante, 982, (this day decided.) Appellant is the mother of *Dallas Dawkins*, and sues for damages for expense of medical attention and for nursing him, and for loss of his services during minority. Judgment was rendered for the defendant upon the verdict of a jury.

Plaintiff, as a witness, testified that the child went upon the hand-car to make the trip on her business, and with her knowledge and consent. No negligence or cause of the injury is proved, except that of permitting such a young and inexperienced child to ride on such a car. The judgment is affirmed.

PERRY et al. v. STEPHENS.*(Supreme Court of Texas. May 9, 1890.)***ASSIGNMENT FOR BENEFIT OF CREDITORS—APPEAL—SALE—WRITS—VENUE.**

1. *Sayles' Ann. St. Tex. art. 65f*, provides that the bond of an assignee shall be approved by either the district or county judge, but contains no provision as to the approval of the bond of a substituted assignee. *Held* that, as the district judge is authorized by statute to remove an assignee and appoint his successor, he is the proper person to approve the bond of the successor.

2. Where an assignee is removed by the district judge, his successor has the right to sue for a tortious taking of the assigned property from the former assignee.

3. There being no statutory provision for an appeal from an order of a district judge removing an assignee, such an order is not suspended by giving notice of appeal and filing bond.

4. The creditor of an insolvent, when sued by the assignee for attaching the assigned property, cannot convert the action into an equitable proceeding for the adjustment and distribution of the trust fund.

5. The fact that, after such attachment was levied, the assignee agreed not to sue the creditor therefor upon the latter giving a bond of indemnity, and agreeing to buy up the other claims of the insolvent, does not amount to a sale of the attached goods to the creditor.

6. The fact that an officer has made return to a writ of attachment showing his action in the premises does not prevent him from testifying, in an action brought by one not a party to the writ, as to his seizure and disposition of the goods levied on.

7. Under *Rev. St. Tex. art. 1198, § 8*, which provides that an action for a trespass may be prosecuted in the county in which the cause of action accrued, an action for the wrongful seizure of property under a writ of attachment may be brought in the county where the seizure took place, though none of the defendants are residents of such county.

Appeal from district court, Willbarger county.

Kearby & McCoy, for appellants.

GAINES, J. Appellants *A. & E. Mitten-thal* caused a writ of attachment from the district court of *Dallas county* to issue to *Willbarger county* against the property of one *Tobolavsky*, and placed it in the hands of their co-appellant, *Perry*, as a constable of the latter county. By virtue of the writ, *Perry* seized a stock of goods at the town of *Harald* which had belonged to the defendant in the writ. A few hours before the levy, *Tobolavsky*, at *Vernon*, the county-seat of the county, made an assignment of his property for the benefit of his creditors. One *Shayne* was made the assignee, and qualified as such, but was subsequently removed by the district judge, and the appellee appointed in his stead. Appellee brought this suit against appellants to recover damages for the seizure and conversion of the goods, and recovered a judgment for their value, from which this appeal is prosecuted.

The defendants pleaded to the jurisdiction of the court on the ground that no one of them was a resident of *Willbarger county* at the time the suit was brought. The pleas were treated as exceptions, which in substance they were, and were overruled. The statute provides that an action for a trespass may be prosecuted in the county in which the cause of action accrued. *Rev. St. art. 1198, § 8*. The goods were seized in *Willbarger county*, and their seizure was a trespass, within the meaning of the statute. *Willis v. Hudson*, 72 Tex. 598, 10 S. W. Rep. 713.

It is, however, contended that if it was a trespass the cause of action remained in the first assignee of the goods, who had the legal title to them at the time of his removal, and did not pass to his successor, the plaintiff in this suit. But we are of opinion that all the rights of property and of action were transferred to the plaintiff by the removal of *Shayne*, and the appointment and qualification of the present assignee, and that the latter had the right to sue.

It is further contended that the suit should have been abated because the bond of the plaintiff was not properly approved. His bond was approved by the district judge, who removed his predecessor and appointed him. The statute provides that the bond of the first assignee shall be approved either by the judge of the county court of the county in which the assignee resides, or by the judge of the district court of the district in which such county is situated. *Sayles' Ann. St. art. 65f*. It does not expressly provide who shall approve the bond of his successor in case there be one. But, if it was not intended that either should have authority to approve the latter bond, it was certainly intended that the judge who orders the removal and makes the appointment should have that power. *Shayne* was removed by the district judge in vacation. This was in accordance

with the statute, and was not a judgment of the district court, from which an appeal could be taken under the statutes regulating appeals from that court. The power to remove an assignee is a special authority conferred upon the judge merely as judge, and not as a court, and no appeal from his order is provided for by the statute. Shayne's notice of appeal and bond were nullities, and did not suspend the order removing him.

It was not error to permit appellant Perry to testify as to his seizure and disposition of the goods levied upon by him, although he had made a return on the writ showing his action in the premises. The plaintiff in this suit was not a party to the writ, and is neither bound nor affected by the officer's return. The same is to be said as to the objection to the testimony of Hammond.

It is assigned that the court erred in admitting in evidence the deed of assignment over the objection that it was not properly acknowledged. There is no specific defect in the acknowledgment pointed out in the bill of exceptions or in the brief. As it appears in the record, it is strictly in accordance with the statute.

It is claimed that the judgment is erroneous because the proof showed that after the levy the defendants A. & E. Mittenthal had purchased the goods in controversy from Shayne while he was assignee. The facts relied upon to establish a purchase are that Shayne demanded the goods of Mittenthal, and that he refused to release the levy; that thereupon Mittenthal proposed to Shayne that he would buy up the other debts against the assigned estate, and would pay therefor 40 cents on the dollar,—his estimate of their value,—and that, if Shayne would not sue for the goods, he would execute to him a bond for indemnity. These terms were agreed to by the latter, and the bond of indemnity executed. The court did not err in holding that this transaction passed no title, legal or equitable, in the goods to defendants A. & E. Mittenthal.

The defendants A. & E. Mittenthal alleged in their answer that they were the holders of all the claims against the assigned property except a few, which amounted in the aggregate to a small sum, and prayed the court to fix the amount of this indebtedness to the end that they might pay it, and thereby defeat a recovery. The court did not err in disregarding this answer. The plaintiff held the legal title to the property of the assigned estate, and it was his right and duty to collect the assets, and distribute them among the creditors. This was an action against trespassers for a seizure of property. They occupied in the suit the position of mere wrong-doers, and were not entitled to convert the action into an equitable proceeding for the adjustment and distribution of the trust fund. If the Mittenthals had become the owners of all the claims against the estate, it does not follow that, by showing the fact, they could have prevented a recovery

in this action. The assignee had rights which the court would have been bound to respect. There was no error in the proceedings, and the judgment is affirmed.

WESTERN UNION TEL. CO. v. YOUNG.

(Supreme Court of Texas. May 9, 1880.)

TELEGRAPH COMPANIES—DELIVERY OF TELEGRAM.

A telegraph company which has received a message directed to one person in the care of another, and has tendered it to the person in whose care it was to be delivered, is under no obligation, on his refusing to receive the message, to find the addressee, and deliver it to him.

Appeal from district court, Grayson county.

Stemmons & Field, for appellant.

GAINES, J. This action was brought by defendant in error to recover of plaintiff in error damages for an injury to the feelings of his wife alleged to have resulted from the failure of the company to deliver to her a telegraphic message informing her that her mother was dying. It was claimed that by reason of the failure the plaintiff's wife was deprived of the opportunity of attending her mother's funeral, and that she was thereby caused great mental distress. The message was directed to "Mrs. N. Young, care of W. R. Henry & Co., Fort Scott, Kansas." The evidence showed that Mrs. Young did not receive the dispatch until it was too late for her to reach the place of her mother's death before the burial. But there was evidence to show that, on the morning of the day it was received for transmission, it was delivered to W. R. Henry, of the firm of W. R. Henry & Co., and that he declined to forward it, and handed it back to the messenger.

The court instructed the jury, in effect, that, if the defendant's agent at Fort Scott tendered the message to W. R. Henry, and he declined to receive it, and gave the messenger such directions as would have enabled him to find plaintiff's wife by the exercise of reasonable diligence, then it was the duty of the agent to use such diligence to find and deliver the message to her. We think the court erred in giving this instruction. The liability of the company must be determined by the terms of its contract. Its obligation was not to deliver to W. R. Henry & Co. and to Mrs. Young, but to deliver to them as her agents, properly addressed to her, to be dealt with by them as they deemed best. The direction to "Mrs. N. Young, care of W. R. Henry & Co.," has the same meaning and legal effect as it would have had if the direction had been "to W. R. Henry & Co. for Mrs. Young." The company contracted to deliver to W. R. Henry & Co. for the benefit of plaintiff's wife; and, when they delivered to a member of that firm, their liability was at an end. The court should have so charged the jury.

The other questions presented by the brief of the plaintiff in error have been so frequent-

ly decided by this court adversely to its contention that they require no consideration. For the error in the charge of the court which we have indicated the judgment is reversed, and the cause remanded.

WESTERN UNION TEL. CO. v. KENDZORA.

(Supreme Court of Texas. May 9, 1890.)

TELEGRAPH COMPANIES—DAMAGES.

In an action for failure to deliver a message summoning a physician to attend plaintiff's wife, who died two days later, plaintiff cannot recover for loss of his wife's services where there is no evidence that her life could have been saved had the message been promptly delivered.

Appeal from district court, Parker county.
Stemmons & Field, for appellant. *E. P. Nicholson* and *J. L. L. McCall*, for appellee.

GAINES, J. The appellee's wife being sick, he caused a telegraphic message addressed to Dr. Haney, Millsaps, Tex., summoning him to her bedside, to be delivered to appellant's agent at Brazos. The message was received by the agent for transmission, and was paid for, but was not delivered to the physician. Dr. Haney had visited appellee's wife some 10 days previous to the day on which the dispatch was received by the company's agent. The message was dated on the 26th of December, and Mrs. Kendzora died at about 2 o'clock on the morning of the 28th. Dr. Haney, not having received the message, did not attend her. He had promised appellee to attend upon receiving a dispatch requesting him to do so. Appellee brought this suit against appellant for breach of the contract to deliver the message, alleging his damages to consist in the loss of his wife's services, and in mental suffering resulting from that breach. The only evidence tending in any degree to show that the physician could have saved Mrs. Kendzora's life was that of the plaintiff himself, whose testimony in reference to that matter was as follows: "Witness saw that his wife was growing worse, and sent for Dr. Haney, believing that he could, by his skill as a physician, save her life; and it greatly affected him mentally to think that he had no physician with her," etc. The court charged the jury as follows: "To authorize you to find for plaintiff for the loss of the services of his wife, you must believe from the evidence that such loss of services was occasioned by the failure of the defendant to transmit and deliver the message to said Dr. Haney; and, unless you so believe from the evidence, you will not find anything for the plaintiff for the loss of the services of his wife." The court also refused charges asked by the defendant to the effect that the jury should not allow such damages. We think the court erred in giving the charge quoted, and in refusing counter-charges. There was no evidence that should have been considered by the jury tending to show that Mrs. Kendzora would not have died if the message had been promptly delivered. At

the time of her death, she had been sick three weeks; and, when Dr. Haney saw her, 10 days before, she had typhoid pneumonia. In the state of the evidence before the jury, it was a mere matter of speculation whether she was not beyond the reach of human skill when the message was delivered to the company. For the errors indicated the judgment is reversed, and the cause remanded.

BROWNSON et al. v. REYNOLDS et al.

(Supreme Court of Texas. May 9, 1890.)

NEW TRIAL—BY SUIT IN EQUITY.

In an action of trespass to try title, the plaintiff, being unable to find a certain deed which constituted a link in his chain of title, relied upon a certified copy of its record, which was excluded by the court, and judgment rendered for defendant. Afterwards the deed was found, and the plaintiff brought suit to set aside the judgment. Held, that he was not entitled to such relief, since he might have averted the judgment by taking a nonsuit.

Appeal from district court, Atascosa county.

Browne & Beasley, for appellants.

GAINES, J. This was an original action, brought by appellants against appellees, for the purpose of setting aside a judgment of the district court rendered at a former term in a cause in which the appellants were plaintiffs, and appellee Brownson was defendant, and of obtaining a new trial of the case. A demurrer to the petition in the present suit was sustained, and that ruling is now assigned as error. The allegations in the petition show that the former suit was an action of trespass to try title to 640 acres of land, that the land had been patented, and that the plaintiffs had a regular chain of title from the patentee down to themselves. A link in that chain is a deed from Lee, the patentee, to one Rose. It is alleged that, at the time of the trial of the former suit, that deed had been lost; that, after diligent search, it could not be found; and that consequently the plaintiffs went to trial relying upon a certified copy from the record of deeds of Bexar county. It was further averred that, when the copy was offered in evidence, it was objected to by the defendants upon sundry grounds, which are stated in the petition, and was by the court excluded, and that thereupon the plaintiffs' counsel permitted a judgment to be rendered against them, without offering to introduce in evidence the subsequent deeds under which they claimed. It is also alleged that the case was not appealed, but that it was agreed between the parties that the affirmance or reversal of the judgment should depend upon the action of the supreme court upon another case, involving the same questions, tried at the same term. It is also averred that since the disposition of the cause, and the adjournment of the term at which the judgment was rendered, the plaintiffs had discovered the original deed in the hands of a third party, who had no connection with the title, and in

whose hands they had never had any reason to suspect it to be.

It is a rigid rule that courts of equity will not grant a party to a judgment a new trial when the failure to have a full and fair presentation of his case has resulted from the negligence or mistakes of his counsel. Public policy demands that, in the absence of fraud on the part of his counsel, the party should be as fully concluded by the act of his attorney as if he were acting for himself. It is also a fixed rule that a court of equity will not interfere to set aside a judgment, and grant a new trial, except upon a showing of strict diligence in the prosecution of the cause, and upon proof that, after doing all that such diligence required to be done, he had been deprived, by fraud, accident, mistake, or other uncontrollable circumstance, of the opportunity of properly presenting his case upon the trial; and if, after it becomes apparent that he must fail in his suit, he fails to avail himself of all means at his disposal to avert the judgment, and to exhaust every legal remedy to vacate it after it has been rendered, relief will be denied. That the complainant has a meritorious case, and that he has been compelled to suffer an adverse judgment by circumstances wholly beyond his control, are the fundamental grounds upon which the equity to demand a new trial must rest. Have the appellants, by the allegations in their petition, shown such a case? We think not. In the first place, when the court, upon the trial of the original suit, excluded the certified copy of the deed, it was certainly possible to have averted the judgment. It is probable that if the counsel had claimed surprise, and moved to withdraw the announcement, the court would have granted the motion. If the ground of the exclusion of the copy was that the proper predicate had not been laid for the introduction of secondary evidence by the affidavit of both of the plaintiffs, and it had been made to appear that that difficulty could be removed by procuring such affidavits, it would have been proper to have granted such a motion. If the record was defective, and the copy in any event inadmissible, the judgment could and should have been avoided by taking a nonsuit. If the ruling of the court was not clearly correct, its correctness could have been tested by taking a nonsuit, followed by a motion to set it aside for the supposed error, and an appeal to this court. If the ruling was wrong, an appeal properly presenting the question would have secured relief, and rendered the resort to an equitable action unnecessary. The inference to be deduced from the allegations in the petition is that the case was so defectively prepared for appeal that it did not present the meritorious question involved. The result of the appeal by which the validity of the judgment here sought to be set aside was to be determined, under the agreement of the parties, is not alleged, and the presumption is that it was without effect.

In *Vardeman v. Edwards*, 21 Tex. 737, it

is said: "In general, where it would have been proper for a court of law to have granted a new trial if application had been made while the court had power to do so, the court of chancery will afford its aid, and grant it, if the application be made upon grounds arising after the court of law ceased to have power to act. * * * And in general the court will be governed by the same principles in passing upon the merits of the application by which the court of law would have been governed." The proposition is expressly stated as a general rule, and the statement implies that it has its exceptions. If the original deed had been discovered during the term, and the application had been made before the adjournment, the new trial should have been rendered. But here the plaintiffs are asking relief against a result which they could have averted by proper procedure. Besides, it is not shown by the petition that the judgment would have been reversed in this court had the case been so prepared as to properly present for revision the ruling of the lower court, and had an appeal been properly taken from the judgment. Equity will not interfere when the complainant had a legal remedy, and has failed to avail himself of it. We are of opinion, therefore, that the court did not err in sustaining a demurrer to the petition, and the judgment is accordingly affirmed.

KAUFFMAN *et al.* v. WOLF.

(*Supreme Court of Texas. May 9, 1890.*)

ASSIGNMENT FOR BENEFIT OF CREDITORS—ACTION ON ASSIGNEE'S BOND—LIMITATIONS.

Under *Sayles' Tex. Civil St. art. 65f*, which provides that the creditors of an insolvent may bring suit on the assignee's bond, against him and his sureties, for any breach thereof, the statute of limitations begins to run in favor of the sureties from the time the assignee breaks the condition of his bond, and not from the time that judgment is recovered against him therefor.

Appeal from district court, Milam county.

Robert G. Street, for appellants. *E. L. Antony*, for appellee.

STAYTON, C. J. On January 22, 1881, Hudson & Son made an assignment, under the statute, for the benefit of such of their creditors as would accept under it, and release them. C. E. Wynne was appointed assignee, and qualified on January 31, 1881, by giving bond required by the statute, with Julius Kauffman, Julius Runge, and J. S. Perry as sureties, conditioned for "the faithful discharge of his duties as assignee, and to make proportional distribution of the net proceeds of said estate among the creditors entitled thereto." On October 1, 1881, the assignee had in hand a fund with which to pay a dividend to accepting creditors, and proceeded to do so; but in doing this he paid to P. J. Willis & Bro., as consenting creditors, a large sum of money to which they were not entitled, because they had not properly established their claim. To recover the sum so

misappropriated, consenting creditors brought an action against Wynne on April 2, 1883; the sureties not being made parties. In that case a judgment was obtained, which on appeal was decided in favor of the creditors as to the fund in issue in this case. *Wynne v. Hardware Co.*, 67 Tex. 40, 1 S. W. Rep. 568. On March 24, 1887, this action was brought by Wolf, who in the former suit was appointed assignee in place of Wynne, removed, against Wynne and the sureties on his bond; and it may be deemed an action on the former judgment as well as on the bond executed by Wynne and his sureties. The sureties interposed as a defense the statutes of limitation applicable to actions for debt founded on contracts in writing, which was overruled, and judgment entered against all the defendants. Defendant Perry pleaded that, by reason of an agreement between himself and co-sureties, they sustained to him the relation of principals; and this the court found to be true, and entered a judgment in accordance.

In so far as Perry is concerned, on payment of a sum of money by consent of all parties, he was discharged from all further liability. This matter has no bearing on the question before us. An appeal is prosecuted by the sureties Kauffman and Runge.

More than four years having elapsed between the misappropriation of the money, and the institution of this action, the cause of action was barred, unless limitation only ran from the time the former action was disposed of by this court. That is the proposition asserted by counsel for appellee. The statute regulating assignments provides that, "whenever any assignee shall have in his hands funds sufficient to pay ten per cent. of the debts due by the assignor, he shall make a *pro rata* distribution of the same among said creditors." *Sayles' Civil St. art. 65p*. At the time Wynne made the *pro rata* payment in which Willis & Bro. participated, he had and distributed a fund making payments largely in excess of 10 per cent. of amount due consenting creditors. The condition of the bond required by the statute, and executed by Wynne and his sureties, is as before stated; and the statute further provides that the bond "shall be filed with the county clerk of the county in which such assignee resides, and shall inure to the benefit of the assignor and the creditor or creditors, who may maintain an action thereon against such assignee and sureties, in his or their own names, jointly or severally, for any breach thereof, or violation of this law, by reason of which such assignor or creditor shall sustain damage." *Id. art. 65f*. The payment made by Wynne to Willis & Bro., although made in the utmost good faith, was unlawful, and amounted to a misappropriation of so much of the fund, which other creditors, at the time that misappropriation was made, were entitled to have paid to themselves in proportion to their several established claims. This was a breach of the bond which bound

the assignee for the "faithful discharge of his duties," as it was a breach of his obligation "to make proportional distribution of the net proceeds of said estate among the creditors entitled thereto." That breach of the bond gave to any one or more of the creditors the right to "maintain an action thereon against such assignee and sureties in his or their own names, jointly or severally, for any breach thereof." Creditors had cause of action as soon as the fund was misappropriated, and might then have brought the action against the sureties as well as principal. If the beneficiaries who were authorized to sue are barred as well as the assignors, then the substituted assignee is barred. It was not necessary by action to establish *deceit* against the principal before action could be maintained against the sureties. It is contended, however, that the judgment against Wynne is binding on his sureties, and that for this reason limitation did not run in their favor until the affirmance of the judgment rendered against him in the former action. There is much conflict of decision as to the extent to which a judgment against a principal alone will be evidence of the liability of a surety, and as to how far such a judgment will bind him; but it is unnecessary in this case to enter into a discussion of that question, for it is too clear that in a case like this a judgment against the principal could not be given a greater effect than to fix the liability, and extent of liability, of the principal. Whether it should be given as against sureties this effect, it is unnecessary to determine. The statute applicable to this case declares that "there shall be commenced and prosecuted, within four years after the cause of action shall have accrued, and not afterwards, all actions or suits in court." The cause of action made the foundation of this suit accrued on October 8, 1881, and more than four years elapsed between that date and the bringing of this action, and it was clearly barred. The fact that the liability of the principal was absolutely fixed by the former judgment is a matter of no consequence on the question of limitation; nor is it a matter of any consequence, in this respect, what may be the effect of that judgment as evidence.

We are referred to the case of *Little v. Com.*, 48 Pa. St. 341, as an authority for the proposition that limitation did not run in favor of the sureties until the affirmance of the former judgment against Wynne; but there was no question of limitation in that case. If the bond which creates the sole obligation of the sureties had been given in the former suit, and conditioned that the principal and sureties would satisfy the judgment therein to be rendered, then a case would be presented in which the statute would not run until the determination of that action; for until then there could be no breach. With sureties, as other debtors, the statutes of limitation will run from the time a cause of action accrues against them. *Wofford v. Unger*, 55

Tex. 483; *Ratcliff v. Leunig*, 30 Ind. 289; *Murfree*, Off. Bonds, § 784; *Brandt*, Sur. § 120. The establishment of any other rule would annul the statute. The defense of limitation urged by the sureties should have been sustained; and the judgment of the court below will be reversed, and the cause dismissed as to the sureties *Kauffman, Runge & Perry*, but remanded as to the defendant *Wynne*.

MANNEY et al. v. ALLEN et al.

(Supreme Court of Texas. May 9, 1890.)

WIDOW'S ALLOWANCE—TITLE—ESTOPPEL—INFANCY.

1. An order of the probate court setting apart certain land of a decedent to his widow as an allowance in gross, free from all claims against the estate, does not give the widow the right to sell the interest of decedent's children in such land.

2. Where land in which a minor has an interest has been exchanged by his co-tenant for other land, and he, after reaching majority, and with a full knowledge of the facts, demands and receives part of such other land, he cannot claim an interest in the land given in exchange.

Appeal from district court, Hill county.

B. D. Tarlton, for appellants. *W. L. Booth* and *McKinnon & Carlton*, for appellees.

STAYTON, C. J. Plaintiffs are the heirs of *Harvey H. Allen*, who, during his marriage with *Mrs. Hancock*, who is the mother of plaintiffs, acquired title to the land in controversy. Defendants claim title through *Mrs. Hancock* and her present husband. *Harvey H. Allen* died in 1862, and administration was had on his estate in Harris county. For the purpose of showing title, defendants offered to read in evidence the following order entered in the probate court for Harris county: "Taken from the minutes of the July term, A. D. 1862. Estate of *H. H. Allen*. This day appeared in open court *Electa Chase Allen*, the wife and administratrix of *Harvey H. Allen*, deceased, who, for the allowance made for her and her children at the last term of the court, has made choice, in the lieu thereof, of the following described property, which is a part of the inventory filed by her in this court, to-wit: One patent for 640 acres of land, the same being for the head-right of *O. B. Monroe*, situated in Navarro county, in the state of Texas; also one patent for 640 acres of land to the heirs of *B. De Barr*, situated in Hill county; also one patent to the heirs of *J. W. Eldridge*, lying and situated in Limestone county; also one patent for 320 acres of land to the heirs of *E. D. Rhotan*, situated and lying in Palo Pinto county. It is therefore ordered, adjudged, and decreed that the same be, and is hereby, set apart to said *Electa Chase Allen* as an allowance in gross, in accordance with said order of court, for her, and for her heirs and assigns, free from all and every claim and demand of whatever character against the estate of *Harvey H. Allen*, deceased, sub-

ject, however, to the acts of the administrator only." Counsel for plaintiff objected to the introduction in evidence of the order "because the said order and decree showed on its face that the county probate court of Harris county had no jurisdiction to make the disposition of the property made in said order, and mentioned therein, and that said order and decree was void because real estate could not be set aside in lieu of a year's allowance for the widow and children." The court sustained the objection, and excluded the decree, and defendant's counsel excepted. The court, in approving defendants' bill, explains (as its reason, evidently, for rejecting the evidence) that "no issue as to this evidence was admitted to the jury, and no injury was done the defendants." The charge of the court virtually withdrew this issue from the jury.

It is not made to appear whether the property named in this order, which embraces the land in controversy, was set apart to *Mrs. Allen* and her children, the plaintiffs, in lieu of the year's allowance, or in lieu of exempt property not existing in kind. If it was the former, the law did not empower the court to set apart real estate, but directed that the allowance be "either in money out of the first funds of the estate that may come to his hands, or in such personal effects of the deceased as such widow or guardian may choose to take at the appraisalment, or a part thereof in each, as they may select." *Pasch. Dig. art. 1304*. If it was in lieu of exempt property, homestead or other, not existing in kind, the evidence would have been immaterial; for the interests of the widow and children in the property so set apart would not have been affected by that action of the court, for the statute "provided that, if the estate of such decedent be not insolvent, nothing in this section contained shall be so construed as to prohibit the distribution and partition of said estate among the heirs and distributees thereof, including the portion herein provided to be set aside for the use of the widow and children." *Id. art. 1305*. It is not shown that the estate was insolvent; but, had it been, the property would have vested in the widow and children, they being then minors, just as it would had it not been so set apart. The only effect of the allowance would have been to withdraw so much of the estate from administration, and from the claims of creditors. As community property, one-half of it would belong to the widow, and the other half to the children, who are the plaintiffs. The order would have conferred on *Mrs. Allen* no power to sell the interest of her children. The lands in controversy, with many other tracts and some land certificates, which presumably all belonged to the community estate of *Harvey H. Allen* and his wife, which the jury found were of the value of \$6,000, were conveyed by *Mrs. Allen*, after her marriage to her present husband, to *R. J. and C. J. Davis*, who in exchange conveyed to her property in Gal-

veston which the jury found was then of the same value. These conveyances seem to have been with warranty of title, and were made while Emmett B. Allen, one of the four plaintiffs, was a minor. The other defendants claim through the conveyance made to R. J. and C. J. Davis with warranty of title. The inference from the record is that the deed to Mrs. Hancock (formerly Allen) for the property in Galveston recited that the consideration therefor was the land and land certificates conveyed to R. J. and C. J. Davis. After Emmett B. Allen reached majority, his mother and her husband conveyed to him a part of the property which had been conveyed to her by R. J. and C. J. Davis, and he relinquished to her any further interest or claim in or to the Galveston property. The conveyance to him was without valuable consideration, except as this may be found in his relinquishment of further claim to the Galveston property. It is alleged that Mrs. Hancock and her husband are insolvent; and R. J. Davis, in this action, is seeking to enforce against them their warranty of title to the land in controversy, as are those who hold under him seeking to recover on his warranty, if plaintiffs recover the land in controversy. Instructions to the effect that Emmett B. Allen was not entitled to recover in this case if he asserted claim to a part of the Galveston property, on account of the fact that it was paid for with lands in which he had an interest, and on this ground received a deed to a part of that property, were asked and refused; and charges were given which excluded that question from the jury. We are of opinion that if, with a full knowledge of all his rights, after reaching majority, he demanded and received a part of the Galveston property on the ground that it was paid for with land, and land certificate in which he had an interest, he ought to be denied a recovery under the facts of this case. *Goodman v. Winter*, 64 Ala. 411; *Pursley v. Hays*, 17 Iowa, 312; *Drake v. Wise*, 36 Iowa, 476; *Deford v. Mercer*, 24 Iowa, 118; *Smith v. Warden*, 19 Pa. St. 430; *Maple v. Kussart*, 53 Pa. St. 349; *Willie v. Brooks*, 45 Miss. 542; *Parmelee v. McGinty*, 52 Miss. 475; *Handy v. Noonan*, 51 Miss. 166; *O'Conner v. Carver*, 12 Heisk. 436. He cannot, in conscience, hold the price, and recover the thing for which it was paid. While the evidence as to some of the facts referred to may not conclusively show the transaction between him and his mother, it was such as required a submission of the matter to the jury.

Other matters, relating to the charge and the form of the verdict, need not be considered, further than to say that the verdict was in proper form, and the charge complained of, other than that considered, not such as could have injuriously affected the right of appellants under the issues submitted. For the error noticed the judgment will be reversed, and the cause remanded. It is so ordered.

JONES v. STATE.

(Court of Appeals of Texas. June 18, 1890.)

CRIMINAL LAW—EVIDENCE—CONFESSIONS.

Where the evidence consists almost entirely of confessions of the accused, which contain statements in his favor not proved to be false, it is error to refuse to instruct that the state is bound by such statements, unless they are shown by the evidence to be untrue.

Appeal from district court, Navarro county; RUFUS HARDY, Judge.

Croft & Croft and A. W. O. Hicks, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. This conviction is for murder in the second degree, and is based mainly upon the admissions made by defendant soon after the homicide. He stated, in substance, that he killed deceased, but that he killed him in self-defense. There was no evidence adduced by the prosecution directly contradicting the defendant that he killed deceased in self-defense. Some slight circumstances were proved by the state, tending to show that the homicide was actuated by malice, and negating the theory of self-defense, but it cannot be said that defendant's claim of self-defense was disproved by the state.

On the trial appellant's counsel requested a special instruction, as follows: "When the admissions or confessions of a party are introduced in evidence by the state, then the whole of the admissions or confessions are to be taken together, and the state is bound by them, unless they are shown to be untrue by the evidence; such admissions or confessions are to be taken into consideration by the jury as evidence in connection with all other facts and circumstances of the case." This instruction was refused, and defendant reserved a bill of exception. We think that, under the facts of this case, the instruction was pertinent, correct in principle, and should have been given. We do not wish to be understood as holding that, in all cases when the admissions or confessions of a defendant are admitted in evidence against him, it is necessary to give such or a similar instruction to the jury. What we decide is that, in this case, in which the criminating evidence consists almost entirely of defendant's admissions that he killed the deceased, the instruction should have been given in view of the fact that the exculpatory portion of defendant's statements about the homicide were not shown by the state's evidence to be untrue. We are of the opinion, however, that in all cases where admissions and confessions of a defendant are admitted in evidence against him, and such admissions or confessions contain exculpatory or mitigating statements, it would be proper and just to the defendant to instruct the jury as was requested in this case. *Pharr's Case*, 7 Tex. App. 478; 1 Greenl. Ev. (9th Ed.) §§ 218, 219, 442, 443; 1 Bish. Crim. Proc. §§ 1235, 1236.

Because of the refusal of the court to give said requested instruction, the judgment is reversed; and the cause remanded.

Ex parte McCORKLE et al.

(Court of Appeals of Texas. June 18, 1890.)

HABEAS CORPUS—EXAMINING MAGISTRATE.

It is error for the district court to award the writ of *habeas corpus*, in cases pending before a magistrate sitting as an examining court, until the magistrate, after an examination, has refused to discharge the accused.

Appeal from district court, Hopkins county.
Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. Appellants were arrested upon a warrant issued by a magistrate of Hopkins county based upon a complaint charging them with the theft of certain cattle. They applied to the Honorable E. W. TERRHUNE, judge of the eighth judicial district, for a writ of *habeas corpus*, which was granted; and, upon a hearing thereof, they were remanded to the custody of the officer who had arrested them.

We are of opinion that the writ should not have been granted pending the proceeding before the magistrate. The magistrate who issued the warrant of arrest had jurisdiction, as an examining court, to inquire into the offense charged in the complaint; and it was not proper, and not in contemplation of the law, that another court or judge should defeat or interfere with that jurisdiction. In such case, until the magistrate has, after examination, refused to discharge the accused, the remedy by *habeas corpus* is not available. *Robertson v. State*, 36 Tex. 346; *Ex parte Kittrel*, 20 Ark. 499; *Church, Hab. Corp.* § 90. It is ordered that this proceeding be, and the same is, dismissed, at the cost of the applicants. Ordered accordingly.

ALLEE v. STATE.

(Court of Appeals of Texas. May 28, 1890.)

BAIL-BOND—ESCAPE—JOINT AND SEVERAL LIABILITY.

1. In an action on a bail-bond the sureties answered that the principal was in custody when the forfeiture was declared. In proof of this allegation they showed his conviction of the offense for which he was held, and subsequent incarceration in the penitentiary. *Held*, that it was competent for the state to show by evidence in rebuttal, without pleading it, that previous to declaring of the forfeiture he had escaped, and had since been at large.

2. The liability of sureties on a bail-bond is both joint and several; and in an action thereon the fact that there is a variance between the judgment *nisi* and the citation describing it, one reciting a joint, and the other a joint and several, liability, does not render the judgment incompetent as evidence, the variance being immaterial.

Error from district court, Atascosa county;
 D. P. MARR, Judge.

W. T. Meriwether, for plaintiff in error.
Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. At the May term of the district court of Atascosa county, 1884, Reindardt Schneider was indicted for the theft of horses, and for said charge, on the 22d day of May, 1884, executed his appearance bond, with A. Y. Allee and J. J. Ellison as sureties.

At the April term of the district court of La Salle county the said Reindardt Schneider was indicted for the theft of horses, jointly with one W. T. Kelly, and was on said charge, at the October term of said court, tried and sentenced; and on appeal the sentence was affirmed. On the 23d day of December, 1884, he was duly lodged in the penitentiary at Huntsville, Tex., whence he escaped on the 14th day of May, 1885. At the April term of the district court of Atascosa county, 1886, Schneider's bond, with A. Y. Allee and J. J. Ellison as sureties, cause pending in said court, was forfeited. At the October term of said court, 1887, the cause was tried on the answer of the bondsmen, in which they alleged the trial, conviction, and sentence of their principal, and his incarceration in the penitentiary, as a defense. The state did not specially plead the escape of Schneider in the cause, but relied alone on the forfeiture of the bond. Final judgment against all the parties for the sum of the bond, to-wit, \$500. The defendant, A. Y. Allee, gave notice of appeal. On the 24th day of June, 1889, Allee filed his petition and bond in error, and now on error submits the cause to this court.

It devolved upon the sureties to make good their defense, which was that, at the time the bond was forfeited, their principal was restrained of his liberty by process of law. They established this defense *prima facie* by showing his conviction of a felony, and confinement in the penitentiary. It was competent for the state to prove, in rebuttal, that at the time of said forfeiture said principal had escaped from custody, and was not restrained of his liberty by the state. It was not necessary that the fact of his escape should have been pleaded by the state. It was a fact in rebuttal of defendant's defense, rebutting the allegation in the answer, that said principal was at the time of the forfeiture restrained of his liberty by the state. It was not error, therefore, to admit the evidence mentioned in appellant's bill of exceptions No. 2.

There is no statement of facts in the record, but bill of exceptions No. 2 and other matters in the record show that, at the time the forfeiture was taken, appellant's principal was not in the custody of the state. He had escaped from the penitentiary, was at large, and there was nothing to prevent his appearing in accordance with the terms of his bond; nor were his sureties deprived by the state of the privilege of capturing and surrendering him. Such being the facts of the case, the defense presented by the answer was not valid, and the judgment appealed from is correct. Code Crim. Proc. art. 452; *Cooper v. State*, 5 Tex. App. 216; *Stafford v. State*, 10 Tex. App. 46.

There is no material variance between the judgment *nisi* and the citation. The liability of sureties upon a bail-bond or recognizance is several as well as joint, and it is immaterial whether it be stated in the judgment *nisi*

or the citation to be joint or several, or joint and several. Code Crim. Proc. arts. 290, 306; *Mathena v. State*, 15 Tex. App. 460. It was not error, therefore, to admit the judgment *nisi* in evidence, it being substantially described in the citation. We find no error in the judgment, and it is affirmed.

URESAP v. STATE.

(Court of Appeals of Texas. May 24, 1890.)

BAIL—REQUISITES OF BAIL-BOND.

In a prosecution under Pen. Code Tex. art. 759, prescribing the penalty for the marking and branding by a person of certain enumerated animals, "not being his own, and without the consent of the owner, and with intent to defraud," a bail-bond which simply describes the offense of the principal as "illegally marking and branding" cattle, without giving the essential elements of the offense, is insufficient; "illegal marking and branding" not being an offense *eo nomine* under the Code.

Appeal from district court, Kerr county; T. M. PASCHAL, Judge.

Burney & Burnett, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. "Illegal marking and branding" is not an offense *eo nomine* under our Code. The elements constituting such an offense are that the persons shall mark and brand any of the enumerated animals, the animals "not being his own, and without the consent of the owner, and with intent to defraud." Pen. Code, art. 759. An indictment under this article, to be sufficient, must allege these elements, (*State v. Hall*, 27 Tex. 333,) and these allegations must be proved, (*Fossett v. State*, 11 Tex. App. 40.) An appearance or bail-bond to answer an indictment charging this offense must also contain a description of the offense by its essential elements, since there is no offense of the kind *eo nomine*. Where an offense is not so defined, then it must be described by stating its essential elements so that it will appear that a particular offense against the law is charged against the principal. *Willson*, Crim. St. § 1794. The bail-bond which was forfeited in this case described the offense of which the principal stood charged as "illegally marking and branding one head of neat cattle." It did not state the offense charged in the indictment, nor any offense under our law, and therefore no legal liability could attach under it. The judgment is set aside, and, because no legal forfeiture can be had upon said bond, a further prosecution of the case is dismissed. Reversed and dismissed.

McLAURINE v. STATE.

(Court of Appeals of Texas. May 24, 1890.)

INDICTMENT AND INFORMATION—VARIANCE.

Although, in a prosecution under Pen. Code Tex. art. 680, for wantonly and willfully killing dumb animals, the ownership of the animals need not be alleged, if such allegation is made, proof of ownership must correspond with the allegation.

Appeal from county court, Comanche county; C. E. WILLIAMSON, Judge.

Asst. Atty. Gen. Davidson, for the State.

WHITE, J. This case was a prosecution by information under article 680 of the Penal Code for willfully and wantonly killing dumb animals. In prosecutions for this offense, the law being intended for the protection of the animals themselves, it is not necessary that the indictment or information should allege the ownership of the animals. *Turman v. State*, 4 Tex. App. 586; *Darnell v. State*, 6 Tex. App. 482; *Willson*, Crim. St. § 1168. In the information before us the charge is that the defendant "did unlawfully, willfully, and wantonly kill four (4) cows, the property of L. T. White," etc. It was in proof that the animals did not in fact belong to White, but that they belonged to his wife and her children by a deceased former husband,—that is, they belonged to the estate of Mrs. White's former deceased husband. Defendant requested the court to charge the jury "that it devolves upon the state to prove every material allegation in the information. The allegation of ownership, being descriptive of the offense, must be proved as alleged, and, unless you find from the evidence that such ownership is proved as alleged, you should acquit the defendant." This charge was refused by the court, and is assigned for error upon an exception saved to its refusal.

The rule is that the material allegations which constitute the offense charged must be stated in the indictment, and they must be proved in evidence. But allegations not essential to such a purpose, which might be entirely omitted without affecting the charge against the defendant, and without detriment to the indictment, are considered as mere surplusage, and may be disregarded in evidence. Mr. Bishop says, however: "Not everything unnecessary can be thus rejected. The rule is that, if what is necessary in allegation is made unnecessarily minute in description, the proof must satisfy the descriptive as well as the main part, since the one is essential to the identity of the other. Or, as expressed by STORY, J.: 'No allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can ever be rejected as surplusage.'"

* * * The word or phrase thus needlessly descriptive of the needful thing cannot be rejected, and the variance will be fatal. * * * Ownership must be proved as laid, because it is descriptive of the identity of the offense, distinguishing it from all other instances. Hence, even though needlessly alleged, proof of it appears to be necessary." 1 *Bish. Crim. Proc.* (3d Ed.) §§ 485, 486, 488b; *Willson*, Crim. St. § 1960; *Warrington v. State*, 1 Tex. App. 169; *Rose v. State*, Id. 400; *Allen v. State*, 8 Tex. App. 360; *Simpson v. State*, 10 Tex. App. 681.

The court erred in charging the jury that

it was not necessary to prove ownership as alleged in the information, and also in refusing to give in charge the defendant's special requested instruction as above set out. Reversed and remanded.

LOOKHART v. STATE.

(Court of Appeals of Texas. June 27, 1890.)

LARCENY—ACCOMPLICE TESTIMONY.

In a prosecution for the larceny of certain sheep, there was evidence that the owner subsequently recovered the sheep stolen from one P., and that defendant had traded certain sheep to P., but there was no evidence to identify the sheep so sold to P. with the sheep stolen. *Held*, that the evidence of an accomplice that defendant had stolen the sheep was not sufficiently corroborated to sustain a conviction.

Appeal from district court, McCulloch county; J. W. TIMMINS, Judge.

On rehearing. Conviction for theft of 33 head of Waters' sheep. The proof showed that the sheep were stolen from Waters' pen, and that Waters subsequently recovered them from Parker. It showed that subsequent to the theft the defendant told Waters that he traded 33 head of sheep to Parker, which sheep, he said, he got from Chaffin in a trade. Chaffin testified that, on the morning of the alleged theft, he started with defendant to a certain point in McCulloch county to seek employment in assisting to collect a herd of stampeded cattle; that *en route* they went by a sheep-pen which contained about 33 head of sheep; that defendant turned the sheep out, told him that he (defendant) stole them from Waters' herd, and that he (witness) helped defendant drive them about a mile and a half towards Van Winkle's ranch, where Parker worked; that on the way defendant told witness that, if his parents found out that he stole the sheep, it would cause them much trouble, and requested him (witness) to tell them and others that he (witness) traded the sheep to defendant for a certain brown horse; that witness consented, and did make that statement to Mrs. Lockhart and others, which statement was false.

R. H. Ward and W. Anderson, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. After a closer scrutiny of the evidence in the light shed upon it by the argument and brief of counsel who presented this motion, we are convinced that the evidence is insufficient to support the conviction, and we were wrong in affirming it, which we did without written opinion. If the witness Chaffin was an accomplice in the theft of the sheep,—and of this fact we entertain no doubt, from his own testimony,—his uncorroborated evidence alone does not support the conviction. It is upon his evidence alone that this conviction rests. Is his testimony corroborated in the manner and to the extent required by law? Upon our first examination of the statement of facts, we were of opinion that it was sufficiently corroborated.

We now see that we were mistaken as to the corroboration. There is no evidence in the record which identifies the 33 head of sheep sold by defendant to Parker, and which defendant claimed he had purchased from Chaffin, with the sheep alleged to have been stolen; that is, Waters' sheep. In the absence of this proof, the testimony of Chaffin is without corroboration as to any material fact,—any fact tending to connect the defendant with the theft of the sheep. Wherefore the motion for rehearing is granted, the judgment of affirmance is set aside, and the judgment of conviction is reversed, and the cause remanded for a new trial.

GATLIN v. STATE.

(Court of Appeals of Texas. May 21, 1890.)

GAMING—EVIDENCE.

A conviction for playing cards in a public place will be set aside where there is no evidence connecting defendant with the offense.

Appeal from Coleman county court; J. T. EVANS, Judge.

Defendant, Gatlin, was indicted for playing cards in a public place, in violation of Pen. Code Tex. art. 355. He was convicted, and appeals.

W. L. Vining, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. There is not a particle of testimony in the approved statement of facts which connects appellant with the offense for which he has been convicted. Holtzclaw, the principal witness for the state, testified that "some time during the month of December, 1888, I saw the defendant, J. P. Lynn, playing at a game with cards." No mention is made by any witness of the name of this appellant, Gatlin, in connection with the trial. There being no evidence to support the conviction, the judgment is reversed, and the cause is remanded.

PURCELLEY v. STATE.

(Court of Appeals of Texas. May 31, 1890.)

INDICTMENT—SURPLUSAGE—INSTRUCTION—REFORMING JUDGMENT.

1. Pen. Code Tex. art. 742a, provides that "any person having possession of personal property of another by virtue of a contract of hiring or borrowing, or other bailment, who shall, without the consent of the owner, fraudulently convert such property to his own use, with intent to deprive the owner of the value of the same, shall be guilty of theft." *Held*, it is unnecessary to charge in the indictment an intent to appropriate the property.

2. Where the indictment charged the fraudulent conversion of a borrowed horse with intent to deprive the owner of its value, and the testimony also showed that defendant took without leave a pistol and saddle, the omission to charge that such evidence must be considered only in its bearing upon the intent as to the horse was not material error; and, in the absence of an exception, or request for an instruction, the verdict will not be disturbed.

3. A verdict of "guilty" means guilty of the offense charged by the indictment; and where, upon a verdict of guilty under an indictment for the

theft of a horse, the judgment and sentence were for the "fraudulent conversion of a horse," such judgment and sentence will be reformed to correspond with the indictment.

Appeal from district court, Farrin county; E. D. McCLELLAN, Judge.

The proof shows that, for the purpose of going to a neighboring town to procure medicine, the defendant borrowed the horse and saddle of J. D. Thomas, and that, having obtained the medicine, he determined to convert the horse, and accordingly started with him to Arkansas. Apprehensive of arrest in the Indian Territory, he returned to Texas, where he was arrested with the horse in his possession. He also took off with him Thomas' pistol, which he had not borrowed. For the defense, it was shown, by the testimony of the defendant, that when arrested he told the officer that he was on his way to Farrin county to return the horse to its owner, and requested the officer to send a man with him for that purpose. He also testified, and to this extent was corroborated, that he made the same statement to another party shortly before his arrest.

W. A. Dunn, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. This conviction is under article 742a of the Penal Code, which reads as follows: "Any person having possession of personal property of another by virtue of a contract of hiring or borrowing, or other bailment, who shall, without the consent of the owner, fraudulently convert such property to his own use, with intent to deprive the owner of the value of the same, shall be guilty of theft," etc. It is charged in the indictment that the defendant did obtain and acquire from J. D. Thomas the possession and custody of a horse by virtue of a contract of borrowing, and did borrow said horse from said J. D. Thomas for temporary use, said Thomas being the owner and in possession of said horse; that afterwards the defendant, while in possession of said horse under said contract of borrowing, did fraudulently convert and appropriate said horse to his own use and benefit, without the consent of the said J. D. Thomas, and with the intent to deprive the said J. D. Thomas of the value thereof, and to "appropriate" the same to the use and benefit of him, the said defendant. It will be observed that, in defining this species of theft, an "intent to appropriate the property" is not expressly made an element of the offense, as it is in the definition of theft in general. To constitute this offense, the following are the essential elements: (1) Defendant must have possession of the property by virtue of a contract of bailment; (2) he must, without the consent of the owner, fraudulently convert the property to his own use; (3) such conversion must be with intent to deprive the owner of the value of the same. These elements are fully and directly alleged in the indictment, and in our opinion make the indictment sufficient. It was un-

necessary, we think, to allege an intent to appropriate the property; and it is immaterial, therefore, that the allegation of such intent as made in the indictment is defective. We think the indictment is in conformity with the statute, and in all respects sufficient.

We do not think that the evidence raises the issue of a voluntary return of the stolen horse; and it was not error, therefore, for the court to refuse to submit the law of such issue to the jury, as requested by defendant.

While the charge of the court should have limited the jury, in considering the testimony as to the stolen pistol and saddle, to the question of defendant's intent with respect to the horse, no exception was reserved to the charge, nor was any instruction upon this point requested by defendant. We do not consider the error a material one, for which the conviction should be disturbed. *Gentry v. State*, 25 Tex. App. 614, 8 S. W. Rep. 925.

By the verdict the defendant is found guilty, which means guilty of the offense charged in the indictment, which offense is declared by the statute defining it to be theft. By the judgment he is adjudged to be guilty of the "fraudulent conversion of a horse," and the sentence, in naming the offense, follows the judgment. In this respect the judgment and sentence are incorrect, and they are here reformed so as to show that the offense of which defendant has been adjudged guilty, and for which sentence has been pronounced against him, is theft of a horse, as charged in the indictment. Code Crim. Proc. art. 869. As reformed, the judgment of conviction is affirmed. Judges all present, and concurring.

DAVIS v. STATE.

(Court of Appeals of Texas. June 4, 1890.)

HOMICIDE — MURDER IN THE FIRST DEGREE — INSTRUCTIONS — EVIDENCE.

On trial for murder in the first degree, the failure of the court to charge the jury as to murder in the second degree, when the evidence tending to establish that grade of the crime is light and trivial, and of such a character that it is not at all probable that the jury would have considered it in arriving at their verdict, is not reversible error in the absence of objection made and exception taken to the charge at the time, as required by Code Crim. Proc. Tex. art. 685.

Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

Geo. Clark, S. C. Upshaw, W. M. Perrill, and B. G. Johnson, for appellant. Asst. Atty. Gen. Davidson and H. M. Furman, for the State.

HURT, J. This is a conviction for murder of the first degree, the penalty being death. Counsel for appellant make 36 assignments of error. We have had the benefit of argument in support of several of these supposed errors, and we have carefully read the record, and the brief for the appellant. The conclusion reached is that there is no such error in

this record as requires a reversal of the judgment.

We desire to discuss but one question, for to discuss all of the assignments would require the writing of a small volume, which we have not the time to do; remarking, however, that each assignment has received our most careful examination.

To support the conviction the state relies upon two aspects of the case, and contends that, if either be true, the judgment should stand. These aspects are: *First*. That Evans was sitting in a chair, reading a newspaper, when appellant approached him, spoke to him, and, before Evans arose, with the paper still in his hand, fired, and killed him; that the killing was with a calm, sedate mind and formed design. *Second*. That, conceding appellant's version to be true, to-wit, "that between 9 and 10 o'clock of the morning of the homicide, deceased came into the store, and commenced talking with Davis, and said to him, 'Mr. Davis, I don't think I will need your services any longer than the 15th,—and this is not all; I have it from the very best information that you have been too intimate with a lady in the house;' that defendant, replying, asked, 'What lady is that, Mr. Evans?' Evans replied, walking off, 'It is enough for you to know that you quit on the 15th;' that defendant proceeded to wait on customers; that in the afternoon, Evans being in his office sitting in a chair, defendant went to him and said, 'I think I have a right to know what lady you have reference to.' Evans answered, 'Davis, you know well enough who I refer to, and Mrs. ——— and Miss R——— are no better;' that defendant answered, 'Mr. Evans, I say if you make that accusation, you are a liar;' that Evans replied, 'You are a God damned liar,' raised up and advanced towards defendant, throwing his hand to one side as if to draw a pistol, when Davis shot him." Admitting, we say, that the above facts are true, the state contends that then other facts and circumstances demonstrate that appellant sought Evans, revived this matter relating to the women for the purpose of provoking a difficulty in order for a pretext to kill Evans; that with a cool, calm, and deliberate mind the provocation was given, or the occasion was produced, and hence there was no murder of the second degree in the case.

We have thus stated the positions of the state with a view to the discussion of the only question we desire to notice. Under the state of case presented by the testimony of the appellant, his counsel contends that the court should have submitted the question of murder of the second degree. Was it in the case? Counsel insists that it was, and that hence there was error in the charge because it failed to submit the degree of homicide to the jury. The learned judge submitted the question of self-defense, but only one degree of murder,—the first. There was no objection to the charge for this omission, nor did counsel request an instruction upon the sec-

ond degree. We have reversed a great number of judgments in all manner of felony cases for this omission, though there was no charge requested, nor objection because of the omission to charge the law applicable to the different phases of the case. But, in the absence of requested charges or objection for the omission, what is the rule? We are discussing the matter upon the hypothesis that murder of the second degree is presented by some evidence in the record. The rule is stated in Bishop's Case, 43 Tex. 390, to be that if the charge is erroneous, and is excepted to at the time, the judgment will be reversed; but though erroneous, if not excepted to, or proper instructions requested, the judgment for this error may or may not be reversed. If the omission was a material error,—one calculated to injure the rights of the defendant,—though the error is called to the attention of the court first in a motion for new trial, the judgment should be reversed. But in determining whether the error is material, and calculated to injure the rights of the accused, we are to look to the whole record bearing upon the subject. What was the nature of the testimony supporting the verdict? Was it cogent and overwhelming? What was the character of the testimony presenting the phase or theory of the case omitted to be noticed in the charge, and upon which omission error is assigned? Was it at all reasonable? Did it present a theory which a reasonable mind could entertain, or was it supported by such testimony as was remotely calculated to destroy the state's case, when considered in connection with the other testimony in the case, as well as the charge as a whole? Was the phase of the case simply an addition to the case as made by the state, and consistent therewith, or was it in direct conflict with the state's theory? These are all important matters to be considered in passing upon the materiality of the omission or error, so as to properly determine whether the error was calculated to injure the rights of the accused.

What, then, was the nature of the state's evidence in support of murder of the first degree? We will not repeat the testimony, but will say that, upon the first phase of the state's case, it is almost absolutely demonstrated, not only by the positive evidence of several witnesses, but by all the surrounding facts, that this was a calmly and deliberately planned assassination; that the appellant, with a cool and deliberate mind, and previously formed design, approached Evans, who was sitting in a chair reading a newspaper, and before he could rise shot him, an unarmed man, and continued to shoot until he was in a manner dead.

Upon the second phase of the case the surrounding facts place it beyond contradiction that appellant, if what he says is true, calmly and deliberately provoked the difficulty—produced the occasion—with but one single purpose, and that was to obtain a pretext to slay the deceased. All of the facts not only tend

this way, but form a mighty torrent moving irresistibly to this conclusion. Now, then, this being the nature of the evidence in support of the second phase of the case contended for by the state, we can concede that what the appellant swears is true, and still, as he calmly and deliberately adopted this method to provoke the difficulty or produce the occasion with intent to slay his victim, there is not only no self-defense in the case, but there is no murder of the second degree; and, in view of the facts, the cogency of the facts, the overwhelming conclusiveness of the facts, in support of murder of the first degree, if a charge had been submitted permitting the jury to find a less degree, no juror with the least degree of intelligence, unless corrupt, would have entertained for a moment the suggestion of any theory less than murder of the first degree. The plain, simple truth is that an honest, conscientious man cannot read this record without concluding that appellant's version of this case was sheer fabrication. But it may be insisted by counsel for appellant that his version may be true, and that he may not have provoked the difficulty or produced the occasion for the purpose of killing deceased, and that hence this was a question for the jury, and that the jury should have been permitted to pass upon the matter under proper instructions; that, while the jury may not have believed that he acted in self-defense, they may have believed his version of the facts, and found him guilty of murder of the second degree. It is possible that the jury may have believed that appellant's theory was true, and it is possible that they may not have believed that he provoked the difficulty or produced the occasion to have a pretext to slay the deceased, and it may have been possible that murder of the second degree would have been the verdict; but there was not the most remote probability that the jury would have done any of these things, and hence there is not the slightest probability that the appellant was injured by the omission. Now, if counsel for appellant had objected to the charge of the court for the omission to charge murder of the second degree, or had requested a charge upon that degree, and it had been refused, there being some evidence tending to present this degree of homicide, we might have been required to reverse the judgment. This, however, is quite doubtful, because appellant's theory of the case tends only to meet the state's first phase, mentioned above, leaving the second position of the state unquestioned; that is, that appellant calmly, deliberately, and very cautiously provoked the difficulty or produced the occasion for but one purpose,—to kill the deceased.

As above said, we have very carefully examined the record in the light of the argument and brief of counsel for appellant, and in view of the awful verdict and judgment in this case; but we have failed to find an error requiring a reversal of the judgment. We have discussed but one question in

the record, but we have given to all the others a most careful consideration, and we do not believe any of the assignments present an error for which the judgment should be reversed, and the judgment is therefore affirmed.

ON MOTION FOR REHEARING.

HURT, J. We have read carefully the motion and brief thereon, and have listened with pleasure and interest to the arguments for and against the same. As in the first opinion, so in this, we will discuss but one question; all the other supposed errors being met by the brief for the state. As there is some evidence tending to reduce the offense from murder of the first to murder of the second degree, though its force be ever so weak, trivial, or light, counsel for the motion contend that it is not only the duty of the court below to instruct the jury on the lesser degree, but failure to so instruct is reversible error, whether or not the omission was objected to at the time. We concede that, under such a state of case, it would be the duty of the court to charge on murder of the second degree, because this is required by the statute; but as there were no objections made to the charge, because of this omission at the time, so as to bring the case within the provisions of article 685 of the Code of Criminal Procedure, does it follow that the judgment must be reversed whether the defendant excepted to the charge or not? This is the question, and we understand that counsel for the motion assume the affirmative; contending that, if there be any evidence tending to present murder of the second degree, or any degree of homicide less than murder of the first degree, the judge must charge on the less degree or degrees, whether requested or not, and that a failure to do so will work a reversal of the judgment, though the charge was not excepted to at the time.

If this proposition be correct, the party who fails to except to the charge occupies a position as favorable as would one who objects. Diligence in bringing forward the objection at the earliest opportunity has no reward; the careful and the diligent and the careless or negligent standing on the same plane. In this connection we call attention to the opinion of **ROBERTS, C. J.**, in *Bishop's Case*, 48 Tex. 390. He says: "This difference in the rule, dependent upon the time when the objection to the action of the court is made, is in harmony with the rules of judicial proceedings generally, that a party who makes an objection at the proper time, which is usually the first practical opportunity, shall have his objection more favorably considered than if it had been inopportunistically delayed." In the above the chief justice is wrong if the counsel is right. The statute, as is well known to the profession, provides that if there be error in the charge in a felony case, and it is excepted to at the time of the trial, the judgment should be reversed. But suppose there be error, and the

accused fails to except, will the judgment be reversed in all such cases? By no means. We will let Chief Justice ROBERTS state the rule applicable to such a state of case: "It is to be particularly noticed that the record shows, and properly, by a bill of exception, in this case, that this charge was excepted to by the defendant's counsel at the time of the trial, and before the case had been submitted to the jury, and before they had retired to consider of their verdict; and that thus an opportunity was given to the judge to correct or withdraw the charge if he had deemed it to have been improper, upon a reconsideration of it then made before the final submission of the case to the jury. This, in reference to the provisions of our Code of Criminal Procedure, will be found to be an important consideration in this case on appeal to this court, by the exception having been made, and shown by the bill of exceptions to have been made, at the time of the trial, and to be much more beneficial to the defendant than if then not made, but made only afterwards, on a motion for a new trial. * * * If such a charge is not excepted to at the time of trial, but presented in a motion for new trial, which is the next point at which it could be presented, then its consideration by this court would be subject to another and a very different rule, which would be whether or not such charge was an error which, under all the circumstances, as exhibited in the record, was 'calculated to injure the rights of the defendant,' and which is prescribed as one of the grounds for the granting of a motion for a new trial, in the following language: 'Where the court has misdirected the jury as to the law, or has committed any other material error calculated to injure the rights of the defendant, [Pasch. Dig. art. 3137,] of what degree of force must the evidence be that tends to establish an offense, or tends to mitigate the offense charged in order to require a charge applicable thereto?'" Chief Justice ROBERTS says that if its force is deemed to be very weak, trivial, or light, and its application remote, "the court is not required to give a charge upon it. If, on the other hand, it is so pertinent and forcible as that it might be reasonably supposed that the jury could be influenced by it in arriving at their verdict, the court should charge so as to furnish them with the appropriate rule of law upon the subject." Bishop v. State, 43 Tex. 390. Hence, unless the evidence tending to present a less degree of an offense, or any theory of defense, be so pertinent and forcible that it might be reasonably supposed that the jury could be influenced by it in arriving at their verdict, a failure of the court to charge thereon would not be ground for reversal in the absence of exceptions.

This position is in exact harmony with the first opinion in this case, and in accord with Bishop's Case, supra, and a number of cases decided by this court: notably Cunningham's Case, 17 Tex. App. 96; Elam's Case, 16 Tex.

App. 40; and Leeper's Case, 11 S. W. Rep. 644, (decided at the present term.) See, also, Johnson's Case, 27 Tex. 766.

Loose expressions upon this subject can be found in the opinions of this court, but the principle is well settled and is absolutely correct, whether this court has always adhered to it or not, that, in the absence of exceptions to the charge of the court, for this court to reverse, the evidence tending to present a phase of the case or theory favorable to the accused must be so pertinent and favorable that it might reasonably (not possibly) be supposed that the jury could be influenced by it in arriving at their verdict. Unless the evidence be of such a character, no injury appears,—no injury is probable; not "possible," but "probable,"—and, unless this appears, there is no ground for reversal, and to reverse in the absence of probable injury would be contrary to principle. This would be the rule as to error in the charge of the court, though excepted to, but for the statute.

Was the evidence presenting murder of the second degree of such force and pertinency as render it reasonably probable that the jury would have been influenced thereby in arriving at their verdict? As there was no exception to the charge, this is the vital question. The counsel for the motion in their argument carefully avoided a discussion of this question when it was the very issue for discussion, and to determine this issue the facts must be carefully examined. When these are consulted, instead of presenting murder of the second degree with such force and pertinency as would render it reasonably probable that the jury would be influenced thereby in arriving at their verdict, when taken as a whole, this degree of homicide is very feebly or lightly indicated. This being the case, no injury is probable, and hence no reversible error is made manifest.

We are of the opinion that there is no reason why the motion for rehearing should be granted, and it is therefore overruled. Rehearing refused. Judges all present, and concurring.

MCCLESKEY v. STATE.

(Court of Appeals of Texas. May 17, 1890.)

KILLING DUMB ANIMALS—WEIGHT OF EVIDENCE.

1. Where the indictment was for wantonly killing a dumb animal, under Pen. Code Tex. art. 680, it was error, in addition to an instruction upon this offense, to charge as to the offense denounced by article 679, which is for the protection of the owner.

2. The following charge is erroneous, because it is upon the weight of evidence: "Circumstantial evidence, when fully and clearly made out, is sufficient to sustain a conviction for crime; but the circumstances must not be of a vague, indefinite, shadowy character, and the facts constituting the chain must be clearly defined. * * * In cases depending upon circumstantial evidence, the mind seeks to explore every possible source from which any light, however feeble, may be derived; and it is peculiarly proper that the jury should have before them every fact and circumstance, however slight. * * *

3. Where one kills a dumb animal while tres-

passing upon his cultivated land, the land being insufficiently fenced, the offense is that denounced by Pen. Code Tex. art. 685, and a conviction could not be had under article 680.

Appeal from county court, Stephens county; D. W. HULLUM, Judge.

The court charged as follows, upon the subject of circumstantial evidence: "Circumstantial evidence, when fully and conclusively made out, is sufficient to sustain a conviction for crime; but the circumstances must not be of a vague, indefinite, shadowy character, and the facts constituting the chain must be clearly defined and fully proved. The more there may be of them, and the longer the chain connecting them, the stronger and more confident will be the conclusion. In cases depending upon circumstantial evidence, the mind seeks to explore every possible source from which any light, however feeble, may be derived; and it is peculiarly proper that the jury should have before them every fact and circumstance, however slight, which may aid them in reaching a satisfactory conclusion. Greater latitude in the presentation of evidence must necessarily be allowed in cases of circumstantial, than in those of direct, evidence."

Wm. Veals & Son, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. This information was brought under article 680 of the Penal Code, and charged the willful and wanton killing of a dumb animal. In his charge to the jury the court submitted the law as to the offense defined in article 679 of the Code, as well as the law concerning the offense for which defendant was being prosecuted, as defined by article 680. The charge was specially excepted to on this ground, and is clearly erroneous. The two offenses named in the two articles are entirely separate and distinct. Article 679 is intended for the protection of the owner of the animals, while article 680 is intended for the protection of the animals themselves. Willson, Crim. St. § 1168. A charge must be confined and limited to the offense charged in the indictment or information, and must not submit the law of any other or separate offense. Again, the charge upon circumstantial evidence is obnoxious to the objection that it is directly upon the weight of evidence. The statement of facts is not authenticated by the approval or certificate of the trial judge, and cannot, therefore, be considered on appeal. We would remark, however, in view of another trial, that in case the evidence should show that the hog was killed or wounded while inside of cleared or cultivated land, surrounded by an insufficient fence, the offense would be the one denounced by article 685, Pen. Code; and in such case a conviction could not be had under article 680, Pen. Code, as charged in this information. Payne v. State, 17 Tex. App. 40; McRay v. State, 18 Tex. App. 331; Willson, Crim. St. § 1169.

Judgment reversed, and cause remanded.

ELEY v. STATE.

(Court of Appeals of Texas. May 21, 1890.)

BURGLARY—CONTEMPORANEOUS THEFT.

On a trial for burglary, at which defendant was charged with having stolen a saddle, testimony by a witness that he arrested defendant on a charge of stealing a saddle and a gun does not warrant an instruction that the theft of the gun may be considered by the jury in arriving at defendant's intent in stealing the saddle, in the absence of any evidence that the saddle and gun were supposed to have been stolen at the same time and place.

Appeal from district court, Jones county; J. V. COCKRELL, Judge.

Davis & Woodruff, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. This conviction is for burglary of a crib, alleged to be the property of G. W. Brown. At the time the crib was burglarized, a saddle was stolen therefrom. Among other instructions to the jury is the following: "The allusion of witnesses to the theft of a gun supposed to have been stolen at same time and place, and found in the possession of the defendant, can only be considered by you in arriving at a conclusion as to defendant's intent in reference to the property charged in the indictment to have been stolen." This instruction was excepted to by defendant because not warranted by the evidence, and a bill of exceptions was duly reserved.

We are clearly of opinion that said instruction should not have been given. There was no evidence, and no allusion even, by witnesses, that a gun was stolen, or was supposed to have been stolen, at the same time and place that the saddle was stolen. A witness stated that he arrested defendant upon a charge of theft of a saddle and a gun, but he did not state what gun or what saddle, or whether the saddle and gun were supposed to have been stolen at the same time and place. Under this state of the evidence, the court should have instructed the jury that they should not consider the arrest of defendant for the theft of a gun as evidence against him for any purpose. It was not a fact in the case entitled to any consideration whatever, either to show the intent of defendant as to the saddle, or any other fact in the case.

As to the sufficiency of the evidence in the case to warrant the conviction for burglary, we will remark that on another trial more and stronger inculpatory evidence than is shown by the statement of facts before us should be adduced, if attainable. Because of error in the charge of the court as pointed out, the judgment is reversed, and the cause remanded.

ALLEN v. STATE.

(Court of Appeals of Texas. May 21, 1890.)

INTOXICATING LIQUORS—VIOLATION OF LICENSE LAWS—INFORMATION.

1. A clerical error as to the month, in the jurat to a complaint for selling intoxicating liquor without a license, does not vitiate either the complaint

or the information, and on the trial the state may show when the jurat was in fact made.

2. An information which alleges that defendant sold intoxicating liquors in quantities less than a quart, "said occupation being taxable by law, without first obtaining a license therefor, and the taxes then and there due by him to the said state upon said occupation amounted to \$300, and the taxes then and there due by him to said county amounted to \$150," these taxes having been duly levied, is sufficient, and charges but one offense.

3. On a trial for selling intoxicating liquors in quantities less than a quart without having paid either state or county taxes, a conviction for the non-payment of the county tax is unwarranted where there is no evidence that it had ever been levied; and a verdict imposing a fine in an amount equaling both state and county taxes will be set aside for uncertainty where there is nothing in the record to show that the jury did not in fact include the county tax as a part of the penalty assessed against defendant.

Appeal from Jeff Davis county court; W. W. WIMBERLY, Judge.

Information against John Allen, which charges as follows: "On or about April 30, 1889, in county and state aforesaid, one John Allen did then and there unlawfully engage in and follow and pursue the occupation of selling spirituous, vinous, and malt liquors in quantities less than one quart, said occupation being taxable by law, without first obtaining a license therefor, and the taxes then and there due by him to the said state upon said occupation amounted to \$300, and the taxes then and there due by him to said county amounted to \$150; the said taxes due the said county and state having been theretofore duly levied according to law." Defendant was convicted, and now appeals.

W. O. Read, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. It was permissible for the state to show, and it was shown, that the jurat of the complaint was in fact made on May 2, 1889, instead of April 2, 1889, as written therein. This was a mere clerical mistake which did not vitiate the complaint or the information.

There is no defect in the information. It is in the usual form, and alleges but one offense. Exceptions to it were properly overruled.

It is alleged in the information that the taxes due by defendant amounted to \$300 to the state, and \$150 to Jeff Davis county; said taxes having theretofore been duly levied according to law. Verdict of the jury assesses a fine of \$450 against the defendant, that amount being the aggregate amount of the state and county taxes alleged to be due. There is no evidence in the record that any county tax had been levied; and if the jury, in assessing the fine, included the county tax of \$150 alleged in the information to be due, the verdict, to that extent, is unwarranted by the evidence. There is nothing in the record which enables us to say that the jury did not include the amount of the county tax as a part of the penalty assessed by their verdict. A conviction for the county tax was unwarranted, in the absence of any proof of the levy

of such a tax, and of the amount levied. *Crews v. State*, 10 Tex. App. 292; *Mansfield v. State*, 17 Tex. App. 468. Because of the uncertainty of the verdict, the judgment is reversed, and the cause remanded.

MAHLE v. STATE.

(Court of Appeals of Texas. May 21, 1890.)

DRIVING LIVE-STOCK FROM ACCUSTOMED RANGE.

One who turns horses out of his pasture, and notifies their owner about them, is not guilty of a violation of Pen. Code Tex. art. 767, which makes it a misdemeanor for any one to "willfully" drive from its accustomed range live-stock not his own, without the owner's consent.

Appeal from Jeff Davis county court; W. W. WIMBERLY, Judge.

W. O. Read, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. Appellant has been prosecuted and committed under article 767 of the Penal Code for willfully driving from its accustomed range live-stock not his own, and without the consent of the owner. As shown by the evidence, the animals were mares that had by some means gotten into defendant's pasture, where he had a stallion running with some mares of his own, and that defendant simply drove them about 100 yards, and turned them out of his pasture gate, and then sent the owner word about them, and where he had turned them out. In substance and effect, this is the testimony. "Willfully," as used in the statute to characterize the offense denounced, means with "evil intent," "legal malice," and "without reasonable ground to believe that the act was lawful." *Thomas v. State*, 14 Tex. App. 200; *Lane v. State*, 16 Tex. App. 173. The evidence wholly and totally fails to support the conviction. Reversed and remanded.

MASTERS v. STATE.

(Court of Appeals of Texas. May 31, 1890.)

ASSAULT AND BATTERY—SELF-DEFENSE—INSTRUCTIONS.

1. Where, on a trial for assault and battery, there is evidence tending to raise the issue of self-defense, the court should fully and correctly instruct on that issue.

2. Defendant and prosecutor got into a religious discussion at breakfast. After going outside, defendant said: "You have raised a difficulty in my family." Prosecutor said he had not, whereupon they called each other liars. Defendant then drew a pistol. Prosecutor said defendant aimed at him, and snapped it. Defendant denied this, and said that, before he drew the pistol, prosecutor stooped to pick up a large stick, and that he then drew the pistol, and told prosecutor not to pick up the stick, or he would shoot him; that he did not intend to shoot, but only to prevent prosecutor from getting the stick. The only instruction on the subject of self-defense was that, if defendant provoked the difficulty, he could not claim that he acted in self-defense. *Held*, that it did not present the issue fairly and fully, and that, though the instructions requested by defendant were faulty, the request was sufficient to call the court's attention to its omission.

Appeal from Falls county court; S. R. SCOTT, Judge.

Defendant was convicted of aggravated assault and battery. Defendant and prosecutor got into a religious discussion at breakfast. After going outside, defendant said: "You have raised a difficulty in my family." Prosecutor said he had not. Then they called each other liars, and defendant drew a pistol. Prosecutor said defendant aimed it at him, and snapped it. Defendant denied this, and said that, before he drew the pistol, prosecutor stooped to pick up a large stick, and that he then drew the pistol, and told prosecutor not to pick up the stick, or he would shoot him; that he did not intend to shoot, but only to prevent prosecutor from getting the stick.

Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. There is evidence which presents the issue of self-defense, and correct instructions upon such issue should have been given the jury. In the main charge, no such instructions were embraced, but the court, at the instance of the county attorney, gave a special instruction to the effect that, if defendant provoked the difficulty, he could not claim that he acted in self-defense. This special instruction was excepted to by the defendant, and he also requested special instructions upon the issue of self-defense, which were refused, and he excepted.

We think the court erred in giving the special instruction requested by the county attorney. It does not present the law upon the issue of self-defense fairly and fully, as was demanded by the evidence. In fact, it presented but one feature of the law of self-defense, and that was the one unfavorable to the defendant. While the instructions requested by defendant are not free from objection, they were sufficient to call the attention of the court to the defect in the main charge, which defect should have been cured by appropriate instructions on the issue of self-defense. Because, in our opinion, the defendant did not have a fair presentation of the law to the jury, the judgment is reversed, and the cause is remanded.

BUCHANAN v. STATE.

(Court of Appeals of Texas. May 31, 1890.)

AGGRAVATED ASSAULT AND BATTERY—EVIDENCE.

Evidence that defendant assaulted a person, but used only his hands and knees,—striking him with his fist, throwing him down, and kneeling on him,—shows only a simple assault and battery, and is not sufficient to support a conviction of aggravated assault and battery.

Appeal from Fannin county court; **W. A. BRAMLETTE, Judge.**

Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. This conviction is for aggravated assault and battery, under an indictment which charges the aggravation to have been that the assault and battery was committed with premeditated design, and by the use of means calculated to inflict great bodily injury. We do not think the evidence

warrants the conviction. The only means used by defendant in committing the offense were his hands and knees. He struck the injured party several blows with his fist, threw him down, and got upon him with his knees, etc. These means were not, under the circumstances of this case, calculated to inflict great bodily injury. There might be instances where the use of such means would be calculated to inflict such injury; but ordinarily the use merely of the hands, fists, or other members of the body will not constitute an aggravated assault and battery. *Keley v. State*, 12 Tex. App. 245. In our opinion, the evidence shows only a simple assault and battery; and the judgment is reversed, and the cause remanded.

RABB v. STATE.

(Court of Appeals of Texas. June 4, 1890.)

DISORDERLY HOUSE—EVIDENCE.

On indictment for keeping a disorderly house, it was shown that defendant, a teamster, rented a house for one N., and moved her from another town, and put her into it, where she afterwards kept a disorderly house; but it was not shown that defendant was ever there, or was in anywise interested in it. *Held*, that the evidence was insufficient to support a conviction.

Appeal from Llano county court; **W. S. MAXWELL, Judge.**

Slator & McLean and Flack & Dalrymple, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. Appellant was convicted in the court below upon an indictment in which he was charged; jointly with one Mrs. Nelson, with keeping a disorderly house; that is, "a house for the purposes of public prostitution, and as a common resort for prostitutes and vagabonds."

The only connection that defendant is ever known to have had with the house is that, as a teamster, he hauled Mrs. Nelson from Burnet to Llano, rented the house for her, and put her into it. If he was ever in or near the house afterwards, or in any manner interested in keeping it, no witness has so testified. There is scarcely a suspicion, even, that defendant ever concerned himself about the house or Mrs. Nelson after he hauled her to it. We cannot sustain convictions based upon such meager testimony,—in fact, based upon what we may almost say is testimony which does not create a suspicion of guilt. Reversed and remanded.

MONTGOMERY v. STATE.

(Court of Appeals of Texas. June 7, 1890.)

UNLAWFULLY BRANDING STOCK—INTENT—EVIDENCE.

A conviction for unlawfully branding a horse without the consent of the owner, with intent to defraud, cannot be sustained, where the evidence shows that, while the branding was done without the consent of the owner, defendant did it to protect the owner, by preventing another person from taking possession of the horse.

Appeal from district court, San Saba county; A. W. MOURSUND, Judge.

Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. This is a conviction for unlawfully branding a horse, the property of another, without the consent of the owner, and with intent to defraud. No doubt can be entertained from the evidence of the branding of the horse by the defendant, or that he branded it without the consent of the owner. But the evidence fails to establish the very gist of the offense charged, which is an intent to defraud. Instead of such intent being shown, we think a preponderance of the testimony shows that in branding the horse the defendant acted innocently, with no intent to defraud, but, on the contrary, that his purpose was to protect the owner of the horse in his property, by preventing said horse from being appropriated by some person to whom he did not belong. Because the evidence does not warrant the verdict, the judgment is reversed, and the cause remanded.

HABEL v. STATE.

(Court of Appeals of Texas. March 15, 1890.)

VENIRE FOR TALESMEN—OATH TO SHERIFF—INSTRUCTIONS—CONDUCT OF ATTORNEY—EVIDENCE.

1. Rev. St. Tex. art. 3056, provides that, "whenever it may be necessary to summons jurors who have not been selected by jury commissioners under the provision of this title, the court shall administer to the sheriff and each of his deputies the following oath," etc. *Held* that, where it was shown that the oath had been administered already at the term, it was not error to refuse to again administer it, at defendant's request, upon the issuing of a special venire.

2. Where, upon request, attachments were issued for absent venire men, it was not error to issue a venire for talesmen before such venire men were brought in, and to refuse a postponement for that purpose.

3. Where a charge was properly rejected as being an incorrect statement of the law applicable to a certain state of facts, and the court erroneously failed to give any instruction as to such facts, the error was not prejudicial, when it appears that, if a proper instruction had been given, its only effect must have been to induce the verdict actually returned.

4. An objection to the conduct of counsel for the state in expressing his personal belief in defendant's guilt will not be considered, when no written request was made for an instruction that the jury must not allow themselves to be influenced thereby.

5. Defendant testified in his own behalf, and counsel for the state used some very harsh expressions as to the credibility of persons so testifying. The court charged: "You are by law made the exclusive judges of the credibility of all the witnesses before you in this case, and of the weight you should give to their testimony; and, after you have considered all the evidence before you, if you have in your minds a reasonable doubt as to the guilt of this defendant, you should acquit him." *Held* that, while the conduct of counsel was improper, the effect was neutralized by the charge, and there is no ground of reversal.

6. Under Code Crim. Proc. Tex. art. 685, a conviction must be set aside for any error, however immaterial, which was promptly excepted to, and properly presented by a bill of exceptions; and the fact that one tried for murder was convicted of manslaughter does not relieve the reviewing court from considering a charge as to

murder in the first degree, which was objected to on the ground that the evidence was not sufficient to raise the question of murder.

7. Where two persons, quarreling in a theater, went outside for the purpose of fighting it out, and the evidence raised the question whether defendant, who had a deadly weapon on his person or in his hand, went with an intent to use it, the issue of murder in the first degree was clearly raised, and it was proper to instruct in regard thereto.

Appeal from district court, Dallas county; R. E. BURKE, Judge.

Under an indictment charging him with the murder of Ed. Gillette, the appellant was convicted of manslaughter, and sentenced to two years in the penitentiary. The evidence showed that the two men were quarreling in a theater, and went outside to fight it out, when appellant drew a pistol, and shot the deceased. Other facts sufficiently appear from the opinion.

D. G. Wooten, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. Appellant was convicted in the lower court of manslaughter, and given two years in the penitentiary. Appellant was indicted, and put upon his trial for murder. The record sufficiently shows that the court ordered the summoning of the special venire out of which the jury was to be selected for the trial of the case; and the objection to the transcript in that particular, based upon the rulings in *Steagald's Case*, 22 Tex. App. 486, 8 S. W. Rep. 771, is not maintainable.

As to other objections to the special venires for talesmen, it is first urgently insisted that the same should have been quashed because the court declined and refused to administer to the sheriff and each of his deputies the oath prescribed by article 3056 of the Revised Statutes before they executed said writs. That statute reads: "Whenever it may be necessary to summon jurors who have not been selected by jury commissioners under the provisions of this title, the court shall administer to the sheriff and each of his deputies the following oath: 'You do solemnly swear that you will, to the best of your skill and ability, and without bias or favor towards any party, summon such jurors as may be ordered by the court; that you will select none but impartial, sensible, and sober men, having the qualifications of jurors under the law; that you will not, directly or indirectly, converse or communicate with any juryman touching any case pending for trial; and that you will not by any means attempt to influence, advise, or control any juryman in his opinion in any case which may be tried by him, so help you God.'" This statute has been held applicable in criminal as well as in civil cases. *Wyers v. State*, 22 Tex. App. 258, 2 S. W. Rep. 722. When this statute was originally passed, it expressly provided in terms that the oath should be administered "at the commencement of each term of the court at which jury cases may be tried." *Hicks v. State*, 5 Tex.

App. 488. In the Revision, as shown in article 8056, *supra*, it is not stated in terms at what particular time the oath should be administered; but we think it is apparent from the language used that, if it has once been administered, that will suffice thereafter at the same term for the summoning of all "such jurors as may be ordered by the court," and that it is not necessary to have the oath repeated every time new or additional talesmen are to be summoned. In explaining the bills of exception on this point, the learned trial judge states that the said oath was duly administered to the sheriff and deputies on the first day that the criminal docket was taken up, and that none but the officers so qualified took part in summoning the talesman in this case. He also certifies that in each instance, before the said talesmen were summoned, he cautioned the sheriff as to his duty in summoning them, as provided shall be done by article 615 of the Code of Criminal Procedure. This was the necessary and proper practice. Defendant's objections to the action of the court in this matter are without merit.

Perhaps we should have first noticed the defendant's objections to the issuance of *venires* for talesmen until certain of the original *venire* men who had been summoned, and who were absent, had been attached, and brought into court to be passed upon. He also asked a postponement of the trial until this could be done. Attachments were promptly issued for these absentees as soon as demanded, but a defendant cannot unreasonably delay the trial on account of the absence of such summoned jurors. Code Crim. Proc. art. 640. The questions here raised were fully discussed in Hudson's Case, 28 Tex. App. 323, ante, 888. No error is made to appear in relation to this matter.

Many objections are made, and criticisms indulged in, with regard to the charge of the court. In so far as murder of the first or the second degree is concerned, all such questions are eliminated by the fact that defendant has been convicted of manslaughter, and not murder. As to manslaughter, the charge embraced all the statutory rules with regard to that crime. Had defendant not been found guilty of manslaughter, the charge might have been held insufficient as not pertinently applying the law of that grade of crime to the particular facts of the case; and defendant, in a special requested instruction which was refused, attempted to call the attention of the court to the omission. The instruction was not itself the law, but was sufficient to call the attention of the court to the necessity of an instruction directly applicable to the facts. An instruction was given by the court with regard to mutual combat entered into where death, or seriously bodily injury likely to result in death, might ensue, and properly instructed the jury that, in such state of case, self-defense would not apply. *King v. State*, 4 Tex. App. 54; *Crist v. State*, 21 Tex. App. 361; *Thumm v. State*, 24 Tex. App.

667, 7 S. W. Rep. 236; *Williams v. State*, 25 Tex. App. 216, 7 S. W. Rep. 666; *Willson, Crim. St. § 982*. But the court did not instruct as to what the law would be if defendant went out to engage in a fistcuff with deceased, and with no intention of having a deadly contest, or using a deadly weapon, and that his deadly weapon was only used after deceased was apparently about using a deadly weapon upon him. The facts, perhaps, called for some such instruction. But in such case the defendant's right of self-defense would not have been, as is insisted by counsel, a perfect one, and entirely justifiable in law, but would have been imperfect to the extent of the gravity of the offense which he intended to commit originally. He went out to engage in an affray, which is a misdemeanor. Pen. Code, art. 318. "A perfect right of self-defense can only obtain and avail where the party pleading it acted from necessity, and was wholly free from wrong or blame in occasioning or producing the necessity which required his action. If, however, he was in the wrong,—if he was himself violating, or in the act of violating, the law,—and on account of his own wrong was placed in a situation wherein it became necessary for him to defend himself against an attack made upon himself, which was superinduced or created by his own wrong, then the law justly limits his right of self-defense, and regulates it according to the magnitude of his own wrong." *Reed v. State*, 11 Tex. App. 509; *Willson, Crim. St. § 982*. If the original wrong of defendant was or would have been a misdemeanor, then the homicide growing out of or occasioned by it, though in self-defense from an assault made upon him, would be manslaughter, if committed under the immediate influence of sudden passion arising from an adequate cause; such, for instance, as anger, rage, terror, or resentment. *Spearman v. State*, 23 Tex. App. 224, 4 S. W. Rep. 586. The court did not err in refusing defendant's second special requested instruction on this subject, because it did not state correctly the law applicable to the facts; and, while the court omitted to charge at all on that phase of the case, the error was harmless, because defendant was found guilty of manslaughter, and that would have been the finding under the charge, had it been given correctly, and adopted as the basis of the verdict.

A bill of exceptions was taken to the following language used by the county attorney in his closing argument to the jury: "Gentlemen of the jury, I tell you, as an honest man and citizen, that it is my candid and honest belief that this defendant is guilty of murder of the first degree, and you ought to find him guilty as such." Defendant did not request the court, in writing, to instruct the jury that they should not be influenced by the attorney's individual opinion as to the defendant's guilt. This should have been done; and, if the court had then refused to give such instruction, the question would

then have been properly presented for adjudication. "While it is true that authors, in treating upon the subject, say that counsel either for or against the prisoner should never express their opinion as to the guilt or innocence of the accused, yet we would hesitate at this day to reverse a judgment because of a violation of this rule." *Young v. State*, 19 Tex. App. 536; *Kennedy v. State*, Id. 618. There are, however, recent instances where the mode and manner of expressing such an opinion on the part of prosecuting officers has been held sufficient ground for reversing a judgment of conviction. *People v. Quick*, (Mich.) reported in full in 25 N. W. Rep. 302. "The impropriety of expressing a personal opinion to the jury upon disputed facts has always been regarded as great, and has in some notable instances led to unpleasant strictures on the character of celebrated counsel." Id.

Defendant testified as a witness in his own behalf. The county attorney commented upon his testimony, which he had the right to do, as in the case of any other witness; but he also indulged in some very harsh reflections as to the credibility of those defendants who would testify in their own cases, and warned the jury that, "so long as defendants are to be believed when testifying in their own behalf, no man will ever be convicted in this state." This language was excepted to, and special instructions were asked in regard to how the testimony of a defendant in his own behalf should be considered, which were refused. The court, however, charged the jury: "You are by law made the exclusive judges of the credibility of all the witnesses before you in this case, and of the weight you should give to their testimony; and, after you have considered all the evidence before you, if you have in your minds a reasonable doubt as to the guilt of this defendant, you should acquit him." "We are not disposed to reverse judgments for merely indiscreet ebullitions of counsel, which may be allowed for, and are neutralized by the effect of the charge." In this instance the charge of the court, we think, fully neutralized whatever unwarranted expression of opinion the prosecuting officer had indulged in, and we cannot think that such idle declamation could or would have the same weight with the jury as the charge of the court.

Defendant's special requested instruction was obnoxious to the objection that it was a charge upon the weight of evidence, and it was properly refused. We have considered all the material questions in the case, and, having found no reversible error, the judgment is affirmed.

ON MOTION FOR REHEARING.

(April 26, 1890.)

WHITE, P. J. We have carefully re-examined the record in this case, in connection with the appellant's motion for rehearing, and the able argument of counsel in support of the same. There is but one question which

we deem it necessary to reconsider. As before stated, the court submitted to the jury in its charge the law of murder in the first and second degrees. Appellant objects to the charge on murder of the first degree, and claims that the court erred in charging the jury the law of murder in the first degree, for the reason "that the evidence in the case did not call for nor warrant a charge on that grade of homicide, and the charge given on that subject was calculated to mislead the jury, and laid undue stress on murder in the first degree, and did in fact prejudice defendant's rights." Defendant was found guilty of manslaughter; and, in our opinion heretofore rendered, in alluding to this assignment of error, we dismissed this subject with the remark that, "in so far as murder of the first or the second degree is concerned, all such questions are eliminated by the fact that defendant has been convicted of manslaughter, and not murder." Our attention has been called to the fact that this statement is incorrect, in view of the manner in which the question is presented in the record. This portion of the charge is specially excepted to, as shown by defendant's thirteenth bill of exceptions. The rule is that the charge must be applicable to and limited by the evidence, and furthermore, that a charge which has no application to any evidence adduced on the trial is erroneous, and calculated to confuse the jury, and mislead them; and it is radical error for the court to assume and charge upon a theory not raised or indicated by the evidence. *Willson*, Crim. St. § 2347. Again, it is well settled that "if the error, however immaterial it may be, is promptly excepted to, and presented by a proper bill of exceptions on appeal, the statute (Code Crim. Proc. art. 685) is mandatory that the conviction shall be set aside, without inquiry as to the effect of such error upon the jury." *Willson*, Crim. St. § 2363. Under these rules, and the manner in which the question is presented, the fact that defendant was convicted of manslaughter does not eliminate the question as to the authority of the court to charge upon murder of the first degree in this case. As to the law as presented upon this degree of murder, we think it sufficiently full, comprehensive, and explicit, and not objectionable for any reversible error. It then remains to be seen whether such a charge was called for or authorized by any evidence in the case. There were two theories in the case as made by the evidence: One that defendant went out of the theater, upon the invitation of deceased, with his deadly weapon upon his person, if not in his hand, and with the purpose and intent of using it in the combat to which he was invited. The other was that he went out merely to engage in an affray. If the former theory was correct, then his crime was murder; if the latter, it was manslaughter. Under the facts, the issue of murder in the first and second degrees was clearly raised, and the court did not err in submitting these issues. We have found no sufficient reason

to warrant us in setting aside our former judgment of affirmance in this case, and the motion for rehearing is overruled. Rehearing refused.

TUCKER v. STATE.

(Court of Appeals of Texas. June 4, 1890.)

INDICTMENT—INDECENT EXPOSURE.

An indictment charging that defendant "did unlawfully and designedly, in public, make an obscene and indecent exhibition of the persons of others," in violation of Pen. Code Tex. § 343, is not sustained by proof that he placed an obscene and indecent writing upon the clothes worn by others.

Appeal from Llano county court; W. S. MAXWELL, Judge.

Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. It is charged in the indictment that the defendant "did unlawfully and designedly, in public, make an obscene and indecent exhibition of the persons of others," etc. This charge is not sustained by the evidence. By the terms "obscene and indecent exhibition of the person," as used in article 343 of the Penal Code, is meant, we think, an exposure of those parts of the person which are commonly considered as private, and which custom and decency require should be covered, and kept concealed from public sight. They do not mean or include obscene or indecent print, picture, or written composition placed upon the clothes worn upon the person. In this case the evidence shows that the defendant was perhaps guilty of placing an obscene and indecent writing upon the clothes worn by other persons, and thereby committed the offense denounced in said article 343, but not in the manner charged in the indictment. If the facts constituting the offense had been properly charged in the indictment, we think the evidence would sustain the conviction, but, as now presented, the allegation and the proof do not correspond, (*Coker v. State*, *Smith v. Same*, 24 Tex. App. 1, 5 S. W. Rep. 510;) and therefore the judgment is reversed, and the cause is remanded.

GARNER v. STATE.

(Court of Appeals of Texas. June 4, 1890.)

OPINION EVIDENCE—INDEFINITE CHARGE.

1. On a trial for selling intoxicating liquors to minors, a witness was properly allowed to state that, from their appearance at the time, he would have taken them to be 17 or 18 years old.

2. A conviction will not be set aside because the charge as to a reasonable doubt was not as definite as it should have been, when the charge was not excepted to, and no additional charge was asked.

Appeal from Llano county court; W. S. MAXWELL, Judge.

Conviction for selling intoxicating liquors to minors without the written consent of their parents. The proof showed conclusively the sale to the persons named, whose ages were, respectively, 18 and 19 years..

Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. The question and answer which the court permitted over objection of defendant, as shown by his bill of exceptions, were: "Question. What age did the physical appearance of Luna Wicks and S. R. Waits indicate them to be in October, 1888? Answer. From the physical appearance of said minors in October, 1888, I would take them to be minors of 17 and 18 years old." Here the question was as to the effect the physical appearances produced on the mind of the witness himself as to the ages of the minors. In *Koblenschlag's Case* the objection to the evidence was that the witness was asked and permitted to state his opinion as to how others would be impressed by the physical marks of age, and such evidence was held inadmissible. 23 Tex. App. 264, 4 S. W. Rep. 888. There is a marked difference in the cases. In this case the evidence sought was the impression made upon the mind of the witness himself, and not his opinion as to impressions made upon the minds of others. "Opinion, as far as it consists of a statement of an effect produced on the mind, becomes primary evidence, and hence admissible, whenever a condition of things is such that it cannot be reproduced and made palpable to the jury." *Clark v. State*, 28 Tex. App. 189, 12 S. W. Rep. 729.

Defendant objected to the court's charge upon the reasonable doubt. This charge was not as definite as it should have been, but the defendant should not only have excepted to the same, but should also have asked such additional charge as was desired. *Loyd v. State*, 19 Tex. App. 321. The testimony showed without dispute that the minors did not have the written consent of either of their parents, and there was no issue calling for the special charge requested by defendant, and therefore the court did not err in refusing to give it. There is no error in the judgment, and it is affirmed.

BREWER v. STATE.

(Court of Appeals of Texas. June 4, 1890.)

SHOOTING ANIMALS—EVIDENCE.

1. On prosecution under Pen. Code Tex. art. 680, for wantonly wounding a hog, which the evidence tends to show was shot by defendant while trespassing on his crop, it is competent for defendant to show that his fence was a lawful one, which, by the stock law prevailing in his locality, was not required to turn hogs.

2. Where the evidence raises the issue whether the hog was wounded in defendant's insufficiently fenced inclosure, the jury should be instructed that, if they find this to be the fact, a conviction cannot be had under article 680, the punishment for such offense being provided by article 685.

Appeal from Stephens county court, D. W. HALLUM, Judge.

Pen. Code Tex. art. 680, inflicts a fine on any person who willfully wounds or kills any domestic animal. Article 685 provides for the punishment of an owner of cultivated land, insufficiently fenced, if he shall wound or kill any hogs or stock of another within such inclosure.

Veale & Son and Mr. Sebastian, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. Appellant was convicted, under article 680 of the Penal Code, of willfully and wantonly wounding a hog. Defendant proposed to prove, in connection with his other testimony, which went to show that the hog was shot by him in his field, and while trespassing upon his crop: (1) That his fence was a lawful fence; (2) that what was known as the "Stock or Hog Law" prevailed legally in the locality including his farm and premises, and that, under said law, it was not required, in order to make a fence lawful, that it should be sufficient to keep out hogs, etc. On objection by the state, this evidence was held inadmissible, and was excluded by the court; and defendant saved his bill of exceptions. The evidence was admissible as tending to rebut the willfulness and wantonness of the act. Willson, Crim. St. § 1169.

Again, upon the evidence as adduced, the issue was clearly raised as to whether or not the animal was wounded in defendant's inclosure, which inclosure was surrounded by an insufficient fence; and in such case the court should have instructed the jury that, if they so believed, the offense would be punishable under article 685 of the Penal Code, and that a conviction could not be had upon the indictment charging the offense denounced by article 680. *Payne v. State*, 17 Tex. App. 40; *McRay v. State*, 18 Tex. App. 831. Judgment is reversed, and cause remanded.

BENNETT v. STATE.

(Court of Appeals of Texas. June 4, 1890.)

CRIMINAL LAW—IMPEACHMENT OF WITNESS.

1. On trial for gaming, a state's witness, who alone testifies that defendant played the game, may be recalled by defendant, and asked questions for the purpose of laying a foundation for his impeachment.

2. By recalling the witness for the sole purpose of laying a foundation for his impeachment, defendant does not make him his own witness, and is not thereby deprived of the right of impeaching him.

3. Impeaching testimony offered for the purpose of showing the *animus* and ill will of the witness is relevant and admissible.

Appeal from Falls county court; S. R. SCOTT, Judge.

Conviction for gaming.

B. H. Rice, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. Henry Phoenix, a witness for the state, was the only witness who testified that defendant played at the game of craps. After said witness had testified, the defendant, with the permission of the court, recalled him, and placed him on the witness stand, and propounded questions to him for the purpose of laying a predicate to impeach him. In this there was no error. *Garza v.*

State, 3 Tex. App. 286; *Treadway v. State*, 1 Tex. App. 668.

Having laid the proper predicate for impeaching said witness, defendant offered impeaching evidence, which, upon objection made thereto by the state, was rejected, upon the ground that, by recalling the witness, Phoenix, the defendant had made said witness his own, and could not impeach him. This was error, and, inasmuch as said witness furnished the only testimony of defendant's guilt, was material error. By recalling said witness merely for the purpose of laying a predicate to impeach him, the defendant did not vouch for his credibility, and was not thereby deprived of the right to impeach him. Nor was the impeaching testimony offered collateral or irrelevant, as it was for the purpose of showing the *animus*, ill will, and reckless disregard of truth of said witness. Because the court erred in rejecting the proposed impeaching testimony, the judgment is reversed, and the cause is remanded.

JOHNSON v. STATE.

(Court of Appeals of Texas. June 7, 1890.)

CRIMINAL LAW—DISORDERLY HOUSE.

1. A plea to the jurisdiction of the county court, on the ground that, in the order transferring the cause from the district court, the word "county" was omitted before the word "court," is properly overruled where it appears that only the county court had jurisdiction of the cause.

2. An amendment of the certificate of transfer by affixing thereto the seal of the district court was proper.

3. Pen. Code Tex. art. 389, defines a "disorderly house" to be one "kept for the purpose of public prostitution, or as a common resort for prostitutes and vagrants." Held that, in an indictment following the language of the statute with the exception that the word "vagrants" is used instead of "vagrants," such word should be stricken out as surplusage; it not being the equivalent of the word "vagrants."

4. Defendant kept a house, as he was licensed to do, for the purpose of selling beer, cigars, etc., and for a variety theater. He had disreputable women in his employment, and such women visited his house for the purpose of seeing the theatrical performances, and buying beer, etc.; but not for the purpose of prostitution. Held, that a conviction could not be sustained.

Appeal from Mitchell county court; W. C. McCOLLUM, Judge.

Smallwood & Smith, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. No error was committed in overruling the defendant's plea to the jurisdiction of the county court. It is evident from the record that the omission of the word "county" before the word "court" in the order of transfer was a clerical mistake. No other than the county court had jurisdiction of the cause, and this court will not presume that the district court intended to transfer the cause to a court not having jurisdiction thereof.

It was not error to permit the certificate of transfer to be amended by affixing thereto the impress of the seal of the district court. Has-

ley v. State, 14 Tex. App. 217; McDonald v. State, 7 Tex. App. 113.

It is alleged in the indictment that the defendant "did unlawfully keep a house for the purpose of public prostitution, and as a common resort for prostitutes and vagabonds." Defendant moved to quash that portion of the indictment which charges that the house was kept as a common resort for prostitutes and vagabonds, which motion the court overruled. At the time of the alleged commission of the offense, article 339 of the Penal Code was in force; and that article declares a disorderly house to be one "kept for the purpose of public prostitution, or as a common resort for prostitutes and vagrants." This definition has been changed by an amendment of said article (Acts 1889, p. 33); but the offense, if an offense was committed, having transpired prior to said amendment, was not affected thereby. Pen. Code, art. 18. It was not error, therefore, to overrule the motion to quash said portion of said indictment upon the ground that it charged no offense against the law. But we think the motion should have been sustained to the extent of striking out the word "vagabonds." That word is not used in the statute defining the offense, and it is not equivalent to the statutory word "vagrant." By force of statute, common prostitutes and professional gamblers are vagrants, (id. art. 385,) but such persons are not necessarily vagabonds. In this case, evidence was admitted that professional gamblers frequented the house kept by the defendant, and it may have been upon this evidence that the jury convicted the defendant. If the word "vagrants," instead of the word "vagabonds," had been used in the indictment, such evidence would have been legitimate; but it was not admissible under the charge that vagabonds resorted to the house. We think the word "vagabonds" should have been stricken from the indictment as surplusage, and that the evidence should have been confined to the charge that defendant kept the house for the purpose of public prostitution, or as a common resort for prostitutes. Considering, then, the evidence, excluding that which relates to professional gamblers, we are of the opinion that it does not warrant the conviction. There is not a particle of evidence that defendant kept the house for the purpose of public prostitution. He kept the house for the purposes of selling beer, cigars, etc., and for a variety theater, businesses licensed by law, and for the privilege of conducting which he had paid the license tax imposed by the law. He had women in his employment in said house who bore the general reputation of being common prostitutes, but they were employed in the conduct of his legitimate business, and were not there for the purposes of prostitution. Women of soiled reputations for chastity visited the house to witness the theatrical performances, and to purchase such articles as the defendant kept for sale, and as they desired. It was not a house kept as a common resort for pros-

titutes, within the meaning of the law, so far as is shown by the evidence before us. Harmes v. State, 26 Tex. App. 190, 9 S. W. Rep. 487; McElhaney v. State, 12 Tex. App. 231.

There was no error in the charge of the court as to the penalty. By the amendment of 1887 to article 339 of the Penal Code, the punishment was increased, and not ameliorated; and, the defendant not having elected to be tried under the law as changed, it was proper to direct the punishment prescribed by said article as it was at the time of the commission of the offense. Pen. Code, art. 15. Because the court erred in not striking from the indictment the word "vagabonds," and because the conviction is not supported by the evidence, the judgment is reversed, and the cause is remanded.

BRAZZIL v. STATE.

(Court of Appeals of Texas. June 11, 1890.)

HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

On first meeting the deceased, defendant was the aggressor, striking him over the head with his pistol. But, having disarmed the deceased, and pursued him a short distance, he abandoned the pursuit, saying that he could not shoot a man in the back. Deceased then withdrew to another building, and defendant turned to the examination of a wound which he had received. After the lapse of two or three minutes, deceased returned at a rapid gait, in an angry, threatening manner, to where defendant was standing. The latter called to deceased to stop; that he did not want to shoot him. Deceased nevertheless kept on, grappled with defendant, and was shot. Held that instructions, treating the affair as a single, continuous combat, and repeating again and again that defendant could not justify the homicide if he brought on or produced the conflict, constituted reversible error.

Appeal from district court, Coryell county; O. K. BELL, Judge.

Vardiman, White & Taylor and McDowell & Miller, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. On the morning of the 25th day of December, 1889, J. V. Matthews, the deceased, had a fight with D. Brazzil, a brother of the appellant, in a little village called "The Grove." D. Brazzil was drunk at the time, and was badly beaten and used up by Matthews in the fight. Appellant was at a dance in the country a few miles away at the time of this occurrence, but was informed of it an hour or so after it occurred, and expressed his determination to go to the village, and see if the deceased could do him that way. He went to the village some time between 3 and 4 o'clock in the afternoon; and, about three-quarters of an hour before the difficulty, the parties met at the post-office, but nothing was said, and no ill feeling exhibited, by either of them. Two rencounters took place between the parties afterwards, in the last of which the deceased was killed by appellant. At the time of the first difficulty the deceased was standing behind the counter in Cliff Graham's store, looking at

some young men who were trying to work out a Chinese puzzle. Defendant came in at the front door of the house; and, walking up to the end of the counter, stepped around behind the counter, within three or four feet of deceased, and said to him: "You are the d—d son of a bitch that beat my brother up this morning while he was drunk." Immediately both men drew their pistols, and the defendant struck the deceased over the head with his pistol. Deceased shoved his pistol under and near the breast of the defendant, and, just as the pistol fired, the defendant struck deceased across his arm with his (defendant's) pistol; and the deceased's pistol, which had just fired, dropped from his hand, and fell upon the floor, behind the defendant. Deceased then ran back towards the south end of the house; the defendant following, with pistol in hand, about halfway the length of the room. As deceased passed out the back door, the defendant stopped, turned, and came back, and, when asked why he did not shoot deceased, replied, "I can't shoot a man in the back," or "I won't shoot a man in the back." Defendant was also asked if he had been wounded when deceased's pistol fired. He answered "Yes," and pulled back his clothing, and showed a bullet hole in his vest, and wound in his breast. Much confusion was occasioned by a crowd gathering around the defendant, examining his wound, and talking to him. Thus occurred and ended the first difficulty. Meantime deceased had gone across the street to the store of W. J. Graham. Upon entering this store, he asked Graham for a pistol. Graham told him he did not need a pistol, and that he had better have the doctor dress the wound on his head. Deceased went back, sat down, and the doctor commenced wiping the blood from his head. When the doctor turned around for something, the deceased got up, and went hurriedly out of the front and north end of the house, saying he was going to get his pistol. He went rapidly in the direction of Cliff Graham's store, where the defendant still was, and was almost in a run when defendant's attention was called to the fact that he was coming. When deceased got within about 10 feet of the gallery of Cliff Graham's store, the defendant, who was just inside the door, said: "Stop, Matthews, stop! Don't come in here! I don't want to shoot you." Deceased continued to advance faster; and, just as he placed his foot on the steps leading on the gallery the defendant fired, the shot passing over the deceased. Defendant fired again, and missed. Deceased then jumped on to the gallery, and into the door, and grappled with defendant. He pushed the defendant rapidly back across the store to the north-west corner, against the wall; the defendant all the time going backward, and trying to strike deceased over the head with his pistol. When they reached the corner, the defendant shoved or knocked deceased loose from him, stepped from behind him, shoved his pistol forward, and

fired; and the deceased fell upon his face, and expired in a very short time.

The facts we have stated constitute substantially the important, and in the main the undisputed, facts in the case. From this statement, it is, we think, apparent that there were two separate and distinct encounters between the parties. That the defendant abandoned the first difficulty, even though it may be conceded that he provoked and brought it on with a deadly purpose, we think is equally clear. He is shot in the breast. He disarms his antagonist; and, when his antagonist flees, he pursues him with pistol in hand but a short distance, and then returns, saying he cannot shoot a man in the back. His antagonist had gone entirely across the street into another store, for safety, or in search of another weapon. Defendant, however, does not appear to know, or to be even considering, his purpose, but is intent upon examining the extent of, and talking about, his own wound. Two or three minutes, at least, must have elapsed before the deceased is seen returning rapidly, and before defendant is notified of his approach. Deceased, when seen by defendant, is approaching in an angry, threatening manner,—almost in a run,—and, according to some of the witnesses for the defense, with his hand hanging down by his side.

It is a general and well-established rule of law that "a conflict provoked by a defendant cannot be set up by him as a defense." (Whart. Hom. § 482.) and that where a defendant, by his own wrongful act, has brought about the necessity of taking life, he cannot plead that such killing was in his necessary self-defense, (Gilleland v. State, 44 Tex. 356; Willson, Crim. St. § 1070.) But it is a rule equally as well settled and established that, "though the defendant may have thus provoked the conflict, yet, if he withdraws from it in good faith, and clearly announces his desire for peace, then, if he be pursued, his rights of self-defense revive." Whart. Hom. § 483. The further rule is laid down in Stoffer's Case, 15 Ohio St. 47, that "the conduct of the accused relied upon to sustain such a defense [of justifiable homicide] must have been so marked in the matter of time, place, and circumstance as not only clearly to evince the withdrawal of the accused in good faith from the combat, but also such as fairly to advise his adversary that his danger had passed, and to make his conduct thereafter the pursuit of vengeance, rather than measures taken to repel the original assault." See this case reported in full in Hor. & T. Cas. 213, and notes to the same. Applying these rules to the case in hand, we think it evident that, though defendant had provoked the original contest for the purpose of bringing on a deadly combat, yet he most clearly and unmistakably abandoned the same, and withdrew from it in good faith, and under circumstances such as fairly to advise Matthews that his (the latter's) danger was past. Matthews, without pursuit from defendant,

had crossed the street, and secured his safety, beyond all question, in another store-house. So far as defendant was concerned, it appears that the contest was entirely and completely at an end. He was not even threatening to renew it. Such being the case, the former or first difficulty had nothing to do with the second and last, save to illustrate the malice by which the parties might be actuated in engaging in a second. Its relation to the second would be about the same as though it had happened the day, week, or month before. It would only be legitimate evidence as to ill will and former grudges on the question of malice, or the intent of the parties. In his charge to the jury, the learned trial judge has treated the case mainly as presenting but a single, continuous combat, and upon the main phases has iterated and reiterated to the jury that defendant could not claim his defense if he brought on or produced the conflict. If defendant did not bring on or provoke the last difficulty, then his right of self-defense was perfect, and in no manner abridged by the first, which he had abandoned and absolutely withdrawn from, and which was in fact at an end, and a matter of the past. *Oakley v. Com.*, (Ky.), 11 S.W. Rep. 72. The question of provoking a difficulty, if necessary to be submitted at all, should have been expressly limited to the acts and conduct of the parties in the last fight. Because we are of opinion that the charge of the court with reference to provoking the difficulty was calculated to mislead, and did probably mislead, the jury, to the prejudice of the appellant, the judgment is reversed, and the cause remanded.

HARDY v. STATE.

(Court of Appeals of Texas. May 17, 1890.)

CRIMINAL LAW—PRACTICE.

1. Where there are two complaints in the record, one of them being filed before, and the other after, the presentment of the information, the latter complaint should be stricken from the record.

2. The fact that a complaint describes the prosecuting witness only as "J. Withers," while the information describes him both as "J. Wither" and "J. Withers," constitutes an immaterial variance.

3. The prosecuting attorney, in his closing argument, said that defendant knew that he was guilty, and challenged defendant to get up, and deny his statement. On defendant's counsel whispering to defendant, the prosecuting attorney said: "That's right. Tell him to get up, and tell me that I have lied." *Held*, that a new trial should be granted.

Appeal from Eastland county court; D. K. SCOTT, Judge.

Prosecution for assault and battery. The charging part of the information reads as follows: "That John Hardy did, on or about the 21st day of July, 1889, in the county of Eastland and state of Texas, in and upon J. Withers, commit an aggravated assault; the said J. Wither then and there being an aged and decrepit person, and the said John Hardy being then and there a person of robust health. And the said John Hardy did commit an assault upon the said

J. Withers, by striking him with a rope, against the peace and dignity of the state." The charging part of the affidavit reads the same, except that throughout it alleges the name of the injured party as "J. Withers," and in no place as "J. Wither." In his argument to the jury, the prosecuting attorney said: "Defendant knows he is guilty. He dare not deny it." At this point defendant's counsel arose, and addressed the court, to take a bill of exception to said remark, upon which the district attorney further remarked: "That's right. Take your bill of exception, and whisper there to the court. Gentlemen of the jury, he [meaning defendant's counsel] has talked himself down taking exceptions, and now whispers them to the court." The district attorney further remarked: "The defendant is guilty. He knows he is guilty, [pointing at defendant:] and I hereby challenge him, right now, to get up before this jury, and contradict my statement." At this point, defendant's counsel whispered to defendant, whereupon the district attorney then said, pointing at defendant and his counsel: "That's right. Tell him to get up, and tell me that I have lied."

D. J. Hunt, R. B. Truly, and J. H. Davenport, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. We are of opinion that the lost or mislaid information was substituted in substantial conformity with the statute. It appears from the record that the original information was presented at the October term, 1889, of the court. There are two complaints in the record,—one dated July 22, 1889, and the other January 13, 1890. It is evident, therefore, that the information is based upon the former complaint, as the latter was made and filed long subsequent to the presentment of the information. The complaint of January 13, 1890, has no standing in this case, and should have been stricken from the record. There is no material variance between the complaint of July 22, 1889, and the information; nor is the information duplicitous. It charges an aggravated assault and battery in the usual form. We have noticed above, and determined, such of the questions presented in the record as are likely to arise on another trial. Other questions presented, but not determined, are of a character which may not occur on another trial.

This conviction must be set aside, however, because of the remarks of the district attorney in his closing argument to the jury. The objectionable remarks are fully set forth in bills of exception. These bills of exception show a gross abuse of the privilege of counsel; and we regret that we are called upon, in the discharge of our duty, to animadvert upon the conduct of the district attorney in strong terms. His remarks were outside of the record; were wholly unwarranted by the evidence; were unprovoked, unjust to defendant and defendant's counsel; and were

calculated to, and doubtless did, injure the rights of the defendant. We will not refrain from further saying that the trial judge should have promptly and effectually punished so flagrant a violation of the rules governing arguments, and should, furthermore, under the circumstances, have granted defendant a new trial. Reversed and remanded.

DEATON v. STATE.

(Court of Appeals of Texas. May 21, 1890.)

THEFT—CIRCUMSTANTIAL EVIDENCE—CHARGE.

Where the evidence of a theft is entirely circumstantial, the omission to instruct the jury upon the law of circumstantial evidence is fundamental error.

Appeal from district court, Val Verde county; W. KELSO, Judge.

Joseph Jones and C. C. Clamp, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. There is no direct evidence that defendant took the animal, of the theft of which he has been convicted. The case, therefore, is one of circumstantial evidence; and the omission of the trial judge to instruct the jury in relation to the rules governing in such case constitutes fundamental error, for which the judgment must be reversed and the cause remanded. Reversed and remanded.

BOWMAN et al. v. STATE.

(Court of Appeals of Texas. May 24, 1890.)

BAIL-BOND—OFFENSE NOT DESCRIBED.

A bail-bond which recites that the principal therein is charged with unlawfully altering a written order for five dollars' worth of goods "by erasing 'five' and writing 'eight,' so as to make the said instrument fully appear as stated above," does not show that he is charged with forgery, since it fails to set out the tenor of the instrument after the alteration, and the bond is invalid.

Appeal from district court, Collin county; H. O. HEAD, Judge.

J. Church, for appellants. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. In the bail-bond it is recited that the principal in the said bond was charged by complaint as follows: "That without lawful authority, and with intent to injure and defraud, he did willfully and fraudulently alter a genuine instrument in writing, which had been made by H. Warden, and which said instrument was an order for five dollars' worth of goods, drawn on W. E. Jones. Said instrument was so altered by said J. H. Bowman as follows: By erasing 'five,' and writing 'eight,' so as to make the said instrument fully appear as stated above." It would have been sufficient if it had been simply stated in the bond that said principal was charged with the offense of forgery. *Morris v. State*, 4 Tex. App. 557. But as this was not done, it was essential that the offense with which the principal was charged should be described by stating its essential

v.13s.w.no.20—64

elements, so as to make it appear that an offense against the law is charged against him. Willson, Crim. St. § 1794.

We are of opinion that the bail-bond in this case does not show that the principal therein was charged with an offense against the law. It states an alteration of a written instrument, without lawful authority, etc., but fails to show the tenor of the instrument after it was altered, or that its tenor differed from the genuine instrument. As described in the bond, the instrument, after being altered, appeared to be the same as the genuine instrument; that is, appeared to be an order for five dollars' worth of goods. Our opinion being that the bail-bond is invalid for the reason above stated, the judgment is reversed, and the proceeding dismissed.

REAGAN v. STATE.

(Court of Appeals of Texas. May 24, 1890.)

MURDER—SELF-DEFENSE—OMISSION TO CHARGE.

Where, in a trial for murder, the evidence clearly raised the issue of self-defense, it was error to omit to instruct the jury upon the law of self-defense, and to refuse a proper charge thereon requested by defendant.

Appeal from district court, Frio county; D. P. MARR, Judge.

L. H. Brown and Lane & Mayfield, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. As presented to us in the record, the evidence clearly raises the issue of self-defense,—justifiable homicide. In the opinion of the trial judge, that issue was not presented by the evidence, and he refused to submit such issue to the jury. Defendant requested correct and appropriate instructions upon it, which were refused, and defendant excepted. It was error to refuse the special instructions requested by defendant, and for this error the judgment is reversed, and the cause remanded.

ADAMS v. STATE.

(Court of Appeals of Texas. May 24, 1890.)

THEFT—CIRCUMSTANTIAL EVIDENCE—INDICTMENT—SURPLUSAGE.

1. That defendant had fresh veal in his possession, that a calf belonging to a neighbor had disappeared, and that the calf's mother was seen near defendant's house lowing over a spot where an animal had been recently butchered, is not sufficient to sustain a conviction of theft where defendant and his wife both testify that a party of hunters who camped near their house killed a calf which they had with them, and gave defendant part of the meat.

2. Where the signature of the foreman of the grand jury to an indictment is placed just before the conclusion, "against the peace and dignity of the state," such signature is mere surplusage, and a motion in arrest of judgment, based thereon, was properly overruled.

Appeal from district court, Frio county; D. P. MARR, Judge.

W. L. Crawford testified for the state, in substance, that he ate dinner at defendant's house on June 21, 1889. The meat of a recently butchered calf was served for din-

ner. Defendant said that a party of horse-hunters who had camped at a neighboring lake on the previous day killed the calf, and gave him a part of the meat, and that, on leaving the neighborhood, they stole the ball from his (defendant's) horse. After dinner the witness went to the lake, but could find no indications of a recent camp, nor place where an animal had been recently killed. Thence he went to a point behind defendant's field, near defendant's farm, when he found the place where a calf had been killed within the previous 24 hours. The paunch was still there, and Mrs. Allen's cow was lowing over it. Her teats and bags showed that she had not been recently sucked. When witness saw that cow, a few days before, she had a red and white spotted calf about six months old. There was blood on the defendant's fence, and a man's track on the outside and on the inside of his (defendant's) field; the latter leading off in the direction of defendant's house. This witness denied that he ever offered to give Emily Webb a dollar's worth of tobacco, and all the candy she could eat, if she would swear defendant killed the calf. Emily, Will, and George Webb testified for the state that early one morning in June, 1889, defendant brought the shoulder of freshly-killed calf to their house, and gave it to them. He knew they had no meat in the house at that time. One of these witnesses testified that defendant told them that the calf was being driven by his house by some hunters, when it gave out, and they killed it, giving him the meat, and keeping the hide. Emily Webb testified that, some time after defendant gave her the meat, she met W. L. Crawford in the road, on which occasion he told her that, if she would swear the defendant killed the calf, he would give her a dollar's worth of tobacco, and all the candy she could eat. George Webb testified that a party of hunters were camped at the lake during a part of the day on which the calf was alleged to have been killed. The disappearance of Mrs. Allen's calf was testified to by the manager of her stock. Defendant's wife testified in his behalf that a party of horse-hunters, who camped at the lake on the day before Crawford ate dinner at defendant's house, gave defendant the side and shoulder of a recently killed calf. It was witness, and not defendant, who told Crawford that the meat served at dinner was given to defendant by the hunters.

Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. The words "S. G. Speed, foreman grand jury," which occur in the indictment just before instead of after the conclusion, are surplusage, and are not to be treated as part of the indictment. The indictment concludes properly, and is otherwise sufficient, and the motion in arrest of judgment was properly overruled.

After a thorough examination and consideration of the evidence in the record, we conclude that it does not warrant the conviction.

It is wholly circumstantial on the part of the prosecution, and fails, we think, to establish, with that certainty and conclusiveness required in such cases, the guilt of the defendant. A strong, in fact the strongest, inculpatory circumstance proved, is that defendant had some fresh meat—the meat of a calf—in his possession. He gave and proved a reasonable explanation of his possession of the meat, and there was no evidence adduced contradicting the truth of the explanation. That the evidence raises a suspicion against defendant that he stole the calf is not to be denied; but suspicion, merely, does not authorize a conviction for crime. Reversed and remanded.

GRAHAM v. STATE.

(Court of Appeals of Texas. June 11, 1890.)

CRIMINAL LAW—NEW TRIAL—APPEAL.

1. In a prosecution for murder, testimony that certain bruises found upon the person of deceased were made with a "rough, hard substance," is not objectionable as opinion evidence.

2. A new trial will be granted on the ground of bias and prejudice on the part of a juror, where defendant and his attorneys swear that such bias was unknown to them before the trial, and affidavits that such juror had said before the trial "that defendant was guilty of the crime charged, and ought to be punished," and that it was a "bad case against the defendant," are not controverted.

3. Exceptions to the exclusion of certain evidence, which fail to disclose the purpose of the proposed evidence, will not be considered on appeal.

Appeal from district court, Coryell county; S. F. DUFFIE, Special Judge.

Vardiman, White & Taylor and Crain & Holbrook, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. Most of the errors complained of in the defendant's motion for new trial and assignments of error in the court below, and so ably argued and discussed in the brief of counsel for appellant in this court, relate to the charge of the trial court. But no exceptions were reserved to the charge, and there were no refused special instructions for defendant. The charge may be liable to some of the criticisms urged against particular portions, but there being no special exceptions, and none of the supposed errors being of a fundamental character, or such as, under all of the circumstances of the case, were calculated to prejudice the rights of the accused, we would not be warranted in revising, much less reversing, the judgment on account of them. But three bills of exceptions are found in the record. The first is to the overruling of the defendant's second application for a continuance; the second is to the refusal of the court to permit the defendant to introduce certain testimony by his witness, Miss Mary Doty; and the third is to the admission of certain testimony over objection of defendant. It is unnecessary to discuss the application for continuance. The second bill of exceptions is insufficient and defective, because it fails to disclose the object and purpose of the pro-

posed evidence, and will not, therefore, be considered on appeal. May v. State, 25 Tex. App. 114, 7 S. W. Rep. 588. As to the third bill of exceptions, it is made to appear that the state's counsel was permitted, over objections of defendant, to ask the witness Clawson to describe the appearances of certain bruises found upon the forehead and chin of deceased, and whether they were "made with a hard, rough substance, or otherwise." To this question the witness answered: "Said bruises seemed to have been made with a rough, hard substance." Defendant's only objection to the testimony was "that the witness could only describe the bruises, and let the jury conclude with what they were made." No material error is pointed out by the objection. The rule is that "opinion, so far as it consists of a statement of an effect produced on the mind, becomes primary evidence, and hence admissible whenever a condition of things is such that it cannot be reproduced and made palpable * * * to the jury." Clark v. State, 28 Tex. App. 189, 12 S. W. Rep. 729; Garner v. State, 28 Tex. App. 561, ante, 1004.

One of the grounds of defendant's motion for new trial was, in effect and substance, that his trial was not fair and impartial, because one of the jurors who sat upon the trial, to-wit, one J. A. Harris, Jr., was corrupt and biased and prejudiced against defendant, though he had fully qualified himself as a juror when examined on his *voir dire*. The defendant and his attorneys made oath that the bias and and prejudice of said juror was unknown to them until after the defendant's trial and conviction. In support of this ground of the motion the defendant filed the affidavits of three parties, two of whom swore that the juror Harris had said to them before the trial that the defendant was guilty of the murder of the deceased, Jim Clawson, and ought to be punished for it. Another affiant stated that said juror Harris had stated to him, soon after the homicide, "that it was a bad case against the defendant." In response to this ground of the motion, the counsel for the state replied that they had, immediately upon the filing of said motion, applied for and procured an attachment for the juror Harris, in order to rebut the statements in said motion and affidavits, but that the sheriff, in whose hands said attachment had been placed for service, "had returned the same indorsed, in effect, that the same was not executed for want of time." The attachment is filed with and made a part of this response, but we find no indorsement of any kind upon the copy sent up in the record on this appeal. As the matter is made to appear to us, we must hold that the juror was corrupt, and that consequently such suspicion is brought against the fairness and impartiality of the trial as that the verdict and judgment should be set aside, and a new trial awarded. Hanks v. State, 21 Tex. 526; Henrie v. State, 41 Tex. 573; Long v. State, 10 Tex. App. 186; Sewell

v. State, 15 Tex. App. 56; Willson, Crim. St. § 2542. The judgment is reversed, and the cause remanded.

COOPER v. STATE.

(Court of Appeals of Texas. June 13, 1890.)

RECEIVING STOLEN GOODS—EVIDENCE—INSTRUCTIONS.

1. In a prosecution for receiving personality, knowing it to have been stolen, for the purpose of showing that the property was stolen before defendant was found in possession of it, an indictment charging one H. with the theft of the property, and a judgment of conviction of said person for such theft, are admissible.

2. That such testimony was introduced after defendant had rested, and was not in rebuttal, did not constitute error; the court having expressly charged the jury that they should consider the testimony for no other purpose than that indicated.

3. Evidence that, when such indictment was served on H., he said that the only connection which defendant had with the property alleged to have been stolen was as a purchaser in good faith, was properly excluded as hearsay.

4. Where, in a prosecution for larceny, there is evidence that, on the night of the theft, defendant was in the town where the theft was committed; that he could not be found the next morning; and that, a few days afterwards, he was seen at a point 500 miles distant, in possession of the stolen property,—the question as to whether the testimony of an accomplice against defendant is sufficiently corroborated to warrant a conviction is properly left to the jury.

5. An instruction that the possession of property stolen is not positive evidence of guilt, but is a circumstance sufficient to warrant the presumption of guilt of defendant, if the evidence shows that such possession was recent, was personal and exclusive, etc., is objectionable as being on the weight of evidence.

Appeal from district court, Wilbarger county; G. A. BROWN, Judge.

Prosecution for the larceny of a horse. One Shannon testified that he, defendant, Hill, and Roquemore agreed to steal the horse; that the part of the enterprise intrusted to him was to secure defendant's saddle from Holman's livery stable, and take it to his co-conspirators, who were to take the horse at a point on the prairie; that he found the saddle in the gangway of Holman's stable, took it, and carried it to the point agreed upon, when he found Hill, Roquemore, and defendant with Crenshaw's horse; that he delivered the saddle, when it was put on the horse, after which the defendant mounted the horse, and rode off. A few days thereafter the defendant was found in possession of the horse in a county 500 miles distant from Wilbarger county. He explained his possession by claiming to have purchased it in Wilbarger county. A state's witness testified that defendant entered Holman's stable about dark on the evening of the theft, and removed his saddle from a granary to the gangway of the stable. It was proved that defendant was in the town of Vernon, wherein the horse was stolen, on the evening of the theft, about dusk, but could not be found on the next morning. Evidence that, when an indictment for the larceny of the horse was served upon Hill, he said that defendant had no connection with the animal until after it was

taken, when he purchased it in good faith, was excluded.

McCall & Britt Bros., C. Wheeler, J. Hall, and N. P. Jackson, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. There are two counts in the indictment,—the first charging the theft of a horse, and the second the receiving said horse knowing it to have been stolen. In support of the second count, to show that said horse had been stolen by another person than defendant, and before defendant was found in possession of said horse, the state was permitted, over defendant's objection, to introduce and read in evidence an indictment charging one Hill with the theft of said horse, and a judgment of conviction and sentence of said Hill for said theft. For the purpose for which this testimony was admitted, we think it was relevant, and otherwise admissible. Whart. Crim. Ev. § 602. It afforded *prima facie* proof that the horse had been stolen by Hill at the time defendant came into possession of it.

That said testimony was admitted after the defendant had closed his testimony, and was not in rebuttal of any testimony adduced by him, is not a valid objection on appeal; it not appearing that the trial court abused its discretion, to the injury of the defendant, in admitting said testimony. This testimony was, by the charge of the court, expressly limited to the purpose for which it was admitted, and the jury were told to consider it for no other purpose.

As to the testimony offered by the defendant, and rejected, it was clearly inadmissible. It was in part hearsay, and in part irrelevant and immaterial.

There is ample evidence, we think, to warrant the instructions as to the law of principals in crime. That defendant and others acted together in the theft of the horse to such extent as to make them all principals in the theft is clearly shown by the testimony of the accomplice witness, Shannon. Whether or not the testimony of the accomplice was sufficiently corroborated to warrant a conviction was a question for the jury to determine, and the trial court properly and correctly submitted that question to the jury; and, in doing so, it was not only right, but it was the duty of the court, to instruct the jury in relation to the law as to principals. It is contended, however, by counsel for defendant that there is no evidence which corroborates the accomplice's testimony to the extent required by the law, and that the uncorroborated testimony of an accomplice cannot form the basis of an instruction from the court. We differ with counsel in their view of the evidence and the law. We think there is evidence corroborating the accomplice's testimony. That defendant was found in possession of the horse shortly after it was stolen is certainly a corroborating circumstance tending to connect the defendant with the theft. That he placed the saddle where Shan-

non could get it is another such circumstance. That he was in the town on the night that the horse was stolen, but could not be found there on the next morning, and, when seen a few days thereafter, was 500 miles distant from the place of the theft, are circumstances tending to connect him with the theft of the horse, and which in material matters corroborate said accomplice's testimony.

We find the charge of the court free from error, except in one particular. As to the circumstances of defendant's possession of the horse recently after the same was stolen, the charge is as follows: "The possession of property stolen is not positive evidence of guilt, but is a circumstance sufficient to warrant the presumption of guilt on the part of the person having such possession, if the evidence shows such possession was recent, was personal and exclusive, and unexplained," etc. This paragraph of the charge was excepted to by the defendant at the trial, and a bill of exceptions thereto duly reserved. In *Lee v. State*, 27 Tex. App. 476, 11 S. W. Rep. 483, this court held a similar instruction erroneous, as being upon the weight of evidence. In the above-quoted paragraph the jury was told that the personal, exclusive, unexplained, and recent possession of the horse after the same was stolen was sufficient evidence to warrant the conviction of the defendant of the theft of the said horse. The instruction should have been that such possession was a mere circumstance to be considered by the jury in connection with other evidence in the case in determining the issue of defendant's guilt. Because of the above-stated erroneous instruction, the judgment is reversed, and the cause remanded.

LOCKHART v. STATE.

(Court of Appeals of Texas. June 21, 1890.)

LARCENY—SENTENCE.

1. In a prosecution for larceny, an instruction that "when the state relies upon the possession of recently stolen property as a presumption of guilt," etc., is erroneous as telling the jury that guilt will be presumed from such possession.

2. Upon the subject of accomplice testimony, a charge in general terms as to the necessity of corroborating the evidence of an accomplice, and defining an "accomplice" in the language of the statute, is sufficient, in the absence of a request for an instruction applying the law to the facts in the case.

3. A sentence fixing the commencement of the sentence at a period about two years subsequent to the date of the sentence, no reason appearing why it was so made to commence, is erroneous, and it will not be presumed, in favor of it, that it was cumulative.

Appeal from district court, McCulloch county; J. W. TIMMINS, Judge.

Prosecution for the larceny of 64 head of sheep. William Chaffin testified for the state that defendant told him that he had stolen the sheep, and that, at the request of defendant, he drew up a bill of sale purporting to transfer the sheep from a third party to defendant. On the subject of accomplice testimony, the court charged that a conviction cannot be had upon the testimony of an ac-

complice unless corroborated by other evidence tending to connect defendant with the offense charged, and that the corroboration is not sufficient if it merely shows the commission of the offense, and defined an "accomplice" in statutory language. Defendant was convicted, and appeals.

R. H. Ward and *W. Anderson*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. It is complained that the charge of the court upon accomplice testimony is insufficient in that it did not instruct the jury that the witness *William Chaffin* was an accomplice. The charge, as far as it went, sufficiently charged the law. *Willson*, Crim. St. § 2455. It could have been made more pointed, perhaps, by directly submitting to the jury the necessity of the corroboration of the accomplice testimony, if they should find from the evidence and law as given that said *Chaffin* was an accomplice; but, in the absence of a special requested instruction amplifying the charge in that respect, no error is made to appear.

Exception was made to the charge of the court upon recent possession, the objectionable language being as follows: "When the state relies upon the possession of recently stolen property as a presumption of guilt," etc. This was tantamount to telling the jury that guilt was presumable, and might be presumed from recent possession. Recent possession is but a fact or circumstance to be weighed by the jury in determining the question of guilt. The inculpatory inference from such recent possession is not a presumption or conclusion of law, but a deduction of fact to be drawn and ascertained by the jury alone from the circumstances of the case. *Boyd's Case*, 24 Tex. App. 570, 6 S. W. Rep. 853; *Mattock's Case*, 25 Tex. App. 654, 8 S. W. Rep. 818; *Florez's Case*, 26 Tex. App. 477, 9 S. W. Rep. 772. To charge the jury that recent possession is a presumption of guilt would be a charge directly upon the weight of evidence. The charge excepted to above is scarcely less objectionable, and will require a reversal of the judgment.

There is error in the sentence of this defendant, in fixing the time for the commencement of his sentence under this conviction from the 16th day of May, 1892, a period of two years from the date when said sentence was passed, to-wit, on May 16, 1890; it not appearing from said sentence that the defendant had been previously convicted in the district court of *McCulloch* county, Tex., or elsewhere. Nor does any other reason appear why said sentence is made to commence in the future. When there are two or more convictions of the same defendant at the same time, judgment and sentence shall be pronounced in each case the same as if there had been but one conviction, except that the judgment in the second conviction shall be that the punishment shall begin when the judgment and sentence in the preceding con-

viction shall have ceased to operate, and the sentence and execution thereof shall be accordingly. Code Crim. Proc. art. 800; *Willson*, Crim. Forms, 771, 772. We might, perhaps, presume, in favor of the correctness of the sentence, that it was cumulative, but there is no reason that such presumptions should be required when it is so easy to state the fact, if fact it be. The judgment is reversed, and cause remanded.

GRAHAM v. STATE.

(Court of Appeals of Texas. June 21, 1890.)

ASSAULT WITH INTENT TO KILL—EVIDENCE—INSTRUCTIONS.

1. Code Crim. Proc. Tex. arts. 42, 284, having vested the county judge with power to issue warrants of arrest, and such a warrant having been issued by a county judge, and signed officially by him, defendant in a prosecution for an assault with intent to kill, committed upon one attempting to serve the warrant, cannot object to it as evidence on the ground that it does not show that it was issued by the county judge as a "committing magistrate."

2. Defendant committed the assault in resisting arrest after he was informed by the officer assaulted that he had a warrant for him. *Held*, that a defect in the warrant, in that it only gave his surname, and did not state that his name was unknown, and give a description of him, being at the time unknown to defendant, was no defense.

3. Testimony as to the good character of defendant subsequent to the commission of the assault was properly excluded.

4. An instruction that "the punishment for an aggravated assault is by fine of * * * and by imprisonment, * * * or by such fine without imprisonment," does not permit the jury to assess imprisonment without fine, and is therefore erroneous, under Pen. Code Tex. art. 493.

5. Such error is a reversible one though no exception was reserved to the instruction, and though defendant was not convicted of aggravated assault, but of assault with intent to kill.

Appeal from district court, *Milam* county; *J. N. HENDERSON*, Judge.

Defendant was convicted of assault with intent to murder, committed in attempting to resist arrest, and appeals.

S. Streetman, *J. L. Peeler*, and *W. K. Homan*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. Defendant's objections to the admission in evidence of the warrant of arrest were properly overruled. It was not essential that the warrant should show that it was issued by the county judge as a "committing magistrate." It was issued by the county judge, and signed officially by him; and the law declares such officer to be a magistrate, and vests him with the power to issue warrants of arrest. Code Crim. Proc. arts. 42, 284.

It is true that the warrant does not state the full name of the accused; nor does it state that his name is unknown, and give a description of him. It states his surname, and that his Christian name is unknown. For the purposes of this case, we think the warrant sufficient. If the officer who had it, in attempting to execute it, had committed homicide, we are not prepared to say that he

could justify under such warrant. Id. art. 233; *Alford v. State*, 8 Tex. App. 545. In this case, however, the defect could not in any way have influenced the conduct of the defendant. He had no knowledge of such defect. He knew, however, or at least he was informed by the officer, that said officer had a warrant for his arrest, and was endeavoring to execute it. He resisted the arrest, and in doing so assaulted said officer with a deadly weapon. Such being the case, we cannot perceive how the defect in the warrant, if any, could in any manner, or to any extent, avail the defendant. If he was being prosecuted for resisting an arrest under such warrant, the question would be quite a different one; for in such case it would devolve upon the state to show a valid warrant of arrest.

There was no material error committed in rejecting testimony offered by defendant showing his good character. This testimony related to a time subsequent to the commission of the alleged offense, and was irrelevant and immaterial. No testimony was offered by him to show that, at and prior to the commission of the assault, he bore the general reputation of being a quiet, peaceable, law-abiding man.

Objections are urged by counsel for defendant to the charge of the court; but no exception, except a general one, was reserved. We think the charge is a clear and almost perfect exposition of the law applicable to the numerous issues presented by the evidence. It is as favorable to the defendant as the evidence would warrant. We have found but one error in it, and that is in the paragraph which states the punishment for an aggravated assault and battery. This error is claimed by counsel for appellant to be fundamental, and therefore reversible error, the same as if it had been specially excepted to at the trial. It has been repeatedly held that if the charge incorrectly instructs as to the penalty of the offense, it is fundamental error, for which the conviction will be set aside although the error be not excepted to, and although it may be an error inuring to the benefit of the defendant. *Willson*, Crim. St. § 2348; *Williams' Case*, 25 Tex. App. 76, 7 S. W. Rep. 661; *Irvin's Case*, 25 Tex. App. 558, 8 S. W. Rep. 681. In this case the court instructed as to the penalty for an aggravated assault as follows: "The punishment for an aggravated assault is by fine of not less than \$25, and not more than \$1,000, and by imprisonment in the county jail not less than one month and not more than two years, or by such fine without imprisonment." The vice in this instruction is that the jury could not assess imprisonment without fine as the punishment, whereas the punishment prescribed by the law permits imprisonment without fine, as well as fine without imprisonment. Pen. Code, art. 498. That this error does not relate to the offense of which the defendant was convicted does not render such error immaterial, as has been held by

this court in *Rodriguez v. State*, 8 Tex. App. 129. Because of said error the judgment is reversed, and the cause remanded.

BEATTY *et al.* v. MASTERSON.

(*Supreme Court of Texas*. May 2, 1890.)

LOCATION OF LAND CERTIFICATES — APPLICATION.

Rev. St. Tex. art. 3895, provides that an application for a survey of public lands shall be in writing signed by the applicant, shall particularly describe the lands applied for, and shall, together with the land certificate, be filed in the office of the surveyor. *Held*, that where a surveyor received certain certificates, together with a blank paper signed by one whose connection with the owner of the certificates was not shown, with directions to locate them upon the head of the Sabinal, and the surveyor himself afterwards filled out the application with the proper description, this was a sufficient compliance with the statute; and, the owner of the certificates having ratified the location, the lands were appropriated according to law, and the surveyor rightly refused to locate other certificates thereon.

Appeal from district court, Bandera county. *Templeton & Carter*, for appellants. *Mazey & Fisher* and *B. T. Masterson*, for appellee.

HENRY, J. This suit was brought by appellee, against the surveyor of Bandera county and appellants, to compel the surveyor to record and deliver the field-notes of certain surveys made for appellee. The lands in controversy were charged to be part of the public domain, and as such subject to be located by certain alternate certificates owned by appellee. The cause was tried without a jury, and judgment was rendered for the plaintiff.

The plaintiff, on the 12th day of September, 1882, delivered the certificates to the surveyor of Bandera county, and at the same time made, in due form, a written application for their survey upon the land in controversy. On the 11th day of September, 1881, one L. L. Myers was the owner of 20 alternate land certificates, which were on that date delivered by a deputy-surveyor of Bexar county to the county surveyor of Bandera county; and at the same time the deputy-surveyor delivered to the county surveyor a blank sheet of paper containing the following signature or indorsement: "L. L. LACEY, Agent for C. J. Jones." The surveyor testified that the certificates and blank were handed to him at San Antonio; that he had informed the deputy from whom he received them that there was vacant land on the head of the Sabinal, in his county, sufficient to put in 20 certificates, of which he could not then give a description so as to make a file; that he received the blank to be filled up by him as an application when he returned to his county, where he had a description of the land; that, upon his return home, he wrote out, above the signature, an application for the land now in controversy, and filed and recorded it on the 12th day of September, 1881; that he surveyed the lands in the months of June, July, and August, 1882; and that the field-notes were recorded be-

tween the 6th and 20th days of November, 1882, when they were forwarded to the general land-office. It was not proved by whom the signature to the blank paper was made, nor that C. J. Jones ever owned any interest in, or had possession of, any of the certificates; but it was proved that all of said certificates were conveyed by the Gulf, Colorado & Santa Fe Railway Company, to which they were issued, to L. L. Myers, on the 2d day of March, 1881, and that they were all conveyed by Myers to the defendants Hart and Shores on the 22d day of May, 1882. The conveyance of the certificates by Myers each recited that the certificate conveyed had been "located by me in the county of Bandera and state of Texas upon the public domain of said state." Appellants contended that "the court erred in finding in favor of plaintiff, and in rendering a judgment against the defendants, because plaintiff failed to show that the land in controversy was unappropriated public domain, and subject to be located by him under any of his pretended files thereon; and, on the contrary, his evidence showed that said land had been appropriated and filed on, and surveyed under, valid certificates, prior to any of his said files or pretended files."

If the application made in the name of Jones, and filed and recorded by the county surveyor of Bandera county on the 12th day of September, 1881, and the subsequent proceedings with regard thereto, were such as to be a lawful appropriation of the lands by the certificates then owned by Myers, and subsequently by the defendants Hart and Shores, it necessarily follows that, without regard to other questions presented by the record before us, the lands were not subject to appropriation by plaintiff's certificates on the 12th day of September, 1882, nor subsequently. Applications for the survey of the public lands are regulated by the following articles of the Revised Statutes: "Art. 3894. Each county, district, and special deputy-surveyor shall keep in his office a well-bound book as a register of entries, in which he shall register all entries or applications for land in his county or district. Art. 3895. An entry or application shall be in writing, and be dated and signed by the applicant. It shall particularly describe the claim to be surveyed, and the land applied for, which entry or application, together with the land certificate or scrip, or other legal evidence of title to be surveyed, shall be filed in the office of the county or district surveyor in which the land is situated, and where the said claim to be surveyed shall remain until returned, together with the field-notes, to the general land-office. Art. 3896. The survey shall be made by a copy of the entry or application, and strictly in accordance with the same, and hereafter no survey shall be made until after entry or application as provided in the preceding article." The statute does not require that the application shall be made by the owner of the certificate. It does not require that the land certificate itself shall be filed with the application. We

think that the possession of a certificate, and the ability to deliver it to the surveyor with the application for its survey, is sufficient authority to the surveyor for him to receive and file the application and certificate, and make the survey. If the possession of the certificate is wrongful, and its location unauthorized, the rightful owner alone can complain. Notwithstanding such want of his consent and authority, the owner of the certificate will own the land located under it; and he may, unquestionably, adopt the location, and ratify all proceedings leading to the acquisition of the land. If the possession of the certificate has been wrongfully obtained, and its location has been made against the will of the owner, he may no doubt disavow it, and be relieved from its effects; but if, in any case, he chooses to retain the location, and acquire the land, other persons have no right to complain. It is not shown that the deputy-surveyor of Bexar county, who delivered the certificates to the surveyor of Bandera county, and directed the application for their survey to be made, or the county surveyor of Bandera, had any interest whatever in the certificates, or in the land located, beyond the legitimate fees of the county surveyor. Myers, the owner of the certificates at the date of their location, seems to have known of their location, and to have approved it. As we have said, as early as May 22, 1882, several months before plaintiff took any step to acquire the lands, he referred to the fact and place of their location; and the present owners purchased them as so located, and continued to acquiesce in the disposition that had been made of them. We are constrained to conclude that the certificates were delivered to the surveyor, by persons intrusted with them by the owner, for the purpose of causing them to be located. We think that there is nothing in the law, and that no good reason exists, forbidding a surveyor from writing out the application addressed to himself for the survey of the certificate, when he is requested to do so by the holder, and when the land applied for is designated, even in a general way, by such holder.

Notwithstanding it is not shown that Jones had any interest in the certificates, or even an authorized agency with regard to their location, the fact that the person who furnished that name to the surveyor as the signer of an application for the survey of the very lands in dispute, had possession of the certificates, connected with the fact that the undisputed owner of the certificates shortly afterwards declared that he himself had made the locations, must, in the absence of all other evidence, lead to the conclusion that all of the precedent acts had been done for the benefit of, and by the authority of, the owner. We think the title of the owner of the certificate to the land to which it had been applied by another, even without his authority, has never been called in question in this state, notwithstanding such transactions have often occurred. The only purpose of the articles

of the statute above quoted was to furnish accessible information of what land had been previously appropriated for the benefit of others who had a right to acquire an interest in what remained unappropriated, so that they could make their selections out of what was left. There was nothing in the mode or substance of the proceedings in this instance that had any tendency to delay plaintiff, or to deprive him of the exercise of that right. The forms of the law having been complied with, and the land having been surveyed by authority of genuine certificates then in the hands of the surveyor, the ownership of the certificates, or the instrumentalities through which they had been applied to the land, unless they could be shown to be prohibited by law, were matters that were immaterial to other scrip-owners. In view of the facts that public domain subject to location was being rapidly exhausted, and that limitation was running against the certificates themselves, we think it would be an unauthorized and harsh construction of the law to hold that, if the first locations and surveys were in fact made without the knowledge or consent of the owner of the certificates, he could not, when the facts came to his knowledge, adopt the locations, and hold the lands; but must lose both the lands and the certificates. We think the judgment should be reversed, and judgment here rendered that plaintiff in the court below take nothing by his suit, and pay the costs of this court and of the district court.

SUN MUT. INS. CO. v. MATTINGLY et al.

(Supreme Court of Texas. May 2, 1890.)

FIRE INSURANCE—PROOF OF LOSS—WAIVER.

1. A letter written by an insurance company informing the policy-holder that the proofs of loss furnished were unsatisfactory, and notifying him that payment of the claim would be resisted because of misrepresentations regarding title and property, operates a waiver of further proofs.

2. An insurance policy requiring proofs of loss to be furnished "as soon as possible" is not forfeited by a failure to furnish them until 60 days thereafter, in the absence of a provision therein that unnecessary delay shall work a forfeiture.

Appeal from district court, Grayson county.

C. N. Buckler, for appellant. *W. W. Wilkins, J. D. Woods, and J. T. Cunningham*, for appellees.

GAINES, J. This suit was brought on a policy of insurance executed by appellant to Henry & Dickerson on certain real and personal property. The appellees became the owners of the claim during the progress of the suit, and without objection made themselves parties plaintiff in the action, and prosecuted it to judgment in their favor. On the 29th of October, 1884, the insured property was destroyed by fire. The policy stipulated that "persons sustaining loss or damage by fire shall forthwith give notice thereof in writing to the company, and as soon thereafter as possible they shall deliver an account of their loss and damage, with all the particulars, as fully detailed as the nature of the case will admit, signed with their

own hands; and they shall accompany the same with their oaths or affirmation declaring the said account to be true, and just when and why the fire originated, so far as they have reason to believe, and until such proof and declaration shall be produced the loss shall not be payable." On the 26th day of December, 1884, the assured furnished a proof of loss which was deficient. It failed to show in detail a description of all the personal property. On the 10th day of January following the company's agent wrote them a letter, of which the following is a copy: "The proofs of loss furnished by you to this company are wholly unsatisfactory as to the amount of your claim, even if this company was liable under the policy. The company, however, denies any responsibility under the policy by reason of material representations as to title and property being untrue, and for other reasons which the company will specifically set forth in answer to any suit you may institute on said policy. The company reserves all objects to your recovery in any form, and hereby expressly refuses to waive any rights of the company under the policy, and hereby notifies you of the fact, and leaves you to pursue such course as you may deem expedient." No other proof of loss was furnished to the company. Upon this state of facts, the court charged the jury that the letter was a waiver of the proof of loss. That charge is assigned as error. The majority of the court are of the opinion that the letter was a waiver. Their opinion is that the proof of loss is only serviceable as a basis for an amicable adjustment, and that it becomes a useless ceremony when the insurer denies all liability under the policy. The doctrine that when the assured is notified by the insurer that the loss will not be paid, except by suit, the proof becomes "an idle ceremony" or "a useless form," has been announced in several cases, though it may be doubted whether in any of them so broad a statement was necessary to the decision of the case. *Insurance Co. v. Coffee*, 61 Tex. 287; *Harriman v. Insurance Co.*, 49 Wis. 71, 5 N. W. Rep. 12; *Taylor v. Insurance Co.*, 9 How. 408; *Insurance Co. v. Sheets*, 26 Grat. 865; *Insurance Co. v. Cary*, 88 Ill. 456. We agree that whether the letter was a waiver or not was a question of law for the court, and also a question of fact for the jury. Nearly two months having elapsed between the destruction of the property and the proof of loss, the defendant company asked the court to charge the jury, in effect, that if, by the exercise of reasonable diligence, the insured could have furnished the proofs of loss at an earlier day than that at which they were actually delivered, they should find for the defendant. As a rule, when the policy requires the proofs of loss to be made within a specified time, a compliance with the requirement is a condition precedent to a recovery; and it should be conceded that if by the terms of the policy the contract is to become void or to be forfeited upon a failure to comply, when once

the forfeiture has occurred, the contract is at an end, and the failure cannot be waived except by such new consideration as would support a new contract. But the policy in this case, while it does provide that the proof of loss shall be furnished "as soon as possible," and that the loss shall not be payable until the proofs are furnished, does not expressly stipulate that a failure shall work a forfeiture. This is the more notable because in other clauses of the policy it is distinctly stated that the doing of certain acts shall render the contract "void and of no effect," and shall be a "cause of forfeiture." The letter of the appellant's agent, already quoted, tends to show that the policy was not regarded as forfeited by a failure to present the proofs at an earlier day, and favors the construction that it was not intended that the insured should forfeit their rights under the policy by mere delay in presenting the proofs of loss. The objection was that the proofs were unsatisfactory, not that they had not been furnished in time. If it were not too late to present them, then it was competent for the company to waive them, and such action relieved the assured from the necessity of a further attempt to comply with the terms of the policy in that respect. It was not error for the court to refuse the charge. The judgment is affirmed.

HIBERNIA INS. CO. v. STARR.

(Supreme Court of Texas. May 9, 1890.)

FIRE INSURANCE—ACTION ON POLICY.

1. Where suit is brought on a policy of fire insurance which stipulates that the company will not be liable for a greater proportion of any loss than the sum thereby insured bears to the whole amount of insurance, and there is some evidence that the loss was less than the whole amount of insurance, it is reversible error to refuse to instruct the jury as to the *pro rata* liability of the defendant, though such limitation of liability was not pleaded by the defendant.

2. The fact that the company objected to the proof of loss when furnished to it, as being incomplete, not in conformity with the policy, and untrue, is no reason for excluding such proof from the evidence, when offered for the purpose of showing a compliance with the terms of the policy, since the final decision as to the sufficiency of the proof rests with the court, and not the company.

Appeal from district court, Bexar county.

H. P. Drought, for appellant. *Shook & Vanderhoeven*, for appellee.

COLLARD, J. There was a clause in the policy of insurance sued on as follows: "This company will not be liable for a greater proportion of any loss sustained by the assured upon any property described in this policy than the sum hereby assured thereon bears to the whole sum assured thereon, whether such other insurance be valid or not, and without reference to the solvency of the other insurance companies." The policy was indorsed: "\$1,000 additional concurrent insurance permitted;" and it was proved by plaintiff that he had another insurance of \$1,000 in the Lion Fire Insurance Company on the same property, made on the same terms as the one

sued on, which was permitted by the defendant. The defendant requested the court to charge upon these facts, and to charge the stipulation in such case as contained in the policy as to *pro rata* liability of plaintiff with the Lion Insurance Company. The court refused the special instructions asked, and the appellant assigns error.

There being no doubt as to the stipulation in the policy that in case of other permitted insurance this company should be liable to pay only the stated proportion, and no doubt that other insurance was taken as permitted by defendant, and there being evidence (though in conflict with the evidence of plaintiff) tending to show that the loss was not as much as the amount of insurance of both companies, the court should have given the rule of *pro rata* liability, on the part of defendant, as stated in the policy. Some such charge as the one asked on this subject should have been given, though it was improper to submit to the jury a question as to whether the provision referred to was contained in the policy or not. It was in the policy, and the court should have simply so informed the jury, and then submitted the other facts with the law. *Insurance Co. v. Coffee*, 61 Tex. 294, 295. The modification of liability in this condition of the policy does not admit of construction. It is a part of the contract, and relates to the liability to the assured, and not to the rights of contribution from the other company. The language is: "This company shall not be liable for a greater proportion of any loss sustained by the assured upon any property described in this policy," etc. This is plain and unequivocal, and must have effect, if the facts accord with it. It was error not to give some such charge as the one asked.

But appellee says defendant did not plead the matter so relied on. This is true; but we think it was not necessary to plead it, under the circumstances. Plaintiff sued on the policy, declaring that defendant agreed as follows, to-wit: "That in consideration of \$17.50 by said plaintiff paid to said defendant, and of the agreements and conditions in said policy of insurance contained," etc.; and also setting up the fact that \$1,000 additional concurrent insurance was permitted. Plaintiff also read in evidence the policy, with its conditions, which were a necessary part of it, and also testified, without objection, that he took out the other policy on the same property. Under these circumstances the court should have instructed the jury as to law of the case made. Besides this, we are of opinion that it devolved upon the plaintiff to show that he was entitled to recover, and how much he was entitled to under the policy.

Plaintiff offered in evidence the proof of loss furnished to defendant for the purpose of showing a compliance with the terms of the policy before bringing suit, to which defendant objected "because that, when the proof of loss was first furnished, defendant objected to it for the reason that it was incomplete; did not comply with the terms of

the policy; that it claimed loss on goods not insured; that the statements in it, though under oath, were contradictory to other statements of plaintiff made under oath; that plaintiff was notified by defendant of its objections, and refused to amend it, or change it in any way; and that plaintiff, while on the stand, contradicted his statements in the proof of loss." The court overruled the objections, and defendant assigns error. It was not the province of the company to determine the question as to the sufficiency of the proof of loss; that was for the court and jury. There were many questions to be considered of which the law does not make the insurance company the judge. The plaintiff may have made the best proof that could have been made under the circumstances. Impossibilities would not be required of him; and if he did fail, in certain particulars, to comply with the terms of the policy in making proof, it was not necessarily fatal to plaintiff's case. Such matters must be submitted to the courts. Plaintiff had the right to submit such proof as had been made on both efforts to prove the loss, and defendant could then, if possible, show the defects in the proof, and the court and jury would have the matter before them from which they could say and determine whether it were sufficient. Defendant was not the final arbiter; and though they might object at the time to the sufficiency of the proof, and require other proof, the question at last is for the court; and, though the proof might not be technically correct, the law might say that, if it were as full and complete as could be made under the circumstances, it would be sufficient, or even that a failure to comply with demands for further proof that might be made did not forfeit any of plaintiff's rights under the policy. *Insurance Co. v. Starr*, 71 Tex. 786, 12 S.W. Rep. 45.

The objections made to the introduction of the proof of loss are, however, abstract. They do not state wherein the proof of loss was incomplete; wherein it failed to comply with the terms of the contract; what goods it claimed as lost that were not insured; what statements were contradictory to others made at other times; nor what the notification of objections to specific deficiency in the proof was. Such abstract objections, if they had been otherwise available, and within the province of defendant, could not be considered by the court.

We think the affidavit of Isaac Cohen was sworn to. It shows on its face to be an affidavit sworn to before Freeborn, notary public of Bexar county, on the 30th of June, 1885. The proof of loss (itemized) offered in evidence is of date July 31, 1885. Plaintiff made another statement of the loss, which he says was incomplete, because made on the "spur of the moment," about a month after the fire. The fire occurred on the 23d of June, 1885; and the affidavit of Cohen states that affiant had seen the statement of loss made by plaintiff. We think it is evident he meant the

first proof of loss, and its introduction is not subject to the objection made to it that it did not identify the proof of loss. We also think that plaintiff or defendant could show all that was done to furnish defendant with the necessary proof of loss.

Other errors assigned—that the court should have granted defendant's second application for a continuance, and that the "verdict was contrary to the law, as charged by the court, and the evidence, in that plaintiff failed to prove the value of the goods destroyed"—need not be considered. Because of the error of the court in refusing charges asked, and in failing to give instructions involving similar principles upon the question of the proportion of the defendant's liability, legitimately raised by the terms of the policy, and the existence of another concurrent insurance upon the same property, we conclude the judgment should be reversed, and the clause remanded, and it is so ordered.

CHAVEZ v. CHAVEZ *et al.*

(Supreme Court of Texas. May 2, 1890.)

DEED—CONSTRUCTION—WILL.

An instrument in writing, executed and acknowledged by a person in the manner provided for conveyances of real estate, which recites that, in view of his approaching marriage, "it is his will" that his proposed wife shall at his death be the absolute owner of certain lands, "with the condition that they shall not be sold by her until after his death," and, in the event of his surviving her, they shall "revert to him or his heirs," but in case they do not marry the "legacy or gift" shall be void, is a deed, notwithstanding a declaration therein that it is a "last will and testament."

Commissioners' decision. Consent case. Error from district court, Bexar county; G. H. NOONAN, Judge.

L. N. Walthall, for plaintiff in error.
Devine & Smith, for defendant in error.

ACKER, J. Juana Hernandez De Chavez, for herself, and as next friend for her minor son, Juan Francisco Chavez, brought this suit in the usual form of trespass to try title, and for damages. All the parties claim under Miguel Chavez. On the trial the plaintiff offered in evidence the following instrument:

"The state of Texas, county of Bexar. In the name of Almighty God, I, Miguel Chavez, of the state and county aforesaid, being of sound mind, and in the full possession of all my faculties, do hereby declare this to be my last will and testament: 1st. I declare that I am the owner of forty *varas* of land on Flores street, in the city of San Antonio, with a depth to the San Pedro creek. Said land is bounded on the north by land of Thos. J. Devine, on the east by Flores street, west by the San Pedro creek. 2nd. I declare it to be my will that, as I am about to marry Juana Hernandez, that at my death she shall be the absolute owner of twenty *varas* of said above-described property, to be taken from the north side of said lot, with the condition that said land shall not be sold by her until after my death; and further, if the said Juana Hernandez should die before I do, said prop-

erty shall revert to me or my heirs. *Srd.* I declare that in the event, from any cause, I do not marry said Juana Hernandez, then the legacy or gift to her of said land shall be null and void. In testimony whereof, I sign my name by making a mark, declaring my inability to write, in the city of San Antonio, this 22nd day of April, A. D. 1872.

his
"MIGUEL X CHAVEZ.
mark.

"Witnesses: ROBERT C. SYMINGTON,
THEO. BALDUS."

The execution of the instrument was certified on the day of its date as having been acknowledged in the manner required for conveyances of real estate. The defendants objected to the instrument on the ground "that it is a will, and not a deed, and had not been admitted to probate, and had not been probated, as a will." The objection was sustained, the instrument excluded, to which plaintiffs excepted; and this raises the only question presented here.

While the language employed in the instrument is largely testamentary, we think it evident that it was intended by the maker to be a conditional conveyance to become operative upon his marriage with Juana Hernandez. The language is inconsistent with the intention that it should not take effect until the death of the maker. If it was intended to be a will, and that no interest should pass by it until the death of the maker, the following provision of the instrument is inexplicable: "With the condition that said land shall not be sold by her until after my death; and further, if the said Juana Hernandez should die before I do, said property shall revert to me or my heirs." No particular words or form of expressions are essential to constitute a deed. It is the intention that controls in determining the question whether an instrument is a deed or not. We think it obvious that the instrument was executed in consideration of Juana's marriage with the maker, which, when consummated, gave immediate effect to it, to the extent of vesting an estate for life in her, with remainder to her in fee, contingent upon her surviving him. The marriage was a good consideration, and the husband could not have revoked the conveyance. A will speaks and takes effect only from the death of the testator, and is subject to revocation at his pleasure. We are of opinion that the instrument is a deed, and that the court erred in excluding it on the ground of objection urged against it. The judgment is reversed, and the cause remanded.

LEROUX *et al.* v. BALDUS *et al.*

(Supreme Court of Texas. May 2, 1890.)

GARNISHMENT—FUNDS IN HANDS OF CLERK OF COURT.

Where funds belonging to a defendant are held by the clerk of court to await the result of the suit, and, on judgment being rendered against defendant, it is satisfied out of such funds, defendant is entitled to the immediate possession of any

surplus remaining without any further order of court, and therefore such surplus in the hands of the clerk is subject to garnishment by defendant's creditors.

Commissioners' decision. Consent case.

Appeal from district court, Bexar county.
Oscar Bergstrom, for appellants. *S. G. Newton*, for appellees.

HOBBY, J. The petition in this case alleges substantially that one Theodore Baldus was elected and duly qualified as the clerk of the district court of Bexar county, Tex., and on the 29th day of November, 1882, as such clerk, executed a bond, with the appellees Fritz Schreiner and H. D. Stumberg as sureties, in the sum of \$5,000, which bond was duly approved and filed; that on the 29th day of December, 1882, the appellee Theodore Baldus, as such clerk, received from the sheriff of Bexar county the sum of \$7,226.21, the property of N. K. Connolly & Co., to be held by him to await the result of a suit pending in the district court of Bexar county, Tex., wherein the Galveston, Harrisburg & San Antonio Railway Company were plaintiffs, and N. K. Connolly & Co. were defendants; that in November, 1883, judgment was rendered in favor of plaintiffs, and against the defendants Connolly & Co., for the sum of \$5,004.06, and all costs of suit, which said amount the said Theodore Baldus was required to pay over to said plaintiffs, leaving in his hands, after satisfying said judgment and all costs, the sum of \$1,981.89, the property of the said N. K. Connolly & Co.; that on the 30th day of January, 1884, the appellants, Leroux & Cosgrove, brought suit against Connolly & Co., to recover of them the sum of \$445.86, with interest at 8 per cent. per annum from January 1, 1883, and on the same day, and while the said Theodore Baldus had in his possession the said balance of money belonging to Connolly & Co., caused a writ of garnishment to be issued and served upon the said Baldus; that thereafter, on the 23d day of May, 1885, judgment was rendered in favor of the said Leroux & Cosgrove against Connolly & Co. for \$528.98, with interest, etc., and that a decree was also rendered in favor of Leroux & Cosgrove against said Baldus as such garnishee for said sum, which he refuses to pay, etc. A certified copy of the official bond approved according to law, and appellee Baldus' oath of office, was attached to the petition. The court below sustained a general demurrer to the petition, and, the plaintiff failing to amend, the cause was dismissed. From the judgment of dismissal this appeal is prosecuted.

The only question raised by the assignment of error is whether the surplus proceeds of property in the hands of an officer of the court, after satisfying the process by which said property was levied upon, is not *in custodia legis*, and subject to garnishment; and, upon the failure of such officer to pay over such surplus, upon a judgment in a garnishment proceeding against him, does he and his sureties on his official bond become liable there-

for? It is evident, we think, in this case, that, after the satisfaction of the judgment for \$5,004.06 obtained by the Galveston, Houston & San Antonio Railway Company against Connolly & Co., by the application to it of that amount of the proceeds of the property in the hands of the clerk, Baldus, the balance of the \$7,226.21, which amounted to \$1,931.89, was the property of Connolly & Co., and which they were entitled to the immediate possession of, and, upon the failure of the appellee to deliver or pay over the same, he and his sureties were liable. The question was settled, at an early day in this state, that money in the hands of the officer belonging to the defendant, being the surplus or residue in his possession after the satisfaction of a writ or execution he is required to apply it to, was subject to execution. *Hamilton v. Ward*, 4 Tex. 365. The ascertained surplus remaining in the officer's possession he is said to be liable to the defendant for as for money had and received. *Freem. Ex'ns*, § 180. The general rule that money or property in the custody of the law is not subject to garnishment is well settled, and not questioned in this case. The reason upon which the doctrine is based is that "no person deriving his authority from the law, and obliged to execute it according to the rules of law, can be holden by process of this kind." *Brooks v. Cook*, 8 Mass. 246, cited in *Pace v. Smith*, 57 Tex. 558. But this reason does not apply to the surplus or residue remaining with the officer after he has satisfied the writ, as he no longer holds it by virtue of any legal process, and it can therefore be reached by the defendants' creditors. Money paid to the clerk of a court in a partition suit was held to be liable to attachment after the court had ordered it to be paid to the parties entitled thereto. *Freem. Ex'ns*, § 190; *Drake, Attachment*, § 509. Such is the weight of authority on this subject. In the present case the judgment in the case of the Galveston, Houston & San Antonio Railway Company against Connolly & Co. was the authority for the payment of the amount of the judgment (\$5,004.60) to the former, and no further order to the clerk was necessary. The ascertained surplus, \$1,931.89, then left in the clerk's hands, could no longer be regarded as in the custody of the law. The right of Connolly & Co. to it had become absolute, and could be enforced by them at law, and was therefore liable to garnishment at the suit of their creditors, under the authorities cited. In the case of *Pace v. Smith*, supra, it was held that money or proceeds derived from the sale of property which had been attached, and afterwards the attachment was quashed, and the clerk was ordered to pay over to the defendant in attachment the proceeds (money) in the hands of the clerk, was not liable to garnishment by the plaintiff in attachment. The opinion rested largely upon the ground that the plaintiff in attachment could not, after having wrongfully sued out the attachment, and brought the defendant's

money into court, take advantage of this wrong by seizing the same money under a garnishment after the attachment was quashed. No such state of facts exists in the case before us. Upon the rendition of the judgment in the suit of the Galveston, Houston & San Antonio Railway Company against Connolly & Co., the amount and ownership of the money in the hands of the clerk, appellee Baldus, was fixed and determined, and the court had no further control necessarily over the residue, and no further disposition was required to be made of it, than that already ordered. No order, in addition to the judgment, is necessary to authorize or require the clerk to pay over the proceeds upon the termination of the suit. Where an attachment is quashed, and the proceeds of the attached property in the clerk's hands, the statute provides that an order shall be made restoring the property to the defendant. Article 182, Rev. St. If in this case the clerk failed to deliver to Connolly & Co. the ascertained surplus above the amounts of the judgment in favor of the Galveston, Houston & San Antonio Railway Company, he would be liable on his bond at their suit; and, if liable to them for this residue, he would certainly be liable as garnishee at the suit of their creditors, the appellants. We think the demurrer was improperly sustained, and that the judgment should be reversed, and the cause remanded, and it is so ordered.

TEXAS HOMESTEAD BUILDING & LOAN ASS'N v. KERR.

(Supreme Court of Texas. May 2, 1890.)

PLEADING—VARIANCE—BUILDING AND LOAN ASSOCIATIONS.

1. Plaintiff, a stockholder in a building and loan association, sued to recover from it the amount which he had paid in on his stock, pleading a by-law of the association permitting stockholders to withdraw after due notice filed, and to receive the amount actually paid in, etc. But there was a proviso in the by-law, which he did not set out, that at no time should more than one-third of the funds in the treasury be applied to the demands of withdrawing stockholders without the consent of the directors. *Held*, that the by-law was not admissible in evidence.

2. Even if the variance had not been material, and the by-law had been admissible, plaintiff could not have recovered, there being no proof that there were any funds in the treasury, nor that the directors consented to the application of funds to plaintiff's demand.

Commissioners' decision. Consent case. Appeal from district court, Bexar county. *Geo. C. Altgelt*, for appellant. *Joseph Ryan*, for appellee.

HOBBY, J. It appears from the petition in this cause that appellee, Kerr, was the owner of 10 shares of stock in appellant corporation; that the by-laws of the corporation required him to pay \$1 monthly upon each share, but entitled him to withdraw, on 30 days' notice, the entire money paid in, with 25 per cent. of proportionate profits. It further appears that appellee paid such dues regularly until he had paid in \$330, when, on

March 1, 1887, he gave notice of withdrawal. Appellee also claims \$23.30 as his proportion of profits, further alleges demand and refusal of payment, and prays judgment. Appellant, defendant below, answered by general demurrer, and by general denial. A trial had October 30, 1888, resulted in a judgment in favor of appellee. From this judgment, this appeal is taken.

The first error assigned relates to the admission by the court of evidence offered by the plaintiff, appellee, over the defendant's objections. The appellee alleged that a by-law (article 7, § 1) permitted him to withdraw his stock after 30 days' notice in writing, to be filed with appellant's secretary, and that, upon the expiration of said 30 days, he was entitled to receive the amount actually paid in on his stock, together with 25 per cent. of the profits to which said stock was at the time proportionately entitled, deducting from the whole amount all dues and fines, if any, charged against such withdrawing stockholder. Upon the trial, he introduced in evidence a printed copy of the by-law, (article 7, § 1,) which permitted such withdrawal as alleged, but with the following clause: "Provided, that at no time shall more than one-third of the funds in the treasury be applied to the demands of withdrawing stockholders without the consent of the board of directors." The objections to this evidence were that there was a material variance between the by-law alleged and that offered in evidence, and that the by-law offered in evidence did not sustain the allegations of plaintiff's petition, nor the issues before the court. The objections to the evidence were well taken, and the court erred in admitting it. The rule is too familiar and elementary to require in its support any special citation of cases that the plaintiff's recovery, if any be had, must be upon the case stated in his pleadings, and that the evidence of plaintiff must correspond with his averments. The material variance between the evidence introduced and the allegation in the petition was apparent in this, that it appeared from the by-law in evidence that "at no time should more than one-third of the funds in the treasury be applied to the demands of withdrawing stockholders without the consent of the board of directors," whereas no such proviso was alleged as constituting a part of the by-law pleaded by plaintiff. *Supreme Council v. Anderson*, 61 Tex. 296.

There were no allegations in the petition that there were any funds in defendant's treasury properly applicable to plaintiff's demand. If, however, there had been no material variance between the evidence and the pleading as indicated, there could not have been a recovery by plaintiff, under the facts of this case, because, if his evidence to the effect that there could be "at no time more than one-third of the funds in the treasury applied to his demand of withdrawal without the consent of the board of directors" constituted no variance and was admissible,

there was no proof that there were any funds in the treasury, nor that the board of directors consented to the application of one-third, or any other amount, of his demand. The judgment of the court is not supported by legal testimony, as a recovery was allowed upon a state of facts not alleged; and the eighth assignment, presenting this question, is fully supported by the record.

We are also of opinion that the testimony of the witness Hugo to the effect that since the institution of this suit, May 1, 1888, a sufficient amount of funds belonging to the corporation had been collected to pay off appellee, was improperly admitted. No allegation, as before stated, was made, that there were any funds collected; and, had there been, the proof referred to showed that the collections were made subsequent to the institution of this suit since June 1, 1888, and certainly were not proper to be considered in deciding the question of appellee's right to recover. For the errors mentioned, we think the judgment should be reversed, and the cause remanded; and it is so ordered.

ROLLINS v. O'FARRELL et al.

(Supreme Court of Texas. April 29, 1890.)

ABANDONMENT OF HOMESTEAD—SUFFICIENCY OF EVIDENCE—INSTRUCTIONS.

1. A lot was purchased by the head of a family with the expressed intention of making it a homestead. It had on it a residence, barn, and other outbuildings, all inclosed by a single fence. The purchaser converted the barn and outbuildings into dwellings, removed them to one side of the lot, placed them upon temporary foundations, built a fence between them and his residence, and rented them to tenants; but all this was done with the expressed intention of selling such buildings, and having them removed from the lot, and it was proved that he had several times offered them for sale, and always required that the purchaser should remove them. *Held*, the evidence justified a finding that the part set off was not abandoned as a homestead.

2. It was not error to charge that a homestead will not be held to be abandoned unless "from all the testimony it clearly appears that the same was permanently abandoned," etc.

3. Where an abstract of a judgment rendered in the district court was duly registered in the county clerk's office, and the question was as to whether certain lands bought by plaintiff at execution sale thereunder had been abandoned by the debtor as a homestead, the effect of such registration was sufficiently indicated to the jury by a charge that, if such lands had been abandoned, then plaintiff should recover.

4. Where the court had already instructed the jury that certain evidence had nothing to do with the case, and was to be disregarded, it was not error to refuse to repeat the ruling on a motion to strike out.

Commissioners' decision. Appeal from district court, Cooke county.

C. L. Patten, for appellant. Davis & Garnett, for appellees.

COLLARD, J. On June 26, 1883, A. C. O'Farrell, a married man and head of a family, having no homestead, purchased of J. T. Spears a piece of land in Gainesville, Cooke county, Tex., fronting 100 feet to the east on Dixon street, and running back 315 feet west; Cummings street being on the south.

The residence was on the east end of the lot fronting on Dixon street, and, at the time of the purchase, there was on the west end a barn, a bath-house, and a cistern-house, all inclosed in one fence, and all used in connection with the homestead residence; there being a fence dividing the barn, the bath-house, and the cistern-house from the residence part of the place. At the time of O'Farrell's purchase, he said he was buying it for a homestead for himself and family, and he immediately moved on the premises with his family, where he remained until in August, 1886, when he died; and his widow and children have since occupied it. Shortly after O'Farrell moved on the place, he converted the barn into a residence, and moved it so as to front on Cummings street. He also moved the bath-house and the cistern-house, attaching two rooms to them, so they could be used as a dwelling-house. The barn dwelling has five rooms,—three down stairs, and two up stairs,—and has dormer windows. A new but a smaller barn, with a buggy-house, was built for use on the property not in controversy. One fence incloses all the property. There is a high board fence separating the tenant-houses from the residence proper, and a light fence between the two tenant-houses. After the houses were so moved and changed, O'Farrell rented them, when tenants could be found, up to his death. It was in proof that O'Farrell had the barn and other houses changed into dwellings with the intention to make them more valuable, and in order to sell them, and have them moved off the place, if a purchaser could be found. Before the change, he had been using the ground as a horse and car lot; but his stock partner suggested to him the change, so that the houses could be rented for enough to pay for the keeping of their saddle-horses at the livery stable. It was also in proof that, he several times, about the time when plaintiff's abstract of judgment was filed for record, and afterwards, offered the tenant-houses for sale, but required the purchaser in all cases to move them from the land, and that he always claimed the whole of the ground as his homestead, and it was also proved that these houses were to be used as such temporarily; that they were upon a stone foundation, not let in the ground, and so placed that they could be easily moved. On November 6, 1885, plaintiff, R. S. Rollins, recovered judgment in the district court of Cooke county against A. C. O'Farrell and others for \$26,289, costs, etc., an abstract of which was made, indexed, and duly recorded in the record kept for such purposes in the office of the county clerk of Cooke county on the 17th day of November, 1885. On June 8, 1886, execution issued, and on the 14th of same month was levied on the 115 feet of land, including the tenant-houses in controversy, which was in due course sold, and deed made to plaintiff, July 6, 1886. Plaintiff, on this title, sued for the land on September 6, 1886, nearly one month after the death of O'Farrell. The trial by

jury resulted in verdict and judgment for defendants, and plaintiff has appealed.

The first error assigned is that "the court erred in refusing to strike out the testimony of John Walker as to the size and condition of his homestead as shown by bill of exceptions No. 1. Walker's homestead was on the north of the O'Farrell place, was out of the same block, and was the same size as the one claimed by defendants. He answered questions as to such relative positions and size of the two places, the place of his residence, and some outhouses on his premises; there being no objections made. It was this evidence that plaintiff moved to exclude. The court, it seems, had already, of its own motion, excluded it, and stated to the jury that it had nothing to do with the case, and hence he declined to exclude it again. This is the trial judge's view of it, as shown by an explanation attached by him as a part of the bill of exceptions. We take it, the explanation destroys the exception, and that there is in fact no exception to the testimony, and no cause to complain.

Appellant makes one proposition under his second and third assignments of error without copying or stating the substance of the assignments. The proposition is as follows: "Appellant's right in the land in controversy having attached at the date of the registration of the abstract of the judgment against O'Farrell, under which the land sold, the court should have plainly told the jury the effect of the registration, and the date of it, in his charge." An examination of the court's charge plainly shows that the court assumed that there was such lien. In fact, he told the jury to find for plaintiff under his title if there was or had been an abandonment as claimed. It was unnecessary to analyze the title, and state the particulars that made it a good title. The charge gave plaintiff the land in case it had been abandoned at any time. The first clause of the charge instructs the jury that plaintiff's judgment, execution, levy, and sheriff's deed established plaintiff's title to the land in suit, if the same was never any part of the homestead, and in such case to find for him. In the second clause, he instructs them as follows: "The land in controversy was purchased by A. C. O'Farrell from J. T. Spears, and at the same time, and as a part of the same transaction, he purchased the land on which the defendants reside, and on which are situated their dwelling-house and some outbuildings; and it is for you to determine from the evidence whether O'Farrell and his wife used the land in controversy as a part of their homestead. If they did, you will find for the defendants, unless you believe from the evidence that the said O'Farrell abandoned the same as a part of his homestead. A homestead in a town or city may consist of one or more lots. It is not necessary that they be in the same inclosure, nor need they be used for any special purpose. They may be used for gardens, lots, or for

any purpose necessary to the enjoyment of premises as a home for the family." And then the charge proceeds, in the third paragraph, as follows: "If you find that the land in controversy was ever a part of the homestead of O'Farrell and wife, then you will determine whether the same has been abandoned as such. In ascertaining whether or not it has been abandoned as a homestead, you will look to all the evidence in the case,—the uses to which the property is put, the character of the improvements upon the same, as well as all of the other testimony; and if, from all the testimony, it clearly appears that the same was permanently abandoned by said O'Farrell in his life-time as his homestead, you will find for the plaintiff. But, if you find that the abandonment of said premises, if any, was only temporary, and without a fixed intention on the part of said O'Farrell to permanently abandon it as a part of his homestead, you will find for the defendants. The owner of the homestead may temporarily rent the same, or any part of it; and, if he do so in good faith, with no intention of permanently abandoning the same, he will not thereby lose his homestead right. But if he erect a building upon a portion of his homestead for the purpose of permanently and continuously renting it, and with a fixed intention to never again use it for homestead purposes, he thereby forfeits his homestead rights in the same. But the erection of a house upon a portion of his homestead for the purpose of temporarily renting the same, and with the intention of having such house removed, and afterwards resuming the same as his homestead, will not work such forfeiture." Having this much of the charge before us, it will at once be seen that the court did tell the jury what the legal effect of plaintiff's title was as favorably as the facts warranted: *First*, that it entitled him to a recovery if the land in controversy had not been used as a homestead; *second*, that, if it had been used as a part of the homestead, it would be protected against plaintiff's claim unless it were shown that it had been abandoned; and, *third*, that, if it had been abandoned, plaintiff's title should prevail. These were the elements constituting the rights of the parties as applicable to the facts, and they gave full force to plaintiff's title, with the lien by registration of the judgment and the levy. *Cline v. Upton*, 56 Tex. 320; *Medlenka v. Downing*, 59 Tex. 32; *Thomas v. Williams*, 50 Tex. 273; *Langston v. Maxey*, 74 Tex. 159, 12 S. W. Rep. 27; *Newton v. Calhoun*, 68 Tex. 451, 4 S. W. Rep. 645.

Appellant complains that the court erred in not correctly stating to the jury in his charge the manner in which a lot of land once claimed as a part of the homestead may be abandoned as such, and in requiring appellant to clearly prove that it was appellees' intention to permanently abandon the same as a part of the home, and in refusing sections 3 and 4 of appellant's requested charges.

It was only necessary that the court instruct the jury as to the law applicable to the facts in evidence. We think this was done so that the jury could understand what the issue of abandonment was, under the facts. It has frequently been decided that if the homestead, or a part of it, be applied to uses which clearly show an intention no longer to use it for purposes of a home, it loses its homestead character. The question was abandonment or not,—whether the lot in suit had been so abandoned by the changes made in it and its uses. The court's charge required the jury to look to all the evidence to determine this question,—the uses to which the property is put, the character of the improvements," etc. The effect of a temporary renting, and an intention to permanently rent, was explained; and everything was said that was necessary to put the jury in possession of the law that had to be applied to the case. It was not necessary to charge upon every distinct fact that indicated a change in the uses of the property, and the change in the character of the improvements. The charge was equally fair to both sides, and needed no amendments by the additional charges asked. We think the charge sufficient.

Appellants criticize the following extract from the charge: "And if, from all the testimony, it clearly appears that the same was permanently abandoned," etc. Where certain lots constituted the homestead in a city, Justice STAYTON said: "Before either of them * * * will cease to be a part of it, it must be applied to a use inconsistent with the uses for which the homestead is protected,—to uses which clearly show an intention no longer to use it for the purposes of a home." *Newton v. Calhoun*, 68 Tex. 451, 4 S. W. Rep. 645. The same language is quoted approvingly by Justice GAINES in *Langston v. Maxey*, 74 Tex. 161, 12 S. W. Rep. 27. Chief Justice HEMPHILL used much stronger language in *Gouhenant v. Cockrell*, 20 Tex. 98. He said: "Admitting, however, * * * that where there is abandonment with a fixed intention not to return, the property may be open to creditors, yet it must be undeniably clear, and beyond almost the shadow, at least, all reasonable ground of dispute, that there has been a total abandonment, with an intention not to return and claim the exemption." We do not mean to say that such language should be used in a charge. We think it would be improper to do so. But we see that our supreme court requires certain and conclusive evidence of abandonment, with no intention of returning, to subject property once the homestead to execution. We do not think the charge of the court in this particular is in violation of law. It would have been a good charge if the word "clearly" had been omitted, but we cannot hold it was error.

The foregoing discussion and conclusions will dispose of the seventh, ninth, and tenth assignments of error adversely to appellant. Section 9 of plaintiff's requested charges is

abstract. The court's instructions, as we have before said, upon the issue of abandonment of the land in controversy, was the law of the facts of the case, and was sufficient. Appellant makes no propositions on his assignments 11, 12, 13, and 14, nor does he copy them in his brief. They will be considered as abandoned.

The fifteenth and last assignment relates to the verdict of the jury, and insists that it "was contrary to the evidence, because the evidence showed that the land in controversy had been separated from the homestead of defendant by large fences and permanent improvements, and was entirely abandoned as to homestead use, and there was no intention ever again to so use the same." We have seen that the testimony shows it was the intention of O'Farrell at the time he made the changes in the property, and constructed the tenant-houses, that they were not to be rented permanently, but that they were to be rented only for a time, until they could be sold and moved from the premises. He claimed the land as a part of his homestead, and so offered to sell the houses until a short time before his death, directly after which this suit was brought. Mrs. O'Farrell also testified to these facts, and that the whole of the land had been so claimed down to the time of the trial. Finding no error, we conclude the judgment should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

REED v. HARDEMAN COUNTY.

(Supreme Court of Texas. May 2, 1890.)

REMOVAL OF CAUSES—DIVERSE CITIZENSHIP.

1. Where a county sued a citizen of Texas and a citizen of Missouri for the cancellation of an alleged fraudulent deed, and the former disclaimed title, and made no further appearance, the controversy was wholly between plaintiff and the citizen of Missouri, and the latter was entitled to a removal to the federal court, under Removal Act Cong. Aug. 13, 1888.

2. The petition for removal was filed eight days after the passage of the act of March 3, 1887, by which the amount necessary to give the circuit courts jurisdiction was raised from \$500 to \$2,000; and, in evident ignorance of such enactment, petitioner averred that the amount in dispute exceeded \$500 in value. Held that, where the record showed that the lands were actually valued at \$25,000, the removal should have been granted, and a judgment rendered after refusal thereof will be reversed.

Error from district court, Baylor county.

Wynne & Steadman and *J. H. Glassgow*, for plaintiff in error. *M. M. Hankins*, *D. G. Smith*, *J. T. Montgomery*, and *Hunter*, *Stewart & Dunklin*, for defendant in error.

HENRY, J. The county of Hardeman brought this suit against J. R. Williams, who it alleged was a citizen of Texas, and William F. Reed, who it alleged was a citizen of Missouri. The petition charged that by fraudulent contrivances the defendants had procured a deed from the county for four leagues of land to defendant Williams in

consideration of his obligation to pay therefor \$5,000, which land, it was charged, had been subsequently conveyed by Williams to the defendant Reed, and that the land was of the value of \$25,000. The petition alleged damage, and prayed for the cancellation of the deeds, recovery of the possession of the land, and for a judgment for the damages sustained. The defendant Williams appeared, and disclaimed having any interest in the premises in controversy, and prayed to be dismissed from the cause. He did not subsequently or otherwise appear or defend. The defendant Reed, at the term of the court when he was made a party, filed his petition and bond for the removal of the cause into the circuit court of the United States. The petition charged that petitioner was a citizen of the state of Missouri, and that the plaintiff was a citizen of the state of Texas; that the amount in dispute exceeded, exclusive of costs, the sum or value of \$500, and that the suit involved "a controversy which is wholly between citizens of different states, and which can be wholly determined as between them." The court refused to make an order removing the cause, and, upon a trial of the issues, rendered judgment in favor of plaintiff.

The petition for removal was filed on the 11th day of March, 1887. The act of congress of March 3, 1887, as corrected and reenacted by the act of August 13, 1888, in so much as it relates to the question before us, reads as follows: "And when, in any suit mentioned in this section, [section 2.] there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district." It does not become necessary for us to decide to what extent Williams remained a party to the cause upon the issue of damages after his disclaimer, nor upon the right of the plaintiff to set up a claim for damages for the first time by amendment after he had filed his disclaimer. Unquestionably, after his disclaimer was filed, no controversy remained between himself and plaintiff with regard to the title to the land, or to the cancellation of the county's deed to him. Such controversies existed between, and were wholly confined to, plaintiff and the defendant Reed, who were citizens of different states, and could be "fully determined as between them."

The plaintiff's petition showed that the value of the property in controversy exceeded \$2,000. The application to remove the cause was made only a few days after the act of 1887 went into effect, by which the amount required to give jurisdiction to the United States circuit court was increased from \$500 to \$2,000; and the application was evidently made with reference to the old law, and without knowledge of the change. The entire

record may properly be looked to to ascertain the value of the matter in controversy, and to aid the petition for removal. *Insurance Co. v. Pechner*, 95 U. S. 186. The allegation in the petition for removal that the matter in dispute exceeded \$500 in value was not inconsistent with other statements in the record showing that it exceeded \$2,000. For the error in the state court in proceeding to try the cause after petition and bond for removal had been filed, the judgment must be reversed, and the cause remanded.

ALEXANDER v. SAN ANTONIO LUMBER CO.

(Supreme Court of Texas. May 2, 1890.)

JUDGMENT BY DEFAULT—SETTING ASIDE—EQUITY.

A petition in equity to set aside a judgment by default, and for a new trial, which avers a good defense to the action, and alleges that the default resulted from a failure of plaintiff's attorney to appear and defend, but which shows no reason for such failure; and no excuse for neglect to move for a new trial within two days after judgment, and in term-time, as required by Sayles' Civil St. Tex. art. 1871, is fatally defective, and will entitle the petitioner to no relief.

Commissioners' decision. Consent case. Appeal from district court, Bexar county.

Appellant brought this action on September 7, 1887, to set aside as to her a judgment, rendered by default, foreclosing a lien on her property, on June 6, 1887, and for a new trial of that case, and for an injunction restraining the sale, and, in her petition for such relief, alleged that the judgment plaintiff furnished her co-defendants, under verbal contract, in November, 1884, lumber to build a house on a lot purchased for a homestead; that on August 28, 1884, petitioner purchased the lot and building, took possession September 6, 1884, and on November 8, 1884, received a deed therefor, without notice of the claimed lien for lumber, but, being then informed thereof, she retained from the purchase money enough to cover it, but afterwards, on legal advice that no valid lien existed, paid it over to her vendors; that she was made a party to the suit to foreclose the lien, and hired an attorney to defend, who on the trial failed to appear; that judgment was rendered foreclosing the lien on the property by default; that her vendors are insolvent, and beyond the jurisdiction of the court; that the judgment plaintiff threatens a sale of the property. A temporary injunction was granted. The defendant answered by general demurrer, and specially excepted to the petition on the ground that all matters pleaded could have been interposed, if at all, in the original suit; and that the petition, "so far as it asks a review of the judgment and a rehearing of the case, is, in effect, a motion for a new trial, and no grounds for such relief are shown, and no reason given why such motion was not made in the time prescribed by law." January 22, 1889, the case was called for trial. The general and special exceptions to the petition were sustained, the injunction was dissolved, and the case dismissed, which action is assigned as

error. Sayles' Civil St. Tex. art. 1871, provides: "All motions for new trials, in arrest of judgment, * * * shall be made within two days after the rendition of the verdict, if the term of the court shall continue so long; if not, then before the end of the term."

L. U. Walthall and *Maydole & Thompson*, for appellant. *Ogden & Johnson*, for appellee.

ACKER, J. A new trial may be obtained after the term at which a judgment is rendered by a suit brought for that purpose; but, to entitle the applicant to a new trial in such case, it must be shown that the judgment is unjust, that it was obtained without fault or negligence on the part of the plaintiff, that he has a good defense to the action in which the judgment was rendered, and show a good and sufficient reason why it was not interposed, and also show a satisfactory reason why a motion for new trial was not made at the proper time. *Spencer v. Kinnard*, 12 Tex. 186; *Cook v. De la Garza*, 13 Tex. 432; *Burnle v. Rice*, 21 Tex. 183; *Plummer v. Power*, 29 Tex. 7; *Bryorly v. Clark*, 48 Tex. 345; *Johnson v. Templeton*, 60 Tex. 289; *Harris v. Musgrave*, 72 Tex. 18, 9 S. W. Rep. 90. Applying the foregoing test established by the authorities to this case, we think it clear that the petition did not make a showing that entitled the plaintiff to have a judgment set aside, and a new trial granted to her. She was served with citation on the 21st of August, 1886; the judgment was rendered the 6th of June, 1887; and this suit was brought on the 7th day of September, 1887. It does not appear when she employed the attorney, nor is any reason given why they failed to appear and answer for her. She does not attempt to show any reason for her failure to move for a new trial during the term at which the judgment was rendered. We are of opinion that the court did not err in sustaining the demurrer to the petition, and the judgment is affirmed.

FRYER v. MEYERS et al.

(Supreme Court of Texas. May 2, 1890.)

FOREIGN JUDGMENT—ESTOPPEL.

1. A decree of another state finding that an exchange of land owned by complainant in that state for land of defendant in this state was obtained by fraud, and directing reconveyances, does not operate, of itself, to divert the title to the land in this state from complainant to defendant.

2. Complainant cannot be said to be estopped from claiming the land in this state where it appears that he never complied with the terms of the decree, that he afterwards assumed to own the land by conveying it, and it does not appear that he ever claimed the land which he exchanged.

Commissioners' decision. Appeal from district court, Hill county.

J. J. Stoker and *A. P. Hodge*, for appellant. *McKinnon & Carlton*, for appellees.

COLLARD, J. Plaintiff below, the appellant, derails title to the Smith 640 acres of land in Hill county, Tex., by deeds as fol-

lows: (1) By general warranty deed of I. N. Vandyke and wife to William and George Walters, dated July 29, 1873, which was filed for record in Hill county, October 7, 1873; (2) by deed of W. H. Walters and wife to plaintiff, Fryer, dated July 22, 1883, which was filed for record in Hill county, January 10, 1888. Defendants claim title from Vandyke as follows: (1) By power of attorney to T. Bethel to sell the land, dated December 23, 1880, filed for record in Hill county, January 25, 1881; (2) deed of Vandyke and wife by the attorney, Bethel, to Thomas Simpson, dated January 10, 1881, filed for record January 25, 1881; (3) deed from Thomas Simpson back to Vandyke, dated January 9, 1883, filed for record January 30, 1883; (4) deed from Vandyke to Wesley Meyers, dated May 28, 1888, filed for record May 7, 1884; (5) deed from Wesley Meyers to defendant A. A. McGraw, dated October 6, 1884, filed for record June 15, 1885. The defendant Wesley Meyers, after his sale to Mrs. A. A. McGraw, remained in possession of the land for her, and was so in possession as her tenant at the time this suit was brought, to-wit, on the 24th day of May, 1888.

It is seen by the deeds and records that Vandyke had sold the land to George and William Walters many years before his sale to Meyers, of which sale Meyers and his vendee had constructive notice at the time of their purchase. But in order to defeat the deed of Vandyke to George and William Walters, and to cut off plaintiff's claim from Vandyke, the common source, defendants were permitted to read in evidence, over the objections of plaintiff, a decree of the circuit court of Coles county, Ill., in the fifteenth judicial district, of date January 1, 1875, of the following purport: The court found that on the 2d day of September, 1872, George and William Walters, owning certain land in Coles county, Ill., conveyed the same to H. J. Ashmore, father-in-law of said Vandyke, in consideration of a conveyance to them by Vandyke and wife of the 640 acres in controversy, and \$1,450 paid to them by Ashmore. The court further found that the trade and exchange of lands were procured by fraud and misrepresentation on the part of Ashmore and Vandyke, practiced upon George and William Walters, the complainants; that Vandyke received \$1,500 for his interest in the land from Ashmore; that Ashmore was dead, and left the defendants in that suit his heirs,—and declared the sale void for fraud, and set the same aside, requiring the complainants to pay to Ashmore's administrator the \$1,450, with 6 per cent. interest from September 2, 1872, within 60 days from the rising of the court, and at the same time to convey, by special warranty deed, their interest in 640 acres in Texas to the heirs of H. J. Ashmore, or tender the same to said parties, and also requiring defendants in the suit, except Ashmore's widow, thereupon to reconvey to complainants the land in Coles county, Ill., and in de-

fault thereof that the master in chancery should make such conveyance. This decree was filed for record in Hill county, January 30, 1879. If it was intended to set aside the deed of Vandyke to William and George Walters, read in evidence by plaintiff, there is an unexplained discrepancy in the decree, as to its date. The decree relates to a deed made on the 2d day of September, 1872. The deed of Vandyke to Walters, read in evidence, is dated July 29, 1873. The parties, however, assume that the decree was intended to vacate the deed read in evidence, and we will so treat it. There is no evidence that performance, or tender of performance, of the decree was ever made by either of the parties to it.

The decree itself did not divert the title to the land in this state. The law applicable to this decree is well stated in the opinion of Judge MALTBIE in the case of *Morris v. Hand*, 70 Tex. 483, 8 S. W. Rep. 210, where he says: "It is settled, without conflict of authority, that courts of one state or country have no authority, under any circumstances, to divest the title to real estate situated in a foreign state or country, or to direct the sale of such land to be made; * * * the extent of the power in such cases being to decree that the person invested with the title make conveyance of it, which may be enforced by personal process against the owner. But the decree is not effectual unless the owner of the land, in person, executes a conveyance." *Moseby v. Burrow*, 52 Tex. 404. The decree of the court in Illinois could only act upon the parties, they being within the jurisdiction of the court. It could not act upon the land in Texas, nor did the court have power to execute the judgment by putting the complainants in possession of the land in this state. It must be held that the decree itself did not have the effect to divest the title.

No principle of estoppel arises from the acts or conduct of William and George Walters, because the record does not show that they took advantage of the decree, or claimed the Illinois land thereafter. It is in evidence that they failed to comply with the decree in refunding the \$1,450 Ashmore had paid them in the exchange of lands. Besides this, we find the Walters, in disregard of the decree, assumed to own the land in Texas by their sale of it to plaintiff Fryer in 1882. It is true Vandyke also claimed the land, and went into possession of it after the decree, in 1876 or 1877; but his acts in this respect could not bind the adverse parties by estoppel.

Neither the statute of limitation of five or ten years was sustained by the evidence. It is not shown that any taxes were paid by defendants, or those under whom they claim, until in 1883. There was a break in Vandyke's possession in 1881, when his tenant abandoned the place, and it was not occupied again under his title until in October, 1883; and it was less than five years from this time to the time of the institution of the

suit, the 24th day of May, 1888. Besides this, the deed from Vandyke to Meyers, though made May 28, 1888, was not filed for record until May 7, 1884; and the deed from Meyers to Mrs. McGraw, dated October 6, 1884, was not filed until June 15, 1885. So that, had there been five years' possession by Vandyke and the defendants immediately prior to the suit, it was not under deed or deeds duly registered, and under which the defendants, and those under whom they claim, entered as required by law. *Medlin v. Wilkins*, 60 Tex. 418; *Porter v. Chronister*, 58 Tex. 56; *Cook v. Dennis*, 61 Tex. 246. The judgment of the court below should be reversed, and the cause remanded; and it is so ordered.

BECKER v. SHAYNE et al.

(Supreme Court of Texas. May 13, 1890.)

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Under Gen. Laws Tex. 1883, p. 47, which requires an assignee to give bond for the faithful discharge of his duties, and provides that creditors may sue for breach of such bond,—where an assignee abandons the entire assets to one creditor, and leaves the state, a creditor may sue the assignee and his sureties to recover the value of the assets, and to have a new assignee appointed.

Commissioners' decision. Appeal from district court, Wilbarger county.

Frank McGhee, for appellant. *Kearby & McCoy*, for appellees.

ACKER, J. A. J. Shayne accepted the trust, and qualified as assignee of the estate of B. Tobolowsky, who had made a statutory assignment for the benefit of his creditors. G. Becker accepted the assignment on a claim for \$96.75. Paul Haeffe and Joseph Schmidt became sureties on Shayne's bond as assignee. A. and E. Mittenthal took the entire assets of the assigned estate, and converted them to their own use. Shayne abandoned the assets and his duties as assignee, refused to bring suit for the assets, became the agent and employe of the Mittenthals, and afterwards left the state of Texas without making any report of his acts as assignee. Becker brought this suit as an accepting creditor against Shayne and the sureties on his bond to recover the value of the assets of the assigned estate, alleged to be \$5,000, which it was alleged he corruptly aided the Mittenthals to convert, and for the removal of Shayne as assignee, and the appointment of a suitable person as assignee to carry out the trust. The petition alleged the facts stated with much particularity. The defendants answered by general and special exceptions, which were sustained, and, the plaintiff declining to amend, the suit was dismissed, and plaintiff appealed.

We deem it unnecessary to state the grounds of the several special exceptions, and think it sufficient to say that in our opinion the petition stated a case of which the court had jurisdiction, and which it should have entertained. The suit was brought for the purposes of removing the assignee and

the appointment of another to carry out the trust in the interest of the accepting creditors, and to recover on the bond of the delinquent assignee the damages such creditors had sustained in consequence of his corrupt participation in the fraudulent conversion of the trust-estate. It is settled that "one or more" of the accepting creditors may maintain a suit in the district court for the removal of an assignee appointed and qualified under a statutory assignment, without regard to the amount of the claim held by such creditor. *McIlhenny Co. v. Todd*, 71 Tex. 400, 9 S. W. Rep. 445. The statute requires the assignee to execute bond, "conditioned that he will faithfully discharge his duties as such assignee," and also provides that such bond "shall inure to the benefit of the assignor, and the creditor or creditors who may maintain an action thereon against such assignee and sureties, in his or their own name, jointly or severally, for any breach thereof, or violation of this law, by reason of which such assignor or creditor shall sustain damage." Gen. Laws 1883, p. 47. The court, having jurisdiction by reason of the value of the assigned estate, would retain the case, and exercise jurisdiction for all purposes of the suit. *McIlhenny Co. v. Todd*, supra.

For the error in sustaining the exceptions, we are of opinion that the judgment of the court below should be reversed, and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

McINTYRE v. LUKER et al.

(Supreme Court of Texas. May 13, 1890.)

ESTABLISHMENT OF HIGHWAYS—NOTICE—WAIVER.

1. Under Rev. St. Tex. art. 4370, as amended February 5, 1884, which provides that the jury appointed to lay out a road shall give notice to the persons through whose land the road will run, the failure to give such notice renders the report of the jury, and the action of the court thereon, void for want of jurisdiction.

2. Appearing before the commissioners' court to protest against the report of the jury is not a waiver of such notice.

Commissioners' decision. Error from district court, Wilson county.

The commissioners' court of Wilson county appointed a jury of freeholders to locate a second-class road, and "assess the damages incidental to the opening of the same." Without notice to him, the jury met, and located the road along the line of J. A. McIntyre's land, so as to appropriate about 15 feet by 912 varas of his land, for which the jury awarded him no damages. McIntyre appeared before the commissioners' court, protested against the report of the jury and its approval, and urged his claim for \$100 damages. The court made an order approving the report of the jury, and directing the road to be opened. McIntyre gave notice of ap-

peal from this order, but did not perfect the appeal. He afterwards brought this suit to restrain Luker, the overseer of the road, and the members of the commissioners' court, from opening the road, but did not sue to recover damages. A preliminary injunction was issued, which, upon trial without a jury, was dissolved, and judgment rendered that plaintiff take nothing by his suit, and pay all costs. The case is here by writ of error.

S. S. Lawhon and J. B. Polly, for plaintiff in error.

ACKER, J., (*after stating the facts as above.*) The statutes providing for the establishment of public roads rest upon the right of eminent domain, and the well-established doctrine that the individual interest and will of the citizen must yield to the necessities and convenience of the public. In authorizing the appropriation of individual property for the public use, the constitution and laws have prescribed certain conditions and procedure which must be strictly observed and performed. Article 4370 of the Revised Statutes, as amended by the act of the legislature of February 5, 1884, provides that the jury of freeholders appointed to lay out a new road "shall issue a notice in writing to the land-owners through whose lands such proposed road may run, or to his agent or attorney, of the time when they will proceed to lay out such road, or when they will assess the damages incidental to the opening of the same, which notice shall be served upon such owner, his agent or attorney, at least five days before the day therein named." The service of this notice in the manner required by this statute is indispensable to the exercise of jurisdiction by the commissioners' court. It is a jurisdictional fact which must be affirmatively shown to sustain the jurisdiction of the commissioners' court in making an order establishing and directing that a public road be opened on the land of a citizen. Without proper service of such notice, the action of the jury of freeholders, and the order of the commissioners' court, are nullities. The constitution and statutes also prescribe, as a condition precedent to appropriating the citizen's land to the uses of a public road, that he shall be paid the damages he sustains by such appropriation. It appears from the trial court's findings of fact that the jury of freeholders did not give the plaintiff the notice required by the statute, and also that plaintiff had sustained damages to the amount of \$25. The court found as a conclusion of law that the plaintiff's appearance before the commissioners' court was a waiver of notice from the jury. It is evident from the conclusions expressed in this opinion that court erred in its conclusions of law, and in rendering judgment against plaintiff. We are of opinion that the judgment of the court below should be reversed, and judgment rendered here perpetuating the injunction, and in favor of plaintiff in error for all costs.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment reversed, and here rendered in accordance with the report of said commission.

CITY OF SHERMAN v. NAIREY.

(*Supreme Court of Texas. May 13, 1890.*)

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—DAMAGES.

1. In an action against a city for a defective bridge, the fact that the street commissioner officially examined the bridge three days before the accident, and noticed no defect, is not conclusive evidence that the defect did not then exist.

2. Where plaintiff had crossed the bridge safely several times on the day of the accident, and he testified that his eye-sight was not good, that it was dark when the accident occurred, and that he had never seen the hole which constituted the defect complained of, it is proper to leave the question of contributory negligence to the jury.

3. Where the evidence shows that plaintiff's wrist was broken, and was, in the opinion of a physician, permanently injured, and that although, after the accident, he earned his board by waking up workmen in the morning, he was unable to work, and received no wages, for six weeks, a verdict of \$700 is not excessive.

Commissioners' decision. Appeal from district court, Grayson county.

This suit was brought in the district court of Grayson county, February 24, 1887, by the appellee, James Nairey, against the city of Sherman, to recover \$5,000 actual damages for personal injuries caused by his horse stepping into a hole in a bridge across one of the public streets; the horse falling, and throwing plaintiff to the ground. The trial resulted in a verdict and judgment for plaintiff for \$700.

J. W. Finley, for appellant. *J. D. Wood and C. H. Smith*, for appellee.

COLLARD, J., (*after stating the facts.*) Appellant, by assignment of error, objects to the verdict of the jury, and says it is contrary to the law and the evidence, because the proof showed that the bridge was in proper condition for travel when examined by the street commissioner on the 2d day of December, 1886, three days before plaintiff was injured thereon. It was testified by Long, a street commissioner, whose duty it was to go over the city, and examine the bridges and culverts, once or twice a week, who testified for defendant, that he passed over the bridge on the Wednesday before plaintiff was hurt, on Sunday, and noticed no hole in the bridge. There was ample evidence, if credible, to prove that there was a hole in the bridge—the one into which plaintiff's horse fell—two or three weeks before the injury. If this evidence is true,—and it was the province of the jury to pass upon its credibility,—the commissioner did not perform his duty in examining the bridge. He says he did not notice any hole. He might not have noticed, and yet it might have been there. The assignment of error is not well taken.

Appellant also complains of the verdict be-

cause it is contrary to law, in this: The proof showed that plaintiff had crossed the bridge six times, and drove 25 or 30 head of mules across the bridge four times, on the day the accident occurred, and that it was by his own negligence that the injuries occurred. Nalley, the appellee, testified upon this subject that he had passed over the bridge with Collins & Despain's teams, men, and outfit the evening before the injuries, and, on the morning of the day he was hurt, he had, with some of the other hands, driven 25 or 30 of the mules and horses to water, and return, and again, on the same evening, he had driven them by the bridge to water. Some of them crossed the bridge, and some of them went around it. He further said that he had never seen the hole before he was hurt, and that he was getting old, and his eye-sight was not good, and that it was dark when he was hurt. The court submitted the question of contributory negligence to the jury, who determined the issue in favor of plaintiff. The verdict is not inconsistent with appellee's testimony, and we do not feel authorized to set it aside after it passed the scrutiny of the trial judge in acting on the motion for a new trial.

Appellant complains of the verdict because it is excessive in amount, oppressive, and unjust, the proof showing that plaintiff left next morning after the alleged injury, and went to work with the grading gang on the St. Louis, Arkansas & Texas Railroad, between Sherman and Whitewright. Plaintiff testified that his wrist was broken, and exhibited the same to the jury, and it appeared disfigured and enlarged where it had been injured. He further said: "I was very stout before I was hurt. I was not able to use my right arm for six months after it was hurt, and it is still very weak. My side hurt me very much at the time it was hurt, and I still suffer pain in my side. Dr. Nesbit, who was called to see plaintiff on the evening he was injured, testified he found him lying on a pallet, seemingly suffering very much with his right wrist and side. Couldn't tell, owing to the swollen condition of the wrist, whether it was fractured or not, but thought it was. He examined the wrist on the day before the trial, and was satisfied, from its shape, that it was broken. It was enlarged, had a bump on the outside, was crooked, and the witness thought the injury permanent. Appellee also testified that, on the next morning after he was hurt, he put his arm in a sling, and went with Collins & Despain's outfit to where they were going to work on the railroad. Remained there with them six weeks. Received no wages, but was given his board for waking up the hands in the morning. He says he was unable to do any work. It is unnecessary to comment upon this testimony further than to say that it shows an entirely different state of facts from that assumed in the assignment of error, and supports the verdict for \$700. The judgment should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

WILLIAMS v. HAYS.

(*Supreme Court of Texas. May 18, 1890.*)

JUDGMENT—COLLATERAL ATTACK.

A judgment of a justice of the peace which recites that the plaintiff against whom it was rendered appeared, is good as against collateral attack though such plaintiff did not in fact appear, or submit to the jurisdiction.

Commissioners' decision. Appeal from district court, Lamar county.

This suit was brought by the appellant, Mrs. Annie Williams, a widow, against appellee, in form of trespass to try title and for damages. Plea of not guilty filed by defendant. The judgment was for defendant, and plaintiff appealed. The court filed conclusions of law and fact. There is no statement of facts. The court's findings are as follows: He says: "(1) I find that on the 2d day of May, 1882, [the day of the alleged trespass,] the plaintiff, Annie Williams, was the owner in fee-simple of the land in controversy. (2) I find that on February 21, 1881, a suit was instituted in justice's of the peace court, precinct No. 7, of Lamar county, Tex., in the name of John W. Williams and Annie Williams, the plaintiff herein, as plaintiff, against one Thomas N. Moore as defendant, on an account for \$128, for which judgment was rendered for plaintiff against defendant on the 4th June, 1881, and all costs of suit, and against each party for the costs incurred by them, and that in same case David Allen and D. Maury were summoned as garnishees, the case against them docketed separately, and that thereafter, on the 3d day of September, 1881, judgment was rendered in each of said garnishment cases dismissing the same by order of plaintiff's attorneys, and rendering judgment against the plaintiff in each of said cases for all the costs therein. (3) I find that each of said suits, and all proceedings therein, notwithstanding they all recite that plaintiff appeared, were in fact without the knowledge of plaintiff, Annie Williams, and without authority from her, or any legally authorized agent of hers. (4) I find that on the 3d day of March, 1882, executions were regularly issued on each of said judgments for costs therein, and after regular levies and notices the land in controversy was sold thereunder for a valuable consideration, and defendant claims by regular chain of transfers under this sale. (5) I conclude and find that said judgments and sale thereunder cannot be collaterally attacked in this suit, and that the defendant is entitled to judgment herein for the land in controversy, and all costs." The errors assigned are that the court erred in his conclusion of law in not rendering judgment for the plaintiff, and in holding that the judgment was binding upon Mrs. Williams, she having been made a party by fraud, and without her knowledge or consent, and hold-

ing that the judgment could not be collaterally attacked by her.

D. K. Forshee, for appellant. *Hale & Hale*, for appellee.

COLLARD, J., (*after stating the facts as above.*) The law, as it has been announced in numerous decisions in this state, is against the claim set up by appellant. It is settled that a judgment of a court of competent jurisdiction cannot be collaterally impeached unless the record affirmatively shows the want of jurisdiction. Even where a part of the record, the citation and its return, show that service could not have been had, the judgment of a justice of the peace reciting that the defendant wholly made default, and that he "was duly served with process," was held not impeached. The judgment being the final act of the court, its judicial finding imported absolute verity. Evidence of fraud *affunde* the record cannot be heard to dispute the judgment even where the fraud is in obtaining jurisdiction. The following are some of the cases decided in this state holding the foregoing doctrines: *Murchison v. White*, 54 Tex. 78; *Fleming v. Seeligson*, 57 Tex. 524; *Odle v. Frost*, 59 Tex. 684; *Watkins v. Davis*, 61 Tex. 414; *Mikeska v. Blum*, 63 Tex. 44; *Treadway v. Eastburn*, 57 Tex. 209; *Long v. Brennenman*, 59 Tex. 210. There are many other cases, more or less in point, which we need not cite. *Treadway v. Eastburn*, *supra*, extends the doctrine to the limit that, where the judgment recites that the party was served, the fact cannot be disputed by the return of the citation. This case was followed by the commission of appeals in *Davis v. Robinson*, (not reported except in 7 S. W. Rep. 749, though the opinion was adopted by the supreme court.) The doctrine is not singular. See *Freem. Judgm.* § 132. We have been cited by appellant to the case of *Glass v. Smith*, 66 Tex. 549, 2 S. W. Rep. 195, as holding a contrary doctrine. Smith recovered judgment in a justice's court for a yoke of oxen, in which Glass, the defendant, acquiesced. "Some person, without authority from Glass, without his knowledge, and contrary to his wish, but in his name," took the case to the district court by *certiorari*, where, Glass failing to appear, judgment was entered against him by default for the oxen, and, in his failure to return them, for their value, \$50. Execution was issued, and levied on land in another county, which was sold. Then another execution was issued, and levied on personal effects of Glass, who sued out an injunction to restrain the enforcement of the judgment. It was shown that Glass was authorized to believe that no adjudication would be had on the proceeding. The injunction was dissolved, and on appeal it was perpetuated; the court holding that, the court not having jurisdiction of the person of Glass in the *certiorari*, the judgment was a nullity. For aught that appears in the record, there was no occasion to hold that the judgment was a nullity to sustain the in-

junction restraining its collection under the statute, which requires such suits (on voidable judgments) to be brought within one year from the time of the rendition of the judgment; certain exceptions being named. *Sayles*, Civil St. art. 2875, and note. Our opinion is, the injunction was a direct proceeding between the original parties to vacate the judgment, and forever prevent its enforcement, in which case the opinion would not be inconsistent with other cases cited, which refer only to collateral proceedings. But, be this as it may, the judgment enjoined did not recite any appearance for Glass. In the case before us, the judgments recited that plaintiff did appear, and that it was at her instance, and the instance of her co-plaintiff, that the suits were dismissed. These judgments are controlled by the law as announced in *Treadway v. Eastburn*, *supra*. They "import absolute verity," and are not subject to collateral attack. Many objections might be made to the principle by which we are controlled in making this decision, but it must be remembered that Mrs. Williams had the right to set aside these judgments by direct proceedings. She has not availed herself of this privilege, preferring rather to treat the judgment as void, a conclusion which the law will not sustain. The judgment of the court below should be affirmed.

STATON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

OURY *et al.* v. SAUNDERS *et al.*

(Supreme Court of Texas. May 13, 1890.)

VENDOR'S LIEN—SUBROGATION—ADVERSE POSSESSION—PART AS WITNESS.

1. Where the vendee of land gives his note for the purchase price, and afterwards pays the note from the proceeds of property belonging to his minor children, the children, though not entitled to a resulting trust in the land, become subrogated to the vendor's lien.

2. A conveyance of such land by the vendee to his children, in satisfaction of their lien, gives them good title as against his wife, since her interest in the land, either as a homestead or as community property, is subject to the lien.

3. A widow, who after her husband's death remains in possession of land which he admittedly held subject to a certain lien, is presumed to hold as he did, in the absence of an express disclaimer or an express hostile occupancy, with the knowledge of the lien claimant.

4. Under Rev. St. Tex. art. 2248, which allows a party to testify when called by the opposite party, a defendant who has, pending the suit, conveyed his interest in the property in controversy to the plaintiff without warranty, is a competent witness for the plaintiff.

Commissioners' decision. Appeal from district court, Guadalupe county.

Action by G. H. Oury and Lena M. Oury, his wife, formerly Lena M. Saunders, and Adam Saunders, against Malvina Saunders, Leander Saunders, and J. F. Gordon and his wife. Plaintiffs appeal.

W. H. Goodrich, for appellants.

COLLARD, J. L. A. Saunders, a married man, and the head of a family, on January

1, 1856, bought the land in controversy at public sale, made by J. F. Gordon, executor of the will of A. M. Grinage, deceased, a deed being then executed to Saunders, reciting that the sale was made for the consideration of \$926, to become due in 12 months. In October of the same year Saunders moved on the premises with his family. Not having the money to pay for the land when the note for the same became due, and having in his possession, in trust for the children of his first wife, Mrs. Gordon, wife of J. F. Gordon, Lena M. Saunders, (Mrs. Oury,) and Adam Saunders, as their property, two negroes, the same were sold by decree for partition, and on February 2, 1859, \$933.33, the proceeds of the sale belonging to plaintiffs Lena and Adam, were applied to the payment of the land note by their father, and the balance due thereon was taken from the share of the proceeds of the sale belonging to Mrs. Gordon, all by agreement with the executor, J. F. Gordon, who was the husband of the Mrs. Gordon before named. The case seems to have been tried upon the idea that such payment in discharge of the vendor's lien note created a resulting trust in favor of the children whose money was so used, and vested in them the title to the land. This, it seems, cannot be. To constitute a resulting trust, the payment must be at the time of the purchase, and not subsequent thereto. 1 Lead. Cas. Eq. pt. 1, p. 337; 1 Perry, Trusts, § 133; Lacey v. Clements, 36 Tex. 661; Long v. Steiger, 8 Tex. 461. It is the transaction itself that gives rise to the trust. Saunders purchased the land in his own name and for himself, and at the time could not have contemplated the use of his children's property in paying for it. The transaction in which the children's property was used was in paying off the vendor's lien note, not in the purchase of the land three years before. So it is to this transaction we must look to know their rights.

Were these children subrogated to the rights of the creditor, and should they be protected on that ground? It is a general rule that when persons are compelled to pay the debt of another, where they are obligated to pay it as a surety, when a junior mortgagee pays off a prior mortgage, or, having an interest in the property, discharges an incumbrance, subrogation will follow. *Sheld. Subr. § 3*. It is said by the same author that "the doctrine of subrogation is not applied for the mere stranger or volunteer who has paid the debt of another without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own." Such a payment would extinguish the debt. *Id.* §§ 240, 241. But the same authority adds that "one who pays a debt at the instance of the debtor, under such circumstances that it appears to have been contemplated by the parties that he

should become entitled to the benefit of the security for the debt held by the creditor from the debtor, may, as against the debtor, be subrogated to the benefit of such security, and of the debt which he has discharged; and a party who has paid the debt at the request of the debtor, and under circumstances which would operate a fraud upon him if the debtor were afterwards allowed to insist that the security for the debt was discharged by his payment, may also be subrogated to the security as against that debtor." *Id.* § 247; 2 Lead. Cas. Eq. pt. 1, p. 287. At the time Saunders paid the note, Mrs. Gordon was a married woman, 19 years old; Lena M. Saunders was 17 years old, and unmarried; and Adam Saunders about 15 years old. Neither of them was consulted about the application of their money to the payment of the note. It was done by their father, with the concurrence of Gordon, who accepted the payment. Saunders always, up to his death, declared he was not claiming the land as his own, but for plaintiffs. The note was taken up with the proceeds of the sale of the negroes, by his consent, of course, because he caused it to be done, and it was done under such circumstances as would amount to a fraud upon plaintiffs if they should not be subrogated, as against him, to the creditor's right of lien on the land. Plaintiffs were not volunteers in the payment of the note. It was paid under such circumstances as would lead to the belief that it was the intention of Saunders at the time to fully protect them. It would be a fraud against them if an obligation could not be implied on his part to subrogate them at least to the debt and lien. His acknowledgment of his obligation to them is forcibly expressed by the deed he made to them in discharge of the same, made one year and ten months after the transaction; and this was done after he had procured a deed for a nominal consideration from the Grinage heirs. He entered upon the land incumbered with the vendor's lien given the executor Gordon, to which his children were subrogated. The whole of the land was subject to the lien in their hands. If the Grinage heirs had any interest in the land, it is not shown that he was ignorant of it, and, in addition to this, he bought from the executor such title as he could give, and took the risk of such outstanding title as might exist for one undivided half of the land. There is no pretense of any fraud, mistake, or misrepresentation. *Edmondson v. Hart*, 9 Tex. 554; *Walton v. Reager*, 20 Tex. 109; *Hawpe v. Smith*, 25 Tex. Supp. 448; and see *Rhode v. Alley*, 27 Tex. 443. If he obtained the title of the Grinage heirs by the deed to him, it appears that he only paid them a nominal consideration, (\$5,) and in such case, if the purchase had been from an individual, he could offset the vendor's lien note by the amount, and only the amount, paid to extinguish the outstanding title; and we have seen in this case nothing was paid. *McClelland v. Moore*, 48 Tex. 360; *Denson v. Love*,

58 Tex. 471; Cooper v. Singleton, 19 Tex. 260.

Mrs. Malvina Saunders could not acquire greater rights by these transactions than did her husband. The land was subject to the lien against her as well as her husband. Neither of them could acquire a homestead that could affect the lien for the purchase money. None of the purchase money had been paid by Saunders. It still was an incumbrance on the land. Under these circumstances, the husband had power to convey to the parties holding the lien the land in satisfaction thereof. *Clements v. Lacy*, 51 Tex. 151; *Roy v. Clark*, 12 S. W. Rep. 845, (decided by the commission of appeals at Tyler, November 5, 1889.) In making this conveyance, he ignored the amount of the purchase money paid out of the funds of Mrs. Gordon, which was, as we estimate it, only \$147. No one but Mrs. Gordon could complain of this, and she cannot and does not complain, because before the amendment of the petition was filed setting up the fact she conveyed all her interest in the land to plaintiffs. It follows from the foregoing that no homestead rights were ever acquired by Mrs. Saunders. It was in evidence that L. A. Saunders, after the payment of the note for the purchase money, up to his death, or near thereto, frequently declared that the land belonged to plaintiffs. His holding therefore was under their title. No limitations could run against Mrs. Gordon, as she was a married woman at the time of the payment of the note by Saunders. Mrs. Oury (*née* Lena M. Saunders) was married long before her father's death, and if it is true that her father acknowledged that his holding was under her and her co-plaintiff, the statute would not run against her at all, as she was still a married woman at the institution of the suit. As to Adam Saunders, if his father claimed to be holding under him and Mrs. Oury, or admitted their title, no limitation would run during his life. *Word v. Drouthett*, 44 Tex. 870. After his death the widow would be presumed to hold, as did her husband, under plaintiff's title, until there was an express disclaimer, or an express hostile occupancy brought home to the owners. This may be done, it seems, "by some open, visible, notorious, exclusive, and adverse act of possession." *Id.* 372. "When the relation of landlord and tenant is once established, it attaches to all who may succeed the tenant immediately or remotely; * * * and a holding over of forty years, although the original tenant died in possession, and was succeeded therein by his son, the latter of whom paid no rent, was adjudged not adverse to the true owner." *Ang. Lim.* § 442.

Appellant assigns as error "the refusal of the court to allow Gordon, one of the defendants, a witness for plaintiffs, to detail conversations with L. A. Saunders, under whom defendants claimed, showing that by request of Saunders, who was unable to pay for the land, the proceeds of two negroes whom he held in

trust for plaintiffs Lena and Adam had been applied to the payment of the purchase money for the land, and that he [Saunders] agreed to hold the land in trust for plaintiffs; he [Gordon] having testified that neither he nor his wife had one cent's interest in the result of the suit in common with plaintiffs." The objection made to the competency of the witness was that he and his wife were parties to the suit, and that, though made defendants, they were really plaintiffs, and interested in the suit, and that Gordon was executor of Grinage's will, to whom the note was payable from Saunders for the land, and that the witness could not testify as to any transactions with or statements by deceased. The witness testified after the objection was made that neither he nor his wife had one cent's interest in the suit in common with plaintiffs. The court sustained the objection.

We think the testimony should have been heard. It would not have been contrary to the letter or the spirit of the law. The statute allows a party to testify in such suits when called by the opposite party. *Rev. St. art. 2248*. Gordon and wife had, pending the suit, conveyed all interest they had in the land to plaintiffs, which fact was afterwards set up by amendment of the petition, and the witness testified that he and his wife had no interest in the result of the suit. The transfer to plaintiffs was not of such character as would make the witness or his wife liable over to plaintiffs if they lost the suit. We see no reason for holding the witness incompetent. 1 *Greenl. Ev.* §§ 386, 397, 419.

We do not deem it necessary to discuss other questions raised by the record. The judgment ought to be reversed, and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

FOOT v. SILLIMAN *et al.*

(*Supreme Court of Texas. May 13, 1890.*)

TRESPASS TO TRY TITLE—LOST DEED—PRESUMPTION OF PAYMENT.

1. Plaintiff's title consisted of a recorded deed of trust, with power of sale to secure a debt due plaintiff, and a deed in fee, executed by the same grantor 30 years afterwards, which recited the making of the deed of trust, and that the trustee had died without executing the trust; that a certain sum was still due plaintiff, and plaintiff having demanded payment, and being "willing to accept a deed of the land described in said deed of trust in payment thereof, now, therefore, in consideration of said sum," etc., and conveyed the land to plaintiff. Defendants' title consisted of a deed from the same grantor dated after the last deed to plaintiff, but recorded before it. *Held*, that plaintiff's deed had no legal connection with the deed of trust, and that defendants, having had their deed recorded first, acquired the title, since they were authorized by the lapse of time to presume that the debt secured by the deed of trust had been paid.

2. An affidavit by plaintiff's attorney that an original recorded deed is lost, and that plaintiff has made diligent search without being able to

find it, is sufficient to authorize the introduction in evidence of a certified copy of the deed.

Commissioners' decision. Appeal from district court, Kinney county.

Carter & Bevins and *Clamp & Clamp*, for appellant. *Robertson & Williams*, for appellees.

HOBBY, J. This is an action of trespass to try title, by appellant, who was plaintiff below, to recover the land described in the petition, brought on June 20, 1887. The defendants entered the usual plea of not guilty, and the statutes of limitation. Judgment was rendered quieting the title to the land of the defendants C. H. Silliman, C. F. Hodges, and the Galveston, Houston & San Antonio Railway Company, and that plaintiff take nothing by the suit. That judgment is now before us, on appeal, for review.

The record shows that both parties claim under a common source,—George H. Giddings. The plaintiff, Mrs. Adelia Foot, through her counsel, offered in evidence a certified copy of a deed of trust dated June 12, 1854, from said Giddings, recorded in Bexar county,—the land being then in that county,—June 14, 1854. It was executed to secure the payment of a debt of about \$2,800, with interest, due Mrs. Foot from the grantor. J. J. and J. D. Giddings were appointed trustees. This copy was accompanied by the following affidavit: "Comes the plaintiff [appellant] by attorney, and on oath says that the original deed of trust executed by G. H. Giddings to J. D. Giddings and John J. Giddings, and for her benefit, of date June 12, 1854, and recorded on the 14th day of June, 1854, in Bexar County Records, Book L, No. 2, pp. 578 and 579, a certified copy of which is now on file in this cause, is lost, and the same cannot be found and procured; that she has made diligent search for the same where last seen, and in all places where the same was liable to be found, but cannot find the same, and that the same is lost; that plaintiff is a female, and not in attendance on this court, and cannot now attend, wherefore this affidavit of loss is made by her attorney instead of herself in person." This was signed by plaintiff's attorney on the day of trial, October 29, 1887. It was objected to by defendants "for the reason that the affidavit to the loss of the original deed of trust was wholly insufficient, in that it was made by appellant's attorney without showing that the matters sworn to were within the personal knowledge of said attorney, and without showing a sufficient excuse for the failure of appellant to make such affidavit in person, and for the reason that the affidavit does not show the particulars of the search therein stated to have been made by appellant for such original instrument." These objections were sustained, and the copy excluded, and plaintiff excepted. Plaintiff then introduced a deed from G. H. Giddings dated January 8, 1885, conveying to plaintiff the land in controversy, among other tracts. This deed re-

fers to the said trust-deed, and was made in lieu of, and to extinguish, the debt secured thereby. It was recorded in Kinney county, where the land was situated, on January 20, 1887. Defendants introduced a deed from G. H. Giddings to appellees Silliman and Hodges, conveying the land. This deed contains the following warranty: "And I do hereby bind myself, my heirs, executors, and administrators, to warrant and forever defend all and singular the said premises unto the said C. H. Silliman and C. F. Hodges, their heirs and assigns, against every and all persons whomsoever lawfully claiming or to claim the same, or any part thereof, by, through, or under me, except as against tax-titles to said land." It is dated June 19, 1886, filed for record in Kinney county August 2, 1886, and recorded on the 3d of August, 1886. The appellee Silliman testified that he paid to G. H. Giddings \$1,002.50, in cash, for the land in controversy; that he found the old deed of trust to Mrs. Foot, appellant, of record, and supposed it to have been paid off without the execution of a release; also found an old judgment against Giddings; that he wrote Giddings about both; that Giddings replied that he knew nothing about the judgment, but the trust-deed had been settled, and the debt paid off, long before; that he searched outside the records for claims against the land, but found none; that the land was worth more money than \$1,000 at the time of the purchase from Giddings; that it was worth at the time of trial \$2,000; that he did not know the land had been sold to plaintiff, (appellant); that plaintiff's deed was not on record when defendants bought from Giddings. The appellee Hodges testified that he paid one-half the purchase money to Giddings; he did not know the land had already been sold to Mrs. Foot; that he and Silliman bought the land in good faith, and without notice of appellant's deed from Giddings; that the land is valuable, having water on it nearly all the time, and some timber and fine grass; that he thinks it is assessed at one dollar per acre. Appellees Silliman and Hodges conveyed on the 20th October, 1886, to the Galveston, Houston & San Antonio Railway Company, for a consideration of \$200 and the enhanced value of their land, etc., a strip off of the land in controversy.

The first assignment is that the court erred in excluding the certified copy of the deed of trust offered in connection with the affidavit of plaintiff's attorney as to the loss of the original, because (1) the affidavit was sufficient to admit secondary evidence; and (2) the certified copy was from a proper record.—was admissible as an ancient instrument. The affidavit, we think, was sufficient. It stated that the original deed of trust was lost, and that it could not be procured. This was all that the statute required. *Hurley v. Barnard*, 48 Tex. 88; *Evans v. Womack*, Id. 234. It is not necessary to set forth the acts of diligence where the affidavit is made as a predicate for the introduction of a certified

copy of the original. This is only required in that class of cases where the affidavit of the loss of the original or its destruction is made with a view to the introduction of secondary evidence of the contents of the deed. It is in these latter cases that more rigid requirements are exacted with respect to affidavits. In the former class, when made to authorize the introduction of a certified copy, the original having been recorded, it has been held that, if such facts be stated as reasonably show the loss, it will be sufficient. The reason for the distinction in the construction of the affidavit in such case, and one made to allow parol proof of the contents of an unrecorded deed, is obvious.

It is evident from the foregoing statement as to the respective titles that, unless the deed from George Giddings to the plaintiff dated January, 1885, can be considered and held to be a conveyance under and by virtue of the deed of trust executed in June, 1854, the defendants' title is superior, and the error in excluding the certified copy of the deed of trust on the ground of the insufficiency of the affidavit was not material. The defendants purchased from Giddings, subsequently, it is true, to the date of the deed of plaintiff, but prior to the registry of the former, and without notice and for value. If the deed to plaintiff from Giddings can be made to relate back to the trust-deed, or be construed, in contemplation of law, as having been executed pursuant to its terms, plaintiff's title is superior, and the exclusion of the copy was prejudicial to her rights. There was no effort on the part of plaintiff, disclosed by the record, to show a foreclosure under the deed of trust. The deed of trust excluded was executed by George H. Giddings, who was the common source from which the parties derived title. It was executed to secure a debt due the plaintiff amounting to about \$2,800, and conveyed the land in controversy to J. W. and J. J. Giddings in trust for this purpose. It stipulated that either of "the trustees may, with my consent, transfer and convey at private sale any or all of said lands, the proceeds thereof to be applied to the payment of said notes and interest, and the balance of the proceeds to be paid over to me, if any; and further, in the event that said notes, or either of them, become due and remain unpaid, either the said J. D. Giddings or John J. Giddings may sell said lands at public sale, by giving twenty days' notice of the time and place of sale, either at Brenham, in Washington county, or at Bexar county-seat, by one written notice posted up at the courthouse of the county where the sale was to be made, and apply the proceeds of said sale to the payment of said notes, and the balance, if any, to be paid over to me; and the said J. D. Giddings or J. J. Giddings may either of them make said sale, and execute good and sufficient titles to the land sold." It was dated June 12, 1854, and recorded in Bexar county on the 14th June, 1854. The plaintiff's title consisted, as shown by the state-

ment of facts, of a deed dated January 8, 1885, executed by George H. Giddings, and which recited that "said Giddings did on the 12th June, 1854, execute and deliver to J. D. Giddings and J. J. Giddings, of the county of Washington and state of Texas, a certain deed of trust conveying the hereinafter described lands for the purpose of securing the payment of three promissory notes payable to Adelia A. Foot or order; and whereas, the said J. D. Giddings and J. J. Giddings have departed this life without having executed said trust, and upon which notes there is now due the sum of eighty-three hundred and fifty-nine and 61-100 dollars, (\$8,359.61;) and whereas, the said Adelia A. Foot having demanded of me payment of the amount due her upon said notes, and is willing to accept a deed of the land described in said deed of trust in payment thereof: Now, therefore, in consideration of said sum," etc. Then follows a description of the land, and usual covenants of warranty. This deed was not recorded in Kinney county—which in the mean time had been detached from Bexar, and where the land was situated—until January 26, 1887. The defendants' title consisted of a deed from said George Giddings dated June 19, 1886, and recorded in Kinney county on August 3, 1886, conveying the same land with covenant of special warranty. It is clear, we think, that the recitals of the conveyance from Giddings to plaintiff made in 1885 show that the trust-deed was not executed or foreclosed at that time. (31 years subsequent to its execution by the grantor in June, 1854;) and the defendants were authorized to presume, although it was of record when they purchased, in July, 1886, that the debt it was given to secure had been extinguished. The fact that the deed of trust had been previously given to secure a debt of about \$2,800, and that the trustees were dead, and that the debt was still due from Giddings to plaintiff, were no doubt considerations for which the deed was made in 1885. But this was no more than the recital of the existence of a past debt as a consideration, and would not, in any degree, be considered as the execution of a title pursuant to the deed of trust. The recitals repel this theory, as they plainly are that the trust "had never been executed." So, then, the conveyance from Giddings was wholly distinct from the trust-deed, having no legal connection with it, and deriving no force it; and it had the effect only which an ordinary deed executed without any reference to the trust-deed would have had. As such, it was recorded after defendants' purchase, and consequently could not affect their title.

It follows from this that, if the trust-deed had been introduced in evidence, it would not have changed the result of the suit, because the facts showed that there was no foreclosure under, nor title acquired pursuant to, its terms. What we have said renders unnecessary any discussion of the effect of the covenant of warranty contained in defend-

ants' title. We perceive no error in the judgment, and think it should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

LUCKIE et al. v. WATT.

(Supreme Court of Texas. May 12, 1890.)

PUBLIC LANDS—BONA FIDE SETTLERS.

1. The acquisition of public lands under Gen. Laws Tex. 1883, p. 85, providing for its classification and sale by the land board, and requiring the applicant for the purchase of such land to be an actual settler in good faith, and to have settled on the land with a view to purchasing it, is distinct from the acquisition of land by pre-emption; and, in a suit by the purchaser of such lands to recover possession, evidence on behalf of defendant that he is the head of a family, and that he located on the land for the purpose of acquiring a homestead therein before plaintiff purchased it, is incompetent.

2. The decision of the land board, awarding such land to one of two claimants, cannot be reviewed in an action between such claimants, or those claiming under them, to recover the land.

Appeal from district court, Kinney county. *Clamp & Clamp*, for appellants. *Clark & Old*, for appellees.

HOBBY, J. C. W. Watt brought suit in the district court of Kinney county in March, 1887, against W. F. Luckie and Ira L. Wheat, to recover the land described in the petition. A writ of sequestration was issued and levied, and defendants replevied. They answered by a general denial, and set up title in themselves. Trial was had October 26, 1887. The court instructed the jury that, the plaintiff having shown title in himself to the land sued for, and defendants having admitted possession, but introduced no evidence showing title or right of possession, they would return a verdict for plaintiff. This the jury did, with \$1,210 damages for occupation and use of the premises.

Plaintiff's title consisted of a patent from the state to S. H. & G. S. Nunn, conveying the land, dated October 26, 1886. Deed from S. H. & G. S. Nunn to plaintiff, dated January 17, 1887, conveying the same land. Defendants offered to prove that "A. W. Haley, from whom defendants claim title, was the head of a family on the 1st day of January, 1884, in the actual possession, in good faith, of the identical land in suit, located upon the same for the purpose of acquiring a homestead; that, within six months after the same was placed upon the market, he applied for the purchase thereof, and tendered the purchase money to the state; that at said date the land in suit was survey No. 874, and school land; that for some reason unknown to Haley the land was not awarded to him, but was in April, 1884, awarded by the the state land board to Robert Boyd, from whom plaintiff claims title under the certificate located as survey No. 873, but subsequently changed to survey No. 874; that said Boyd never was an actual settler on the land; that the survey numbers since April, 1884, were changed, but the land is the same 640

acres as shown by field-notes." This was objected to by plaintiff's counsel, substantially, because the defendants failed to show any equity in the land, and the evidence attempted to be introduced shows that the land to which they asserted claim had been awarded by the state land board to Robert Boyd, and this award was conclusive as between the parties seeking to purchase said land, and could not be impeached in this action; and, further, because the patent in evidence shows that the land in controversy is not a state or school section, but is 640 acres surveyed for a railroad company, and was patented to plaintiff vendors. These objections were sustained. The evidence excluded, and the court's action, furnishes the ground for the first assignment of error.

If all the excluded testimony had been admitted, it would not, we think, in any degree, have contributed to the defendants' success, or have authorized a decree in their favor; nor would it have detracted from or impaired the title of the plaintiff. If the defendants' vendor, Haley, had, either through or by virtue of the facts which were attempted to be established by the excluded testimony, acquired any character of legal or equitable right to the land under the law providing for its sale by the land board, it is manifest from the record before us that it had been passed upon by said board adversely to Haley; and this tribunal was invested with authority to adjudicate such rights, if any existed. But it does not appear from the evidence excluded that, if it had been admitted, it would have established any right under the act of 1883 to the land upon the part of the defendants' vendor, Haley. That act, (page 85, Gen. Laws 1883,) providing for the classification and sale, etc., of said land, required the applicant for purchase to be an actual settler in good faith, and that he should have so settled upon it with a view to its purchase. Many other statutory requirements were stipulated, the compliance with which constituted the condition precedent to the right to purchase. Snyder v. Nunn, 66 Tex. 256; Taylor v. Burke, 66 Tex. 646, 1 S. W. Rep. 910; Martin v. McCarty, 74 Tex. 132, 10 S. W. Rep. 221. The evidence offered indicates that the settlement made, or attempted to be made, by Haley was with a view to the acquisition of the land as a homestead under the pre-emption laws. It was proposed to prove that he was the "head of a family," and that he located upon it for the purpose of acquiring a homestead. This was not the character of acquisitions of land to which the act first referred to relates. That act (the law of 1883, supra) provided for a mode of acquiring the public lands by individuals wholly distinct from that prescribed by our pre-emption laws. The leading distinction between these methods of acquiring land which these laws disclose is that in the former the land is sold under direction of a special tribunal,—the land board; in the latter the lands are not, under any circumstances,

sold to the head of a family, and the jurisdiction of the land board does not attach. There are many other important distinctions, not, however, necessary to refer to. There was no error in excluding the testimony offered by defendants. We think the judgment should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

HOUSTON *et al.* v. MAYES.

(*Supreme Court of Texas. May 13, 1890.*)

EXECUTORS AND ADMINISTRATORS — WITHDRAWAL FROM ADMINISTRATION — SETTLEMENT AND ACCOUNTING.

1. An administrator, on appeal to the district court from an order of the county court refusing to allow an exhibit filed therein, asking for an allowance for extra services, cannot amend his pleadings in the district court, and set up other claims against the estate not embraced in his exhibit, since Rev. St. Tex. art. 2198, requires such claims to be filed in the county court, and there entered on the claim docket.

2. Appellee applied to the county court, under Rev. St. Tex. c. 14, for an order withdrawing an estate from administration, which was granted. The administrator appealed to the district court, where, on a trial *de novo*, a similar order was entered, and the judgment was affirmed by the supreme court. *Held* that, since Rev. St. Tex. art. 2207, provides that an appeal to the district court from an order of the county court withdrawing an estate from administration must be tried *de novo*, the administrator continued to be such after his appeal, and since, at the time the appeal was determined the exhibit filed before commencement of the proceeding no longer represented the true condition of the estate, appellee could not maintain an action in the district court to compel the administrator to turn over the estate without first requiring him to file another exhibit in the county court.

Appeal from district court, Wilson county.

B. F. Ballard, for appellants. J. B. Polly and W. E. Goodrich, for appellee.

• HENRY, J. R. C. Houston was administrator of the estate of Mary A. Mayes. In the year 1884 the administrator filed in the county court an exhibit, and asked for an allowance of \$225 "for extra services." The probate court refused to allow the claim for extra services, and the administrator appealed to the district court. This cause was numbered 445 on the docket of the district court. In the year 1885, E. D. Mayes applied, in pursuance of the provisions of chapter 14 of the Revised Statutes, for the withdrawal of the estate from administration; and, the required bond having been executed and approved, an order was made in the county court requiring the administrator to deliver the estate to the said E. D. Mayes. The administrator appealed to the district court from this order, where, upon a trial *de novo*, substantially the same order was made. An appeal to this court was taken from the district court, and the judgment was here affirmed. In 1885, during the pendency of these proceedings, Houston filed another exhibit in the county court. In the year 1886, E. D. Mayes filed in the district

court, against Houston, a separate suit, setting up the proceedings to withdraw the estate from administration; that the decree of the district court closing the administration had been affirmed by the supreme court; that Houston had failed to deliver the entire estate to him as ordered,—and setting up other demands and claims against Houston, growing out of his administration, not included in his exhibits. This cause was numbered 526 on the docket of the district court. The court consolidated the two causes numbered 445 and 526. Houston amended his pleadings, charging that he had delivered the whole estate to Mayes according to the judgment, and setting up divers claims against the estate not embraced in any of his exhibits. It does not appear that these claims of the administrator, or any of them, had been filed in the county court, and there entered on the claim docket, as prescribed by article 2198 of the Revised Statutes. In the case of *Richardson v. Kennedy*, 74 Tex. 509, 12 S. W. Rep. 219, we decided that it was necessary for that course to be pursued.

The mode of proceeding by an heir, devisee, or legatee when it is desired to withdraw an estate from administration, and by the administrator and the court, is prescribed in chapter 14 of the Revised Statutes. The administrator is required to file in the county court "an exhibit, under oath, of the condition of such estate." One of the conditions of the bond required to be given by the party withdrawing the estate from administration is that he "will pay the executor or administrator any balance that may be found to be due him by the judgment of the court on his exhibit." It is intended that the exhibit filed in the county court shall be made to show the exact condition of the estate, and that all claims and demands in favor of or against the administrator, growing out of his management of the estate, shall be there ascertained by exceptions to the exhibit, by evidence, and by a restatement of the exhibit, if it becomes necessary. All such matters must be litigated in the court in which the administration is pending upon the hearing of the administrator's final exhibit. Unless the administration is being conducted in the district court in a proper case, such questions cannot be tried there except on appeal. *Franks v. Chapman*, 61 Tex. 576. The administrator's appeal to the district court from the judgment of the county court withdrawing the estate from administration vacated the order, as the statute requires such appeals to be tried anew in the district court. Rev. St. art. 2207. While the appeal was pending in the district court and in this court, Houston continued to be the administrator of the estate; and as, at the expiration of such proceedings, the exhibit filed before their commencement no longer represented the true condition of the estate, or of his own accounts, it was proper and necessary for him to be required to file another exhibit, to be proceeded with as in the first place. After

the consolidation of causes 445 and 526 in the district court, an exception to the pleadings of the administrator setting up his claims against the estate was sustained, and his appeal, or cause numbered 445, was dismissed. The suit brought by Mayes against Houston, or cause No. 526, was then tried by the court without a jury; and judgment was rendered in favor of plaintiff for the sum of \$830.45, from which Houston prosecutes this appeal. As the administrator had not filed, and caused to be docketed, his claims against the estate in the county court, the case made by his appeal was properly dismissed; and other questions with regard to it need not now be considered. If the order of the county court for the delivery of the property of the estate, and for closing the administration, had not been appealed from, and the property had not been delivered by the administrator according to the order, Mayes could then have sued for its recovery in the district court. But, in order to have a cause of action either for effects with which the administrator was chargeable when he made his exhibit, but which were not included in it, or for effects acquired by him after his exhibit was filed, and during the time covered by the litigation, it was necessary for him to have such cause of action ascertained and fixed in the county court. Until that is done the proceedings in the county court are not final.

It will be proper to yet proceed in the county court to compel the administrator to render a correct final account of the condition of the estate as administered by him; and the administrator may, before he has filed such final account, file with the clerk, and have entered on the claim docket, his charges for reasonable expenses and attorney's fees, as provided by articles 2193 and 2193 of the Revised Statutes. *Richardson v. Kennedy*, 74 Tex. 509, 12 S. W. Rep. 219. The judgment is reversed, and the cause is dismissed.

FOLTS *et al.* v. FERGUSON *et al.*

(Supreme Court of Texas. May 13, 1890.)

INFANCY—CONTRACTS—JUDGMENT—LAND IN UN-ORGANIZED COUNTY.

1. In an action by minors to recover land sold under a power of attorney given by them, defendants answered that plaintiffs obtained title through a deed of gift from their mother, at the time of the execution of which the state had a valid judgment which was a lien on the land; that plaintiffs, after the execution of the deed to them, gave a power of attorney to sell the land to satisfy the judgment; and that their said attorney, in consideration of \$100, and the balance due on the judgment, conveyed the land to defendants, who on account of such conveyance paid off the judgment. *Held*, that the defense was good, since plaintiffs, though they may not have been bound by their power of attorney, and the deed executed thereunder, could not annul it, and recover the land, without repaying to defendants the amount paid by them in discharging the judgment.

2. A judgment, in order to operate as a lien on land situated in an unorganized county attached to another county "for judicial purposes only," must be recorded in the county to which such unorgan-

ized county is attached, since the recording of a judgment is for judicial purposes.

Appeal from district court, Shackelford county.

Harwood & Harwood and *D. W. Doom*, for appellants. *L. W. Campbell* and *Douglas & Lanier*, for appellees, (on motion for rehearing.)

HENRY, J. Appellees instituted this suit to recover undivided interests in two tracts of land lying in Hardeman county. Their petition charged that, while they were minors, they, with the owners of the other interest in the land, signed a power of attorney authorizing one William F. Ferguson to execute a deed of conveyance of the land, and that, acting under the power, Ferguson sold and conveyed the land to parties under whom the defendants claim title to it. The petition prayed for a decree canceling the power of attorney, and deed made under it, and quieting plaintiffs in their possession of the land. The defendants, among other defenses, pleaded the following: "That heretofore, to-wit, the 21st day of December, A. D. 1878, in a certain suit then pending in the district court of Travis county, in the state of Texas, No. 5,070, styled the State of Texas v. William F. Ferguson, Henry Woodruff Bendy, Elijah A. Ferguson, and Elizabeth A. Ferguson, the plaintiff in said suit, the state of Texas, recovered a judgment against the defendants in said suit, William F. Ferguson, Henry Woodruff Bendy, Elijah A. Ferguson, and Elizabeth Ferguson, in the sum of \$2,442.46, together with her costs in that behalf expended, and that execution issue therefor; that said William F. Ferguson, Elijah A. Ferguson, and P. L. Ferguson, and the plaintiffs in this suit, making six in all, were brothers; and the said Elizabeth A. Ferguson was their mother, and a widow, at the time the said judgment was rendered; that the said judgment, as soon as it was rendered, became and was the debt of the said Elizabeth A. Ferguson, and was a charge upon all of her property subject to execution for the payment of debts, and all of her said property could, by execution issued on the judgment, be sold for the payment thereof; that afterwards, to-wit, on the 17th February, 1879, a certified copy of the said judgment was filed in the clerk's office of the county court of Shackelford county, Tex., to which county the county of Haskell, which was then unorganized, and in which the lands in controversy in this suit are situated, was attached for judicial purposes, and on, to-wit, the 19th day of February, A. D. 1879, was duly recorded in the office of the county clerk of the county court of said Shackelford county, in Record Book A, pages 629 and 630, Book of Mortgages, and thereby became a lien on the land sued for in this case to the extent of the interest owned by the said Elizabeth A. Ferguson in said land; that at the date of said judgment, and the record of a certified copy thereof, as afore-

said, the title to all of said land, so far as any interest claimed by the plaintiffs in this case is concerned, was in said Elizabeth A. Ferguson, who held a deed of gift therefor, making it her separate property, and neither the state of Texas, its officers, agents, or attorneys, had any notice, either actual or constructive, of any pretended claim to said land, or any part thereof, by the plaintiffs in this suit, or any of them; that afterwards, to-wit, on the 2d day of December, 1879, within one year from the date of said judgment, execution was issued thereon to Travis county, Tex., as required by law, which execution was on, to-wit, the 4th day of December, 1879, returned by the sheriff of said Travis county 'not executed, no property found,' in that county; that afterwards, to-wit, on the 4th of December, 1879, within one year from the date of said judgment, another execution was issued on said judgment to Jasper county, Tex., where all the defendants in execution then resided; that afterwards, to-wit, on the 5th day of January, 1880, the said Elizabeth A. Ferguson, while the said judgment, and the lien thereof upon the lands in controversy in this suit, was in full force, and said judgment unpaid and unsatisfied, made, executed, and delivered to her children, P. L. Ferguson, G. R. Ferguson, L. T. Ferguson, Austin H. Ferguson, Elizabeth L. Ferguson, wife of said Elijah A., and Clara E. Ferguson, wife of the said William F. Ferguson, (these last two husbands were parties to said judgment,) a deed of gift, upon no consideration except love and affection, conveying to them the lands in controversy in this suit; that at about the same time the said Elizabeth A. Ferguson made and executed to same grantees deeds of gift, without any consideration save love and affection, conveying many other tracts of land, viz., one tract of 1,700 acres in Hardin county, one league in Tyler county, one tract of about 3,100 acres in Hamilton county, and all other land and property of every kind owned by her except her homestead; that at the time the said deeds were made the said Mrs. Ferguson was largely in debt to various persons, besides the judgment aforesaid, and after making said deeds of gift was wholly insolvent; that the said deeds of gift were all fraudulent, and were made to hinder and delay her creditors, particularly the state of Texas, the owner of said judgment, and were therefore void; that all of said lands and property conveyed by the deeds aforesaid, and particularly the lands involved in this suit, being still subject to the payment of said judgment, * * * the parties to the same, including the said Elizabeth A. Ferguson, made, executed, and delivered to said William Ferguson the said power of attorney, to enable him to convey the lands in controversy, satisfy and pay off said judgment, that they might enjoy the remainder of the lands and property free from liens or liability to be sold for the satisfaction of said judgment; that, in pursuance of

said power of attorney, the said William F. Ferguson, as the agent and attorney of the said Elizabeth A. Ferguson and grantees in said deed of gift, including plaintiffs in this suit, for and on their behalf executed and delivered to said Folts & Donnan the deed of conveyance of date 5th of May, 1880, conveying the land in controversy, for the consideration of \$100 cash and the balance due on the judgment, amounting to \$1,684.03, and then and there agreeing with Folts & Donnan that the title of said land should pass to them as perfectly as if the same had been sold under execution issued upon said judgment; that, on account of said sale and conveyance to them, said Folts & Donnan paid off and satisfied the balance due on said judgment as aforesaid, and caused the same to be satisfied of record, and the last execution issued on said judgment was returned without levy, and no further execution has been issued on said judgment, and all of the remainder of said lands and property conveyed by said deeds of gift were, by the payment and satisfaction of said judgment, set free from all liability to be sold in satisfaction of said judgment, and said plaintiffs were benefited, and placed in condition to enjoy the remainder of said lands and property conveyed by said deeds of gift from all hindrance on account of said judgment, and thus the said Folts & Donnan and their assignee, the defendant C. R. Beatty, became subrogated to all the rights of the state of Texas, to the same extent as if the said land had been sold under execution issued on said judgment, and purchased by them at said sale." The court sustained plaintiff's exceptions to this defense, and, after hearing the evidence, rendered judgment in favor of plaintiffs, according to their prayer.

The facts alleged in the answer are sufficient to show that at the dates of the conveyance of the land in controversy by their mother to plaintiffs, and the deed by virtue of the power of attorney to Folts & Donnan, the judgment in favor of the state was a subsisting lien upon it. As the land was sold for the express purpose of providing for the discharge of the judgment lien, it follows, as the result of repeated decisions of this court, that, even if plaintiffs are not bound by the deed to Folts & Donnan, on account of their minority, they yet cannot annul that deed, and recover back the land, without restoring the money that went to discharge the judgment lien, with interest. *Howard v. North*, 5 Tex. 290; *Giddings v. Steele*, 28 Tex. 748; *French v. Grenet*, 57 Tex. 273; *Northcraft v. Oliver*, 74 Tex. 162, 11 S.W. Rep. 1121. We think the court erred in sustaining exceptions to so much of the answer as set up the judgment lien, and the right of the defendant to be subrogated to the rights and remedies of the state under its judgment. The defendants offered record evidence to prove that the judgment in favor of the state was a subsisting lien on the land at the date of its conveyance to them, which was excluded. We can

see no objection to the evidence, except that, after an exception was sustained to the pleading, there remained no issue for it to apply to. Upon another trial, it should be admitted. For the error noticed the judgment must be reversed, and the cause remanded. As the other grounds of error now insisted upon may not occur upon another trial, we deem it unnecessary to rule upon them now.

ON MOTION FOR REHEARING.

HENRY, J. Appellees, in support of their motion for a rehearing, contend that the recording of the state's judgment in Shackelford county on the 17th day of February, 1879, did not create a lien on the land in controversy situated in Haskell county, which was then attached to Shackelford county "for judicial purposes only." The act of November 9, 1866, was in force when the judgment was rendered, and directed that "a transcript thereof, duly certified by the clerk under the seal of the court, be recorded in the book used for the registration of mortgages" in the county where the land was situated. The record in this instance was made before the passage of the act of March 30, 1881, and cannot derive any aid from that act, which provides that all deeds, conveyances, mortgages, deeds of trust, or any other written contract relating to real estate which are authorized to be recorded, relating to real estate situated in an unorganized county, shall be recorded in the county to which such unorganized county is attached for judicial purposes. The act contains a proviso that nothing in it "shall be construed to affect the registration of any such instruments heretofore made" in either a land-district to which any unorganized county may have been attached, or any county to which any unorganized county may have been attached for judicial purposes." While this act settled for the future the disputed question as to where such records should be made, it did not in any way affect the legality of records previously made. Appellees, in support of their contention against the validity of the record of the judgment made in the county of Shackelford, to which Haskell was then attached, as an unorganized county, for "judicial purposes only," refer us to the case of *Baker v. Beck*, 74 Tex. 562, 12 S. W. Rep. 229. The question in that case was whether a deed for land situated in an unorganized county, and attached for judicial purposes only to another county, was before the act of 1881 required to be recorded in the county from which the territory of the unorganized county was taken, or in the county to which it was attached for judicial purposes only, and it was decided that the county from which the territory was taken was the proper place to record the deed. The question before us is as to the proper county for a judgment to be recorded in, to make it operate as a lien on land, and not as to the proper place for recording a deed conveying land. The questions are materially different. We think

that the recording of a judgment for the purpose of making it a lien is strictly a judicial purpose. It is as much one step towards collecting a judgment as is the levy of an execution issued on the judgment.

The sheriff's deed, when made, relates back to the date of the record, which thereby becomes an essential part of the title conveyed by him. There can be no doubt about the propriety of issuing the execution upon the judgment to the sheriff of the county to which the unorganized county is attached for judicial purposes, and in which the judgment was rendered, nor about that officer's power to sell the property at the court-house of his own county. It is useful and important for bidders to have the means of ascertaining whether the judgment under which the sale is being made is a lien on the land at the time and place of making the sale. It is true that knowledge of all records relating to the land would be useful, under the same circumstances. But the fact that the law, before 1881, did not require conveyances to be recorded in the county where the judicial proceedings were conducted, cannot be held to modify or limit the effect of laws with regard to such proceedings which include all of the steps taken in actions for the recovery of debt, from the filing of the original petition to the sale of the property, and the execution of a deed to the purchaser, and payment of the money to the creditor. The judgment in favor of the state was recorded at the proper place, and in due time; and, proper diligence having been exercised in the issuance of executions, according to the averments of the answer, a lien upon the land did exist in favor of the state.

We do not think that this is a proper case to apply the rule contended for as applicable between principal and surety, so as to devolve the whole of the judgment in favor of the state upon the one-sixth of the land purchased by defendants from W. F. Ferguson, or from his wife, rather. The answer of defendants shows that only one-half of the land was conveyed by appellees, and that defendants only acquired from them one-half of the land in controversy. Plaintiffs in the court below claimed one-half, and not the whole, of it; and by the expression in our opinion that they cannot "recover back the land without restoring the money," we did not intend to be understood as deciding that they must refund the whole amount of purchase money paid by defendants. Before they can be permitted to recover one-half of the land, they must refund one-half of the purchase money paid by defendants, and interest thereon from the time that the money was paid by defendants. If it shall be made to appear that defendants have had the actual use of the land, they should be charged with that, or with the excess of the value of the use over permanent and valuable improvements, if they have placed such on the land. This question is raised by appellees by their motion for a rehearing; but, as it is not otherwise properly

presented, it does not become necessary or proper for us to say more on that branch of the cause.

Appellants, in their reply to the motion for rehearing, ask us to pass upon the following proposition, which they contend is raised by one of their assignments of error: "The voluntary conveyance by Mrs. Ferguson to her children was void as to her creditors, and, being void, the title remained with her; and her subsequent sale, effected through her agent, William F. Ferguson, to Folts & Donnan, for the purpose of paying her debts, was a valid sale, and cannot be questioned by the donees claiming under the voluntary conveyance." We cannot give our assent to this doctrine. The question was considered by this court, and decided otherwise, in the case of *Miller v. Koertge*, 70 Tex. 162, 7 S. W. Rep. 691. The motion is overruled.

NEWCOMER *et al.* v. STATE.

(*Supreme Court of Texas*. May 13, 1890.)

TAX COLLECTORS—ACTION ON BOND—SUCCESSIVE SURETIES.

Where a tax collector carries a balance due from him to the state over to the succeeding year, when he enters on a second term, with new sureties, and there is a deficit for such year, it will be considered a deficit for the preceding year to the extent of such balance; but where the accounts are balanced for such succeeding year, and the collector's private funds are used to the amount of the balance brought forward, the sureties on his bond for the first term are not liable for any deficit that may thereafter occur.

Appeal from district court, Travis county.

Simpson & James and *H. C. Duffie*, for appellants. *J. S. Hogg* and *J. H. Robertson*, for appellee.

GAINES, J. This suit was brought by the state against the sureties on the bond of one Henry Hamilton, given to secure the performance of his duties as tax collector of Bandera county for a regular term of office beginning in the year 1884. The object of the suit was to recover tax money collected by Hamilton during that term of office, and alleged not to have been paid to the state. He was elected sheriff, and, by virtue of that office, was the collector of taxes for his county. In the year 1886 he was elected to succeed himself, and gave a new bond. Only one of the sureties on the first was a surety on the second bond. The state claimed in this suit the sum of \$2,217.46, and recovered a judgment for \$1,109.12. The defendants appeal, and complain that there was error in rendering judgment against them for any amount; and the state files cross-assignments of error, claiming that it should have had a judgment for the entire sum sued for in the petition.

Hamilton died before the suit was brought. It is conceded that during his two terms of office he was a defaulter to the amount claimed in the petition. The questions are, which set of sureties are liable? and, if neither are liable for the whole, what is the extent of the liability of each? The several accounts of Hamilton from the department of

the comptroller for the fiscal years ending in 1886, 1887, and 1888 were read in evidence. On the account of the first year he was indebted to the state in the sum of \$213.01, which was charged against him in the next year's account. The second and third accounts were balanced, and the last showed an indebtedness due the state of \$2,189.08. It follows that the liability of these appellants depends upon the question whether the second year's account was ever properly balanced or not. The bond for Hamilton's second term was approved by the commissioners' court of the county on the 29th of November, 1886, but was not formally approved by the comptroller until the 3d of March, 1887. At the former date the account shows that there was a balance due of \$2,262.46. Subsequent to that date the following credits were entered: December 8, 1886, deficiency claim, \$45; same date, deficiency claim, \$296.75; March 2, 1887, "draft," \$811.59; "coupon 2-7," \$1,109.12. The state contends that the last three items were improperly credited upon this account, and that they should have been credited to the account of the next succeeding year. To sustain this contention, the state invokes the principle announced in the case of *State v. Middleton's Sureties*, 57 Tex. 185, that, as between the sureties upon the successive bonds of a tax collector, taxes paid into the treasury must be credited to the account of the year during which they are collected, and cannot be appropriated to make good a defalcation of a previous year. The item of \$296.75 was proved to be for money due Hamilton as sheriff; and the comptroller, there being no instructions to do otherwise, properly applied it to the account in question. The credit designated as "coupon 2-7," for \$1,109.12, was a voucher for money paid to the county treasurer upon the order of the comptroller in discharge of the portion of the available school fund set apart to Bandera county. The court below held, in effect, that this item was improperly allowed as a credit on the account sued upon. There was no evidence to show whence the money was derived with which the draft for \$811.59 was paid. The court, however, held that it was a proper credit. We surmise that the trial judge was of the opinion that the circumstances create the presumption that the coupon was paid with money collected on the tax-rolls of 1886, and that no such presumption was raised in the case of the draft. Whether these conclusions were correct or not we need not determine; for we are of opinion that if it had been shown that both of the payments had been made with tax moneys which were collected on the rolls of 1886, and for which the sureties on the second bond were responsible, it would not, under the facts of this case, have established the liability of these defendants, the sureties on the first bond. As between the state and Hamilton, the principal, it was a matter of no moment how the payments were appropriated. The application only becomes impor-

tant as between the sureties upon the first and those upon the subsequent bond; and, if it has not operated to the prejudice of the latter, no reason is seen why the credits as applied should not be allowed.

The claim is that money was appropriated to the credit of the account ending June 30, 1886, which the law holds primarily applicable to an account for which the securities on the second bond were liable, namely, the account for the year ending May 1, 1887. Should such be the fact, the latter sureties have no right to complain, provided their principal has paid the account for the year ending in 1887, without appropriating to its settlement tax moneys which should have been applied to the account of the next succeeding year. If the default of one year is attempted to be made good by the appropriation to its payment of taxes collected on the next year's account, and if the deficit so produced in the second account is in turn discharged by the application of moneys due on the next succeeding account, the default should be attributed to the first account. If the last be settled, no harm accrues. If not, then the payments properly applicable to it must be so applied. Such application necessarily produces a deficit in the second account, and gives the sureties who are responsible for its adjustment the right to have the payments wrongfully appropriated to the first withdrawn, and applied as they should have been in the first instance. But in this case, if the account for the year ending May 1, 1887, was balanced without drawing upon the taxes charged on the account of the succeeding year, the sureties on the second bond have no cause to complain of any misappropriation of the tax moneys of that year. It was their right to demand that, when any of such moneys were paid into the treasury, they should be applied to the credit of the account against the tax collector, upon which such taxes were originally charged, until that account was settled; but that right ceased as soon as the account was discharged with funds not collected as taxes.

When we turn to the evidence in the case, we are satisfied that the account for 1887 was discharged without resort to the taxes applicable to the account of the next year. The statement of facts contains this language: "Defendants also showed that the items in the comptroller's several statements of H. Hamilton's accounts above set forth, styled 'treasury warrant,' 'comptroller's draft,' 'deficiency claim,' and 'drafts,' were private funds, and funds pertaining to his office as sheriff, and not 'tax moneys.'" The items so designated embrace all the credits for money paid on the account for the year ending in 1887, except two coupons credited in June and July of that year. The dates of these coupon credits show that they were not paid with taxes chargeable on the account of the next year. These taxes were not collectible until the 1st of October next after the credits were entered. Rev. St. art.

4739. But, again, let it be admitted that the account of the fiscal year ending in 1886 was paid off with funds that should have been upon the account of next year. It was then Hamilton's duty to the sureties on the second bond either to correct that misappropriation, or to redress the wrong done them by making good the deficit produced by it on the next year's account, by a payment from his own private funds. Having done the latter, they were not injured. The result is precisely the same as if the proper application had been made in the first instance, and his private funds had been applied to make good the original default. For the reasons given we are of opinion that the court erred in giving judgment against the defendants for even a part of the state's demand, and that the judgment should be reversed, and here rendered for them; and it is so ordered.

POLK et al. v. STATE.

(Supreme Court of Texas. May 18, 1890.)

Appeal from district court, Travis county.

Hancock, Shelley & Hancock, for appellants.
J. S. Hogg and J. H. Robertson, for appellee.

GAINES, J. This case is the counterpart of that of *Newcomer v. State*, ante, 1040, (this day decided.) It was brought by the state to recover of the sureties upon the bond of Henry Hamilton given to secure the faithful performance of his duties as tax collector of Bandera county during his second term of office. There is no question made as to the amount of Hamilton's defalcation during the two terms he held the office, and the state in this suit, as in the former, seeks to charge the defendants with the entire amount. The purpose of course is not to secure a double recovery, but to have the court fix the obligation where it belongs. The petition in this case declares upon the account from the comptroller's office for the fiscal year ending May 1, 1888, which shows a balance against Hamilton of \$3,179.08. In this case, as in the other, the accounts for the fiscal years ending in 1886, 1887, and 1888 were introduced in evidence; and in all respects the evidence is substantially the same in the two cases, except that in this case it was not proved that the items styled "Treasury Warrants," "Comptroller's Drafts," "Deficiency Claims," "Drafts," in the accounts read in evidence, were private funds, and funds pertaining to Hamilton's office as sheriff, and not tax moneys. In this case we have a certified statement of the quarterly reports of Hamilton of moneys collected by him from December 31, 1884, to December 31, 1887; but it is not seen that these reports throw any light upon the issues involved. If there had been proof in this record, which would satisfy us that no part of the tax moneys of the subsequent year were used in paying off the account for the year 1887, we should, upon the principles announced in the other case, reverse this judgment, and render a judgment against the defendants for the whole amount claimed in the petition. But, although we think the evidence such as to require a reversal of the judgment, we do not consider it such as to require us to make a final disposition of the case. The account certified to by the comptroller is *prima facie* correct; and the burden was upon these defendants to show, if such were the fact, that tax moneys properly applicable to it had been paid into the treasury, and had been wrongfully appropriated to the account which the sureties upon the first bond were liable to make good. This they have wholly failed to do, unless the presumption of a wrongful appropriation can be drawn from the face alone of the account of the fiscal year ending in 1887. We find nothing in the credits there entered that justifies us in drawing that presumption. There is one item styled "Draft"

which bears date after the tax-rolls of 1887 went into Hamilton's hands, and after a portion, at least, of the taxes charged in the account sued on may have been collected. But we do not think this warrants the presumption that the draft was drawn upon money which had been collected as taxes. Upon the evidence adduced, the court below should have rendered judgment against the defendants for the whole amount claimed in the petition. The state's assignment that the court erred in not so rendering the judgment is well taken, and the judgment must be reversed. In order to afford the defendants the opportunity of proving, if they can, that some part of the account for the year ending in 1887 was paid with moneys that should have been credited upon the account sued on, the cause will be remanded for a new trial.

BAKER et al. v. McFARLAND et al.

(*Supreme Court of Texas. May 18, 1890.*)

APPEAL—WEIGHT OF EVIDENCE—STALE CLAIM.

1. A finding that the grantee of land was the husband and father of defendants will not be disturbed though there is evidence that there were three persons of the same name, one of whom never came to Texas. Of another, there was no trace; but the husband and father of defendants came to the state before the grant, and died in Louisiana, having papers relating to land in Texas.

2. Persons in possession of land without title cannot set up the defense of stale demand.

Appeal from district court, McLennan county.

Suit in equity by W. Y. McFarland, administrator of the estate of John Isbel, against John H. and John W. Baker, and the unknown heirs of William Dease, deceased, for specific performance. The Bakers appeal.

W. S. Baker and Alexander, Winter & Dickinson, for appellants. *Felix H. Robertson*, for appellees.

STAYTON, C. J. This suit was prosecuted by the administrator of the estate of John Isbel, deceased, against the unknown heirs of William Dease, to enforce specific performance of a contract made between Dease and Isbel in 1838, whereby the latter was to receive 370 acres of the land to be granted under a certificate for one-third of a league issued to Dease. The land in controversy was located and caused to be patented by Isbel under that agreement. The court appointed an attorney to represent the unknown heirs of William Dease; and during the pendency of the suit a number of persons, representing themselves to be the widow and children of William Dease, made themselves parties defendant. John H. and John W. Baker were on the land, but without title, and they were made defendants. The attorney for the unknown heirs of William Dease, as well as the persons who claimed to be his widow and children, asserted rights against the Bakers; and all of them set up the defense of stale claim against the plaintiff. There was a judgment in favor of plaintiff, and also a judgment in favor of those who claimed to be the widow and children of Dease, through which the entire tract of land was partitioned. From that judgment John W. and John H. Baker alone appeal, and they present but two questions.

They contend that the evidence was not sufficient to show that the William Dease to whom the land was granted was the husband and father of the persons who made themselves defendants. The evidence tends to show the existence of three persons whose names were William Dease or Deas, members of the same family, and the same person, at times spelling the name one way, and at other times the other. One of these persons, it is clearly shown, never came to Texas, but there is evidence tending to show that the others did. Of one of those, however, there was no trace, while the other was clearly identified as the husband and father of the persons who made themselves defendants, and in whose favor a judgment was rendered for all the land not adjudged to the estate of Isbel. The evidence tends to show that the William Dease last referred to came to Texas prior to the date of the certificate under which the land was granted, and that he subsequently lived in Louisiana, where he died. That he asserted claim to lands in Texas, and had papers in reference thereto, was shown; but the witnesses did not know their import. The court found that this William Dease was the person to whom the land was granted, and we are not prepared to hold that the evidence was not sufficient to sustain the finding. A detailed statement of the evidence would serve no useful purpose; but it is such as was usual on questions of identity, and, while not conclusive, cannot be said to be wholly wanting probative force.

All persons made defendants urged the defense of stale claim; but, as none but the Bakers have appealed, it is unnecessary to consider it, for they are not in a situation to assert such a defense. There is no error in the judgment, and it will be affirmed.

CITY OF SHERMAN v. LANGHAM.

(*Supreme Court of Texas. May 16, 1890.*)

NUISANCE—CITY DUMP GROUND—NEGLIGENCE.

The fact that plaintiff purchased and located on his land, after the city had established its dump ground, will not preclude his recovering damages for the negligent manner in which it uses the place for that purpose, whereby it becomes a nuisance.

Commissioners' decision. Consent case. Appeal from district court, Grayson county. *A. Mayfield and Bryant & Dillard*, for appellant. *Wilkins & Haslewood*, for respondent.

ACKER, J. R. Langham brought this suit against the city of Sherman to recover damages alleged to have been sustained by him in consequence of the negligence of defendant in maintaining a dump ground or place of deposit for dead animals, garbage, and filth of all kinds adjacent to plaintiff's home. The defendant answered by general exception, general denial, and specially pleaded the exercise of diligence in the use of the ground, and that, if any matter was deposited thereon so as to become a nuisance, it was done without the knowledge and con-

sent of defendant, and it was not responsible therefor. It also set up in its answer that the land had been purchased and designated by it as a place of deposit of garbage and refuse matter before the plaintiff established his residence adjacent to it, and that the plaintiff, therefore, had no right to complain. The general exception was overruled, and the trial by jury resulted in verdict and judgment for plaintiff for \$1,164, from which this appeal is taken.

The petition was good on general demurrer, and the court did not err in so holding. It is contended that the plaintiff could not recover, because he purchased his property and located thereon after the dump ground was established by defendant, and thereby contributed to his injury if he had sustained any. The contention cannot be sustained. The action was brought to recover damages resulting from the negligent and improper manner in which the defendant managed and maintained the place of deposit. It was not sought to recover damages for the mere establishing and designating the place as a dump ground. In establishing his residence near the ground that had been so designated, the plaintiff had the right to rely upon the proper performance of duty on the part of the defendant so that the place would not become a nuisance to his injury. It is well settled that a municipal corporation is liable for the damages sustained by a citizen in consequence of such corporation permitting such ground under its control to become a nuisance. *City of Fort Worth v. Crawford*, 74 Tex. 404, 12 S. W. Rep. 52. This is very similar to the *Crawford Case*. The other questions presented here were involved in that case, and there decided adversely to appellant. We are of opinion that the judgment of the court below is correct, and it is affirmed.

SHROPSHIRE v. BEHRENS *et al.*

(*Supreme Court of Texas*. May 13, 1890.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—CORPORATE SEAL.

The use of the corporate seal being necessary to convey land, under Rev. St. Tex. art. 600, an assignment by a corporation for the benefit of creditors, purporting to convey all its property, real and personal, is invalid without the seal, though the inventory shows only personalty.

Appeal from district court, Brown county. *Bell & Drane*, for appellant. *Clark, Dyer & Ballinger*, for appellees.

STAYTON, C. J. The petition alleges that the Brownwood Drug Company, a private incorporation, incorporated under the laws of this state on April 12, 1887, made an assignment of all its property, real and personal, for the benefit of such of its creditors as would consent to take under it, and release the corporation. The instrument through which it was alleged this was done was made an exhibit to the petition, and so much of it as is in question reads as follows: "For the benefit of the creditors of the Brownwood

Drug Company only who will consent to accept their proportionate shares of the estate of said Brownwood Drug Company, and discharge said Brownwood Drug Company from their respective claims, and the remainder, if any, to be paid to such creditors as do not accept under this assignment; and the said B. D. Shropshire, on his part, accepts said trust, and freely covenants and agrees to faithfully perform his duties as said assignee, in accordance with the statutes concerning assignments for the benefit of creditors. Witness our hands this 12th day of April, A. D. 1887. THE BROWNWOOD DRUG COMPANY, by JOHN C. BERNAY, President. B. D. SHROPSHIRE, Assignee. Attest: W. C. MORGAN, Sect." The instrument purports to convey all property, both real and personal, of the corporation, while the inventory attached to it shows only personal property, but does not exclude the existence of realty also. After appellant, as assignee, took possession of the estate, a lot of drugs were seized under a writ of attachment sued out by appellees, and this action was brought by the assignee to recover damages for the seizure.

Special exceptions were filed which questioned the sufficiency of the petition, in that it did not show that the instrument was executed under authority of the directors of the corporation, or under its corporate seal; and, further, on the ground that the instrument was indefinite, in that it did not show that it was made exclusively for the benefit of consenting or of non-consenting creditors. Under the averments of the petition, and from the face of the instrument, it must be held that the intent was to assign both real and personal property, and that the instrument was not executed under the corporate seal. While the use of seals has been rendered unnecessary to the validity of contracts between individuals, the statutes of this state still require that corporations shall evidence their contracts by use of their corporate seals. They are excepted from the operation of the law which renders the use of seals unnecessary in contracts between individuals. Rev. St. art. 4487. The law of this state provides that "any corporation may convey lands by deed, sealed with the common seal of the corporation, and signed by the president or the presiding member or trustee of said corporation; and such deed, when acknowledged by such officer to be the act of the corporation, or proved in the manner prescribed for other conveyances of lands, may be recorded in like manner and with same effect as other deeds." Id. art. 600. We think it is clear that the instrument in question, because not executed under the corporate seal, is insufficient to convey to the assignee any real estate owned by the corporation, which, to give validity to the assignment, was necessary. If, in fact, the corporation owned no real property, this fact should have been distinctly alleged, and such fact cannot be implied either from the averments of the petition or

language of the instrument. It therefore becomes unnecessary to consider whether the assignment would have been valid had the corporation owned only personal property. It also becomes unnecessary to inquire whether the provision that such of the estate as might not be necessary to satisfy consenting creditors should be paid to those not consenting would invalidate the assignment. The exception was properly sustained on the ground noticed, and the judgment of the court below will be affirmed.

FURNISH et ux. v. MISSOURI PAC. RY. CO.

(*Supreme Court of Missouri*, June 30, 1890.)

CARRIERS—INJURY TO PASSENGER—DAMAGES.

1. A railroad company is liable to a passenger for slight negligence, and is bound to furnish a reasonably safe and sufficient track, rolling stock, and service, so far as can be provided by the utmost human skill, diligence, and foresight, which is such skill, diligence, and foresight as is exercised by a very cautious person; but it does not insure safety.

2. The fact that a railway car ran off the track, causing an injury to a passenger, is evidence of negligence, which, if unexplained, will justify a recovery; and it is not substantial error to charge that it shifts to the carrier the burden of proof that the injury did not occur through any omission to discharge its legal duty.

3. A woman 53 years old, a passenger on defendant's railway, was injured in a wreck. There was a great deal of tenderness in the small of the back, but no external evidence of injury, except that in a day or two there was some discoloration. She had suffered a great deal from the injury, been unable to walk or attend to any of her household duties, and would probably be unable to walk for a long time, and always have a weak back. Seven years before she had been in delicate health for two or three years, and to within two years of the accident she had had attacks of neuralgia, often complaining of her back. \$15,000 damages were awarded. *Held* excessive, and set aside, unless the sum of \$5,000 be remitted.

Appeal from circuit court, Bates county; D. A. DE ARMOND, Judge.

This was an action brought by Martha A. Furnish, being joined therein by her husband, to recover of defendant damages for injuries sustained by her while a passenger on one of defendant's cars. It appeared in evidence that on the 6th of February, 1886, she took passage on an accommodation train, consisting of a locomotive and a tender, a baggage-car, and two passenger coaches, at Independence, Mo., intending to go to Kansas City. When the train arrived within a mile and a half of Kansas City the locomotive and all the cars left the track on an embankment, and, after leaving the rails, the train tipped over and rested on its side. The plaintiff introduced evidence tending to prove that at the point where the locomotive left the track a number of ties were broken off and splintered, (some of them were decayed and rotten,) and that the tire of one of the drive-wheels, which had been placed thereon shortly before the accident, was three-eighths of an inch thicker than the one upon the companion drive-wheel, and that the difference in thickness had been called to the attention of

defendant's assistant master mechanic, while the locomotive was in the repair shop, shortly before the accident. The effect of this difference was to make one drive-wheel larger than the other. There was evidence that the south rail at the point where the locomotive left the track was bent inwardly towards the north rail. Defendant introduced evidence tending to show that the ties, at the point where the train left the track, were sound ties, capable of holding the spikes; that the track at that point had been inspected daily for a long time; that it had been inspected two hours before the accident occurred; and that there was nothing to indicate any defect in the track or road-bed. Defendant also gave evidence tending to prove that the engine was inspected by the engineer immediately before it left Independence on that trip, and it was found in perfect condition as far as he could discover. The master mechanic, assistant master mechanic, and engineer of defendant all testified that the difference in the thickness of the tire would have no effect upon the safety of the locomotive, nor any tendency to throw it from the track. The assistant master mechanic denied that his attention had been called to the difference in the thickness of the tire by the witness who testified he had done so, and further testified that the latter had nothing to do with the engine when it was in the shop for repairs. Plaintiff's evidence as to her injuries was that after the car in which she was riding was derailed, she was found lying in the top of the car, with her feet through a window, and a cushion across face. She was taken out of the wreck, and placed upon some cushions, and afterwards removed to an hotel in Kansas City, where she remained for 25 days. She was examined by a physician the afternoon of the accident. He testified that he found a great deal of tenderness in the small of the back, increased pain upon pressure, radiating from several inches around the point of injury, with increased sensibility of the limbs, and that she was suffering a great deal from the fall. At that time there was no external evidence of an injury, but in a day or two afterwards there was some discoloration along the back and side. After her return home he saw her several times, and found her but little improved. The evidence of her family physician was to the effect that he had known and prescribed for her since 1879; considered her in delicate health for two or three years from that time, and up to within two years she had had attacks of neuralgia, often complaining of her back, but for 18 months prior to her injury he had not prescribed for her; that her injuries had rendered her an invalid, unable to walk or attend to any of her household duties; and that he believed she would be unable to walk for a long period. On cross-examination he testified that in his opinion her spinal cord was not injured by the accident; that she had no indications of paralysis; and that she would probably in

time recover so as to get around, but would, in all probability, always have a weak back. Another physician, called as an expert, testified that he had seen her twice,—the first time in April, 1886, and the second time a week before the trial; that in some respects she had improved, in others not; that he believed her injuries were permanent, but that the probabilities were that she would get better; that she had got better. Testimony was given by non-professional witnesses that she had not been able to walk prior to the trial.

At the close of the evidence the court, of its own motion, gave the following instructions to the jury, without objection or exception by either party, viz.: "(a) If the jury believe from the evidence that, at the time said train was overturned, the employes of defendant were exercising, and had exercised, the highest practicable care, caution, and diligence, which capable and faithful railroad men would exercise under similar circumstances, and that the train ran off, or was thrown from, the track, and was overturned by causes or a cause unknown to the defendant, its agents, and servants, and which could not have been discovered by them, and the causes or cause of the accident removed or counteracted by the exercise of the aforesaid care, caution, and diligence, then the plaintiffs cannot recover in this action, and the verdict should be for the defendant. (b) The jury are instructed that although they may believe from the evidence that some of defendant's ties on its road-bed were decayed or rotten, as described by some of plaintiff's witnesses, yet they should not find a verdict for plaintiffs on this ground if they believe from the evidence that such condition of said ties did not cause the train to be thrown from the track, and plaintiff Martha A. Furnish to be injured, as complained of in the petition. (c) The court instructs the jury that although they may believe from the evidence that one of the drive-wheels of the locomotive, which was hauling the train in question, had been re-tired, and that the new tire had not been turned down, yet they cannot find for plaintiffs on this ground, unless it appears from the evidence that it was necessary to have the same turned down, to render it fit and proper to be used to avoid accident; nor can they find for plaintiffs on this ground if it appears from the evidence that the injury complained of did not result from defendant's failure to have said tire turned down."

Furthermore, the following instructions were given at the instance of plaintiff, viz.: "(d) The court instructs the jury that if they believe from the evidence that the defendant corporation was engaged in the business of transporting passengers for hire upon a railroad operated by it, then the law denominates the defendant a common carrier; and it was bound to provide a reasonably safe track and road-bed, and reasonably safe and staunch road, worthy cars and engines, and careful employes to manage the same, so far as human skill, diligence, and foresight could provide;

and is responsible for all injuries resulting from slight negligence on the part of itself, its agents or servants. If, therefore, the jury believe from the evidence that on or about the 6th day of February, 1886, the plaintiff Martha A. Furnish took passage on the cars of the defendant, and that said car, while said Martha A. Furnish was a passenger thereon, ran off the track of defendant's railroad, and fell down the embankment thereof, and the plaintiff Martha A. Furnish, without fault or negligence on her part, was thereby injured, then it rests on the defendant to prove to your satisfaction that said car, the engine drawing the same, the machinery by which it was operated, and the road-bed, track, and ties of the road, at the place of derailment, were reasonably safe and sound, so far as human skill, diligence, and foresight could provide, and that said accident was caused by inevitable accident or defects in said car, engine, machinery, road-bed, track, and ties that could not have been seen, detected, or known to the defendant, its agents, or servants, by the exercise of the utmost human skill, diligence, and foresight. (e) The court instructs the jury that if they believe from the evidence that on or about the 6th day of February, 1886, the defendant was engaged in the business of transporting passengers in the state of Missouri, and that on said day the plaintiff Martha A. Furnish was received by it, to be carried as a passenger on one of its said cars, and that while being so transported on said car she was injured by reason of said car leaving the track and falling down an embankment of defendant's railroad, then the burden rests upon the defendant to prove to the satisfaction of the jury that said derailment was caused by inevitable accident, and not from any defect or imperfection in said car or the engine by which it was drawn, or the machinery by which it was operated, or in the road-bed, track, or ties of the defendant's road, which could have been prevented by the exercise of the utmost human skill, diligence, and foresight, and to prove that the injury could not have been prevented by the exercise of the utmost human skill, diligence, and foresight; and unless the jury so believe they will find for the plaintiffs. By the utmost human skill, diligence, and foresight is meant such skill, diligence, and foresight as is exercised by a very cautious person under like circumstances. (f) If the jury should find for the plaintiffs, they will assess Martha A. Furnish's damages at such sum as they may believe from the evidence will compensate her, the said Martha A. Furnish, for her injuries, including all bodily pain and mental anguish they may believe from the evidence she has suffered, and will necessarily and inevitably suffer, and any permanent injury or incapacity they may believe from the evidence she has sustained; and it will be proper for the jury to consider also the effect of the injury upon plaintiff Martha A. Furnish's health in the future, if they believe from the evidence her future health will be

affected by the injury, and all damages, present and future, which from the evidence they believe to be the necessary result of the injury complained of, not exceeding the sum of \$25,000."

The instructions given in behalf of defendant were these, viz.: "(g) The court instructs the jury that the defendant, as a common carrier of passengers over its railroad in its cars, did not undertake to insure or absolutely guaranty the safety of Martha A. Furnish, and the defendant was not bound to have its road-bed or tracks, ties, cars, engine, and machinery absolutely safe; nor did the law require the defendant to adopt every precaution to prevent Martha A. Furnish from being injured, and the persons in charge of defendant's train and railroad were only required to use that degree of care which prudent railroad men would exercise under like circumstances, with no knowledge that an accident was to happen. (h) The court instructs the jury that there is no evidence in this case tending to show that any part of the car in which plaintiff Martha A. Furnish was riding at the time of the injury was defectively or improperly constructed. (i) The jury are instructed that if they find for the plaintiff, they can only find such damage as Martha A. Furnish has sustained as the natural and reasonable result of the injury she received at the time of the accident; and these must be only compensatory. In this case punitive or exemplary damages cannot be allowed by the jury." "(k) The jury are instructed that if they find for the plaintiff, they must not allow any present damages for her alleged permanent injury, or for apprehended future consequences of the injury received by the accident in question, unless they believe from a preponderance of evidence that there is such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury. It is not enough that the injury received may develop into more serious consequences or conditions than those which were visible at the time of the injury or at the present time, or even that they are likely to develop consequences contingent, speculative, or merely possible, which are not proper to be considered by the jury in ascertaining the damages. (l) The jury are instructed that the merely possible, or even probable, continuance of plaintiff's (Martha A. Furnish's) disability or injuries received at the time of the accident is not an element of damages in this case. To justify them in assessing damages for future or permanent disability or injury, it must appear by a preponderance of the evidence in the case that continuous or permanent disability is reasonably certain to result from such injuries. Consequences which are speculative or contingent cannot be taken into consideration by the jury in arriving at the verdict. It is not enough that plaintiff's (Martha A. Furnish's) injuries which she then received may develop into a condition more serious than

they are at present or may continue; but the jury must be satisfied from a preponderance of the evidence that they will so result or continue.

The instructions offered by defendant and refused by the court were as follows, viz.: "(1) The jury are instructed that under the pleadings and evidence in this case the plaintiffs cannot recover, and you will find for the defendant. (2) Although the jury may believe that the train in which Martha A. Furnish was riding was overturned by some defect in defendant's road-bed, track, ties, cars, engine, or machinery, yet they will find for the defendant, unless they further find from a preponderance of the evidence that the defendant's employes knew of such defect, or by the exercise of reasonable skill and diligence could have discovered such defect. (3) If the jury believe from the evidence that at the time said train was overturned the employes of the defendant were exercising, and had exercised, the highest practical diligence which capable and faithful railroad men would exercise under similar circumstances, and that the said train was thrown or ran off the track, and was overturned by causes which were unknown to the defendant, and which could not have been known to the defendant by the exercise of reasonable care and caution, skill, and diligence, then plaintiff cannot recover in this action, and the finding must be for the defendant. (4) The jury are instructed that, although they may believe from the evidence that some of defendant's ties of its road-bed were decayed or rotten, as described by some of plaintiff's witnesses, yet before they can find a verdict for plaintiffs on this ground they must believe from a preponderance of the evidence that such condition caused the train to be thrown from the track, by which plaintiff suffered the injury complained of. (5) The jury are instructed that, although they may believe that one of the drive-wheels of the locomotive which was hauling the train in question had been re-tired, and that the new tire had not been turned down, before they can find a verdict for the plaintiff on this ground they must believe from a preponderance of evidence that it was necessary to have the same turned down to render it fit and proper to be used so as to avoid accident, and they must further believe that the defendant's failure to have the same turned down did cause the injury complained of; and in this connection the jury are further instructed that if they believe that Mr. New, master mechanic of defendant, was a skillful, experienced mechanic, familiar with the construction and repair of locomotive engines, defendant had a right to rely upon his judgment and his decisions thereunder as to the necessity of turning down the tire of said drive-wheel, and the defendant is not liable for any error of judgment of said New in that regard."

Under the instructions and evidence the jury found a verdict for plaintiffs for \$15,000.

and judgment was rendered thereon, from which the defendant appealed, in due course, after the proper motions and exceptions.

T. J. Portis, Robt. Adams, and T. B. Buckner, for appellant. *Gates & Wallace*, for respondents.

BARCLAY, J., (*after stating the facts as above.*) It is conceded by defendant that the case made by plaintiff entitled her to its submission to the jury, and no question of her contributory negligence was raised at any time. The exceptions now urged are only those bearing on the correctness of the instructions and on the amount of plaintiff's damages.

1. Defendant's chief objection is to the rulings of the trial court marking the degree of care to be maintained by it as a carrier of passengers. It should first be noted that the instruction given (of its own motion) by the court defined the care required of defendant towards passengers as the "highest practicable care, caution, and diligence which capable and faithful railroad men would exercise under similar circumstances." This instruction was given without objection from any quarter, and therefore must be accepted as the law for the case in hand, without regard to its correctness or incorrectness in the abstract; and, since it states the rule substantially as laid down in the other instructions, there is serious doubt whether defendant is in position to question the latter now. But we do not deem it necessary to dispose of the question upon any such narrow ground of practice. Being satisfied of the soundness of the rulings of the trial court on this subject, we think it opportune to consider them from a stand-point of wider range. Throughout the instructions it is asserted that the duty owing by a steam-railway carrier to its passengers is to furnish reasonably safe and sufficient road-bed, track, cars, and engine "so far as human skill, diligence, and foresight could provide," and that defendant "is responsible for all injuries resulting from slight negligence" on its part. In another part of them the import of the words "utmost human skill, diligence, and foresight," as used by the court, is explained to be "such skill, diligence, and foresight as is exercised by a very cautious person under like circumstances." This is substantially and almost literally the same language as is approved by text-writers of high authority in summarizing the law deducible from all the precedents. Story, Bailm. § 601; 2 Greenl. Ev. § 221; 2 Kent, Comm. 601. The court also told the jury that the defendant, as a common carrier of passengers, did not undertake to insure the safety of plaintiff. Taking the declarations of law together, we think they stated the obligations of defendant to plaintiff as its passenger with great accuracy. To exercise the highest practical care which capable and faithful railroad men would take, in like circumstances, to provide a track, rolling stock, and service reasonably fit and

sufficient to safely perform the contract of transportation into which the carrier has entered, is the measure of defendant's legal duty in such cases. That rule does not rest upon any artificial or technical division of negligence into grades or classes, but springs naturally from an application to such facts of the general principle that a man of ordinary prudence is required to exercise a care proportionate to the risks he assumes in the business he has in hand. Where he undertakes a risk involving safety of life and limb to those with whom he deals, he is charged with a care proportionate to the peril. When a passenger commits his person to a carrier for hire for transportation by railroad over rivers, across mountains, through cities, in the night, (it may be while asleep,) at a speed expressive of the progress of the age in which we live, he may justly demand the exercise of such care on the part of the carrier against disaster as in the nature of things such undertaking would imply. That degree of care has generally been defined in language such as was used in the instructions before us. It has been repeatedly approved by many courts, and we consider this rule so well established in our jurisprudence as to require no further argument to support it. *Leslie v. Railroad Co.*, 88 Mo. 50; *Pennsylvania Co. v. Roy*, 102 U. S. 451; *White v. Railroad Co.*, 186 Mass. 821; *Railroad Co. v. Anderson*, 94 Pa. St. 351; *Caldwell v. Steamboat Co.*, 47 N. Y. 282. As stated above, we do not consider it in conflict with the ruling here in *Dougherty v. Railroad Co.*, 8 S. W. Rep. 900. The instructions of the court go no further than to declare this rule in various forms of expression, the meaning of which, taken as a whole, is unmistakable. Irrespective of any question of the burden of proof, there was, in the present action, abundant evidence to justify the inference that the injury to plaintiff resulted from a derailment of the cars, occasioned by the giving way of rotten and unsafe ties in the road-bed at the place of the accident. That such a defect in the roadway could have been discovered by a proper discharge of defendant's duty of inspection in time to avert the calamity the evidence strongly tended to show. That duty was an essential part of defendant's obligation towards its passengers, and it was chargeable in its performance with any omission of the "highest practicable care of capable and faithful railroad men" (in the language of the court) in the circumstances. *Miller v. Steamship Co.*, 118 N. Y. 200, 23 N. E. Rep. 462.

2. Regarding the instruction marked "d," placing the burden of proof upon defendant to show that the injury did not occur through any omission to discharge its legal duty in the premises, it should be remarked that the same instruction first required plaintiff to establish that the car in which he was a passenger "ran off the track of defendant's railroad, and fell down the embankment thereof," and that he was thereby injured. Thus framed, the instruction correctly expressed

the law on the subject. The mere injury of plaintiff while a passenger did not call for explanation or proof from defendant. It first devolved on plaintiff to show some fact with reference to it from which negligence on defendant's part as a carrier might be fairly inferred. Here it was shown that the car ran off the track and over the embankment. The condition of the road-way at that point warranted the inference that the injury was occasioned thereby. In that state of the case, if the jury found that plaintiff had been injured by the derailment of the car and its fall down the embankment, it then devolved on defendant to explain how these things occurred without breach of its duty to plaintiff as a carrier. This is what the court said in effect, and it committed no error in so doing. *Hipsley v. Railroad Co.*, 27 Amer. & Eng. R. Cas. 287, and 88 Mo. 348; *Breen v. Railroad Co.*, 109 N. Y. 297, 16 N. E. Rep. 60; *Seybolt v. Railroad Co.*, 95 N. Y. 562. It may not be entirely in accord with technical nicety to instruct that the burden of proof shifts to defendant in the course of such a trial. It might be more accurate to say (in proper form, for the purposes of a jury trial) that the facts of the derailment of the car, and of plaintiff's injury thereby, make out a *prima facie* case of defendant's negligence which, unexplained, would justify a recovery; but in the ordinary course of administering law it has become usual to declare that on a certain showing by plaintiff in such cases, the burden of proof then rests on defendant to prove that it has not been negligent. We are not prepared to condemn that form of expression at this day, in view of our statute to the effect that in all proceedings we should regard substance rather than form, (Rev. St. 1879, § 3586), and should not reverse for any error not affecting the substantial rights of the adverse party, (Id. § 3569.)

3. Defendant's next contention is that the court erred in refusing certain instructions requested by it. They are recited in the statement accompanying this opinion. We will consider them separately: That numbered 1 declared that the plaintiff could not recover on the evidence. It is not argued here. Obviously there is nothing in the exception to its refusal. That numbered 2 is defective in holding defendant to the "exercise of reasonable skill and diligence" only. In view of what we have already said above, it is unnecessary to comment further upon it. That numbered 3 is almost literally the same as that marked "a," given by the court of its own motion, except that the words "afore-said care" are substituted by the court for "reasonable care." As the instruction *a* was not objected or excepted to, it is difficult to see how defendant can now avail itself of the refusal in question. But, irrespective of that, we think the change made by the court was proper to bring the instruction into harmony with itself. Without that modification two different degrees of care would have been

stated in the same declaration of law as measuring defendant's liability. The court adopted the first one, as defined by defendant, and brought the rest of the instruction into consistency with it. To this defendant took no exception, and is now concluded by the action of the trial court in that regard. No point has been made in this court in any way upon the refusal of instructions numbered 4 and 5, as asked by defendant. There is, hence, no need to consider them. The court, in the instructions marked "b" and "c" (unexcepted to) gave to the jury as much of the requests referred to as the law warranted.

4. No complaint is entered against the instructions fixing the measure of damages; but it is earnestly insisted that the assessment by the jury of plaintiff's compensation of \$15,000 is excessive. We have no hesitation in setting aside a verdict when clearly satisfied that the evidence does not support the assessment of damages, as in other instances of failure of proof. But many cases arise in which, at this distance from the trial court room, we feel ourselves disposed to defer to the action of the circuit judge on this point, and to resolve any reasonable doubts on the subject in favor of the correctness of his ruling approving the find. The trial court should, on motion, fearlessly and willingly reduce any verdict to its proper amount when the weight of the evidence indicates it as excessive. He has the advantage of forming his opinions from the living realities before him, and the impressions so obtained are far more reliable than those given by any transcript of the record on appeal. We therefore give great weight to his rulings on the matters depending on the credibility of witnesses, on the physical appearances of parties, and the like. It is therefore of the most importance in the administration of justice that he should act firmly and promptly on such subjects, and apply a proper corrective to any unwarranted findings thereon by juries. The cases in which we can properly interfere are exceptional, and only such as imperatively require it to prevent a total and obvious failure of justice. In the case before us there is evidence that the plaintiff is probably crippled for life, owing to the injury of her spinal cord; that she suffers pain intermittently; that she was not able to walk before or at the time of the trial; was 53 years of age, and had left her house but once since the accident; that she was then carried out for fresh air, but was so pained that she did not go out again. She was examined at various times by several eminent physicians, among them by Dr. King, of Sedalia, one of the leading surgeons of the defendant; but defendant did not give the jury the benefit of Dr. King's observations of the case. The plaintiff's injuries are of such nature and extent that we are not prepared to say the damages awarded for them are excessive. Certainly they are not sufficiently so to warrant us in reversing the verdict or reducing it, in view of our uni-

form rulings as to the proper occasions for such interference. Approved precedents have sanctioned many larger findings in cases of serious injuries of somewhat similar character. *Harrold v. Railroad Co.*, 24 Hun, 184; *Railroad Co. v. Holland*, 18 Ill. App. 418, affirmed 122 Ill. 461, 18 N. E. Rep. 145; *Woodbury v. Dist. Columbia*, 5 Mackey, 127.

The exceptions urged to the judgment pronounced by the trial court we find untenable. It is therefore affirmed conditionally as indorsed hereon by the court; that is, on condition that the plaintiff remit \$5,000 of the judgment within 30 days, otherwise the cause will be reversed and remanded because of excessive damages. All concur except as to the remarks on the question of excessive damages.

WILLIAMS v. BROWNLEE.

(Supreme Court of Missouri. June 16, 1890.)

MORTGAGES—MERGER—FORECLOSURE—SWAMP LANDS.

1. Where one who has purchased swamp land from a county goes into possession, and executes a mortgage thereon to secure school money borrowed from the county in order to pay the purchase price, a deed subsequently given him by a commissioner appointed by the county to convey swamp lands to those who have paid the purchase money does not operate as a merger or satisfaction of the mortgage.

2. In an action by the county to foreclose such mortgage, failure to bring in as defendant a creditor whose debt is secured by a subsequent deed of trust on the land can have no other effect than to allow those claiming through a sale under that deed to redeem from the foreclosure.

3. In a deed from the county for such land after the foreclosure, a recital that the grantee therein had become the purchaser and paid the price in full, with interest, does not tend to show that the land was sold to him privately, but is consistent with a public sale, as required by Rev. St. Mo. 1879, § 7115.

Appeal from circuit court, Livingston county; JAMES M. DAVIS, Judge.

S. P. Huston and *H. Lander*, for appellant. *E. R. Stephens*, for respondent.

BLACK, J. This is an action of ejectment to recover 120 acres of land in Linn county. The defendant claims no interest in 40 acres of the land sued for, so that the controversy is over 80 acres. The case was tried in Livingston county on a change of venue, and without a jury. Defendant appealed.

The evidence discloses these facts: The land was a part of the swamp land belonging to and duly conveyed to Linn county. In 1856 the county sold the same to James Pace, but made no deed to him at that time, though he took possession. To pay the balance of the purchase price, Pace borrowed school moneys from the county, and to secure the payment thereof executed to the county a mortgage on the land, dated the 6th March, 1871. The county, by its commissioner, George N. Martin, conveyed the land to Pace by a deed dated 11th July, 1876. This deed contains a recital that Martin was appointed commissioner by an order of the county court, made at its February term, 1871, to

convey swamp and overflowed lands to the purchasers upon payment of the purchase money; that James Pace purchased the land in suit on the 25th February, 1876, at the price of \$246; and that he had paid the purchase price. As before stated, this deed is dated 11th July, 1876. After the date of the mortgage, and before the date of the commissioner's deed, namely, on the 9th August, 1873, Pace executed a deed of trust on the property to secure a debt owing by him to Thomas D. Price, and the defendant, Brownlee, became the purchaser at a sale made under this deed of trust in 1881. In 1879 the county commenced a suit in the circuit court to foreclose the mortgage executed to it by Pace, dated 6th March, 1871, and such proceedings were had that the mortgage was foreclosed. The county became the purchaser at the sale made under the decree of foreclosure, and received a deed dated the 10th June, 1880. The county, by B. A. Jones, commissioner, conveyed the property to Thomas B. Beckett by a deed dated May 16, 1881, and Beckett conveyed to plaintiff by a deed dated 3d February, 1884. Pace testified that he purchased the land in 1856; took possession and paid interest on his notes given for the purchase price; that to pay these notes he borrowed the school money and executed his mortgage to the county. The evidence of Commissioner Martin is that Pace paid for the land out of the school moneys borrowed from the county, and he says he does not know what caused the delay in the execution of the deed to Pace; that the land was sold to Pace before he went into office as county clerk, which was in 1871. From this evidence of Pace and Martin, it is perfectly clear that the recital in the deed made by Martin as commissioner, that the land was sold to Pace on the 25th February, 1876, is a mistake, and it is also clear that the sale occurred back in 1856. The county, it will be seen, held a mortgage from James Pace, dated the 6th March, 1871, securing school money loaned him, and on the 11th July, 1876, the county, by Commissioner Martin, conveyed the land to Pace. The claim of the defendant is that the commissioner's deed either merged the whole title in James Pace, or must be held to operate as a satisfaction of the mortgage. There is no basis for either claim. This is not a case where the mortgagor, or one claiming under him, conveys the property to the mortgagee in payment of the mortgage debt. A merger takes place in such cases, unless there is an intervening interest outstanding in a third person. *Collins v. Stocking*, 98 Mo. 290, 11 S. W. Rep. 750. But, as just stated, this is not such a case. Here the mortgage to the county shows upon its face that it was given to secure the payment of school moneys borrowed by Pace from the county. The commissioner's deed shows on its face that it was made pursuant to a sale to, and the payment of the purchase price by, Pace. The commissioner had no power to assign or

transfer the school mortgage, nor did he have anything to do with it. The deed made by him simply perfected the title in Pace, subject to the mortgage. On the face of these deeds, there can be no merger or satisfaction of the mortgage. The powers of the commissioner are set forth in the deed made by him, and from these it will be seen that he simply undertook to convey the land to Pace because the latter had paid the purchase price.

But, when we come to look at the transaction in the light of the other evidence, there is nothing whatever upon which to found a claim of merger or satisfaction of the mortgage. Pace purchased the land in 1856. In 1871 he borrowed the school money to pay the purchase price, and then gave the mortgage. A deed should have been made to him at that time, but the delay cannot prejudice the county. There was, it is true, no record evidence introduced of the sale to Pace, save the recital in the deed to him; but it was competent for him to state under what claim he went into possession, and the further proof is that there were no sales made of swamp lands after 1871. Thomas D. Price, the beneficiary in the second deed of trust executed by Pace, was not made a defendant in the suit prosecuted by the county to foreclose the first or school mortgage. It is possible that the failure to make Price a party would allow those claiming under his deed of trust to redeem, but the failure to make him a party can have no other effect. It constitutes no defense to this action of ejectment.

The remaining question is as to the validity of the deed from B. A. Jones, commissioner, to Thomas B. Beckett, dated 16th May, 1881. The objection made to this deed is that it shows a sale of the land at private sale, whereas the sale should have been a public one. The land was first sold and conveyed under the swamp-land laws to Pace. He then mortgaged it to the county to secure the loan from the school fund, and the county acquired title under a foreclosure of this mortgage. There is therefore much to be said in favor of the proposition that a resale should be made under section 7115, Rev. St. 1879. Under that section the lands thus purchased may be resold "in such manner, and on such terms, at public sale, as said court may deem best for the interest of said school or schools." Recitals in the deed show that the county court at its March term, 1881, made an order appointing Jones commissioner to convey the land to Beckett upon the payment in full of the purchase money, with all interest that may be due thereon, to the treasurer, and that Beckett became the purchaser of the land, and had paid the purchase price, with all the interest due thereon. There is nothing in the deed which shows, or tends to show, that the land was sold at private sale. The recitals lead to the conclusion that the land had been before sold, and the commissioner was appointed to make a deed upon the payment of the purchase price.

The deed and all of its recitals are perfectly consistent with the fact that the land had been sold at a public sale. No other evidence was offered on the subject, and the objection was properly overruled. The court might well have instructed, on the case presented, that the judgment should be for the plaintiff, and, this being so, it is useless to consider the instructions in detail. The judgment is affirmed. All concur.

CAFFEE v. SMITH.

(*Supreme Court of Missouri. June 16, 1890.*)

FRAUDULENT CONVEYANCES—PRIOR EQUITIES.

Where a son agrees to convey a tract of land to his father in consideration of the father's buying a lot and building a house for him in a neighboring town, and the father performs his part of the contract, he has such an equity in the tract agreed to be conveyed as cannot be divested by a sale of the land under execution at the suit of a creditor of the son, whose debt was contracted after the making of the agreement, at which time the son had no debts.

Appeal from circuit court, Jasper county; M. G. MCGREGOR, Judge.

This is a proceeding in equity, brought to set aside, as fraudulent as against creditors, a deed to real estate situate in Jasper county, executed February 6, 1885, by R. R. Smith to his father, Sanford M. Smith. The facts developed on the trial in the court below were substantially as follows: In June, 1882, the land in question was owned by R. R. Smith, he having acquired the same from his mother. Said R. R. Smith, being desirous to move to town, and engage in the practice of his profession, sold the land to his father, Sanford M. Smith, for \$700, which he was to pay by buying a lot in Sarcoxie, and building a house on it, for his son. This defendant did, and had the lot conveyed to his son. By the terms of this agreement the defendant was to, and did, in July, 1882, enter into full possession of said land, and has ever since been in the open, notorious, peaceable, adverse, exclusive, and continuous possession thereof, claiming and using the same as his own, etc. At the time the defendant and his son entered into the agreement to sell the land to the defendant, said R. R. Smith was out of debt, and there is no pretense that insolvency or fraudulent intent on the part of the defendant or his son, R. R. Smith, existed in June, 1882, at the time the contract of sale was made. In pursuance of this agreement, the said R. R. Smith, by his deed dated February 6, 1885, conveyed this land to the defendant. He did not call on his son for a deed before, because he had confidence in him, and believed that he would comply with his agreement when called on. On the 5th of March, 1885, A. H. Caffee & Co. instituted an action in the Jasper circuit court against R. R. Smith on an account of goods sold him during the years 1883 and 1884, and, in October following, recovered judgment thereon for \$269. An execution was issued on this judgment, and the land sold as the property of R. R. Smith, and purchased by the plain-

tiff for \$25. The defendant had no knowledge of the existence of A. H. Caffee & Co.'s debt until suit was brought on it. On the trial, the court, after hearing the evidence in the cause, found for the defendant, and dismissed the bill.

Flanigan & Booth, for appellant. *W. N. Phelps* and *E. O. Brown*, for respondent.

SHERWOOD, J., (*after stating the facts as above.*) The defendant, being placed in possession of the premises in question by R. R. Smith, his son, in accordance with a valid parol agreement, made upon a valuable consideration, and at a time when R. R. Smith was not in debt, and having performed that agreement, he acquired such an equity in the premises as would have warranted specific performance against the son, and in favor of the father. Wat. Spec. Perf. §§ 270, 272, 274-276; Fry, Spec. Perf. 180, 181; 2 Story, Eq. Jur. (13th Ed.) 76, 77. The fact that the son afterwards became indebted to plaintiff cuts no figure in the case, as the equity of the father became vested, and the subsequently acquired right of the creditor could not divest the equity of the father. That was beyond the reach of the creditor; and the son, in making the deed to the father in 1885, only did without suit what a court of equity would have compelled with suit. This view is fully illustrated in *Dozier v. Matson*, 94 Mo. 328, 7 S. W. Rep. 268; and *Payne v. Twyman*, 68 Mo. 389; *Parks v. Bank*, 97 Md. 130, 11 S. W. Rep. 41. Therefore judgment affirmed. All concur.

STATE v. MILLER.

(*Supreme Court of Missouri. June 30, 1890.*)

For majority opinion, see ante, 832.

BLACK, J., (*dissenting.*) I dissent from the opinion filed in this case, and shall only speak of two matters, and of these only because the facts are not fully stated. Concede that the court erred in refusing permission to the defendant to interrogate Mortimer as to whether he had not been in the penitentiary two or three times, still no complaint was made of this ruling in the motion for a new trial, and the error is therefore not before us for review. The defendant did complain, in his motion for a new trial, that the court permitted incompetent witnesses to testify, and that the court admitted illegal evidence offered by the state; but he made no complaint whatever that the court excluded evidence offered by himself. The evidence excluded was of no value except as affecting the credit to be given to the witness. It was, in substance and effect, evidence offered by the defendant, and, as exclusion of evidence offered by him was not made a ground for a new trial, the error in excluding it should not be considered in this court. I do not understand the opinion before filed in this case to hold that Mortimer was an incompetent witness. He was certainly competent to testify on behalf of the

state; for he was not a party to this record. Besides this, he entered a plea of guilty before he was called as a witness. It seems to be held that his evidence should have been excluded on the ground that he had made a corrupt contract with the state. The evidence of such a contract, if any there is, is that elicited from Mortimer on cross-examination, and that is this: "Question. You were indicted for this murder, were you not, George? Answer. Yes, sir. Q. You negotiated with the state to testify, and they agreed to let you off from that indictment by a plea of murder in the second degree? A. Yes, sir. Q. That was an arrangement between you and the state? A. Yes, sir. Q. You are indicted for several other offenses, are you not, in this court? A. Yes, sir. Q. Did they agree to let you off from those? A. Yes, sir. Q. Let you off free from those indictments, and take a plea of murder in the second degree, if you would testify against Miller? A. Yes, sir. Q. And that arrangement was made this afternoon, in the courthouse, was it? A. Yes, sir." I fail to discover anything in this evidence which shows, or has the least tendency to show, that the agreement was that the witness should testify to anything other than the truth, the whole truth, and nothing but the truth. In my judgment, a conclusion that this witness was not to make a full and complete disclosure is simply a play upon the words "negotiate" and "testify against Miller,"—words which were put into the mouth of the witness by counsel who cross-examined him. This is but the ordinary case of an accomplice testifying against a confederate in the commission of a crime, and it is to be hoped the time has not arrived in the criminal jurisprudence of this state when such evidence is to be excluded. There is certainly nothing in the extracts made from Bishop and Blackstone which gives any support to the proposition. There can be no doubt but these two men, defendant and Mortimer, murdered old man Apgar, and I see no error in the record before us, and the judgment should be affirmed.

MARTIN et al. v. RATCLIFF et al.

(*Supreme Court of Missouri. June 16, 1890.*)

MORTGAGES—REDEMPTION—DECREE.

In a suit to redeem from the foreclosure of a mortgage, a decree allowing redemption by paying a specified sum by a given date, and providing that on failure to make payment within the given time the mortgage shall stand foreclosed, is not erroneous, in that it does not direct a sale on failure to redeem, where plaintiffs in their petition did not ask such sale, and did not, by motion or otherwise, ask the court to modify the decree in that respect.

Error to circuit court, Henry county; *E. L. EDWARDS*, Judge.

A. W. Anthony and *Jas. A. Spurlock*, for plaintiffs in error. *B. R. Richardson* and *Draffen & Williams*, for defendants in error.

BLACK, J. On the 20th August, 1859, Jeremiah Ratcliff mortgaged 520 acres of

land in Morgan county to John A. Powell, to secure a debt of \$2,959. Ratcliff died in 1863, and in 1865 Powers, acting by an agent, sold the land under a power of sale in the mortgage. In 1880, 15 years after the sale, the plaintiffs, who are heirs of Ratcliff, brought this suit to redeem. There are a great number of defendants who have purchased parcels of the property from the persons who purchased at the mortgagee's sale. It is said there is a small village on a part of the land, but the record furnishes only an intimation of the fact. The court made an interlocutory decree to the effect that plaintiffs were entitled to redeem, and appointed a referee to state an account. Upon the incoming of the referee's report the court made a decree that plaintiffs be allowed to redeem by paying into court the sum of \$16,849 on or before a given date, and, if payment should not be made by that time, then the mortgage should stand foreclosed. Plaintiffs filed exceptions to the referee's report, a motion for new trial, and a motion in arrest, all of which were overruled. They then sued out this writ of error. The evidence is not preserved. In short, there is no bill of exceptions in the record.

The court, by the interlocutory decree, directed the referee to charge the plaintiffs with the value of the improvements placed upon the property by the defendants, and to charge defendants with rents, not including rents upon the improvements made by them. Plaintiffs object that by this statement of the account they are improved out of their property. It is to be observed, in the first place, that no objection was made to the order for an accounting. Again, the plaintiffs having filed no bill of exceptions, the exceptions to the referee's report and the motion for a new trial are no part of the record. The questions which the plaintiffs seek to raise are therefore not fairly before us. But, aside from this, we see no error in the directions as to the accounting. As we understand this very imperfect record, the deeds executed by the mortgagee do not disclose the fact that he made the sale by an agent. The finding of the court is that the defendants purchased in good faith, believing that they acquired a perfect title. The character of the improvements is not disclosed by the record, yet the amount which the plaintiffs were required to pay, in order to redeem, leads to the conclusion that the improvements are far in excess of any ordinary use of the land for farming purposes. The improvements may have been in excess of those for which a mortgagee in possession is ordinarily allowed compensation. But, so far as an accounting is concerned, the defendants do not stand in the exact attitude of one in possession as an avowed mortgagee. Having purchased in good faith under the belief that they acquired a perfect title, they are entitled to the full value of the improvements, though they may exceed those which a mortgagee in possession is ordinarily justified in making. 2 Story, Eq. Jur. (13th

Ed.) § 1237; *Mickles v. Dillaye*, 17 N. Y. 80. The doctrine embodied in the expression that a mortgagor cannot be improved out of his estate has no application to a case like the one in hand. The defendants were not entitled to have, and were not allowed, interest on moneys invested in the improvements; and, on the other hand, they should not be charged with rents on the improvements made by them.

A further point is made that the decree is illegal because it amounts to a strict foreclosure. It does not provide for a sale, but says, if the amount required to be paid by way of redemption is not paid within the time named, then the mortgage shall stand foreclosed. Such a decree is, in effect, the same as one providing that, if the money is not paid within the specified time, then the bill shall be dismissed at the costs of the plaintiffs; for it seems that a decree in the latter form, followed by a dismissal, will operate as a foreclosure. 2 Jones, Mortg. (4th Ed.) § 1108. *Bollinger v. Chouteau*, 20 Mo. 89, was a suit brought by the heirs of a mortgagor to redeem. In that case there had been an invalid foreclosure sale, and this court directed the trial court to enter up a decree just like the one now in question. *Davis v. Holmes*, 55 Mo. 350, was a suit to set aside a sale of land made under a mortgage, and for leave to redeem. The decree provided that, if the plaintiff did not redeem within a specified time, then the equity of redemption should be sold. The defendant objected that there should have been a strict foreclosure, but this court overruled the objection, and held that the order should have been to sell the land, and not simply the equity of redemption. It was then said that a strict foreclosure is a novelty in proceedings on mortgages in this state. To the same effect is the recent case of *O'Fallon v. Clopton*, 89 Mo. 285, 1 S. W. Rep. 302, where the question arose on the defendant's answer asking that a sale made under a deed of trust be set aside. Jones says the form of the judgment ordinarily is that the plaintiff may redeem upon paying the amount found due on the mortgage within a specified time, together with costs; and that upon his doing so the defendant shall discharge the mortgage, and deliver up the mortgaged premises; and that upon default of such payment the complaint be dismissed, with costs. 2 Jones, Mortg. (4th Ed.) § 1106. Such is the usual form of the decree in suits for the redemption of a mortgage. 2 Daniell, Ch. Pr. (5th Ed.) 998; *Decker v. Patton*, 120 Ill. 464, 11 N. E. Rep. 897. In the case last cited the plaintiff, as in this one, sought to reverse a decree in his own favor because it did not provide for a sale of the property. Said the court: "Had this been a bill to foreclose a mortgage, and had a decree been rendered cutting off the rights of parties in interest, without a sale of the mortgaged premises, and denying the redemption provided by the statute, there might be force in the argument."

Our statute concerning mortgages and deeds of trust contemplates a sale of the premises in all suits brought to foreclose such instruments, and a strict foreclosure in any such case would be erroneous on its face. There is no doubt but the court may, on a petition to redeem, direct a sale of the premises in the event the redemption money is not paid within the specified time. And in such cases the sale may be ordered, though there is no specific prayer therefor, either in the petition or answer. But it is a different thing to say that a decree is, on its face, erroneous, and must be reversed, because it does not provide for a sale. The plaintiffs in this case did not ask for a sale of the property in their petition. They did not, by motion or otherwise, ask the court to modify the decree. They have made no showing that a sale can be of any possible benefit to them. If this decree is reversed, it must be upon the ground that in all suits, where there is a decree permitting the plaintiff to redeem, there must be a further order that, in case of default in payment of the amount found due, the premises shall be sold. This, in our judgment, is not the law, for there is a wide distinction between a suit of foreclosure and one brought to redeem from a voidable foreclosure sale. Affirmed. All concur.

BECKE v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri. June 30, 1890.)

IMPUTED NEGLIGENCE—DEATH BY WRONGFUL ACT—DAMAGES.

1. Contributory negligence of a stage-coach driver will not be imputed to his passengers, and thus defeat a recovery for injuries sustained by the latter in a collision with a train of cars.

2. In an action for injury at a railroad crossing, it was not error to instruct the jury that if they believed that the night was dark, and that the engine was running 25 miles an hour through a thickly-settled portion of the country, without the head-light being lighted, in consequence of which the collision occasioning the injury occurred, they should find for plaintiff.

3. Under Rev. St. Mo. 1879, § 2121, fixing the amount of recovery for injuries resulting in death "caused by the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employe, whilst running any locomotive or train of cars," at \$5,000, it was proper to instruct the jury that, if they found that the injury resulted from the failure to light the head-light of the locomotive, they should give the plaintiff a verdict for \$5,000.

Appeal from St. Louis circuit court; SHEPARD BARCLAY, Judge.

T. J. Portis and Bennett Pike, for appellant. A. R. Taylor, for respondent.

BRACE, J. In this action plaintiff sues to recover damages for the death of her husband, Charles Becke, who was a passenger in a public stage or hack that was struck by a train of defendant at a public crossing a short distance from Nevada, Mo., thereby causing the said coach to be overturned, and the said Becke injured so that he died within two days after the collision, from such injuries. The plaintiff had judgment for \$5,-

000, and the defendant appeals. The only errors urged as grounds for reversal are upon the instructions. They may all be considered upon instructions 1 and 8 given for plaintiff, and instruction A refused for the defendant:

"No. 1. If you find from the evidence that plaintiff was the wife of Charles Becke when he died; and that on January 16, 1886, said Charles Becke was a passenger on a public stage or hack going from Montevallo to Nevada, in Missouri, and had no control over the driver thereof, or of the management of said hack; and that the hack in which said Becke was then such passenger was struck on said day by an engine of defendant at the crossing of the railroad and a traveled public road near Nevada, Mo., and not within any city; and that in consequence of said collision said Becke received injuries from which he died at Nevada, Mo., on or about January 18, 1886; and if you further find, from the evidence, that said collision directly resulted from or was caused by the omission of defendant's employes in charge of said engine to give any of the signals mentioned in instruction No. 2; and that said Charles Becke, at and prior to said collision, was himself exercising ordinary care to avoid injury and danger,—then your verdict should be for plaintiff, and you should assess her damages at the sum of \$5,000."

"No. 3. If you find, from the evidence, the facts to be as mentioned in instruction No. 1, except as to the omission of signals, and find on that point that one of the signals mentioned therein (and more particularly described in instruction No. 2) was given; but if you then further find, from the evidence, that at the time and place of said collision it was no longer daylight, but was after dark, and that there was no head-light lit or burning on said engine, and that in consequence of said omission said collision occurred at said crossing,—then your verdict should be for plaintiff, and you should then assess her damages at the sum of \$5,000, that being the measure of damages fixed by the statute in this case in the event you find for the plaintiff under these instructions and the evidence before you."

"A. The court instructs the jury that if they believe from the evidence that on the 19th day of January, 1886, one Hanley was driving a hack from Montevallo to Nevada, and that he had driven that hack from Nevada to Montevallo and back six days each week for one-third of the time since the 1st of December, 1885, and had known the road ever since the railroad was built for four or five years, and had been over it often during that time, and knew said public road on which he was traveling crossed the defendant's railroad at a point from a mile to a mile and a quarter south-east of the town of Nevada in open prairie land, where the railroad train could be seen from half a mile to a mile and a quarter before the train reached said crossing, and that said train could have

been seen or heard by said Hanley for a distance of thirty rods or more before he reached the crossing if he had looked in the direction of the train, or could have been heard by him if he had listened carefully, or if it was after dark in the evening, from 6:10 to 6:25 o'clock P. M., and said Hanley had stopped and carefully looked and attentively listened, that he could have seen or heard the train, and that said Hanley knew it was about train time, and, notwithstanding, said Hanley drove his team and hack onto the railroad crossing without stopping and carefully looking and attentively listening, and plaintiff's deceased husband was injured in consequence thereof, either by the train, or by reason of the team running away, upsetting the hack, and dragging deceased, or otherwise, the defendant is not liable for any injury so done, and the jury should find their verdict for defendant, whether the whistle was sounded, the bell was rung, or the head-light was lit or not."

1. It is contended by counsel for the defendant that the court committed error in refusing to instruct the jury that the plaintiff could not recover if the driver of the hack in which her husband was a passenger was guilty of negligence which contributed to the injuries which resulted in his death, and that the doctrine laid down in *Thorogood v. Bryan*, 65 E. C. L. 115,—that a passenger upon the vehicle of a common carrier who sustains an injury which is the result of the concurrent negligence of those in charge of such vehicle and third persons is so identified with the former as to be chargeable with their negligence in an action against the latter, and therefore only entitled to recover damages from his carrier,—should govern the case. This doctrine, from the time it was first announced in *Thorogood v. Bryan*, in 1849, though afterwards followed by the English courts for a time, (*Armstrong v. Railway Co.*, L. R. 10 Exch. 47,) was continually subjected to adverse comment and criticism, until recently, in the case of *The Bernina*, (Jan. 24, 1887,) 12 Prob. Div. 58, the whole question was re-examined, and the authorities, English and American, reviewed by the court of appeals of England, and the doctrine condemned; and *Thorogood v. Bryan*, and the cases that followed it, cannot any longer be considered authority even in England. Lord ESHER, M. R., thus sums up in the *Bernina* Case: "After having thus laboriously inquired into the matter, and having considered the case of *Thorogood v. Bryan*, we cannot see any principle upon which it can be supported, and we think that with the exception of the weighty observation of Lord BRAMWELL, though that does not seem to be a final view, the preponderance of judicial and professional opinion in England is against it, and that the weight of judicial opinion in America is also against it. We are of opinion that the proposition maintained in it is essentially unjust, and inconsistent with other recognized proposi-

tions of law. As to the propriety of dealing with it at this time in a court of appeal, it is a case which from the time of its publication has been constantly criticised. No one can have gone into * * * an omnibus, railroad, or ship on the faith of the decision. We therefore think that, now that the question is for the first time before an English court of appeal, the case of *Thorogood v. Bryan* must be overruled." The doctrine of *Thorogood v. Bryan* has received the sanction of some American courts, notably in *Lockhart v. Lichtenthaler*, 46 Pa. St. 151, and others might be cited, but it has never been generally recognized or followed in this country,—in fact, the great weight of American authority is against it; and to this conclusion the supreme court of the United States arrived in the recent case of *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. Rep. 891, after a thorough consideration of the subject and a review of the American authorities. That it is unsound in principle, and against the weight of authority, is amply demonstrated in the following additional cases: *Chapman v. Railroad Co.*, 19 N. Y. 341; *Robinson v. Railroad Co.*, 66 N. Y. 11; *Dyer v. Railway Co.*, 71 N. Y. 228; *Bennett v. Railroad Co.*, 36 N. J. Law, 225; *Railroad Co. v. Steinbrenner*, 47 N. J. Law, 161; *Trautner Co. v. Kelly*, 36 Ohio St. 86; *Railway Co. v. Eadie*, 43 Ohio St. 91, 1 N. E. Rep. 519; *Cuddy v. Horn*, 46 Mich. 596, 10 N. W. Rep. 32; *Railway Co. v. Shacklet*, 105 Ill. 364; *Turnpike Road Co. v. Stewart*, 2 Metc. (Ky.) 119; *Railroad Co. v. Case*, 9 Bush, 728; *Tompkins v. Railroad Co.*, 66 Cal. 163, 4 Pac. Rep. 1165. The question has never been passed upon in this court, but, so far as judicial opinion upon this subject has been expressed by the court of appeals, it has been in harmony with the general current of American authority. *Hunt v. Railroad Co.*, 14 Mo. App. 160; *Keitel v. Railway Co.*, 28 Mo. App. 657. The recent and exhaustive consideration which this question has received in many of the cases cited, renders unnecessary any extended discussion of the principle involved. It is so plain that to maintain the doctrine would be to abrogate a well-settled rule of the common law, which gives a right of action for an injury resulting directly from the joint wrongful act of two wrong-doers against either or both of such wrong-doers, and that its effect would be to make an innocent person answerable for the wrong act of another over whom he has and exercises no control, and who is neither his servant nor his agent. That argument would seem unnecessary (whatever the authority to the contrary may have been) to show that such a doctrine ought not to stand. The court committed no error in refusing to instruct the jury that the contributory negligence of the driver, if any, would defeat plaintiff's right to recover.

2. The error complained of in the third instruction given for plaintiff is "that the court therein assumes, as matter of law, that the

failure to have the head-light lit or burning at the time of the alleged collision was negligence on the part of the defendant. The uncontradicted evidence in the case was that the collision took place at a public crossing about a mile and a quarter south of the city of Nevada, on the 16th day of January, within half a mile of another crossing south, about 6 o'clock in the evening; that the night was dark; that the train was a passenger train from Joplin, going north to Kansas City, and was running at about 25 miles an hour. The court submitted to the jury the question whether the head-light was lit and burning, and whether it was dark at the time of the collision; and if it was dark, and the head-light was not lit or burning, whether the collision occurred in consequence of the omission to have the head-light lit and burning. All the disputed facts were submitted to the jury. "The court takes judicial notice of the power, speed, and management of railroad trains and of common experience." "Where the facts are undisputed, the question whether they amount to negligence or not may be one of law or fact." *Pierce, R. R. 315*. "We agree that it is the province of the jury to * * * declare the law on the facts as found. In some cases the question of negligence may be determined by the court on the facts found or admitted. * * * Where, from the facts found or agreed upon, the question of negligence is one about which reasonable minds may differ, it should be left to the jury to make the deduction from all the circumstances to determine the ultimate fact." *Tabler v. Railroad Co., 98 Mo. 79, 5 S. W. Rep. 810*. "If, upon a given state of facts, negligence can be clearly asserted, then the court may so declare; but, if reasonable minds may differ as to the conclusion to be drawn from the given facts, then the question of negligence must be determined from all the surrounding circumstances. The question of negligence then becomes one of mingled law and fact, and must be determined by the jury." *Barry v. Railroad Co., 98 Mo. 62, 11 S. W. Rep. 308*. "If the facts are such that all reasonable men would be likely to draw from them the same inferences, the question of negligence is one of law for the court; but, if they might differ as to the conclusion, the question is one of fact for the jury." *Pierce, R. R. 316*. These quotations from the authorities define as well as may be the limit upon the power of the court to declare when an act is negligent. Reasonable minds might well differ as to whether a railroad company was guilty of negligence in not having a watchman stationed at a particular crossing, because the stationing of watchmen at all crossings is not the common and usual means of warning adopted by prudent railroad companies; hence it was error for the court to declare, as matter of law, that the absence of such watchman was negligence, as was held in *Welsch v. Railroad Co., 72 Mo. 451*. But it is not possible that reasonable minds could come to any other conclusion than that the

failure of those having in charge a passenger train, running through a populous country at the rate of 25 miles an hour, approaching a crossing near the suburbs of a city, in the night-time, on a dark night, to have the head-light of the engine lighted and burning, was an act of negligence. This is a common and necessary means adopted by all railroad companies for the protection alike of those rightfully on the train, and on the track, or approaching it, in the night-time. No engine is constructed without such a light, and no train is run in the night-time by any railroad company, under any ordinary circumstances, without having it lighted. This is a fact known to all reasonable minds by common experience, and the court committed no error in declaring that it was negligence if the defendant's servants failed to have such light lighted and burning at the time of the collision. It is the duty of those approaching a railroad track at a public crossing in the night-time to look that they may see an approaching train, and the corresponding duty is imposed upon the employees of the railroad company to have the light burning, by means of which the approach of the train may be seen by those whose duty it is to look.

8. The last objection urged against the instructions is that the damages to be assessed are fixed by the court at the sum of \$5,000. There was no error in this. By statute, that sum is fixed as the damages to be given "whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employee whilst running, conducting, or managing any locomotive, car, or train of cars." *Rev. St. 1879, § 2121*. The negligence in this case was that of the employees of the defendant in failing to give the statutory signal, or in failing to have the head-light lighted and burning. Either was negligence of the employees "whilst running, conducting, or managing any locomotive, car, or train of cars;" and in the application of this section "it can make no difference whether the negligence resulting in death is a breach of a statutory or a common-law duty." *Crumpley v. Railroad Co., 98 Mo. 84, 11 S. W. Rep. 244; King v. Railroad Co., 98 Mo. 235, 11 S. W. Rep. 563*. Finding none of the errors assigned well taken, the judgment is affirmed. All concur, except *BAROLAY, J.*, not sitting.

COX v. COX et al.

(Supreme Court of Missouri. June 16, 1890.)

WILL—PROBATE—DEVISAVIT VEL NON.

Under *Rev. St. Mo. § 3980*, providing that, in a proceeding in the circuit court to contest the validity of a will, the issue to be tried is "whether the writing produced be the will of testator or not," where plaintiff seeks to have an order of probate annulled because, though he was the only child of testator, he is not mentioned therein, and this allegation was denied by defendants, a question not germane to the issue is presented, and it is error for the circuit court to pass upon it. *Overruling Kenrick v. Cole, 61 Mo. 572*.

Appeal from circuit court, Greene county; W. D. HUBBARD, Judge.

This was an action by Thomas E. Cox, the appellant, against John B. Cox et al., respondents, to set aside the decree probating the will of J. B. Cox, deceased.

Boyd & Delaney, for appellant. *Sibley & Buckley*, for respondents.

BRACE, J. On the 23d of August, 1886, the following instrument of writing, purporting to be the last will and testament of J. B. Cox, deceased, was admitted to probate in the probate court of Greene county: "Springfield, Mo., August 19th, 1886. Know all men by these presents, that I, J. B. Cox, of Springfield, Mo., do hereby state that I am a man of sound mind, and in the full enjoyment of my full senses. I hereby bequeath to my grandchildren all my property herein-after named, viz., namely, 121 feet upon Campbell street, 196½ feet deep, after all my funeral expenses and debts are paid, the balance to go to the family; and I further agree to make John Foley my legal executor of this, my last will and testament. J. B. Cox. Attest: W. W. SMITH. M. E. HOLLEY." On the 11th day of November, 1886, the plaintiff instituted this suit. His petition, after setting out the probate of said instrument by the probate court, states "that plaintiff, Thomas E. Cox, at the time of the death of said John B. Cox, was, and now is, the only child of said John B. Cox; that said order and decree of the probate court aforesaid should be adjudged null and void, and said pretended will rejected, for these reasons: That said paper pretending to be the will of said John B. Cox, deceased, is not in fact such will, because it is not executed and attested in manner and form prescribed by law; because plaintiff, who is the only child of said John B. Cox, deceased, is not mentioned in said pretended will. Plaintiff further states that defendants are the pretended devisees in said pretended will, and are the only persons interested in the subject-matter of this proceeding; that they are both minors. Wherefore, plaintiff contests the validity of said pretended will, and prays the court to set aside said order of said probate court, and reject said pretended will, and for other and further relief." The defendants answered by guardian, denying the allegations of the petition, except that deceased was the owner of the real estate mentioned in the petition, and that he willed the same to the defendants. A jury being waived, an issue was framed, "whether the writing produced and contested by petitioner as invalid be the will of John B. Cox, deceased," the case submitted to the court on an agreed statement of facts, and the evidence of the attesting witnesses taken on the probate in the probate court; and the court made a finding, and rendered judgment, as follows: "And the court, upon the evidence, finds that said instrument produced is the will of said John B. Cox, deceased; that said John B. Cox did not die intestate as to plaintiff;

and that said contestant, Thomas E. Cox, was sufficiently named in said will. It is therefore considered by the court that said instrument is, and the same is hereby declared to be, the last will and testament of John B. Cox, deceased; that plaintiff take nothing," etc.; from which judgment the plaintiff appeals.

In a proceeding in the circuit court to contest the validity of a will, or to have a will proved which has been rejected, the statute prescribes the issue that shall be tried; and that issue is "whether the writing produced be the will of the testator or not." Rev. St. 1879, § 3980. And in such proceeding this is the only issue that can be tendered or tried. This was, and could be, the only issue tendered in the petition in this case. The field of inquiry upon this issue was limited by the specific allegation to a single particular wherein the instrument failed to be his will, and that was "that it was not executed and attested in manner and form prescribed by law." The issue thus limited was fully met when the will was produced, and it was shown that it was signed by the testator, and attested, as the law required, by two witnesses, who subscribed their names thereto in the presence of the testator. Section 3962. The allegation in the petition that "plaintiff is the only child of the said John B. Cox, deceased, and is not mentioned in the will," was not germane to the issue to be tried. It tendered an issue that could not be tried in this proceeding,—an issue that went to the effect of the will when established, and not to the issue whether the will should be established as the will of the testator or not. The question at issue was purely one of probate,—whether the instrument should be probated or rejected as the last will and testament of the deceased in solemn form, in the only manner provided in our statute, upon contest in the circuit court, in an action to which all parties in interest are made parties. "It is no part of the proceeding on probate to construe or interpret the will, or any of its provisions, or to distinguish between valid and void, rational and impossible, dispositions. If the will be properly executed and proved, it must be admitted to probate, although it contain not a single provision capable of execution, or valid under the law. Hence the probate does not establish the validity of any of its provisions. This is to be determined by the courts of construction when any question arises requiring their interposition." 1 Woerner, Adm'n, § 228, p. 502. This is the uniform doctrine both in this country and in England. The only case we have been able to find which countenances a departure therefrom is the case of *Kenrick v. Cole*, 61 Mo. 572, in which the action of the circuit court in refusing to establish a clause of a will on the ground that it was in violation of the constitution was sustained. Without stopping to distinguish that from the case in hand, we confess our inability to see how that case can be sustained either on principle or

authority. The only authority cited by the learned judge who wrote the opinion is Redfield. In the opinion, he says: "There is no direct precedent bearing upon the question in this state. Redfield says that it is customary in the English practice to exclude portions of the will from probate when they do not legitimately belong to the instrument, as, for instance, where they are *illegal* or fraudulent; and he is of the opinion that there is no reason why the same course should not be pursued here." The word "*illegal*," which we have placed in italics, indicates wherein the opinion goes beyond the authority cited. What Redfield does say is that "it is customary * * * to exclude portions of the will from probate where they do not legitimately belong to the instrument, as, for instance, where a particular clause has been inserted by fraud, without the knowledge of the testator, in his life-time, or where it is done by forgery after the death of the testator, or where a particular portion of the will has been induced by fraud of the party in whose favor it is, or where actual incapacity is shown at the time of making the latter portion of the will." 8 Redf. Wills, 53. But nothing therein contained warrants the conclusion reached by the learned judge that a clause of a will can on probate be rejected because its provisions cannot be made effective by reason of legal inhibition, constitutional or statute. Nor would the authorities cited by the learned author have justified such a conclusion. The learned judge does not undertake to maintain the position on principle, but begs the question by saying that, "as a question of plain, practical common sense, it is not easy to perceive why a void clause in a will should be probated in order that another proceeding should be instituted to annul it." The point of this observation is dulled, however, by the consideration that there is no necessity whatever for instituting another proceeding to annul that which is already void. If void, it simply confers no rights. The probate of the will does not render its provisions effective, or render one or any of its provisions valid. If any such provisions are in violation of law, the law will not carry them into effect. Nevertheless, the testator made them. They are his will, and on probate whether they are or not is the only question to be decided. And in this case the establishment of the instrument as the will of the testator in no way impairs the rights of the plaintiff as heir at law. If he has been pretermitted therein, as he claims, he can enter, defend his possession, or bring his action of ejectment, as the case may be, whenever he chooses. The probate of the will does not stand in his way on that issue. But, in the very nature of things, that issue cannot be tried in a proceeding designed by the law to ascertain the single fact whether a certain paper is or is not the will of the deceased.

The court committed error in inquiring into and passing upon the question whether plaintiff was named in the will, and as to the

testator's dying intestate as to him. The judgment is well enough except for this; and, that no question may ever be raised, that that issue was adjudicated in this proceeding, the judgment will be reversed, and the cause remanded with directions to enter up judgment establishing the will, omitting any finding upon that issue. All concur.

HENRY v. DIVINEY *et al.*

(*Supreme Court of Missouri. June 16, 1890.*)

SECONDARY EVIDENCE—LIMITATIONS—NEW TRIAL.

1. Secondary evidence of the contents of a letter addressed to plaintiff is admissible on testimony of his daughter that she took charge of it when received; that she was in charge of the house, and did all the business in caring for her parents, who were very old; that she had searched the house for the letter before coming to the trial, and could not find it; and that she supposes it was among some letters she destroyed some time ago, there being nothing to show that it was willfully destroyed.

2. An instruction that a note is taken out of the statute of limitations if a certain payment was made on a given date, is sufficient without requiring the jury first to find that a memorandum of the payment indorsed on the note was made at or about the time of the alleged payment.

3. Refusal to permit defendants to file an affidavit on motion for new trial, after they have announced that they have closed their evidence on that motion and have argued it, is not error, unless there is an abuse of discretion, which is not shown where the affidavit states that affiant went to certain places, and had barely time to find the witnesses, and what they would testify to, before he had to take the train, and it does not appear that he might not have taken some of their affidavits in the week intervening, and also alleges the discovery of a material witness, with whom he had not been able to communicate otherwise than by telegram, it not stating positively that any communication had been had, or what it was.

Appeal from circuit court, Bates county; JAMES B. GANTT, Special Judge.

Thos. J. Smith and Wm. Page, for appellants. *Francisco & Rose* and *J. S. Francisco*, for respondent.

RAY, C. J. This is an action founded on a promissory note executed by defendants' testator, Antony Henry, deceased; to the plaintiff, Bryan Henry, his father. The note is an ordinary promissory note for \$1,000, dated January 1, 1869, and due one day after date. On said note is an indorsement as follows: "Paid, November 6th, 1882, twenty-five dollars." The note was first presented to the defendants, the executors of said Antony Henry, deceased, and to the probate court of Bates county, Mo., for allowance; the attorney of said Bryan Henry having been elected judge of the probate court. Before the said cause was heard in said court, the same was certified to the circuit court, where the case was tried. There were no pleadings, and the defense was the statute of limitations. The body of the note and signature thereto, as was admitted by defendants at the trial, were in the handwriting of said Antony Henry, deceased; but as the note bore date January 1, 1869, and was due one day after its date, it was barred by operation of the statute of limitations, unless tak-

en out of the statute by reason of said payment of \$25 thereon on the 6th of November, 1882. The controversy, therefore, was over this payment and indorsement on the note, and is presented in this court on exceptions to evidence in that behalf, admitted on the part of plaintiff, and to instructions given at his instance, and to certain rulings in respect to the application and motion for new trial, which will be taken up in appropriate order hereafter.

When plaintiff offered to read the note with its said indorsement thereon in evidence, it was excluded, upon defendants' objection, until proof of the indorsement was made. Plaintiff then introduced Miss Minnie Henry, daughter of plaintiff, and sister to Antony Henry, deceased, maker of said note. The note was shown her, and she testified as follows: "I know of the indorsement of the \$25 on it; was present in my mother's room, at our mother's home, in Lewiston, Illinois. My father, brother Will, and cousin Tom Lally were present. The money was received in a draft on national bank. The indorsement was placed on the note by direction of my father, Bryan Henry, at the time the money was received, and at the date it purports to have been done. Cousin Tom was present when the letter and draft was received. Father called to one of the boys to indorse the amount of the draft on the note, and I think cousin Tom did it. It is in his handwriting, I think. The draft came in a letter written and sent from Butler by my brother A. Henry to my father. The draft was \$25. I was at home, and brother Will lived at father's until he came to Butler. He was there. This is the letter the draft came in." Plaintiff here offered, and read in evidence without objection, as follows: "A. Henry, Attorney at Law. Butler, Mo., Nov. 3d, 1882. I wrote you last Monday from Kansas City. I suppose you got it. Harry is not well yet, but has improved some. I send you inclosed \$25, and when you need more let me know. I will, some time between this and Christmas, come to see you all. I hope mother will take some care of herself, and get better. There is nothing new I can state. ANTONY." Witness continued: "Brother Antony wrote father a letter from Kansas City a few days before we received the letter containing the draft." Counsel for plaintiff then asked witness to state contents of the Kansas City letter. Defendants objected until said letter was accounted for. Witness thereupon stated she had searched for the letter of A. Henry from Kansas City, "and cannot find it. I live at home with my father. My mother is dead. She was for many years an invalid. I was in charge of the house; did all the business in caring for my parents. When this letter came to father I took charge of it. Before coming to the trial I searched the house for it. Some time ago I destroyed a good many letters, and suppose this must have been one of them, as I can find it nowhere." Counsel for de-

fendants here interposed further objection "that Miss Henry is not competent to prove by herself her custody of said letter as agent," and the further objection that "the evidence as to the loss is not sufficient to admit parol testimony as to contents, but Bryan Henry, the claimant, must himself testify as to its loss,"—all of which objections the court then and there overruled, and defendants then and there excepted. Witness then testified: "A few days before this letter with the draft in it came, father received a letter from Kansas City, Missouri, from my brother A. Henry, in which he said he would send father \$25, to be applied as interest on this note." Counsel for plaintiff further asked: "Did you ever hear a conversation between your father and A. Henry about this note?" "Heard nothing particular about this note in their conversation in 1883, but I had a conversation with my brother A. Henry in 1884, when he was on his way to the national Democratic convention in Chicago that nominated Grover Cleveland. He often spoke to me about his business at this time. He said he had about \$75,000 worth of property, and was some in debt. He alluded to the \$25 payment. He said he would have paid this interest sooner, but there was no necessity for it." Cross-examination: "I had frequent correspondence with my brother A. Henry. I generally attended to the correspondence of the family with him. Question. Were the two letters referred to in your examination addressed to your father? They were, and I read them after he died. I had the letter in reference to the payment of interest from Kansas City. It has been lost. I have searched for it, and cannot find it. I have no idea where the envelope for the one written November 5, 1882, is. I don't remember when I saw the envelope last. My recollection is that the envelope was one with his attorney's card on it, with directions to return if not called for. I sometimes kept letters in a drawer in my mother's room, sometimes in my own. The drawers were not locked in our house. The draft for \$25 was made payable to M. B. Henry or order. M. B. Henry is my name. I was to draw the money on it. I usually attended to business for my father."

Defendants' counsel, at the close of the testimony, asked the court to withdraw from the jury her evidence in regard to the contents of the letter from Kansas City, because she had not sufficiently accounted for its absence, which request the court refused, and defendant excepted. It may be further observed that this witness further stated that her father was 80 years old, lived in Illinois, and was unable to attend the trial, and that at the time of said indorsement her mother was an invalid, and had since died, as had also her said brother Will and the said cousin Lally; these being the only other persons present at the time the draft was received and payment indorsed on the note as aforesaid.

The first point for defendant is that plain-

tiff himself was a competent witness to prove that the letter was not in his possession; that there was nothing to show that it was not in his possession at the time of the trial, except that it was possibly destroyed by the witness Minnie Henry, and that if destroyed by her there is nothing to show that it was innocently done, and that, under this state of facts, the loss of the letter was not properly accounted for, and therefore secondary evidence as to its contents was not admissible. The evidence of the daughter shows that she, and not her father, was the actual custodian of the letter. She took charge of the letter when received, and testifies that she was in charge of the house, and did all the business in caring for her parents; that she had searched the house for the letter, and that she could not find it; and that she supposes it was among other letters which she destroyed some time ago, etc. The search was by the daughter, the one last in possession of the letter, and who attended the business for her father, and in the place or places where it would likely or probably be found; and the search was recent, before coming to the trial. The evidence of the witness was therefore *prima facie* sufficient to show the loss or destruction of the letter, and to lay the foundation for the admission of secondary evidence as to its contents. *Meyers v. Russell*, 52 Mo. 26; *Whart. Ev.* § 147. There is, we apprehend, nothing in the evidence to indicate that the letter was destroyed by the plaintiff, or by his direction, or that the destruction by the daughter, if it was destroyed, was willful, or with any purpose to suppress or make way with it as a matter of evidence in the cause. Proofs of this sort must necessarily be left largely to the discretion of trial courts, and we see nothing in this behalf calling for our interference.

Instructions 1 and 3, given on behalf of plaintiff, are assailed as erroneous in that they direct the jury that, if they find that A. Henry, the deceased, did on or about the 6th of November, 1882, make a payment of \$25 on the note in question, then the note is thereby taken out of the statute, and they will find for plaintiff, without requiring them to first find that the alleged payment had been credited on the note at or about the time payment is claimed to have been made. The material question was as to the alleged payment, and this could be shown by any competent testimony, and proof that credit was actually given by said indorsement on the note was not necessary. If the maker made the alleged payment on the note at the date given, this was sufficient to remove the bar of the statute.

The remaining question we will consider is the claim that the trial court should have permitted defendants to file the affidavit of Thomas J. Smith in support of the motion for new trial. The trial was had June 15th, the motion for new trial was filed June 18th, with affidavits of said Smith and of the ex-

ecutrix in support of it. The affidavit in question of Smith was offered on the 27th of June and refused, "because it was offered after defendants had announced they had closed their evidence on said motion, and had argued the same." Defendants alleged, as one of the grounds of new trial, that since the trial they had discovered certain named witnesses, who would testify that said Thomas Lally died in January, 1882,—that is, some eight months prior to the date of said indorsement; and that they had also discovered that the indorsement of said credit of \$25 was written thereon on or about the 8th day of December, 1885, by one R. P. Paul, at request of plaintiff or the said daughter, and that said Paul at the time of the motion lived in Lamar, Colo. The affidavit in substance is "that affiant was engaged in this court after the trial of this cause, and was not enabled to go to the state of Illinois to investigate the facts connected with indorsement of the credit upon the note in suit herein until Saturday, June 18th, 1887; that he did not and could not reach Ipadia, Illinois, until Sunday evening, the 19th of June, 1887; and that he was compelled to leave that point at 7:05 o'clock A. M. on Monday, June 20th, 1887, to go to Lewiston, in said state of Illinois, to investigate and look after other material evidence, as shown in defendant's application for a new trial. Affiant says that, after discovering the names of the witnesses, and the facts that could be proven by them, at Ipadia, Illinois, and seeing said witnesses, he had no time to write or procure affidavits from them of the facts as alleged in defendant's motion for a new trial, but was compelled to at once go to the depot to meet the train aforesaid, and hardly had time to reach the depot in time to take said train. Affiant says he went to Lewiston, Illinois, and prosecuted his search for the remaining evidence as rapidly as possible, and did not succeed in discovering all of it until a few moments before eleven o'clock A. M. of that day. Affiant says he was compelled to leave Lewiston for his home by the train leaving there June 20, 1887, at 11 o'clock A. M., and that on that account it was impossible for affiant to write or procure affidavits from the witnesses, or any of them, proving the facts as set forth in said motion for a new trial. Affiant says that defendants have not been able to communicate with the witness Paul otherwise than by telegram since discovery of what he will swear, as shown by the motion for a new trial, that it is the fact as to his writing the indorsement of credit on the note in suit. Affiant says that if the court will give defendants time to procure the affidavits aforesaid, he believes that he can in two weeks procure and file the affidavits of all the witnesses named in said motion for a new trial, proving the facts as therein alleged."

The due administration of justice requires, we think, that matters of this sort as to allowing affidavits to be filed out of order, and

after parties have closed their evidence and argued their motions, should be left to the discretion of trial judges, and their action upheld unless their discretion is abused, which we do not see is so in the case before us. Besides, it may be doubted if the affidavit, even if admitted, shows the proper diligence under all the circumstances of the case. The note, with its said indorsement, had, it seems, been on file since 2d day of July, 1886. Besides it looks like the said attorney might have taken time to take the affidavits of one or more of said witnesses when he was at Ipavia on June 20th, or at least have caused some of them to be taken during the week thereafter. The affiant does not claim to have seen the witness Paul, who it is alleged wrote the indorsement of credit on the note; and the affidavit states that "defendants have not been able to communicate with the witness Paul, otherwise than by telegram," which perhaps is no more than tantamount to saying that they could communicate by telegraph with the witness, and not that they had in fact done so, and, at all events, it does not say what the purport of the communication was, if there was any. This exception must, we think, also be ruled against defendants.

We see no error requiring us to interfere with the judgment, and we therefore affirm the same, in which all concur,

LILLY et al. v. TOBBEIN et al.

(Supreme Court of Missouri. June 30, 1890.)

WILL—CONTEST—PARTIES—AMENDMENT.

1. An action by the trustees, on behalf of the members of a voluntary religious association, to establish a will making it a devise, is not barred by the reversal of a judgment establishing the same will at the suit of the church as a corporation organized after the rejection of the will by the probate court, the reversal having been because the corporation was held not to be a proper proponent.

2. In a suit to establish a will making a devise to a voluntary religious association, afterwards incorporated, brought by the church as a corporation, the trustees, for and in behalf of the members, may be substituted as plaintiffs by amendment, under Rev. St. Mo. 1879, § 8567, authorizing the adding or striking out the name of any party, or the correction of a mistake in the name of a party.

3. Such an amendment, made after five years from the rejection of the will, in an action brought within that time, relates back to the commencement of the action, and avoids the bar contained in Rev. St. Mo. 1879, § 8980, limiting actions to establish or contest a will to five years after the probate or rejection thereof.

4. In a suit to establish a will, the issue to be tried is, will or no will, and the validity of the devise will not be considered.

5. The trustees of a voluntary religious association may, for and in behalf of all the members, sue to establish a will making it a devise.

6. In a suit by some members of a voluntary association for and in behalf of all, it is not material that some of the named plaintiffs have died, or ceased to be members, or are minors or married women; and they may be disregarded, as unnecessary parties.


Appeal from circuit court, Jackson county;
TURNER A. GILL, Judge.

This was an action under Rev. St. Mo.

1879, § 8980, to establish a will rejected by the probate court.

Karnes, Holmes & Krauthoff, for appellants. *Alexander Graves and Mansur & McLaughlin*, for respondents.

BLACK, J. Ilett Tobbein died on the 25th September, 1879, leaving a wife, but no children. By an instrument purporting to be his last will, he devised to his wife, Catherine, for her natural life, all of his property, real and personal, and at her death the one-half to go to her heirs, and the other half to the Catholic church at the city of Lexington, in the state of Missouri. It is then made the duty of the nominated executor, William A. Donaldson, at the death of Catherine, to sell all of the property, real and personal, at public sale, and pay the proceeds over to her heirs and to the church. The will was presented to the probate court, and by it rejected, on the 26th December, 1879. The estate was then ordered into the hands of the public administrator. The nominated executor died before the testator. The church, as an incorporated society, brought suit to establish the will, which resulted in a judgment establishing it. That judgment was reversed without remanding the cause. 82 Mo. 418. Thereafter the present suit was instituted in the Caldwell circuit court for the purpose of establishing the same instrument. The venue of the cause was changed to Jackson county, where a trial resulted in a judgment in favor of the will, to reverse which the defendants prosecute this appeal.

This suit was commenced in the name of the "Immaculate Conception, the Catholic Church at the city of Lexington, in the state of Missouri," as plaintiff. It is alleged in the petition that the plaintiff is and has been an incorporated society since 1863. The defendants filed a demurrer to this petition, which was sustained. There are several grounds set out in the demurrer, but we understand it to have been sustained on the motion that the church as an incorporated body could not maintain the action. Thereupon an amended petition was filed, in which the plaintiffs are designated the "Immaculate Conception, the Catholic Church at Lexington, an unincorporated religious association, John J. Lilly, Michael Howell, Patrick O'Malley, and Thomas Clark, members of and trustees for the association." These persons profess to sue for themselves and all other members. The amended petition goes on to name as plaintiffs 100 or more members of the church as additional plaintiffs. The defendant's demurrer to this amended petition was sustained as to the unincorporated association, but overruled as to the other plaintiffs, and the cause proceeded in the names of the individuals as plaintiffs. The will is in due form, and properly attested; and it was admitted on the trial that the testator was of sound and disposing mind. The widow, it may be added, renounced the will, and made her election under the law. 

1. A point made in the trial court, and urged here, is that the judgment in the former suit is conclusive; that the present plaintiffs cannot again bring forward the instrument for the purpose of having it established as the will of Tobbein. It was a conceded fact in the former case that the church was not incorporated until after the death of the testator, and the conclusion seems to have been reached that the corporation had no such an interest in the probate of the will as would give it a standing in court as proponent. The judgment was therefore simply one of reversal. The final judgment, in a proceeding brought in the circuit court to establish a will, must be either one that the paper is or is not the will of the testator. This court gave no such judgment. There was no judgment whatever on the issue of will or no will. The judgment of reversal simply said the then plaintiff had no right to prosecute the suit. It left no impediment in the way of a new suit by any other person having the requisite interest.

2. The proof on the trial of the present case shows that the church was not incorporated until after the death of the testator. At the time of his death the church organization was simply a voluntary association for religious purposes, and was not a legal entity. The validity of the devise is therefore placed upon the ground that it is a devise to charitable uses. There is no doubt but a devise or bequest to an unincorporated association will be upheld and enforced, if it be a charity. 2 Perry, Trusts, (8d Ed.) § 780. See, also, Schmidt v. Hess, 60 Mo. 591. But the defendants insist that the devise in this case is not one for a public charity, and for that reason must fail. The inquiry therefore arises at once, can the validity of the devise or bequest be considered in this suit? Under our statute the will is first presented to the probate court, and the proceeding in that court is *ex parte*. The statute provides that if any person interested in the probate of any will shall appear within five years after the probate or rejection thereof, and by petition to the circuit court contest the validity of the will, or pray to have a will proved which has been rejected, an issue shall be made upon whether the writing produced be the will of the testator or not. From these provisions of the statute, it is plain to be seen that the only issue to be tried is, will or not will. If a clause has been inserted by fraud or forgery, so that in point of fact it is no part of the will, then it may be rejected. But where the clause is found to be a part of the will the whole must be probated, and this, too, though the particular clause cannot be enforced. The court, in trying the issue of will or no will, is not called upon to construe its provisions, nor to say which are legal or which illegal. This question was fully considered in the recent case of Cox v. Cox, ante, 1055, (not yet officially reported.) As there said, if the will be properly executed and proved, it must be admitted to probate, although it contain not

a single provision capable of execution, or valid under the law. It follows from what has been said that the questions made in the briefs as to whether the bequest to the church is a charity or not, and as to whether it must fall by reason of the fact that the widow renounced the will, are all foreign to the issues in this case. Such questions can only be determined when the will is probated. We therefore express no opinion upon the questions made concerning the validity of the devise.

3. Objections were made on the trial, and are now urged, against the filing of the amended petition. The *first* is that the amended petition is simply the substitution of new parties for an incompetent plaintiff, and is, in effect, the institution of a new suit under the guise of an amendment; the *second* is that the new parties brought in by amended petition are barred because more than five years intervened between the rejection of the will by the probate court, and the filing of the amended petition in this case. The present suit was commenced on the 26th November, 1884, which was within the five years; but the amended petition was filed on the 18th January, 1885, which was after the expiration of that time. The plaintiff in this suit, as first commenced, was the Immaculate Conception, alleged in the petition to have been incorporated as far back as 1863, which was before the death of the testator. The proof, however, shows that it was not incorporated until after the will had been rejected. The demurrer to the petition seems to have been sustained on the ground that the corporation, as such, had no interest in the probate of the will. As before stated, the plaintiffs in the amended petition are the Immaculate Conception, an unincorporated religious association, and Lilly and others, trustees and members thereof. The defendants' demurrer to the amended petition, which was sustained in part, excluded the association. The church, therefore, both as an incorporated body and as a voluntary association, has been excluded from this suit by objections interposed by defendants. The first question, then, is whether the court erred in allowing Lilly and others to be made parties plaintiff. Counsel for defendants are correct in saying it has been held that a proceeding to contest a will, or to establish one which has been rejected, stands on a different ground from ordinary actions at law. The proceeding to contest or establish a will takes the place of an appeal; no appeal being allowed from the judgment of the probate court. The plaintiffs, when contesting the validity of a probated will, cannot dismiss the suit over the objections of the contestees; for the contestees, as well as the contestants, are in a sense actors, and have a right to demand that the will be proved in "solemn form," as it is called. Benoit v. Murrin, 48 Mo. 48; McMahon v. McMahon, ante, 208, (not yet officially reported.) But notwithstanding these peculiarities the proceeding is a new suit. The parties are

for the first time brought before the court by the service of notice, and the proceedings are governed by the practice act. By that act the court may, in furtherance of justice, at any time before final judgment, amend any pleading by adding or striking out the names of a party, or by correcting a mistake in the name of a party; and, when a complete determination of the controversy cannot be had without the presence of other parties, the court may order them to be brought in. Sections 3566, 3567, Rev. St. 1879. These provisions of the Code have always been liberally construed; and amendments are largely in the discretion of the trial court. It is but every-day practice to bring in new parties by way of amended pleadings. There was, therefore, no error in allowing the present plaintiffs to be made parties. But it is insisted that they have no such interest in the establishment of the will as enables them to maintain this suit. Under the constitution of this state, a religious corporation can be created "for the purpose only of holding the title to such real estate as may be prescribed by law for church edifices, parsonages, and cemeteries." Article 2, § 8. In view of this section, it was said in the former case (82 Mo. 425) that a church organization for religious purposes must continue after incorporation. The meaning of this must be that the unincorporated association continues for the purposes for which it could not be incorporated. The association, as distinguished from the corporation, therefore, has an interest in the probate of this will. Since the corporation has been excluded, and the voluntary association cannot sue or be sued, that interest must go unrepresented, unless the members of the association can appear, and file the petition to have the will established. It is a well-established rule in equity pleading that one or more of the members of a voluntary association, whether organized for public or private purposes, may sue for and in behalf of all of the members. Story, Eq. Pl. (9th Ed.) §§ 94, 114c. A statutory provision embracing such and other cases is found in the Codes of many of the states; and in such states it is made to apply to all causes, whether legal or equitable, though for the most part resorted to in the latter class of cases. Bliss, Code Pl. (2d Ed.) § 79; Pom. Rem. (2d Ed.) § 893. We have no such a provision in our Code; but, in a proceeding to contest the validity of a will, all parties in interest should be made parties plaintiff or defendant. *Eddie v. Parke's Ex'r*, 31 Mo. 513. The court in that case said: "Although this is technically a proceeding at law, yet in many respects it partakes of the nature of a proceeding in chancery; and the rules recognized in courts of equity with respect to the persons necessary to be made parties to a bill, we think, are to a great extent applicable to a case of this kind." The right of a few persons to sue for themselves and all other persons similarly situated has been recognized by this court on

several occasions. *Newmeyer v. Railroad Co.*, 52 Mo. 81; *Overall v. Ruenzi*, 67 Mo. 203. Looking to the parties who should be brought before the court, the method of making up the issue, and the character and form of the judgment, we can but conclude that a suit to contest or establish a will has many of the features of a suit in chancery. The equity rule allowing one or more members of a voluntary association to sue for all should be applied in a case like the one in hand. As *Lilly, O'Malley, Howell, and Clark* sue for themselves, and all other members of the association, the suit is well brought by them, and in their names. It results from what has been said that it is a matter of no consequence that some of the other named plaintiffs have died, or ceased to be members of the church, or are minors or married women. They may be disregarded, as unnecessary parties.

4. The persons suing for themselves and others were not made parties by the amended petition until after the expiration of five years, though the suit was commenced in due time, and the next question is whether the plaintiffs are barred by the statute. Where the amendment sets up no new claims, but is a variation of the allegations concerning the demand already in issue, the amendment relates back to the commencement of the suit, and the running of the statute is arrested at that point. *Buel v. Transfer Co.*, 45 Mo. 562. In the case before us, there has been no change whatever in the demand itself. The amendment simply brought in other parties plaintiff. In the case just cited the cause of action was barred in one year. The plaintiff could recover only by a joint action with her divorced husband, who was made plaintiff after the expiration of the one year, and it was held the amendment related back to the commencement of the suit. Amendments are often allowed for the express purpose of saving the cause from the statute of limitations. *Lottman v. Barnett*, 62 Mo. 170; *George v. Reed*, 101 Mass. 379. This suit has been, from first to last, an effort on the part of the church to get a standing in court; and the amendment substituting the present plaintiffs for the corporation was not the setting up of a new claim or cause of action, but the prosecution of the same demand, and that, too, in the same interest. It follows that the amendment bringing in these new parties related back to the commencement of the suit, and the cause of action is not barred by the five-years statute of limitations.

5. The unincorporated church association is named as a devise in the will, and that of itself gives it, by and through its members, a standing in court to prosecute a suit to establish the will; for, as we have said and now repeat, the validity of the devise is not a question considered, or to be considered, in this case. The correctness of the conclusion reached in the former case, that the subsequently organized corporation could not maintain the suit, may well be doubted.

But, as there said, since the corporation could only be created for the purpose of holding title to real estate for the designated purposes, the voluntary association as a religious congregation continued, and that association has an interest in establishing this will. That interest, we hold, may be represented in this case by designated members suing for themselves and all other members. The defendants cannot object that the corporation is no party to this suit, for it has been excluded at their instance. As we have said, the will is in due form, and the testator is conceded to have possessed testamentary capacity, and the will should have been probated at the outset. The judgment is affirmed.

BARCLAY, J., absent. The other judges concur.

STATE v. RILEY.

(Supreme Court of Missouri. June 2, 1890.)

CRIMINAL LAW—LARCENY—INDICTMENT—EVIDENCE—VARIANCE.

1. Failure to set out in an indictment for larceny the Christian name of one of two persons therein alleged to have been joint owners of the stolen property is not ground for quashing the indictment, since Rev. St. Mo. 1879, § 1812, provides that it shall only be necessary to allege in such indictment the property to belong to one of such joint owners, and section 1820 provides that, on trial of a felony, a variance between the statement in the indictment and the proof, in the Christian name or surname of a person, shall not be grounds for an acquittal unless the court shall find that the variance is material to the merits of the case, and prejudicial to the defense.

2. A variance between the indictment and the proof, on trial for larceny from a dwelling-house, in that the former alleges the house to belong to one person, while the proof shows that it is owned by another jointly with him, is not fatal, since Rev. St. Mo. 1879, § 1812, provides that, where any offense shall be committed upon or in relation to any property belonging to several owners, the indictment shall be deemed sufficient if it allege such property to belong to any one or more of them.

3. On indictment for larceny from a dwelling-house, though the proof shows that the value of the article stolen was less than \$30, an instruction to find defendant guilty of petit larceny only is properly refused, since, under Rev. St. Mo. 1879, § 1809, larceny from a dwelling-house is grand larceny, irrespective of value.

4. On indictment for larceny, it appeared that defendant, who was 24 years old, had for several years used intoxicating liquors to excess; that he would go off several times a month, and stay on a spree for several days; that he had several times had *delirium tremens*, the last time being a few months before the larceny. But the evidence did not show that he was insane, or that his mind was affected so that he could not tell right from wrong. He was drunk a few days before the larceny, but three witnesses, to whom he sold the stolen article on the day of the larceny, testified that he was then sober. *Held*, that an instruction to find defendant not guilty if, by reason of his intemperance, he did not have mind enough at the time of the larceny to know right from wrong, was properly refused.

Appeal from circuit court, Buchanan county; SILAS WOODSON, Judge.

Woodson & Woodson, for appellant. The Attorney General, for the State.

RAY, C. J. Defendant was indicted, tried, and convicted in the Buchanan county crim-

inal court of the larceny of a shotgun from a dwelling-house, and his punishment assessed at imprisonment in the penitentiary for three years. Omitting caption, and signature of the prosecuting attorney, the indictment in the cause is as follows: "The grand jurors of the state of Missouri, within and for the body of the county of Buchanan aforesaid, being duly impaneled and sworn, upon their oaths do present that James Riley, on the 15th day of May, A. D. 1889, or within a few days next before said 15th day of May, at the county of Buchanan and state aforesaid, from the dwelling-house of George W. Gibson, one double barrel shotgun, (a better description is to the grand jurors unknown,) of the value of thirty dollars, the joint personal property of George W. Gibson and W. E. Brocken, then and there being found, to-wit, in said dwelling-house and at said county, did feloniously steal, take, and carry away, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state." The evidence in behalf of the state is to the effect that Gibson, who was a man of family, and Brocken, who was single and unmarried, lived together upon a farm in Buchanan county, Mo., and were partners in managing and working the farm. Having closed up their house, said Gibson, with his wife and child, and said Brocken and a hired hand, left early on the morning of May 11th, and went to St. Joseph, Mo., for the day. The children of Gibson were sent over to their uncle's, in the neighborhood, so that no one was left at the house on said day. The doors of the house were shut, but not locked. At a point called "Frazier," on their way to St. Joe, and two or three miles from their farm, they met defendant, who asked Brocken if they were going to town, and was told that they were. Upon their return, at about 8 o'clock that same evening, they found that a shotgun, which had been left in a gun-rack over a door in the interior of the house, was missing. Between 2 and 3 o'clock in the afternoon of the same day, one Henry Cook and two others met defendant on the road, some three or four miles from the place of larceny, carrying the gun in question, which defendant represented he had taken in part payment for labor from a man at or near Plattsburg, Mo.; and, after some parley and negotiation, defendant sold the gun to said Cook for six dollars. The value of the gun was, it may be remarked, variously estimated at from \$20 to \$30. This evidence was not disputed or controverted.

It is practically conceded that defendant took the gun; and the only evidence in defendant's behalf was offered to show that he was not responsible for the crime, because of his mental condition, due to continued and excessive intemperance. We will recur to this branch of the evidence later on in the course of this opinion. The summary of the evidence already given will, we think, suffice for a correct apprehension of its general char-

acter and bearings, and we will now proceed to a consideration of the points now urged for a reversal of the judgment of conviction:

First, then, there was a motion to quash the indictment because the indictment did not set out the Christian name of W. E. Brocken, who was one of the owners of the stolen gun. This motion was, we think, properly overruled by the court. See sections 1812, 1820,¹ Rev. St. 1879.

Again, it is contended that there is a fatal variance between the indictment and proof, inasmuch as the indictment charged the larceny to have been committed in the dwelling-house of Gibson, whereas the evidence shows the house was held in partnership by Gibson and Brocken. This state of facts is expressly provided for in section 1812, Rev. St. 1879, which provides that, where any offense shall be committed upon or in relation to any property belonging to several partners or owners, the indictment shall be deemed sufficient if it allege such property to belong to any one or more of such partners or owners, without naming all of them.

Complaint is also made of the refusal to give instruction No. 3 asked by defendant. The gist of this instruction, so far as the objection thereto now urged is concerned, is that it authorizes the jury to find defendant guilty of petit larceny if they found the value of the gun to be less than \$30. The gun was, as the evidence shows and the indictment charges, taken and stolen from a dwelling-house; and this is grand larceny, irrespective of the value. The value was therefore immaterial, and the instruction properly refused on this account, if no other. Section 1809, Id.; State v. Ramelsburg, 30 Mo. 26; State v. Smith, Id. 114.

Defendant also asked the following, upon the refusal of which error is predicated: "(1) The court instructs the jury that if they believe, from all the evidence, facts, and circumstances in this case, that the defendant, from a long and continued use of whisky and alcoholic liquors, or either of them, had brought upon himself *delirium tremens*, and weakened and impaired his mind so that he did not have mind enough at the time of the alleged offense to know the right from wrong in taking the gun alleged to have been taken, and that he took said gun, while he was suffering by such use of alcoholic liquors, for the purpose of obtaining liquors to drink, then they must acquit the defendant in this case." We see no special reason to criticize the form and phraseology or doctrine set forth in the instruction just quoted. While drunkenness is no defense, and does not mitigate the offense, and while temporary insanity immediately resulting from voluntary intoxication

does not discharge any one of his responsibility, on the other hand, long-continued habits of intemperance, producing permanent mental disease amounting to insanity, or, as the instruction says, so weakened and impaired the mind that one committing an offense has not mind enough at the time to know right from wrong, relieves the party, we apprehend, of responsibility under the law. Insanity of this sort, and thus produced, is the same in law as insanity arising from other causes. State v. Hundley, 46 Mo. 414, and cases cited. But the instruction was refused, we apprehend, upon the ground that it was not supported by any evidence in the cause. Defendant, then 24 years old, had for several years used intoxicating liquors to excess. He seems to have contracted this unfortunate habit when a lad only 17 years of age. He would work, it seems, for several days, get his pay, and go off and get drunk, and stay drunk for several days at a time, or as long as he could get liquor. He would get a jug or jugs of whisky, and lay in the woods or horse lot; and thesesprees happened sometimes as often as three or four times a month. He had *delirium tremens* a number of times; the father and a brother say twice some seven or eight years before, and once about a year before the date of the larceny. The mother says he had *delirium tremens* seven or eight times,—the last time in December, about five or six months previous to the larceny. The defendant himself says in his testimony that the last attack was in February. Without going into all the details, the evidence, we think, shows a gross and uncontrolled appetite or thirst for strong drink; and some of it tends to show that when recovering from hisprees, which were sometimes protracted for several days, he was dull, nervous, and shaky, and did not seem to be at himself, exactly. But there is nothing in it to show that defendant was insane, or suffering from any permanent mental disease arising from excessive use of liquor or narcotics, or otherwise, or that his mind was so weakened or impaired from any cause that he did not know right from wrong. The trial court, of its own motion, as well as the state's attorney, questioned the witnesses introduced by defendant directly as to his mental condition; and the general purport of the testimony is that, when not drinking, no one ever noticed any strange action on his part, or anything out of the common. He was, it seems, at all intermediate times, a man of good enough ordinary sense; was thought a good workman, and to know generally what he was about. There is, we believe, no evidence that he was drunk on Saturday, when the larceny was committed. The mother of defendant testifies that he was drunk on the Thursday before Saturday, (the 11th,) the date of the larceny, and that she heard he was drunk on Friday, but did not see him that day, or until the Monday following, when she testifies he came home, and did not seem to be right, but stupid, and not at him-

¹ Rev. St. Mo. 1879, § 1820, provides that on trial of a felony a variance between the statement in the indictment and the proof, in the Christian name or surname of a person, shall not be ground for an acquittal unless the court shall find that such variance is material to the merits of the case, and prejudicial to the defense.

self. The three witnesses named Cook, who bought the gun, as before stated, testified that he was sober at the time of the purchase; that is, in the afternoon of the day the larceny was committed. We have looked through the evidence in the record pretty carefully in this connection, and see no prejudice to the rights of the defendant in the matter of refusing the above instruction, which, we think, was without evidence to support it.

Our attention is also called to a further exception of this sort. Defendant's counsel inquired of the prosecuting witness touching his knowledge of defendant's habits in respect to sobriety, and the state's objection thereto was sustained. Even if the ruling in this behalf was erroneous,—and we do not think it was,—defendant was not thereby prejudiced as to his substantial rights, inasmuch as he was afterwards allowed to fully interrogate the witness on that subject. The witness, moreover, knew little or nothing about the matters. The trial court permitted the examination to take a wide range on this branch of the case, treating defendant liberally in this regard, so that we think he has in this respect no just ground of complaint. This leads to an affirmance of the judgment of the trial court, and it is accordingly so ordered. All concur.

HUBBARD v. TEXAS COUNTY.

(Supreme Court of Missouri. June 16, 1890.)

CLERK OF COURT—FEES FOR ENTERING ASSESSMENT LISTS.

The revenue law, (Rev. St. Mo. 1879, § 6862,) providing that "the following fees and compensation shall be allowed to the several officers and persons herein named for services rendered under the provisions of this chapter," etc., provides for all fees that are to be allowed; and, since none are therein provided for such work, the clerk is not entitled to fees for entering the assessment lists, under section 6888, which provides that the assessment lists "shall be by the assessor, after he has completed his assessor's books, filed in the office of the county clerk, and by him, after entering the filing of the same thereon, be preserved and safely kept."

Appeal from circuit court, Texas county; C. C. BLAND, Judge.

A. H. Livingston and J. D. Young, for appellant. V. M. Hines, for respondent.

BRACE, J. The plaintiff presented to the county court for allowance the following demand: Houston, Mo., February 14th, 1887. Texas County, in account with S. M. Hubbard, County Clerk, Dr. 1887. Feb. 4 & 5. To filing 3,319 assessment lists, at .05 each, \$165.95. The county court refused to allow the demand, and the plaintiff appealed to the circuit court. On the trial in the circuit court, the court declared the law to be "that the plaintiff is not entitled to any fee for filing and preserving the assessment lists delivered to him by the assessor," and rendered judgment for the defendant, from which the plaintiff appeals to this court. By the revenue law (Rev. St. 1879, c. 145, § 6888) it is

provided that the assessment lists "shall be by the assessor, after he has completed his assessor's books, filed in the office of the county clerk, and by him, after entering the filing of the same thereon, be preserved and safely kept." By section 6862 of the same chapter it is provided that "the following fees and compensation shall be allowed to the several officers and persons herein named for services rendered under the provisions of this chapter, viz.: To clerks: *First.* * * * For extending the tax on the assessment book, three cents for each name, to be paid by the state and county in proportion to the number of tax columns used by each. *Second.* For making a copy of the tax-book for the use of the collector, including certificate and seal to the same, for every hundred words and figures, ten cents, one-half to be paid by the state, the other half by the county; for making an abstract of the assessor's book for the state auditor, five dollars, and, in addition thereto, fifty cents for every hundred thousand dollars' worth of property on such abstract, to be paid by the state. *Third.* For making an abstract of the tax-book for the state auditor, including certificate and seal to same, five dollars, and one-tenth of one per cent. of the amount of revenue tax on such abstract, to be paid by the state. *Fourth.* For certifying statements to the auditor as required by this chapter, or making any certificate required by this chapter, under the seal of said court, seventy-five cents for each certificate and seal, to be paid equally out of the state and county treasury. *Fifth.* For every settlement with the collector, thirty-five cents, to be paid equally out of the state and county treasury. *Sixth.* For safe-keeping, filing, and transmitting the collector's bond to the state auditor, one dollar."

The service charged for in this case was a service rendered under the provisions of said chapter. For all services whatever that may be performed by the county clerk under the provisions of that chapter, the fees and compensation allowed are those provided for in said section, and those only. The comprehensive language of the first paragraph of the section requires such a construction. The specific division of the compensation to be allowed between the state and the county tends to support it; while the fact that the revenue law is a complete system within itself, prescribing service, and providing compensation therefor, admits of no other conclusion; and so it was in effect ruled in *Harris v. Buffington*, 28 Mo. 53, in which it was held that the fees of county clerks for services performed under the revenue law are regulated by that law, and not by the law regulating the fees of such officers generally. The revenue law allows no fee for filing assessment lists, and the plaintiff can make no claim for pay for such service under the general fees law, (chapter 103, § 5600, Rev. St. 1879,) under which this claim is made. The judgment of the circuit court is affirmed. All concur.

ORR v. RODE *et al.*

(Supreme Court of Missouri. June 16, 1890.)

MORTGAGES—TRUSTS—EVIDENCE—LIMITATION OF ACTIONS—PLEADING—PARTIES—APPEAL.

1. Decedent, being indebted, conveyed land to a trustee in trust to enable the latter "to sell such parts of said property as may be desired to settle and satisfy said debts, * * * and, in order to settle said debts, he may give his individual notes for the same, and execute a mortgage on the before-described lands and lots, or any part thereof, to secure the same, upon such terms * * * as to him may seem proper and advisable." *Held*, that the deed authorized the trustee to borrow money to meet such debts, and to give his individual note therefor, secured by a mortgage on the land.

2. In a suit to foreclose such a mortgage, evidence on the part of the heirs of the grantor in the deed of trust, that when the note was executed by the trustee all the debts, to settle which the trust-deed was given, were paid, is inadmissible, since Rev. St. Mo. 1879, § 3987, provides that no person who in good faith pays money to a trustee authorized to receive it shall be responsible for the application of such money, nor shall the right or title derived by him from such trustee, in consideration of such payment, be called in question in consequence of any misapplication by such trustee.

3. In such case, plaintiff is competent to testify as to transactions between him and the trustee in regard to the execution of the note and mortgage, though the grantor in the deed of trust is dead. The statute regulating the admissibility of the testimony of interested persons, where the adverse party is dead, does not apply.

4. The supreme court can on appeal amend a judgment by striking out the names of parties erroneously joined in the suit, and affirm it as to the remaining parties. Rev. St. Mo. 1889, § 2101, provides that, after final judgment, the court may amend, in affirmance of such judgment, any record or other proceedings in the cause by striking out the name of a party.

5. The bar of the statute of limitations is not available, unless it is specially pleaded.

6. In Missouri, 10 years' possession of the property, adverse to the mortgagee, is necessary to bar a suit to foreclose the mortgage.

Error to circuit court, Buchanan county; JOSEPH P. GRUBB, Judge.

This action was commenced by the plaintiff, October 30, 1880, against the children of John H. Rode, deceased, who are the sole devisees, (and the husbands of such of them as were married women,) and James W. Strong, Ira Brown, and others, to foreclose a deed of trust in the nature of a mortgage executed by defendant Strong, dated April 3, 1867, purporting to convey certain lands described, in Buchanan county, Mo., to defendant Brown, in trust to secure the payment of a promissory note of the same date, whereby defendant Strong promised to pay to the plaintiff, one year after that date, \$4,000, with interest at 10 per centum per annum. On the back of this note are the following indorsements: "Paid on this note \$210 interest, Nov. 16, 1874. October 23d, 1875, Cr. by Weatherby notes, \$351; Cr. by Chesmore, \$10.00." The pleadings in the case need not be fully given. The answers of certain of the defendants, besides general denials, set up the statute of limitations. The deed of trust sought to be foreclosed in this proceeding was executed by defendant Strong pursuant to supposed authority conferred by an earlier conveyance of John H. Rode, upon

the construction of which the case chiefly turns. The language of the deed last mentioned, bearing directly on the pending controversy, is as follows: "To have and to hold the same, together with the appurtenances thereunto belonging, to the said party of the second part, [Strong,] and his successors and assigns, forever. This conveyance is made in trust, however, for the following uses and purposes; that is to say: That whereas, the said John H. Rode is now indebted to divers persons; and whereas, several judgments are now of record in said county of Buchanan, and which are liens upon the real estate and property hereby conveyed, and said conveyance is made to enable the said party of the second part to sell such parts of said property as may be desired to settle and satisfy said debts, and the said party of the second part is hereby empowered by the parties of the first part to make any arrangements which he may deem advisable with any of the creditors of the said John H. Rode, and in order to settle said debts he may give his individual notes for the same, and execute a mortgage on the before-described lands and lots, or any part thereof, to secure the same, upon such terms, and payable at such times, as to him may seem proper and advisable; and he is also authorized to sell and convey any part of said property or real estate for such fair price as he may deem advisable for deferred payments of any of said indebtedness, selling the unimproved town lots first,—that is, the lots having no dwelling-house on first, and the whole of the town lots before selling the said tracts of land or any part thereof, and continuing to sell such parts as may be proper and necessary, until all of the said debts, which are liens on said real estate, are paid, and then such other debts as may now exist against said Rode, paying his security debts last; and it is further understood, directed, and agreed that, after said debts are paid, said lands are not to be disposed of or sold by said party of the second part, unless it is to reconvey the balance thereof to the parties of the first part, or to convey the same by their written request or concurrence in writing."

The cause was tried by the court. Several of its rulings are the subject of exceptions that will be noted, with other material matters, in the progress of the opinion of the court. The plaintiff was examined on his own behalf as a witness, and his testimony (referred to in the opinion) was as follows: "William Orr, the plaintiff, called in his own behalf, being duly sworn, testified as follows: Direct Examination. Questions by Mr. White. Question. You are the plaintiff in this case? Answer. Yes, sir. Mr. Brown. We object to Mr. Orr's being permitted to testify here in the case at all. He is the opposite party, and the pleadings show that Mr. Rode is dead. We think he is an incompetent witness. The Court. The objection is overruled. To which ruling defendants then and there excepted. Q. Where do you live? A. I live in Maysville, Mo. Q. How

long have you lived there? A. I come there in 1854. Q. Been living there ever since? A. Yes, sir; close to there. I don't live in town all the time, but I live there and around there. Q. Lived there in 1867? A. Yes, sir. Q. Where you acquainted with J. W. Strong? A. Yes, sir. Q. State, Mr. Orr, the circumstances which led to you making this loan in question, fully. A. Well, sir, Mr. Strong came down there to court, and asked me if I had any money to lend. 'Well,' says I, 'I don't know how.' He found out I had some money here in Mr. Beattie's bank, and he called my attention to it, and told me that it might as well be drawing me interest as to be laying there. I told him I did not know whether I cared about lending it or not. He insisted on me lending it, and I finally came to the conclusion that I would lend it, providing he gave me security, and he told me that he wanted it for Mr. Rode. Mr. Brown. We object to him being permitted to testify to the remarks that he made to Strong, and we wish to save an exception to the ruling of the court on that specific objection. The Court. I can't see where this testimony will lead to. I don't see its relevancy as yet. Mr. Brown. We think that he is incompetent to testify. The Court. So far as anything that took place between him and Mr. Rode, as a friend, he is unquestionably incompetent, and I am unable to see any relevancy; but so far as any conversation between himself and Mr. Strong, his friend, I don't see what harm it can do. I will hear it out, anyway, and I will take it from me by instructions, if necessary. Q. Did not Mr. Vories ask him if he would not let Mr. Strong have the money? Mr. Brown. We object to his stating what Henry Vories may have said, on the ground of irrelevancy; Mr. Vories being dead. The Court. Well, that objection is sustained. Mr. White. We except. Mr. White. We offer to prove that William Orr, prior to making this loan, consulted with Henry M. Vories, the agent and advisor of John H. Rode, as testified to by Allen H. Vories; that in that conversation Henry M. Vories told William Orr that the sum of four thousand dollars was needed by John H. Rode to pay off his debts; that in the same conversation H. M. Vories told Wm. Orr that Strong had the power and right to borrow this from John H. Rode, and under the deed of trust in evidence, and in consequence of this statement, and not until then, did Mr. Orr loan the money. The Court. You will not be permitted to show this by this witness. Q. State if you loaned the money on the note and deed of trust, as read in evidence, to Mr. Strong. A. Yes, sir; I gave my check on the bank for \$4,000, and he got the money,—at least, he told me he did. I seen that they charged it to me in my account. Mr. Brown. We object to that, as incompetent, for the witness to testify upon that matter. The Court. The court has already said that your exceptions would be saved. You have said that more than once,

and I have already stated that I would hear anything that took place between Mr. Strong and Mr. Orr. The defendant then and there excepted. Q. What payments have been made you on this note? A. Those on the back of the note. Q. I will call your attention to these credits on that note. Were these payments made at the time they purport to have been made on the note? Mr. Brown. We object. The Court. I think the objection will be sustained as to that, Mr. White, Mr. Orr not being a competent witness to prove the credits. Mr. White. We except. Take the witness. Mr. Brown. Stand aside." After a finding for plaintiff, and the usual formal motions, this writ of error was sued out on the part of defendants.

Ramey & Brown, for plaintiffs in error.
H. K. White and C. A. Masman, for defendant in error.

BARCLAY, J., (*after stating the facts as above.*) 1. In the construction of such an instrument as the deed from Rode to Strong in this case, the first and best rule of interpretation is to gather from the entire document, as best we may, the intention of the parties to it, and give effect to such intent when manifest. *Gibson v. Bogy*, 28 Mo. 478. The deed in question conferred on Strong not merely a power of sale, but the legal estate as well, in trust for certain purposes defined. The prime object of the trust was declared to be the payment of the debts of Rode. This court has held that, where such was the object, a power of sale was necessarily implied, even when unexpressed; the property itself being bound by law for the payment of the debts. *Porter v. Schofield*, 55 Mo. 56. To the same effect is *Cherry v. Greene*, 115 Ill. 591, 4 N. E. Rep. 257; and *Haggerty v. Lanterman*, 30 N. J. Eq. 37. But in the case before us the authority to sell is definitely given, in clear terms, with a further power to make any arrangements with the creditors of Rode which the trustee may deem advisable, and to charge the property by mortgage to secure the trustee's individual note for such debts, etc.

One rule, of quite frequent application to this subject, is that where a power of absolute sale is vested in a trustee for a special purpose, necessarily contemplating the raising of funds, (as here for the payment of debts,) such power impliedly includes that of raising such funds by mortgage, which is, in its nature, merely a conditional sale. *Hill, Trustees*, (2d Amer. Ed.) § 475; *Loebenthal v. Raleigh*, 36 N. J. Eq. 172; *Bank v. McKnight's Heirs*, 2 Mo. 42. Moreover, the law requires no more than a substantial execution of the powers conferred on such a trustee. *Warner v. Insurance Co.*, 109 U. S. 369, 3 Sup. Ct. Rep. 221; *Cumming v. Williamson*, 1 Sandf. Ch. 17; *Mead v. McLaughlin*, 42 Mo. 198. Here express and undoubted authority was given to satisfy any of Rode's debts with the trustee's own note, and to secure it by mortgage on the

property. What difference in effect can be pointed out between so doing and pursuing the course which the trustee actually adopted, of raising funds to meet such debts, by such a note so secured? We think there is no substantial difference, in view of the evident purpose and intent of the entire trust. Viewing the instrument of authority as a whole, we regard it as fully authorizing the trustee Strong to make the charge upon the property which forms the basis of this foreclosure suit.

2. The trial court excluded evidence offered by the defendants tending to prove that the debts of Rode had been paid before the execution of the deed of trust by Strong. This was not error. It is provided by our statutes that "no person who shall, in good faith, pay money to a trustee, or other person acting in a fiduciary capacity, authorized to receive the same, shall be responsible for the proper application of such money; nor shall any right or title, derived by him from such trustee or other fiduciary in consideration of such payment, be called in question in consequence of any misapplication by such trustee." Rev. St. 1879, § 3937. As the instrument under review created a trust, and not a mere power, as we have already ruled, it was not obligatory upon one dealing with the trustee to see that the funds raised for the purposes of the trust were properly applied. So long as the trust continued, the authority to raise the funds contemplated by it, for the purpose and in the manner indicated in it, continued. It was not obligatory on persons acting in good faith, and without knowledge of any breach of trust, to see whether or not the purposes of the trust had been fulfilled before dealing with the trustee in relation to the property vested in him.

3. Some of the defendants interposed the statute of limitations as a bar to the foreclosure of the deed of trust sued upon. There is no evidence before us of any adverse possession by the mortgagor or grantor in the deed of trust, or of those standing in privity to either. Therefore this point in the case is controlled by the rulings in *Lewis v. Schwenn*, 98 Mo. 26, 2 S. W. Rep. 391, and *Booker v. Armstrong*, 93 Mo. 49, 4 S. W. Rep. 727, if they are to be followed. We have been asked, in a masterly argument of counsel for appellants, to review and overrule those decisions, but, having given the whole subject to which they relate further consideration, we are rather more strongly inclined to adhere to them, and confirm the principles they declare, that the statute of limitations governing real actions applies to suits of this nature, (to foreclose mortgages or deeds of trust,) and that it is immaterial to such foreclosure that the notes secured may be barred by the limitation applicable to personal actions. Without further elaboration, it may suffice to say that we approve the views expressed in the cases last referred to, and follow them.

Whether the finding of the trial court, in

so far as it established a personal indebtedness of James W. Strong, as maker of the note, was correct or not, in view of the limitation law applicable to actions on notes, is unimportant now, since the separate answer of Strong does not plead that statute. It is scarcely necessary to repeat that, ordinarily, the bar of limitation, to be available, must be in some way set up. Without this its bearing on the rights of the parties cannot properly be considered.

4. Defendants complain of the action of the court in permitting plaintiff to testify at the trial, Rode, the grantor in the deed to Strong, being dead; but it will be seen by reference to the report of his examination (in the statement of the case) that plaintiff was only allowed to testify to conversations and dealings with J. W. Strong, the trustee. Many years ago this court ruled that the strict letter of the statute, regulating the admissibility of interested testimony where the adverse party was dead, should yield to its reason and spirit, which aimed at placing the parties upon an equality. Rev. St. 1889, § 8918; *Coughlin v. Haussler*, 50 Mo. 126. Since that construction was announced, the statute has been revised and re-enacted without change in the language so construed. We therefore accept that view of it as having received legislative approval by such re-enactment, and as furnishing a proper rule for our guidance. The reason and spirit of the law do not sanction the exclusion of the evidence here in question, even if Strong be regarded as a mere agent of the grantor, Rode. Though the latter was dead, Strong, at the time of the trial, was living and competent. The statute, when given its rational interpretation, does not exclude the evidence of one party to a contract when the transaction on the other part was had with an agent, still living and competent, though the principal (for whom the business was transacted) may be dead. *Ward v. Ward*, 37 Mich. 253. But, as we have already remarked, Strong was no mere agent of Rode. He was trustee of an express trust, and might have sued in his own name to enforce his rights as trustee, and, within the scope of the trust, had power to contract as such as a principal. Having done so, the testimony of Orr, as to dealings with him in that capacity, were admissible, even under the strict letter of the statute.

5. Whether or not the trial court erred in including, in the amount of its finding, the payment, by plaintiff, of a judgment in favor of the state for delinquent taxes on the realty described in the deed of trust to him, is not a proper subject for review, as the attention of the trial court was not called to the subject in any of the reasons assigned for a new trial. No claim of any excessive finding was then made, and consequently none can now be entertained. In civil causes, no exceptions can be taken in this court except such as have been expressly decided by the trial court. Rev. St. 1889, § 2302.

6. Certain of the parties defendant have

(so far as the record before us shows) no interest or estate in the property described in the deed of trust of Strong. The judgment of the trial court should, therefore, have been in their favor, dismissing the petition as to them; but, as they are not necessary parties to the litigation, it is proper for us, in obedience to the plain command of the statutes, not to reverse the judgment for this reason, but to direct it to be amended by striking out their names as parties, and affirming the judgment. Rev. St. 1889, § 2101.¹ For this course there are several precedents in former decisions. *Cruchon v. Brown*, 57 Mo. 38; *Crispen v. Hannovan*, 86 Mo. 160. It is therefore ordered that the names of Silas Woodson, A. D. Green, S. B. Green, and John S. Crosby, defendants, be stricken out, and the cause dismissed as to them, and the judgment of the circuit court be affirmed, the respondents to pay the costs upon this writ of error. All the judges concur.

SLOCUM et al. v. CALDWELL et al.

(Court of Appeals of Kentucky. June 26, 1890.)

MECHANICS' LIENS.

Act Ky., approved March 2, 1869, provides that any person who shall furnish to a previous building any machinery or fixtures, alterations, additions, or repairs, which are capable of being removed from such building without material injury thereto, shall have a lien thereon superior to all others, even though the employer had no right to bind the land on which the building is located for a sufficient estate to satisfy the liens. *Held*, that plaintiffs, who furnished machinery to the lessee of a flour-mill, to enable him to convert it into a roller mill, were entitled, as against one holding a vendor's lien on the land, to remove all such machinery capable of removal without serious injury to the mill, although they did not put the former machinery back in the condition it was before being detached.

Appeal from Louisville chancery court.

"Not to be officially reported."

Stons & Sudduth and *Jas. A. Beattie*, for appellants. *Walter Evans* and *A. E. Wilson*, for appellees.

LEWIS, C. J. In 1882, Hornsby sold to Slocum a lot of land, retaining in the deed therefor a lien for purchase money. Slocum erected on the lot a flour-mill, and in 1886 gave to Hornsby a mortgage on the property to secure \$2,000 borrowed money. In March, 1887, Pollock leased the lot and mill, reserving by terms of the contract right to purchase at a price fixed. After Pollock got possession under the lease, he changed the character of the mill, which had been operated by stones, to what is called a "roller mill," and to that end detached and removed from the building, though not off the lot, all the machinery not necessary or adapted to making flour by

the roller process. It appears that by contract with Pollock, W. E. Caldwell & Co. and the Nordyke & Marmon Company each furnished new machinery which was placed in the building, and used for operating the mill; and, not being paid therefor, each company instituted an action to enforce its alleged lien in pursuance of a statute entitled "An act to provide a mechanic's lien law for the city of Louisville and county of Jefferson," approved March 2, 1869; and thereafter, September 28, 1887, Pollock, without exercising his right to purchase the property, abandoned the lease. The two actions having been consolidated and tried together, Hornsby and Slocum, now appellants, being parties to each, judgment was rendered, in substance, that Hornsby had a superior lien upon the lot of land, together with the flour-mill and all the improvements and machinery thereon, except the machinery and implements furnished by Caldwell & Co., and by the Nordyke & Marmon Company, respectively, and put up and used for operating said roller mill; that the property to which Hornsby had the superior lien be sold to satisfy his debts mentioned against Slocum, and the other property be sold to satisfy the debts of the two companies just mentioned.

Whether that judgment is correct depends upon construction of sections 1 and 6 of the statute referred to, which are as follows: "Section 1. That all persons who shall perform labor, or furnish materials, fixtures, or machinery, for constructing, finishing, altering, adding to, or repairing any house, building, mill, manufactory, or other structure, within the city of Louisville, or county of Jefferson, by or under any employment or contract, express or implied, shall and may have a joint lien upon such house, building, mill, manufactory, or other structure, and upon the interest of the employer in the parcel of land upon which such structure may be situated, and in the previous structure added to, altered, or repaired, to secure the payment of their several demands, which lien shall be prior and superior to all other liens or incumbrances on such house, building, mill, manufactory, or other structure, and the fixtures and machinery so constructed, where the structure is wholly new; and upon any machinery, or fixtures, alterations, additions, or repairs, to a previous building, which are capable of being severed or removed from such previous building without material injury thereto; and shall be prior and superior to all other liens or incumbrances upon the interest of the employer in the lot or parcel of land built upon, and upon any previous structure so altered, repaired, or added to, created after the commencement of constructing the house, building, mill, manufactory, or other structure, or adding to, altering, or repairing a previous structure: provided, that no lien shall so attach for any sum amounting to less than ten dollars." "Sec. 6. The liens herein provided shall be enforced by appropriate orders, judgments,

¹Rev. St. Mo. 1889, § 2101, provides that, "after final judgment rendered in any cause, the court may, in furtherance of justice, and on such terms as may be just, amend, in affirmance of such judgment, any record, pleading, process, entries, returns, or other proceedings, in such cause, by adding or striking out the name of a party, and such judgment shall not be reversed or annulled therefor."

or decrees for the sale of the property on which the lien exists, according to equity usage; and if it shall appear that the employer did not own, or had no right to bind, the land for a sufficient estate to satisfy the liens, then the court may provide for the sale and removal of the house, building, mill machinery, or other structure when it is wholly a new structure, or of the fixtures, machinery, alterations, additions, or repairs upon which the lien exists, so far as the same may or can be removed without material injury to the former structure not owned by the employer, or to rent the same for the benefit of lien claimants, if it shall appear the rents will pay the lien claims in a reasonable time, in cases where the owner of the land or former structures consents to the renting on election given."

It is manifest, operation of that statute was not intended to be regulated or limited by the general rule giving to a mortgagee benefit of improvements made by or for a mortgagor, nor is it material whether the machinery furnished and attached to the mill building by appellees is to be regarded as such fixtures as may not generally be removed by a tenant, or as may not be incumbered with liens to secure payment to those furnishing them; for the statute in express terms provides that any person who shall furnish any machinery or fixtures, alterations, additions, or repairs, to a previous building, which are capable of being severed or removed from such previous building without material injury thereto, shall have a lien thereon prior and superior to all other liens, which may be enforced by a sale and removal thereof, even when it appears the employer did not own nor have a right to bind the land whereon the building is situated for a sufficient estate to satisfy such liens. It is not, therefore, a question of law, but all of fact, depending upon the evidence, whether the machinery furnished by appellees could be severed and removed from the previous building without material injury thereto; and as the chancellor determined that question affirmatively, and was, we think, authorized by the evidence to do so, there was no other alternative under the statute but to direct a sale of the machinery to satisfy the respective liens of appellees.

But is argued for appellants that the phrase "previous building" applies, not merely to the actual structure in the condition it was when the machinery furnished by appellees was put into it, but also to the machinery and appliances used when flour was made by use of buhr stones; and consequently the right to remove the rollers, and other machinery used in connection with them, could not be exercised by or for benefit of appellees, except by putting the former machinery back in the condition it was before being detached. But it seems to us the position cannot be maintained. The statute expressly provides for a lien in favor of a person who may furnish machinery, for not merely constructing,

finishing, adding to, or repairing, but as well for altering, a mill or manufactory which generally, and in such cases as this necessarily, requires previous removal of the old, in order that the new and entirely different machinery may be put into the building or structure. Consequently, while the lien of a vendor or mortgagor may still exist upon materials or machinery which was in the mill or manufactory when it was created, it would not be consistent with the language of the statute, nor with reason, to require the person furnishing new and improved machinery in place of the old, and perhaps obsolete, to deduct any account from the value of his services or materials in good faith rendered or furnished. By the judgment the old machinery and materials, though detached, were directed sold towards satisfying the debts of appellant Hornsby, and that is all he can claim under the statute, the theory of which is that machinery and materials furnished for the purposes mentioned add to value of the realty, benefitting creditors as well as owners, and therefore those who furnish them should be paid therefor. Moreover, whatever cause of complaint Hornsby may have is against Slocum, with whose knowledge and consent Pollock caused the old machinery moved, and he cannot prevent appellees, who afterwards and in good faith furnished the new machinery, recovering compensation therefor. It appears Pollock, in part payment of machinery furnished, sold a pair of buhr stones to appellee the Nordyke & Marmion Company, and Slocum seeks to deduct the value thereof from the claim of the company. But as Hornsby, who alone, if any party, would have a right to complain, asks no relief on that account, we think the counter-claim of Slocum was properly dismissed.

WARD v. SMALL'S ADM'R.

(Court of Appeals of Kentucky. May 15, 1890.)

DEEDS—DELIVERY AND ACCEPTANCE—EVIDENCE—LANDLORD AND TENANT.

1. A deed was delivered by the grantor to a third person, who had it recorded, but who had no express authority to receive it. He was not grantee's general agent, though he had been attending to various matters for him, as the grantor knew. He testified that it might have been two or ten years before he received the deed since he had transacted business for the grantee, and that, though he had no communication with the grantee in regard to the deed, he thought he had authority to receive it. The grantee subsequently demanded rent for the land. *Held*, that the delivery and acceptance were sufficient.

2. Where a person takes possession of land as "agent," without disclosing any principal, and afterwards applies to the owner to purchase the land, telling him he had been renting it out, such a privacy arises between him and the owner as will entitle the latter to bring *assumpsit* against him for the rents afterwards accruing, and collected by him.

Appeal from circuit court, Henderson county.

"To be officially reported."

John Young Brown and Vance & Vance,

for appellant. *R. H. Cunningham*, for appellee.

HOLT, J. The petition in this case avers, in substance, that, R. A. Small being the owner of a certain tract of land under a deed made to him in 1875 by W. G. Taylor, the appellant, Thomas E. Ward, being aware of such ownership, took possession of it, and assuming to act for Small, and representing himself as his agent, rented it out for the years from 1882 to 1886, inclusive; that its rental value was \$100 per year; that Ward, by himself and tenants, used it during the years named, he promising Small to pay him the rent he received, but failed to do so, and wrongfully transferred the rent-bond for 1886, as well as surrendered the possession of the land to another party. It appears that for the first three years the rent was paid in improvements upon the land. The rent received by Ward for 1885 was \$50, and the rental bond for 1886, disposed of by him, was for \$60. The jury returned a verdict for these two sums only. The two grounds mainly relied upon for a reversal are: *First*, that it was not shown that Small was the owner of the land, because he never accepted the deed from Taylor; *second*, that Ward was not the tenant of Small, and therefore could not be sued by him in *assumpsit* for the use of the premises.

It is requisite to every deed that it be delivered, and also that it be accepted. Kent says: "Delivery is another incident essential to the due execution of a deed, for it takes effect only from delivery." 4 Kent, Comm. 454. This does not mean that there must be a manual delivery to the grantee. It may be delivered to his agent; also a delivery to the recording officer or a stranger will be valid, and the acceptance by the grantee presumed from his conduct, without an express acceptance. The delivery and acceptance may be by doing something and saying nothing, or by speech without act, or by both. They may, of course, be found to have taken place from conduct alone. The conveyance is not binding, however, upon the grantee, unless he has in some way assented to it. He cannot be made the purchaser without his knowledge or consent. Its acceptance, especially as it is for his benefit, may be presumed from his conduct; but this presumption is not a conclusive one, and it in itself shows that an acceptance is essential. Mr. Washburn says: "The better opinion seems to be that no deed can take effect as having been delivered until such act of delivery has been assented to by the grantee, and he shall have done something equivalent to an actual acceptance of it." 8 Washb. Real Prop. (5th Ed.)* 580. The prevailing doctrine appears to be that a deed, to become effective, must be either delivered to the grantee or his agent, or such circumstances must be shown as will raise a reasonable presumption of its acceptance by him. He certainly may decline to accept it prior to the doing of an act equivalent to an accept-

ance, although, by legal fiction, the presumption of an actual acceptance by him exists for his benefit, as against the grantor and his heirs or devisees, from the time the grantor delivers it to any one for the benefit of the grantee. These views, we think, are supported by many cases, among which are: *Jackson v. Phipps*, 12 Johns. 418; *Com. v. Jackson*, 10 Bush. 424; *Bell v. Bank*, 11 Bush, 84. In this instance it appears that the deed was delivered by Taylor to one Atkinson, who had no express authority from Small to receive it, and was not empowered to act as his general agent. He had, however, for many years been attending to various matters for Small, who lived remotely; and of this Taylor was aware. Atkinson testifies that he cannot say how long before the reception of the deed he had attended to anything for Small,—says it may have been two, and it may have been ten, years; and, although he had no communication with Small as to the deed, yet he would not have received it, and had it recorded, as he did, unless he had thought he had the authority to do so. We are inclined to the opinion that he was so far Small's agent as to render a delivery of the deed to him for Small effective; but, even if not, yet Small certainly knew of it subsequently, and ratified it. The appellant himself testifies that prior to the year 1885 he applied to him to purchase the land, telling him he had been renting it out, and that Small declined to confer with him upon the subject, saying he had not authorized the renting. Moreover, before the bringing of this suit, he demanded the rents of the appellant. All this shows plainly that Small knew of the existence of the deed, and had accepted it. It is also proven that Taylor, prior to his death, told at least two parties that he had sold the land to Small.

It is true that *assumpsit* does not lie for the use and occupation of premises unless the relation of landlord and tenant exists by virtue of express or implied contract. Waiving the question whether this is such an action, or merely one to recover from the appellant money collected by him for Small, yet the verdict only embraces the rent for the years 1885 and 1886, and the appellant knew of the existence of the Taylor deed prior to 1885, and in person informed Small that he had been renting the land, and applied to him to buy it. He informed the owner of what he had been doing with his land, and tried to purchase it from him. Most assuredly, a privity then arose between them; and the appellant, from that time at least, controlled the land as belonging to Small, and by his sufferance. This being so, even the action of *assumpsit* for use and occupation would lie against the appellant. He took possession of the land as agent. He rented it at the outset, styling himself as "agent," but without having his principal in the lease. It is somewhat curious that he is unable to say as agent for whom, but it is evident that at

least from some time prior to 1885 he recognized Small as the owner of the land. Even if one takes possession of land as agent, and uses or controls it, the relation of landlord and tenant arises. *Farrow's Heirs v. Edmundson*, 4 B. Mon. 605. Upon the appellant's own evidence, we think it apparent that he was holding the land for Small, and he has by the verdict been made liable only for what he actually rented the land for after a time when he unquestionably recognized Small's claim to it. Certainly, the judgment is as favorable to him as he had any good reason to expect.

The instructions given to the jury conformed to the views above expressed. Those asked by the appellant, so far as they embraced correctly the law of the case, were comprehended by those given by the court.

There is a cross-appeal. The ground of it does not clearly appear. The appellee excepted to the rejection of certain testimony offered by him, and we infer the object of the cross-appeal is to test the correctness of the ruling of the lower court in this respect. The conclusion we have reached as to the main appeal renders it unnecessary to consider the cross-appeal, and it is therefore dismissed. Judgment affirmed.

McCUTCHEN et al. v. CALDWELL et al.

(Court of Appeals of Kentucky. June 7, 1890.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES.

1. Under Gen. St. Ky. c. 44, art. 2, § 1, providing that every mortgage made in contemplation of insolvency, with the design to prefer one or more creditors, shall inure to the benefit of all the creditors of the mortgagor, but further providing that such statute shall not affect any mortgage made in good faith to secure any debt created simultaneously with such mortgage, a mortgage given by an insolvent to secure a debt, a portion of which is created at the same time, is a valid security for such portion, though the residue of the debt is a pre-existing one.

2. But a mortgage given to secure a pre-existing debt, in pursuance of a verbal agreement made at the time of the creation of the debt months before, is not within the exception of the statute.

Appeal from circuit court, Logan county.
"Not to be officially reported."

Gen. St. Ky. c. 44, art. 2, § 1, provides that every sale, mortgage, or assignment made by a debtor in contemplation of insolvency, and with the design to prefer one or more creditors to the exclusion of others, shall operate (with a certain exception noted in the opinion) as an assignment of all the property of the debtor, and shall inure to the benefit of all his creditors.

John S. Rhea, E. W. Hines, and S. R. Creadson, for appellants. *Thos. H. Hines and Browder & Edwards*, for appellees.

Lewis, C. J. This appeal is from a judgment rendered in two actions consolidated and tried together. One of them was instituted October 11, 1886, by F. Raltz and others, creditors of W. H. Whitaker, against parties named to whom he had executed mortgages, alleged in the petition to have

been made by him in contemplation of insolvency, and with design to prefer the mortgagees, to the exclusion in whole or part of others. The other was brought October 12, 1886, by J. B., M. L. & P. B. Whitaker against W. H. Whitaker, G. S. Hardy, (to whom a deed of assignment for benefit of creditors was made October 5, 1886,) and others, in which the plaintiffs asked for enforcement of liens existing in virtue of two mortgages executed to them by W. H. Whitaker, September 30 and October 4, 1886, for settlement of the transactions of Hardy, trustee, and sale and distribution of proceeds of the property of the debtor according to rights of parties. By the judgment two claims were allowed to attorneys,—one of them for service in writing the deed of trust to Hardy, and the other for services rendered him in the two actions. The two mortgages executed to R. B., M. L. & P. B. Whitaker were each adjudged to have been made in violation of section 1, art. 2, c. 44, Gen. St.; that for the same reason no lien existed in favor of Evans' administrator, as to other creditors, in virtue of the mortgage made to him October 4, 1886, except to the extent of \$200 of the debt of \$500 attempted thereby to be secured. It was further adjudged that by the mortgage made September 30, 1886, to R. H. Caldwell & Son, they acquired a lien on the tract of land mentioned, subordinate only to a mortgage lien on the same land created in 1885 in favor of Evans' administrator for \$2,171. Hardy, trustee, was not made a party to the action of F. Raltz and others. Consequently the chancellor did not formally adjudge the deed of assignment to be void and of no effect, as prayed by them, nor was the trustee deprived of possession of the property conveyed to him, though he was made subject to the jurisdiction and orders of the court. It thus resulted that the lower court was not authorized to wholly reject the claims mentioned, nor can this court reverse the judgment as to them, as there is nothing to show them unreasonable in amount. It appears that \$200 of the \$500 for which W. H. Whitaker gave to Evans' administrator his note on October 4th was money that day loaned, the residue being a pre-existing debt. It is expressly provided that the statute under consideration shall not vitiate or affect a mortgage made in good faith to secure a debt or liability created simultaneously with such mortgage, if the same be lodged for record within 30 days after its execution. And in *Farmer v. Hawkins*, 79 Ky. 184, it was held that, although a mortgage may be withdrawn article 2, c. 44, as to such part of a debt as previously existed, yet it is a security for so much as may be created simultaneously. The same doctrine was, in substance, settled in *Whitaker v. Garnett*, 3 Bush, 402. The chancellor did not, therefore, err in respect to the mortgage to Evans' administrator.

March 27, 1886, W. H. Whitaker purchased of R. H. Caldwell & Son mules at the price of \$1,800, for which he gave his note,

payable in six months. According to the statements of Caldwell & Son, they did not then exact of Whitaker mortgage security, which he was willing and able to give, because they regarded the debt safe without, and in fact he was at the time solvent; for, as shown by an exhibit he made, his assets were, in the language of R. H. Caldwell, twice as much as his debts. But they plead, and also testify, to a verbal agreement then made, that he was to give to them a mortgage on demand. No demand was made for execution of the mortgage until September 30th, three days after the note became due, and the natural conclusion is that it was then done because R. H. Caldwell & Son had become convinced of the fact, about which there is now no controversy, their debt was insecure, and in danger of being wholly or partially lost. Of the three other mortgages executed September 30th and October 4th, two were adjudged by the lower court wholly within operation of the statute, and the third partially so; of which action none of the mortgagees have complained, nor under the circumstances can justly complain; for we think it manifest those mortgages were made by W. H. Whitaker in contemplation of insolvency, and with design to prefer. There is nothing to save the mortgage to Caldwell & Son from the same fate, if the verbal agreement mentioned be not sufficient for the purpose. By its express terms, the only condition in which operation of the statute can be limited or restricted is where a mortgage is made in good faith to secure a debt or liability created simultaneously with such mortgage. And it seems to us virtue cannot be imparted to a mortgage made months after creation of the debt, so as to affect other creditors, without violating the express language used, and defeating the main purpose of the statute. For what protection can be afforded by it to other creditors of a debtor who has transferred his property in contemplation of insolvency, and with design to prefer, if vendees and mortgagees be allowed to found superior equitable liens upon the property sold or mortgaged, in virtue of unenforceable verbal agreements, alleged to have been made months before, and never known or attempted to be carried out until the debtor becomes insolvent? The case of *Brooks v. Staton's Adm'r*, 79 Ky. 174, was where B. W. & Co., commission merchants, and as such dealers in leaf tobacco, advanced to W. a certain sum of money, upon an agreement that W. would purchase tobacco, and ship it to B. W. & Co., who were to sell the same on commission, and out of the proceeds indemnify themselves for advances. It was held that from the time the advances were made there was an inchoate right to the property on which they were made, which right became complete when the creditors, with reasonable diligence, reduced it to possession before other equities intervened. In that case, the agreement between the parties, being in writing, was definite as to the property, as well as money advanced,

unconditional and enforceable. In this case it was not contemplated by the parties that the mules were to be retained by Whitaker, to await the demand of Caldwell & Son for a mortgage on them, but he had the right to sell and dispose of them, as well as the land which he subsequently mortgaged; and, besides, the agreement was not enforceable, but was executed by Whitaker voluntarily, and with the design denounced by the statute, and preference was thereby obtained by Caldwell & Son, which they did not previously have, nor could coerce from Whitaker. In the case of *James v. Sigler*, 7 S. W. Rep. 632, it was held that, although a debt was created upon the faith of the debtor's promise to transfer a certain claim to the creditor, yet, as the promise could not have been specifically enforced, compliance after the debt was created was an act of preference, and operated as an assignment for benefit of all the creditors. That case is, we think, decisive of the question before us, and, in our opinion, the mortgage to Caldwell & Son operated in the same way, and the chancellor erred in sustaining it. Wherefore the judgment is affirmed, except as to the mortgage to Caldwell & Son, as to which it is reversed and remanded for further proceedings consistent with this opinion.

DANT v. HEAD.

(Court of Appeals of Kentucky. June 10, 1890.)

STATUTE OF FRAUDS—TRADE-MARKS—DECEIT.

1. Gen. St. Ky. c. 23, § 1, providing that no actions shall be brought on oral agreements not to be performed within one year from the making thereof, applies only to agreements not to be performed by either party within a year, and therefore such statute cannot be set up as a defense to an action for the second annual installment of the purchase price of certain personality, the use of which as his property the defendant has had from the beginning.

2. A trade-mark affixed to articles manufactured at a particular place may be lawfully sold with the establishment, though it consists simply of the name of the vendor.

3. In an action for the purchase price of a distiller's brand, an answer setting up that defendant purchased on the faith of plaintiff's representation that the brand was of good repute, and that plaintiff fraudulently concealed from defendant the fact that he had destroyed the value of the brand by the manufacture of a large quantity of inferior whisky, states a good defense.

4. Under Civil Code Ky. § 135, providing that if a plaintiff, having a lien on property for a debt due and a debt not due, state both claims in his petition, he may, upon a suggestion of record that one of them has become due *pendente lite*, have judgment for a sale of the property therefor, a plaintiff, in an action for installments of the purchase price of certain personality, cannot have judgment for installments becoming due pending the action on a mere suggestion of record, where there is no lien on property to secure such installments.

Appeal from circuit court, Marion county.
"To be officially reported."

Rountree & Lisle, for appellant. *Harri-son & Relden*, for appellee.

LEWIS, C. J. September 12, 1881, appellee, in consideration of \$4,000, sold and conveyed to appellant his interest in a tract of

land leased jointly with B. F. Bryant from R. C. O'Bryan for 10 years, beginning June 1, 1879, upon which was a distillery. The deed, in addition to the contract for sale of the realty, contained the following: "It is hereby covenanted and agreed that said F. M. Head, party of the first part, for and in consideration of one hundred dollars per annum payable at the end of each year during the time of the present lease from R. C. O'Bryan, which is eight years from June 30, 1881, sells, conveys, and confirms unto said J. B. Dant, his heirs, executors, and assigns, all his right, title, and interest in or to a certain distiller's brand known to the trade as 'F. M. Head & Co.,' to have and to hold all and singular the above-mentioned premises, together with all and singular the appurtenances," etc. November 28, 1883, appellee instituted this action for judgment on the second installment of purchase price of the brand mentioned, which became due September 12, 1883, the first having been paid, and judgment also upon the remaining six installments, to take effect as they respectively become due. The judgment rendered was for recovery of the second installment, together with interest, and that defendant be required to show cause by the next term of court why he should not be adjudged to pay three other installments which the plaintiff suggested to the court had then become due, and remained unpaid. Power to enforce payment of the other installments from time to time was reserved.

Section 135, Civil Code, provides: "A party may be allowed, on motion, to file a supplemental pleading alleging material facts occurring after the filing of the former pleading; but if a plaintiff, having a lien for a debt due and a debt not due upon property which he seeks to subject, state both claims in his petition, he may, upon a suggestion of record that one of them has become due *pendente lite*, have judgment for a sale of the property therefor." A plaintiff may under that section, by supplemental pleading, allege another or other notes of the same series, and given for the same consideration, as the one sued on, have become due during pendency of the action, and have judgment therefor. But it does not seem to us a mere suggestion on record of such fact was intended to authorize judgment on a note not due when the action was commenced, except when a lien on property to secure it exists. It thus results the only judgment appellee was entitled to as the record stands, if any at all, was for amount and interest of the installment sued on.

The main defense set up in the answer, to which a general demurrer was sustained, is that the agreement sued on is not enforceable, because within operation of section 1, c. 22, Gen. St., as follows: "No action shall be brought to charge any person * * * upon any agreement which is not to be performed within one year from the making thereof, unless * * * agreement * * * or

some memorandum or note thereof be in writing, and signed by the party to be charged therewith, or by his authorized agent. But the consideration need not be expressed in writing. It may be proved, when necessary, or disproved, by parol or other evidence." It was definitely settled by this court as early as *Roberts v. Tennell*, 3 T. B. Mon. 247, that a parol agreement to pay money, though not to be done within a year, is not void, if the consideration be legal. In that case a distress warrant for rent payable in two years was issued, and the court said: "On a verbal lease for more than a year no action will lie; but, as the statute has not declared the lease void, any use may be made of the lease by either party, except that of maintaining an action upon it. The lessee, therefore, in case he enters in virtue of the lease, may use it for the purpose of showing he is no trespasser; and, after he has enjoyed the leased premises for the term, he will be liable for the rent, not upon the express contract, but upon the contract implied by law from his use and occupation of the premises; and in such an action either party, we apprehend, may avail himself of the express contract to show the amount of rent to be recovered." In the same case it was held an action cannot be maintained upon an agreement that the borrower shall repay at the end of two years money loaned, because, by the terms of the agreement, it is not to be performed within a year from the making thereof. But it was said: "To give to the statute the effect of rendering the contract void, and thereby utterly preventing the lender from recovering the money lent, or, if he be allowed to recover the money upon the implied contract resulting from the loan, to give to the statute the effect of not permitting the borrower to prevent the recovery of the money lent before it is due, or of a higher rate of interest than is due by the terms of the contract, would be extending the operation of the statute beyond its letter, and, instead of making the statute the means of preventing frauds, it would be converting it into an instrument of fraud and injustice. It most certainly could not be said to be demanded by the reason and spirit of the statute."

In *Berry v. Graddy*, 1 Metc. (Ky.) 553, by a verbal agreement, Belt, the decedent, induced appellee, who had married his niece, to abandon his determination to remove from the state, and incur expense of purchasing a farm, by verbally agreeing to pay a certain amount of the price in three annual installments. Graddy was to, and did, perform his part of the agreement within a year; and his right as administrator to credit for the amount was held to be unquestionable, according to the doctrine settled in *Roberts v. Tennell*. But although it was then said to have been decided in England and some of the American courts that in such case the statute of frauds does not apply, and an action will lie for non-performance of the agree-

ment by the other party, it was not deemed necessary to decide whether or not the doctrine could be sustained on principle; the right of Graddy to the amount claimed being placed on the common-law right of retainer for the debt due under the verbal contract.

In *Montague v. Garnett*, 3 Bush, 298, it was held there was "a distinction between contracts executed, in part or whole, and one wholly to be executed by both parties." But the right of the plaintiff to recover for the pork and corn loaned to the defendant was based alone upon the implied contract to return or pay for the articles, simply because the agreement was not to be performed within a year, although the statute was then said to have been "never designed to enable one man to get the property of another by virtue of a parol contract, and then refuse to either execute the contract or return the property."

It now seems to us the statute was intended and does properly apply only to an agreement that is not to be performed by either party within a year, but not to one which is to be or has been performed by one or either of them within such period. And that construction has been adopted elsewhere. *Railroad Co. v. English*, 16 Pac. Rep. 82; *McClellan v. Sanford*, 26 Wis. 595; *Curtis v. Sage*, 35 Ill. 22; *Berry v. Doremus*, 30 N. J. Law, 408; *Haugh v. Blythe*, 20 Ind. 24; *Smalley v. Greene*, 52 Iowa, 241, 8 N. W. Rep. 78; *Blanding v. Sargent*, 33 N. H. 239. For if the practical effect and operation of the statute is, as has been uniformly held by this court, in every case where one party has performed an agreement within a year, to hold the other party liable on such agreement, although he is not to perform within a year, such should be construed and held to be the meaning and import of the language used. In fact, the statute properly applies to agreements that are wholly executory; and one which has been or is to be performed by one of the parties within a year is to that extent executed, and cannot with propriety be called an agreement not to be performed within a year. In this case the agreement is set out in the deed, which was accepted by appellant, and recorded. The distiller's brand, which is the consideration for the amount he agreed to pay, was received and used, and is still his property; and to permit him to evade payment under cover of the statute would serve to wholly pervert the purpose of the statute without any reason.

The defense that the distiller's brand was not a subject of sale and transfer, and therefore formed no consideration for the alleged agreement, because the use thereof by another than F. M. Head & Co. was deceptive, is not valid; for it is well settled that a trademark affixed to articles manufactured at a particular place may be lawfully sold and transferred with the establishment. But it is stated in the answer that appellee fraudulently represented the distiller's brand to be of good repute, and it was purchased by appellant upon faith of that representation, al-

though appellee had by the manufacture of a large quantity of inferior whisky impaired and destroyed the value of the brand, which fact he fraudulently concealed from appellant. It seems to us that allegation, if true, constitutes a defense, and it was error to sustain the demurrer to the answer, and for that the judgment must be reversed for further proceedings consistent with this opinion.

RACHFORD v. RACHFORD *et al.*

(*Court of Appeals of Kentucky. June 12, 1890.*)
EXECUTORS AND ADMINISTRATORS—ACTIONS—PARTIES.

The administrator, and not the heirs, of a deceased grantor of land, is the proper person to bring suit for the unpaid purchase money.

Appeal from circuit court, Pendleton county.

"Not to be officially reported."

C. H. Lee, for appellant. L. T. Applegate, for appellees.

PRYOR, J. Pierce Rachford died, leaving several children; and his surviving children, except Philip Rachford, brought suit against Philip to have the land upon which Philip lived partitioned between all the children, alleging that it belonged to their father. Philip made defense, alleging that he had purchased the land of his father, and exhibited the latter's bond for title. This, therefore, ended the cause of action. The heirs then filed an amended petition seeking to recover the purchase money. The action for the recovery of the money should have been instituted by the administrator, and a recovery by the heirs would be no bar to an action by the administrator or by creditors. The father of these children died in the year 1884 or 1885, and there is no reason why they should be allowed to sue on these notes, and partition the recovery between the children. Judgment reversed, and remanded, with directions to dismiss the petition without prejudice.

WILLIAMS *et al.* v. MURRELL'S ADM'R.

(*Court of Appeals of Kentucky. June 14, 1890.*)

APPEAL—ATTORNEY'S FEES.

Where there is evidence to sustain a finding as to a balance due for services as attorney, except as to a charge against them of the amount of a judgment, which does not appear to have been collected, the cause will be reversed as to that item alone.

Appeal from circuit court, Daviess county.

"Not to be officially reported."

W. P. D. Bush, G. W. Jolly, and R. A. Miller, for appellants. Weir, Weir & Walker, C. U. McElroy, and J. B. Grider, for appellee.

PRYOR, J. The record in this case is so voluminous, by reason of extended pleadings, and a mass of record evidence that has no relevancy to a plain issue, that the mind becomes confused in its consideration, and at the same time hours of unnecessary reading is required. The action was at law by the

administrators of Sallie D. Murrell against Williams and Brown, to recover of them \$221.30 costs that as their attorneys they had collected for the administrators, and the further sum of \$2,600, moneys collected by them as their attorneys on a claim placed in their hands against one Stirman; that, as their attorneys, they collected this money, and on demand made, etc., refused to pay it over. Another count, to the effect that the claim against Stirman was for \$3,217, and the attorneys, after judgment and without any authority from them, had compromised the claim by receiving the \$2,600 in full satisfaction of the judgment. They seek to make them liable for the difference. This is the claim of the plaintiffs. The defendants (now appellants) deny that they collected these costs for the plaintiffs, or that they were employed by them as attorneys to prosecute the claim against Stirman, but that one Brown, who was the heir and only child of the intestate, Mrs. Murrell, employed them, and in the course of the employment it was necessary to have administration on Mrs. Murrell's estate, and these plaintiffs merely administered, that their names might be used for the benefit of the heir at law, Brown. That they had settled with Brown, or made a contract fixing their fees, in which the plaintiffs had no interest, nor have they any interest in the sums recovered. The sole question was whether the administrators had employed these attorneys or Brown, and, if employed by the plaintiffs as administrators, what their services were worth, as no contract had been made in reference to the fees. The pleadings on the issues cover 60 or 70 pages, and contain the history of much important litigation in the Henderson circuit court for many years past; the records of which are also filed as a part of the present case. The case was transferred to equity, over the objections of the plaintiff, with the reservation that the questions of fact should be submitted to the jury. Upon special findings, it appears that the jury ascertained that the attorneys had been employed by the administrators of Mrs. Murrell. The jury also fixed the fees of counsel entirely at variance with the testimony, and their verdict was set aside. On the next trial the court assumed, over the objections of the plaintiffs, to determine the questions of fact, and finding, as the jury did, against the defendants, on the issues of fact, they have appealed. The important inquiry in the case was to ascertain whether the defendants were employed by the administrators, or by Brown, and, as both the jury and the chancellor have determined that they were employed by the administrators, and the testimony authorizing the finding, this court will not disturb it. The proof really conduces to show an employment by both Brown and the administrators, not a joint, but a several, employment; for the administrators did not agree to pay a sum equal to 50 per cent. of the recovery as the fee. The administrators, there-

fore, had the right to this money. Its collection was conceded, and the attorneys, the defendants, in settling with Brown, fixed the fee at \$2,628.50. The fees were in cases involving large sums of money, and in which the estate of Mrs. Murrell was greatly interested, and really the only question before us is as to the value of the services rendered by the appellants. This question, like the one in regard to the employment, is one of fact, and the court's finding would be sustained, but for a credit of an unpaid judgment of about \$700 against one Scott as administrator of Dugan. It does not appear that the attorneys have collected this money, or that on a settlement of Dugan's estate Brown would be entitled to it. The administrator of Dugan may have converted this sum to his own use, or may have wrongfully appropriated it to Brown. Besides, there is no claim in this suit for that money, and, if the appellees claim the benefit of the settlement with Brown by these attorneys, they cannot accept so much as is to their benefit, and reject that to their disadvantage. It seems to us the question in this case is, what moneys the appellants have received and failed to pay over that these administrators (appellees) were entitled to. The judgment, charging or crediting the appellants herein for services by this judgment, being erroneous, is reversed for that reason alone, and remanded, that the judgment be overruled to that extent, and no further. As this case is in equity at the defendant's instance, if they have received the amount of the judgment it should be charged to them, if a proper case is made out on an amended pleading. This, however, is the only issue to be made. Cross-appeal affirmed.

LYONS v. HODGEN *et al.*

(Court of Appeals of Kentucky. June 17, 1890.)
GAMBLING—RECOVERY OF MONEY LOST—CONTRACTS.

Contracts between customers and commission merchants or stock speculators, which consist of bets and wagers on the future rise and fall in the price of petroleum, grain, provisions, and stocks, by means of purchases or sales which do not contemplate a delivery, followed by periodical settlements of differences between the agreed and the market prices, are within the purview of Gen. St. Ky. c. 47, art. 1, which provides that gambling contracts are void, and money or property lost thereunder may be recovered.

Appeal from Louisville law and equity court.

"To be officially reported."

D. M. Rodman and Brown, Humphrey & Davis, for appellant. *W. W. Thum and Rozel Weissinger*, for appellees.

LEWIS, C. J. Appellant brought this action to recover of appellees \$1,600 alleged in his petition to have been lost and paid by him, and won and received by them, in sums of more than \$5 at any one time, between January, 1884, and January, 1886, in bets and wagers between him and them upon the future rise and fall in price of petroleum,

grain, provisions, and stocks; which bets and wagers were determined, and settlements thereof made, according to difference in each case, less commissions charged by them, between the contract price at time of a deal and market price on the day for delivery of the property, which, however, was not nor intended to be delivered. It is further stated that appellees, during the period mentioned, were engaged in the city of Louisville, under name of the "Louisville Cotton, Grain & Provision Exchange," in the business of gaming, speculating, and wagering for money upon fluctuations of prices of the articles mentioned, none of which were actually sold and delivered, and while so engaged they won and received from appellant in the manner mentioned the amount sued for.

To the petition a general demurrer was sustained, and whether properly done depends upon the true construction and meaning of article 1, c. 47, Gen. St., the sections of which relating immediately to the question are the following: "Section 1. Every contract, conveyance, transfer, or assurance for the consideration, in whole or in part, of money, property, or other thing won, lost, or bet at any game, sport, pastime, or wager, or for the consideration of money, property, or other thing lent or advanced * * * at the time of any betting, gaming, or wagering, to a person then actually engaged in betting, gaming, or wagering, shall be void. Sec. 2. If any person shall lose to another at one time or within any twenty-four hours five dollars or more, or property or other thing of that value, and shall pay, transfer, or deliver the same, such loser, or any creditor of his, may recover the same, or the value thereof, from the winner, or any transferee of the winner having notice of the consideration, by suit brought within five years after the payment, transfer, or delivery. Recovery may be had against the winner although the payment, transfer, or delivery was made to his indorsee, assignee, or transferee; and if the conveyance or transfer were of real estate, or the right thereto, in violation of the first section of this chapter, the heirs of the loser may recover it back by suit brought within two years after his death, unless it shall have been passed to a purchaser in good faith, for valuable consideration, without notice." Section 3 authorizes an action in equity for discovery and relief by such loser or his creditor, or the persons designated in the preceding section; "but, when so obtained, the winner shall be discharged from all penalty and forfeiture for having won the money or other thing which, or the value of which, is so recovered back." Section 4 empowers any other person to sue the winner, and recover treble the amount or value of money or thing lost, "if such loser or his creditors do not sue * * * within six months after its payment or delivery." Section 5 provides for recovery from a "stakeholder of any money or other thing that may be staked on any bet or wager." And succeeding sections

of the same article provide fines, penalties, and forfeitures where certain designated machines and contrivances used for betting are set up and kept; for fine of a person who invites, persuades, or induces another to visit any place where gaming is carried on, and recovery from such person by the loser or his creditor of what may be lost in gaming at such place; and specific modes for punishing offenders and suppressing such games. Article 2 relates alone to betting on elections, and provision is made not only for fines, but also for forfeiture to the commonwealth of the money or other thing so bet and received.

Although section 1, art. 1, seems to apply to executory contracts, the consideration of which, in whole or in part, is money or property won, lost, or bet at some one of the specified forms of gaming, and therefore, independent of the statute, void and unenforceable, it must nevertheless be taken and considered in connection with all other parts of the chapter, in order to definitely and certainly ascertain and carry into effect the intention of the legislature; for, as each part relates to the subject of gaming, the inference is the entire chapter "was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions." That policy, as clearly indicated, is to not only punish by fines and forfeitures for the offense of setting up and keeping certain designated games, which, by an act passed subsequent to adoption of the General Statutes, was made a felony, but to give to the loser, or his heirs and creditors, the right to recover from the winner money and property bet and lost in any game within purview of the chapter; but if the right to recover given by section 2, under which this action was brought, be decided, as is contended, not to relate to money lost in any one of the modes described in section 1, it is utterly without value or meaning. It is therefore both a legitimate and decisive inquiry in this case whether the process by which appellant, as alleged, lost to appellees the money sued for, can be properly denominated a "wager,"—not, we think, being either a game, sport, or pastime, according to common and approved usage of those terms; and, if it can be fairly and legally thus classified, appellant has *prima facie* a cause of action.

In *Smith v. Telegraph Co.*, 84 Ky. 664, 2 S. W. Rep. 483, this court used the following language in reference to parties engaged in the precise character of business described in appellant's petition: "They merely wagered on the market price of the commodity at some specified time in the future. A mere statement of the character of business done by * * * [them] shows it to be a species of gambling as well defined and as reprehensible as that of keeping a faro-bank or a dice-machine, and is therefore illegal, and contrary to public policy." In *Beadles v. McElrath*, 85 Ky. 280, 3 S. W. Rep. 152, it was held a contract in form one for sale and fut-

ure delivery of personal property, but made with no intention to deliver, but that, instead, the seller should pay or receive the difference between the contract price and market price on the day stipulated for delivery, is a mere wager, and cannot be enforced by either party. The same ruling was in substance made in *Sawyer v. Taggart*, 14 Bush, 727; and so has the peculiar business in question been characterized and denounced by courts generally elsewhere. It would therefore seem this court cannot now consistently decide otherwise than that the process by which appellant lost, and appellees won and received, the money in contest, was, in the meaning of the statute, a wager, and, being so, the right to recover it exists under section 2, art. 1.

It is, however, contended that the mode by which the money in question was bet, won, and lost is not within the purview of chapter 47, because—*First*, it had not been contrived, nor was known to the legislature, in 1852, when the statute as it now exists was first embodied in the Revised Statutes; *second*, it is not comprehended by the language used in section 2. Whether it was known or devised as early as 1852 does not seem to us at all material; for the policy of the legislature was then, as it is now, to give to a loser right to recover from the winner money or property "bet and lost at any game, sport, pastime, or wager," no matter by what particular process or contrivance it might then or thereafter be done. It was the vice of gaming, and its baleful consequences, intended by the statute to denounce and provide against; and whatever mode then used, or has since been devised, which may be correctly denominated either a game, sport, pastime, or wager must be regarded as then and now in contemplation of the legislature. It seems to us just as logical to say that the business or occupation in question is not against public policy because not known or practiced in 1852, as that for the same reason a winner thereby may hold to his ill-gotten gains, or enforce his contract for payment of losses incurred by his dupe; for, if that form of gambling is not within the operation of the statute, no obstacle to recovery by a winner what may be lost by his customer exists at all. The language used in section 3 of the act of 1798, which gave right of recovery to the loser at any game is that "if any person, * * * at any time hereafter, within the space of twenty-four hours, by playing at any game, * * * shall lose," etc. That provision was evidently made with reference to money lost at cards or other like game, and would not be applicable to a wager of the character we are considering. But the language used in section 2, art. 1, c. 47, Gen. St., is: "If any person shall lose to another at one time, or within any twenty-four hours, five dollars or more," etc. It does not, in our opinion, make any difference when the bet or wager may be made, or how long it be pending and undetermined; but, when there is lost at a wager

as much as five dollars at one time, the right of the loser to recover it from the winner exists, and he may sue therefor, or for the aggregate amount so lost during a given period. We think a cause of action was stated in the petition, and it was error to sustain the demurrer: wherefore the judgment is reversed, and cause remanded for proceedings according with this opinion.

OWINGS v. TUCKER.

(Court of Appeals of Kentucky. June 19, 1890.)

DEED—ACCEPTANCE.

A father conveyed land to his children jointly. He afterwards canceled the conveyance, and divided the land among them, but conveying a life-estate only to his son H., with remainder to his children. At the time of the first conveyance H. was a minor, and he never assented thereto. Held, that H. had no title under the first deed, and hence the only interest in the land that could be sold at the suit of his creditors was the life-estate.

Appeal from circuit court, Montgomery county.

"Not to be officially reported."

Wood & Day and *Turner & Son*, for appellant. *Wm. H. Holt* and *H. L. Stone*, for appellee.

BENNETT, J. In 1853, David L. Jones deeded jointly to his children, as a gift, his home tract of land, containing 475 acres, reserving the right of maintenance out of the land. H. L. Jones was an infant son of the donor, and was one of the donees. In 1859, David L. Jones divided this land between said children, and made each a deed to his part, deducting previous advancements from his interest. David L. Jones conveyed by deed the part designed for H. L. Jones to him for life, remainder to his children. Several years thereafter the appellant caused the life-interest of H. L. Jones in this land to be sold by the sheriff, and he purchased it, and received a deed for it, and took the possession of it under said deed, and so held the possession for several years; when he discovered, as he says, that David L. Jones had, in 1853, conveyed to H. L. Jones an undivided fifth interest in said tract of land in fee, which he had sold under another execution to satisfy the remainder of the debt, existing after the sale of said life-interest. Did H. L. Jones acquire title under the deed of 1853? Certainly not. The case of *Davenport v. Prewett*, 9 B. Mon. 98, 99, etc., upon which the appellant relies, says that, in order to make a valid conveyance, there must be both a grantor and grantee, and, if the grant is beneficial to the grantee, it may be presumed that he has accepted; and if, from the nature of the grant, this presumption does not arise, an acceptance of the grant must be otherwise shown, else there is no grant. And, if a grant is made to an adult, without his knowledge or consent, it is no grant, because he cannot be made a grantee without his knowledge and consent; and when the knowledge is brought home to him he may reject the grant. Also, of a grant made to infant, if benefi-

cial to him, equity will imply an acceptance; but he may reject the grant upon his arrival at age, if he has not done some act which will estop him. Here there is no proof whatever that H. L. Jones ever accepted the deed of 1853. On the contrary, it is expressly proven that he did not accept said deed, but accepted the deed of 1859, and took possession of the land under it, and held the possession under it, until it was sold by the appellant. The old suit upon which the appellant relies as evidencing that H. L. Jones accepted the deed of 1853 explicitly shows the reverse of that fact. It shows that H. L. Jones accepted the deed of 1859. Also it is shown beyond all cavil that the deed of 1853 was, prior to the deed of 1859, canceled by a reconveyance of the land. This is shown not only by the decided weight of evidence in this case, but by the answer of J. M. Jones in the old suit, referred to, which is not denied in the particular that it alleges the reconveyance. The judgment is affirmed.

HOLT, J., not sitting.

SIMS v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 17, 1890.)

MURDER—INDICTMENT—EVIDENCE—INSTRUCTIONS.

1. Under the requirement of the Criminal Code of Kentucky, that the foreman of the grand jury shall sign an indictment, it is not necessary that either the commonwealth's or the county attorney should sign it, and it is immaterial that either does it.

2. An indictment charging defendant with shooting deceased with a pistol is not insufficient because it fails to allege that the pistol was loaded with powder and a leaden ball or other hard substance.

3. On an indictment for murder, defendant testified that he was shooting at one J., who had tried to kill him, and he accidentally shot the deceased. The evidence showed that when the shot was fired J. was running away. *Held*, that it was not error to refuse to charge the jury on the subject of self-defense in reference to J., as tending to excuse the accidental killing of deceased.

Appeal from circuit court, Lee county.

"Not to be officially reported."

W. L. Hurst, for appellant. P. W. Hardin, for the Commonwealth.

BENNETT, J. The Criminal Code of Practice requires that an indictment must be indorsed "a true bill, and the indorsement signed by the foreman." The Code does not require the commonwealth's attorney to sign the indictment. It makes no difference whether the person signing the indictment was county or commonwealth's attorney. The law did not require either to sign it. The indictment charges that the appellant "did feloniously, willfully, and with malice aforethought kill and murder Arthur Fitzpatrick, by shooting him with a pistol." It is contended that the indictment is lacking in sufficiency, because it fails to state that the pistol was loaded with powder and leaden ball or other hard substance. It is alleged that the appellant killed the deceased by shooting him with a pistol. It seems that it would be necessarily understood that the pistol was

loaded with powder and some hard substance capable of producing death. There is no dispute about the fact that appellant killed the deceased without any provocation from him whatever. The appellant says that he was shooting at a man by the name of "Convict Joe," who had just tried to kill appellant, and he accidentally shot the deceased. If it be true that Convict Joe had just shot at the appellant, he (Joe) was at the time appellant shot running from the appellant, with the evident purpose of abandoning the conflict, and the appellant was pursuing him; which was not necessary for him to do in order to free himself from apparent danger. Therefore it was not error not to instruct the jury upon the subject of self-defense in reference to Joe, in order to excuse the accidental killing of the deceased. But the court did instruct the jury that if the appellant tried, in sudden heat and passion, to kill Joe, and accidentally killed the deceased, he was only guilty of manslaughter. This was as favorable as the appellant was entitled to. The appellant was found guilty of manslaughter only. The judgment is affirmed.

CRANE v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 17, 1890.)

MURDER—INSTRUCTIONS—SELF-DEFENSE.

1. On an indictment for murder, where the only issue is whether the killing was done in self-defense, an instruction that defendant was guilty of manslaughter if he intentionally fired off his pistol, and accidentally and carelessly, and not in self-defense, killed deceased, is misleading and erroneous.

2. There was evidence that defendant sought deceased with intent to do him bodily injury, but that before the conflict took place he abandoned that intent, and was in good faith endeavoring to avoid a difficulty. The court charged the jury that if defendant "brought about a meeting" with deceased for the purpose of killing or chastising him, then he could not be acquitted on the ground of self-defense, though he was in imminent danger or great bodily harm. *Held*, that the instruction was erroneous, as his right of self-defense would revive upon the abandonment of his intent to injure deceased.

3. The expression "brought about a meeting," in such instruction, is misleading, where the evidence shows that the killing occurred at a public meeting where defendant had a right to be.

Appeal from circuit court, Webster county.

"Not to be officially reported."

Yeaman & Lockett, for appellant. P. W. Hardin, for appellee.

HOLT, J. The appellant, George Crane, urges several grounds for a reversal of his conviction upon an indictment for manslaughter charging him with the killing of Douglas Below. We perceive but one error, and it alone will therefore be discussed. The court, after instructing the jury as to the law of manslaughter and self-defense, gave these two instructions: "(8) If the jury find from the evidence, to the exclusion of a reasonable doubt, that the defendant brought about a meeting between himself and the deceased for the purpose either of killing or chastising him, and in a meeting so brought

about the parties become involved, and the defendant shot and killed Below, they will not acquit on the grounds of self-defense or apparent necessity, even though he may have been in imminent danger of great bodily harm at the time, as contemplated in the second instruction. (4) If the jury believe from the evidence, beyond a reasonable doubt, that defendant, at the time and place mentioned by the witnesses, intentionally fired off his pistol, and accidentally, in a careless, reckless manner, and not in self-defense, shot and killed deceased, they will find him guilty, and fix his punishment as in the first instruction."

The last instruction was misleading. There was no claim that the killing was a reckless, unintentional one. The only question was whether the appellant acted in self-defense. This was the issue, and the only one, disclosed by the evidence. The appellant testified that he did the shooting, and that it was intentional, but in his self-defense. No instruction should therefore have been given as to a reckless, unintentional killing.

Nor did the third instruction present correctly and fully the law of the case as disclosed by the evidence. Its language is objectionable in being of a too general character. It tells the jury, if the accused "brought about a meeting" between himself and the deceased in order to kill or chastise him, then he could not rely upon self-defense, even though he may have been in imminent danger when he shot the deceased. Undoubtedly, this is true, generally speaking, as to one who seeks and then provokes a quarrel with another in order to kill him. If one by his own wrongful act makes the danger or harm to himself necessary or excusable in the person about to inflict it, then the former cannot excuse the taking of life, or doing of great bodily harm, upon the plea of self-defense. The term, "brought about a meeting," is of too general a character, however, for use in an instruction to a jury where life or liberty is involved. It gives them too much latitude. It is true, it was coupled with a required intention upon the part of the accused; but yet it is, in our opinion, as was said in *Allen v. Com.*, 6 S. W. Rep. 645, open to objection. The killing occurred at a public meeting to which the accused had a right to go. The jury may from the general language of the instruction have believed, however, that by his so going he "brought about the meeting," and was therefore deprived of the right of self-defense, although they might believe that after his arrival he was in no way or to any extent the aggressor. There was testimony tending to show, however, that even if the accused sought the deceased for the purpose of provoking a difficulty, and then doing him great bodily harm, he had just before the conflict abandoned any such purpose, and was in good faith trying to avoid one. If this were so, his right of self-defense revived; and, there being some evidence to this effect, this phase of the case

should have been by proper instruction submitted to the jury. It is in this respect the instruction now under consideration is especially objectionable. We refrain from a discussion of the evidence in the case, as there must be a retrial. Judgment reversed, and cause remanded for a new trial consistent with this opinion.

GERMAN INS. CO. v. READ'S EX'X.

(Court of Appeals of Kentucky. June 19, 1890.)

INSURANCE—CONDITIONS OF POLICY.

1. Where a policy of insurance provides that the company will make good to the assured, his executors, administrators, and assigns, all loss or damage to his dwelling-house, not exceeding the interest of the assured in the property, caused by fire or lightning between certain dates, the company cannot avoid payment of a loss under the policy on the ground that the assured died before the loss occurred, in the absence of a provision for forfeiture for such cause.

2. In an action on a policy of fire insurance, before the defense of overvaluation of the property can prevail, it must be shown that the insured falsely, and with intent to deceive the insurer, placed an overvaluation on the property insured.

Appeal from circuit court, Nelson county.

"Not to be officially reported."

John S. Kelley, for appellant. *John D. Wickliffe*, for appellee.

LEWIS, C. J. Appellant, the German Insurance Company of Freeport, Ill., by a policy of insurance dated May 24, 1886, and issued to F. S. & T. S. Read, agreed to make good unto the insured, their executors, administrators, and assigns, all such immediate loss or damage not exceeding in amount the sum insured, nor the interest of the insured in a dwelling-house, furniture, wearing apparel, provisions, and sewing-machine, as might happen by fire and lightning to the property during a period of five years beginning May 24, 1886. This action was brought against appellant by Sallie T. Read, executrix, and also styled sole devisee of F. S. Read, who died in 1887, to recover value of property insured which, it is alleged in the petition, was totally destroyed by fire, occurring without fault of the plaintiff or any other person, on January 15, 1888; and upon final trial a verdict and judgment was rendered in favor of the plaintiff for \$1,948.44.

As the property insured was destroyed after death of F. S. Read, in whom title of the property was, but within the period of five years from date of policy, the main question is whether the policy was in force at date of the fire, or ceased at death of the insured to be of force. It is not necessary to consider that question at length, because the identical question was presented, considered, and determined in the case of *Richardson v. Insurance Co.*, ante, 1, decided at the present term of this court. It was in that case decided that the policy, which contained the same provision, and recited the same causes of forfeiture as are found in the one under consideration, did not become void or inoperative upon, and by reason alone of, death of the insured. It is alleged in the petition by appellee S. T. Read,

who was wife of F. S. Read, that her name was put in the policy for some reason unknown to her, and she disclaims any insurable interest in the policy except in virtue of the will of her husband, stating the contract was really with F. S. Read alone; and consequently the simple question just mentioned was presented and passed on in the lower court.

One other defense made was alleged overvaluation of the property in the application for insurance, which applies to the dwelling-house alone, as no complaint was made on that account in reference to the other property. The whole amount of property insured was \$2,000, the dwelling-house being valued at \$1,500. As held by this court in *Insurance Co. v. Rudwig*, 80 Ky. 223: "Before such a defense can prevail, it must appear that the party falsely, and with the purpose of deceiving the company or its agent, placed an overvaluation on the property insured." And we think the issue on that subject was fairly, and in accordance with the rule thus laid down, presented by instruction of the court to the jury; and the verdict, being against appellant on the facts, cannot be disturbed by this court. Judgment affirmed.

DOLL v. REED.

(Court of Appeals of Kentucky. June 19, 1890.)

REMEDIES OF SURETY.

Plaintiff attached property of defendant in an action to recover money paid by him as surety. Defendant testified that plaintiff had agreed to give him indulgence in the payment of the amount due, but plaintiff denied this, and it was shown that he had made repeated efforts to collect his claim, and that defendant made no attempt to enforce the alleged agreement. Held, that the evidence was sufficient to warrant a judgment for plaintiff.

Appeal from Louisville law and equity court.

"Not to be officially reported."

E. E. McKay, J. R. M. Polk, and A. Vutzel, for appellant. *Simrall & Bodley* and *M. W. Morancy,* for appellee.

PRYOR, J. The appellant, Doll, had executed two mortgages on certain lots of ground in or near the city of Louisville, and, failing to meet the debts secured by this lien, his creditors brought an action to foreclose, and the property mortgaged was sold under a judgment of the Louisville law and equity court, and Doll himself (the original debtor) became the purchaser. The mortgages were executed to Gheens and to Carter Bros. & Co. Doll applied to the appellee, Reed, to become his surety on the purchase-money notes, being three in number, and each note calling for \$1,870.90, bearing interest. Reed became Doll's security, and, when the first note fell due, Doll, failing, and in fact having no means to pay with, applied to Reed to indorse his note in bank to raise the money with which to meet the note. This the appellee, Reed, refused to do, and Doll failing to pay, Reed, the surety, paid off the

note, and brought his suit, with an attachment to secure himself in the liability he had assumed. The grounds of the attachment were that his judgment would be endangered by delay, etc. In a few days after this action by Reed, Mueller instituted his action, and sued out an attachment. Reed, having paid the first purchase-money note, also obtained a rule against Doll to pay him the amount. The rule was made absolute, and an attachment against the person granted, but Doll could not be found. When the second bond matured, a rule was awarded against Reed and Doll, and still Doll could not be found; and, an attachment having been issued from time to time, Doll was at last arrested and put in jail. He finally surrendered the property in controversy to pay the second note, and also the first note, the same to be sold subject to the lien of the third note. The property was sold and purchased by Goodloe for Gheens, his client. There was some misunderstanding about the terms of sale, or the amount to be bid for the property; and this sale was set aside, and Doll says without his consent. It is apparent from the proof that Doll knew all about it, and his subsequent conduct with reference to the resale shows this fact, and, if not, certainly gave him every opportunity to have the error corrected, if any existed, in setting the sale aside. When the property was resold, Reed bought that on Breckenridge street and on Preston and Lee streets for \$2,400, and assumed to pay the last note. The sale was made, reported, and confirmed. The lot on Chestnut street had been sold and purchased by Gleason to satisfy a lien for street improvements, and Reed afterwards acquired Gleason's title by purchase. Reed is out of pocket \$1,767, amount paid on first bond, and \$65 paid on second bond, and which the purchase by him of the property sold failed to pay, as well as some costs. He claims to own the Breckenridge-Street lot and the Preston and Lee lot bought by him in the case of Gheens and from Gleason; and these lots he does own, unless an agreement between him and Doll existed, as Doll alleges. He is seeking to secure, by the sale of the property upon which the attachment is levied, what is still due him by Doll for money paid as Doll's surety. Doll alleges that there was an agreement by which Reed was to aid him in some contemplated litigation with Caldwell & Standiford in regard to some real estate that they, or one of them, had agreed to sell him, and that Reed was to pay off these purchase-money notes, and give him indulgence greater than the law would allow him for payment, and that he neglected or failed to notice or appear in the litigation after Reed had become bound as his surety in any way, having full confidence that Reed would in good faith carry out his agreement. Reed denies that any such agreement was made, and says that, having involved himself as the surety, he attempted to secure the liability as best he could, and was endeavor-

ing by all the means afforded him by the law to coerce payment from Doll, the real debtor.

We have been unable to conjecture what the claim against Caldwell had to do with this case, or Reed's becoming surety; and in fact that claim, if any existed, was more imaginary than real, or at least there was nothing in its execution or results, when executed, that would benefit Reed, or cause him to involve himself as Doll's surety. Nor do we perceive that degree of intimacy or friendship between Reed and Doll that would induce Reed to invest his own means for Doll's benefit, giving him such indulgence as would relieve him from debt, without any other consideration. That Doll was embarrassed, and his appeals to Reed to aid him in his troubles, with the assurance that Reed would have nothing to pay, caused, no doubt, Reed to sign the bonds; but that he proffered such acts of friendship to one who had no claims upon him whatever, as Doll states, and says was agreed on when the bonds were executed, is a fact inconsistent with the entire controversy, from the time the first note became due until the litigation ended. There is testimony conducing to show that Reed, after all his efforts had been made to secure himself, admitted, in effect, that such an agreement as Doll claims was entered into. This occurred in the presence of the attorneys of those adverse to Reed, and when they tendered to him the money to redeem some realty that had been purchased under a judgment in favor of the German Bank, and that was in fact redeemed. They say, however, that they tendered or offered to pay Reed all he had advanced, and that the conversation related to the purchase in the Gheens case, etc. This Reed denies, and, while some of the parties are evidently mistaken as to what took place at Reed's farm, it is singular that, if this agreement was made, as Doll contends, when Reed signed these bonds, he should have refused to go on Doll's paper to meet the first note, or that Doll should have called on him, if he (Reed) was to advance the money. Besides, Reed was having rules awarded against Doll to bring the money into court, with attachments based on them, that enabled the marshal finally to take Doll into his custody and lodge him in jail. To escape confinement in prison for contempt, he surrendered the property, saw or knew it must necessarily be sold, and made no effort whatever to compel Reed to comply with his agreement. He was evidently hiding from the collecting officer when Reed, who was amply able to raise this money, had agreed to pay it off, and hold the property for him. The confidence reposed in Reed, if such was the fact, is so unnatural, as well as unreasonable, under the circumstances, that no chancellor could well adjudge that any such arrangement had been made. The entire theory of the appellant indicates an effort to make a defense on an imaginary state of facts. The property purchased by Reed was bought for

more than two-thirds of its value; and, while there is conflicting proof on this subject, the testimony authorized the chancellor to so adjudge. The appellant was insolvent. Reed had become his surety, and, as such, had been left to fight his way out in the best manner possible. This he seems to have done; and his debtor, who placed Reed between himself and the chancellor when this debt had to be paid, ought not to be heard to complain. The attachment, or the grounds of it, are well stated in the pleading of Reed, and then sworn to as the law requires, and, we think, well sustained by the testimony.

The judgment below is affirmed.

HALL v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 12, 1890.)

MANSLAUGHTER—EVIDENCE.

On an indictment for murder, the evidence showed that defendant walked up to deceased with pistol drawn, while deceased was standing near another person, and shot him dead, without provocation, and notwithstanding such other person's remonstrance; that defendant was in no danger whatever; and there was evidence tending to show that deceased, when drunk, was a dangerous man. *Held*, that a verdict of manslaughter would not be disturbed.

Appeal from circuit court, Harlan county.
"Not to be officially reported."

P. W. Hardin, for the Commonwealth.

PRYOR, J. There was no excuse or justification on the part of the accused for taking the life of Fields. The deceased, according to the weight of the testimony, was standing near to one of his friends, with his hand on his shoulder, when the accused approached, with pistol drawn, and shot him dead. The witness told the accused not to shoot, but the latter, bent on taking the life of the deceased, persisted in firing the fatal shot. He was in no danger whatever when he fired, but, on the contrary, it clearly appears that it was a wanton and cruel murder. There is no legal question raised in the case, and certainly none prejudicial to the accused. The jury seem to have been lenient in their verdict, resulting, no doubt, from testimony showing that Fields, when drunk, was a dangerous man. There is no ground for a reversal. Judgment affirmed.

BEDFORD v. MEGIBBEN.

(Court of Appeals of Kentucky. June 12, 1890.)

SALE—WARRANTY—BREACH—ACTION—INSTRUCTIONS.

1. In an action for a breach of warranty, where it is shown that plaintiff agreed to buy of defendant a bull, for a certain price, if, after the application of an agreed test, he should prove to be a breeder, and that defendant represented that the test had been successfully applied, whereas, in fact, the bull was not a breeder, an instruction that the jury need not necessarily believe the defendant guilty of false representations before they could find for plaintiff is proper.

2. Where plaintiff alleged a special warranty to be based on a given test, and defendant denied that the test to be applied was that alleged by plaintiff, and set up a different test, and there is evidence tending to support the contention of each, an instruction that if the jury found that there

was a general warranty, and a breach thereof, they should find for plaintiff, is erroneous.

Appeal from circuit court, Woodford county.

"Not to be officially reported."

Breckenridge & Shelby, Brent & McMillan, Huston & Mulligan, and Porter & Wallace, for appellant. *J. G. Carlisle*, for appellee.

PRYOR, J. This action was instituted in the Bourbon circuit court in October, 1876; and, there having been two mistrials, the case was removed to the county of Scott, and from that county to the county of Woodford, where the plaintiff obtained a verdict and judgment for \$10,000, with interest from the 24th of June, 1879. The case was brought to this court, and, after arguments of counsel, passed for briefs, and the case continued by agreement, and the briefs not filed until in December, 1889. The record contains a large volume of testimony conflicting in its character, and upon the testimony alone no reversal should be had. The case, although the testimony has been carefully read and considered, must be disposed of upon the legal questions raised by the appellant in this court.

The plaintiff and the defendant purchased jointly a blooded heifer for the sum of \$25,000. This heifer dropped a bull calf called the Duke of Woodland. The plaintiff Megibben, purchased of the defendant Bedford his (Bedford's) one-half interest in the bull calf for the price of \$9,000; the money to be paid on the 1st of March, 1876. The calf was then too young to serve cows, and was in Bedford's possession, on his farm in Bourbon, when this sale was made. It is agreed by both parties in their pleadings that the sale was conditional, and before the payment of the money a test of the animal's capacity to procreate was to be made. How this test was to be determined is a question at issue between the parties, as no calf could be dropped between the time the calf was old enough to serve cows, and the payment of the money. It was, then, either a mere matter of conjecture to be determined as to the number of cows the animal turned off, or there was a warranty that the animal had proved a breeder by his performance under the special contract set up by the plaintiff.

The plaintiff, Megibben, alleges in his original petition that he agreed to purchase the half interest of the defendant at the price of \$9,000, to be paid on the 1st of March, 1879, on condition that the bull should prove a breeder; that the calf was to remain on the farm of the defendant, and in his possession, to be tested, and, if proven to be a breeder, he was to receive him, and pay the money on the day the note fell due; that such was the contract between them. He alleges that in February, 1876, the defendant, in order to induce him to receive and pay for the bull, stated and represented to the plaintiff that "the test had been made,

and the bull had proven to be a breeder, and the plaintiff, believing and relying on these statements and representations, was induced to and did receive the calf, and paid to the defendant the \$9,000; that, by reason of his absence from the farm of defendant when the test was to be made, he had no means of knowing or ascertaining the results of the test, except the statements and representations made to him by the defendant; that he believed and relied on those representations, and was thereby induced to complete the purchase; that the statements and representations made to him by the defendant were not true; that the bull was not then, and has not since been, a breeder, but on the contrary was impotent, and incapable of getting calves, and, ascertaining that fact, he tendered him back to the defendant." The plaintiff subsequently filed an amended petition, in which he alleges that by mistake of his counsel the exact terms of the contract were not fully set out in the original petition, and that the test of breeding was to be made upon four or five cows belonging to the plaintiff, which were to be sent to defendant's farm for that purpose, and that it was agreed, in case these cows should be got with calf by the bull, the plaintiff was to pay the \$9,000 at the time mentioned, and take the bull; that, as soon as the bull was old enough to serve cows, he sent four cows to the farm of the defendant, to be bred by him, and that in the month of February, 1876, while the cows and bull were in the possession of, and under the control of, the defendant, the latter, in order to induce the plaintiff to complete the purchase and pay the money, represented to him that he had bred the cows to the bull, and three of them were in calf, and that he had proved himself to be a breeder by his service on plaintiff's cows; that plaintiff, believing and relying on this statement and representation, and having no other means of knowing or ascertaining the facts, was thereby induced to complete the contract, and pay to the defendant the money; that said statements were not true in whole or in part; that none of said cows were with calf by the bull, and he had not proved himself to be a breeder by his service on them, and was not in fact a breeder, but was impotent, and incapable of getting calves. The answer of the defendant denies the agreement as to what the test should be, as alleged in the amended petition, and says that the bull was to remain with him, in order to have his breeding capacity tested, and that when, having served cows, they refused to permit the bull to serve them again, that fact was to be accepted by both parties as conclusive evidence that the animal was a breeder, and as soon as this was ascertained the plaintiff was to accept the bull as his own, and pay the money at the time specified. He alleges that the bull served a number of cows, and turned off fully the usual and ordinary number,—the cows, after being served by him the usual length of time, refusing to be served

again; that he wrote to and fully informed the plaintiff of the tests made, and the results, placing before him all the facts and circumstances relating thereto, and the plaintiff, being fully satisfied with the tests made, accepted the animal, and paid for him. He denies that he ever stated or represented to the plaintiff that he had fully tested the animal, and that he had proved to be a breeder, without laying before him, truly and fully, every fact to enable the plaintiff to determine the sufficiency of the tests made, and upon these facts the plaintiff, being an expert in the breeding of cattle, was as fully competent to form an opinion as the defendant. He denies that the bull was impotent, or that any representation made by him to the plaintiff was untrue, etc.

Upon the pleading, issues were properly made; and on this appeal it is insisted that the court erred in giving the instructions for the plaintiff, and in refusing those asked by the defendant.

Before noticing the instructions, it may be proper to determine the character of the action instituted by the plaintiff. It is not an action for deceit, as the *scienter* is not alleged, but an action *ex contractu*, upon a breach of warranty alleged to have been made by the defendant to the plaintiff at the time the contract of sale was completed. That the contract was a conditional one, all the parties concede; that is, if the bull proved to be a breeder upon the test agreed upon as to his breeding qualities, the appellee (plaintiff) was to take him, and pay the \$9,000. The bull was in the possession of the appellant, and the latter represented to the appellee that the test had been made, and the cows were with calf. It was not the mere opinion of the appellant upon which the appellee relied, but the statement or representation of a fact that had to transpire before the money was paid. The representation was made according to the theory and the testimony of the appellee that the test had been made, and the cows were with calf; and this statement amounted, in law, to a warranty. The test was to be made by the appellant, and, when representing that the test had been made, and the cows were with calf, and on the faith of this representation the bull was received, or the money paid, it was something more than the mere opinion of the defendant, and amounted to a warranty that the test had been made, and that the cows were in calf; and, although the appellant may have been mistaken in his judgment, he is nevertheless bound, if the testimony for the appellee is to prevail. There was no binding contract with these parties until the test was made; and, the appellee having had nothing to do with the breeding of the bull, if induced by the appellant to pay for him upon the representation that the test had been made, and proved successful, he is bound by it,—as much so as if there had been no previous agreement as to the test; the sale being made, and a statement at the time that a test

had been had, and the bull had gotten the cows in calf. The entire value of the animal depended on the fact that he had proven himself a breeder by getting the cows in calf; and, the affirmation or representation that such was the fact, and the appellee relying on it as true, it was in law a warranty upon which the appellant is responsible, if the representations were untrue, however innocent the latter may have been of any fraud. "Whenever the vendor, at the time of the sale, makes an assertion or representation respecting the kind, quality, or condition of the thing sold, upon which he intends that the vendee shall rely, and upon which he does rely, in making the purchase, it amounts to a warranty." *Lamme v. Gregg*, 1 Metc. (Ky.) 446. The court below, therefore, very properly instructed the jury that it was not necessary to believe the defendant guilty of a fraudulent representation before they could find for the plaintiff. This was an action on the contract, and not for a tort, as the *scienter* is neither proven nor alleged.

The difficulty in the way of affirming the judgment below arises from an instruction, given at the instance of the appellee, upon a state of fact that all parties conceded did not exist. "By instruction No. 2 the jury was told that, if they believed from the testimony that, by the terms of the contract, the defendant agreed with the plaintiff to guaranty the bull, Duke of Woodland, to be a breeder, and that plaintiff bought and paid \$9,000 for defendant's one-half of said bull upon the faith of said guaranty, and that said bull was not at the time, and is not now, a breeder, they should find for the plaintiff, etc. The bull, to have been a breeder, must have possessed the power of procreation in the degree usually and ordinarily existing in short-horned bulls used for the purpose of breeding," etc. There was testimony conducing to show that the bull had but one testicle, and that the appellee refused to make any purchase unless there was a warranty that the bull calf would prove to be a breeder, and also other testimony conducing to show that a general warranty was made. Now, that character of testimony was not relevant to any issue that had been made by the parties, and could only be introduced as corroborative of appellee's view of the agreement. It is not claimed by the appellee that there was a general warranty, but, on the contrary, there was only a special warranty on the facts stated by the appellee, and that was that he was to prove a breeder in the way alleged in the amended petition. The fact of a general warranty is, in effect, disclaimed by the amended petition, because the plaintiff in his amendment says that the averment therein of facts that would amount to such a warranty was made by mistake, and then the special agreement was alleged in the amendment as presenting the real contract between the parties. It is true the appellant denies that such a contract was made, but admits that a special agreement was entered into by which the bull was to be

bred to cows, without designating the number, and, if he turned the cows off as bulls usually do, it was to be conclusive that he was a breeder. The court after giving an instruction based on both the theory of the plaintiff and the defendant, then proceeds, in the second instruction, to ignore each of the special contracts set up, and, in effect, says to the jury: "You may disbelieve both; but, if there was a general warranty made, you must find for the plaintiff." Now, there is evidence conducing to establish the claim of the plaintiff, and also evidence conducing to establish the special agreement set up by the defense; and when both parties, especially the plaintiff, are relying on the special contract, and the representation by the defendant that it had been complied with, and the test made as agreed on, it was error to present an instruction authorizing a verdict for the plaintiff on an issue not made by the pleadings, and upon a state of fact that the plaintiff, by his pleading, said did not exist. The plaintiff says the defendant is liable because the test had been made of the four cows, and they were not in calf, and the representations made to him by the defendant were a warranty that the test as alleged was satisfactory, and conclusive that the bull was a breeder. Bedford says such was not the agreement. The bull was to be bred to cows that season; and, if he turned off the usual number, this was to be conclusive. The plaintiff and defendant both testified in support of their views of the contract, and each sustained by other testimony. They were equally credible; and the jury, in considering the case, might have well said that it was useless to determine who of the parties were entitled to credit upon the issues made, because the court has, in effect, said that, if we believe from the testimony the defendant guaranteed the bull to be a breeder, and the bull was not then, and is not now, a breeder, we must find for the defendant; and, there being evidence conducing to show a warranty, we will find that way, although the bull may have gotten the cows with calf, as Bedford states, for the proof is clear that he is not now a breeder.

There are other errors relied on by counsel, but we perceive nothing objectionable but the instruction alluded to. The judgment is reversed, and remanded for a new trial in conformity with the opinion.

BROWN v. UNITED STATES HOME & DOWER ASS'N, (two cases.)

(Court of Appeals of Kentucky. June 19, 1890.)
NEGOTIABLE INSTRUMENTS—JUDGMENT—AMENDMENT.

1. In an action on a note by an assignee for value, the maker cannot avoid liability by setting up that the original holder, a corporation, had no authority to loan money, which was the consideration for the note.

2. Where judgment is rendered directing a sale of defendant's undivided interest in land on the ground that it cannot be divided without impairing its value, the court may at the same term

amend the judgment by withholding the order of sale, and ordering the land to be divided, where it is of opinion that it can be done.

3. Where in an action to recover judgment on a note, and to foreclose a mortgage securing it, defendant appears, and has the recovery on the note reduced by equitable set-offs, he cannot object to a personal judgment against him that he was served with process in another county than that in which the judgment is rendered.

Appeal from circuit court, McCracken county.

"Not to be officially reported."

Stone & Sudduth, for appellant. Campbell & Wheeler and E. W. Hines, for appellee.

PRYOR, J. Bell, as assignee of the home and dower association, brought an action to recover judgment on a note executed by Brown, the appellant, for \$2,000, and to foreclose a mortgage on real estate in the county of McCracken. The land was owned jointly by the appellant and Mrs. Dorsey, who was a defendant to the action.

It is urged by way of defense that the association had no power to assign the note, and that it contained usury. The usury was purged by the chancellor, and it appears from the testimony that before Bell purchased the note he was informed by Brown that it was all right. The fact that the company may not have had authority by its charter to loan money in this state (if that be conceded) does not relieve Brown from liability to the assignee, who has taken it for value. There is nothing vicious in the consideration. Brown obtained the money, and the mortgage lien was properly enforced for its payment. Nor does it appear that there were two judgments, final in their character, rendered at different terms of the court. It does appear that there was a judgment directing a sale of Brown's undivided interest on the ground that it could not be divided without materially impairing its value. It then appears that the judgment was amended; the record showing that the court thought the land could be divided, and an order entered directing the commissioner to make division, and report, and the order of sale was withheld until the report was made of the division, or until the further order of court. There is nothing showing that all this was not done at the same term of the court, and this court must assume that such was the fact. The commissioners in September made their report of division. That was confirmed, and, in October following, a judgment was entered directing a sale of the land. The sale was made, and report confirmed. The court had the power to amend its judgment during the term at which it was rendered, and this amendment worked no hardship on the appellant; but, whether so or not, the right to amend existed, and the court, instead of selling the undivided interest, sold the interest when set apart to the defendant. The appellant also objects to a personal judgment against him. The defendant appeared, and not only contested the lien, or the right to enforce it, but reduced the amount of the note by equitable

set-offs, and should not be heard now to say that, as he was served in Jefferson county, no personal judgment should have been rendered against him in McCracken county.

Judgment affirmed.

OWENSBOROUGH & N. R. Co. v. SUTTON.
(Court of Appeals of Kentucky. June 25, 1890.)

RAILROAD COMPANIES—USE OF STREET.

Authority granted to a railroad company to lay its tracks and switches in a public street does not carry the right to use such street as a place for making up trains, nor as a depot for cars, nor for receiving or discharging freight.

Appeal from circuit court, Daviess county.
"Not to be officially reported."

W. N. & J. J. Sweeney, for appellant. G. W. Williams and G. W. Jolly, for appellee.

LEWIS, C. J. This is an appeal from a judgment of the Daviess circuit court, rendered in an action of J. E. Sutton against the Owensborough & Nashville Railroad Company, enjoining and restraining the defendant from "passing and repassing plaintiff's dwelling-house, on Main street and Lewis street, with its locomotives, in making up its trains in said Lewis street, and from using the said Lewis street as a depot for cars, and from receiving and discharging freight from its cars therein." It seems that appellant has had for several years right of way for a railroad track from the south side along Lewis street, in the city of Owensborough, to the Ohio river bank on First street, and that appellee owns a lot of land binding on Second and Lewis streets, upon which is situated his residence.

There appears to be no dispute of the right of appellant to run its locomotive and cars along the center of Lewis street, nor to use switches which connect with the main track between Second and First streets, in order to reach its yard and depot, situated on its own lot, east of Lewis, and between the other two streets. Nor could such right be withheld in this case without preventing passage of trains through the city, and reception and discharge of passengers and freight at convenient and acceptable places. But the argument of counsel is, in substance and meaning, that, authority to lay its tracks and switches in Lewis street having been granted to appellant, it acquired as an incident of that grant such necessary use of the street as its business requires, and as will not unreasonably obstruct the use which the general public has in the street. The use of a public way may be granted to a railroad company for passage through a city or town, or by switches from its main track to its depot, or receptacle for passengers and freight, because it is in many cases necessary, and may be done without materially injuring the street as a public way. But even a grant for that limited purpose cannot be made, or the right under it exercised, except upon condition of the company being liable for injury done thereby to owners of abutting property;

for legislative power does not exist to exempt either an individual or corporation from obligation to so use his or its own as not to hurt others. There is no reason nor necessity in this, or any other case like it, for a railroad company to use a public street as a place for making up its trains, or as a depot for standing cars, or for receiving or discharging freight; for such use necessarily defeats the purpose for which streets are dedicated to the public, prevents reasonable enjoyment by owners of abutting property, and consequently municipal legislature is without power to grant the right. It seems to us appellant does not have the legal right to use Lewis street in the manner complained of by appellee, and such use of it was properly enjoined by the lower court. Judgment affirmed.

LOUISVILLE & N. R. Co. v. COPPAGE.

(Court of Appeals of Kentucky. June 21, 1890.)

DEATH BY WRONGFUL ACT—RIGHT TO SUE.

Gen. St. Ky. c. 57, § 3, provides that, if the life of any person is lost by the willful neglect of another person, company, or corporation, then the widow, heir, or personal representative of deceased shall have the right to sue, etc. *Held*, that the word "heir," in such section, is equivalent only to "child," and hence no right of action exists in favor of the father of deceased.

Appeal from circuit court, Marion county.
"Not to be officially reported."

Wm. Lindsay and Rowntree & Lisle, for appellant. John D. Fogle, Saml. Arritt, and Lewis Edelen, for appellee.

HOLT, J. John I. Coppage was injured in attempting to board a train of the appellant, and died therefrom in a few hours. This action was brought by his father, John W. Coppage, under section 3, c. 57, Gen. St., which provides: "If the life of any person * * * is lost or destroyed by the willful neglect of another person, * * * company, * * * corporation, * * * their agents or servants, then the widow, heir, or personal representative of the deceased shall have the right to sue such person, * * * company, * * * corporation, * * * and recover punitive damages for the * * * destruction of the life aforesaid." The petition avers that the deceased left no children or mother, and the evidence shows that he left no widow. The complaint is—*First*, that the injury was caused by the willful negligence of those in charge of the train; and, *second*, that the agents of the company, after taking charge of the wounded man, through willful negligence caused a fatal delay in the performance of a necessary surgical operation. The first ground appears to have been abandoned upon the trial, and the case fought out upon the second one. It is unnecessary to consider, however, whether the company is chargeable with willful neglect in either of these respects, because a preliminary question is decisive of the case.

Objection was made by demurrer to the appellee's right to sue. This court determined in the case of *Henderson's Adm'r v.*

Railroad Co., 86 Ky. 389, 5 S. W. Rep. 875, that the word "heir," as used in the section of the statute above cited, was equivalent to "child," and that any recovery under it was for the exclusive benefit of the widow and child or children of the decedent; the right to sue, so far as vested in the personal representative, being for their benefit. This case has been followed by that of Jordon's Adm'r v. Railroad Co., 88 Ky. —, 11 S. W. Rep. 1013, and other cases, holding that, the benefit of the recovery being confined to the wife and children, if the deceased leaves none, no action can be maintained. These cases are decisive of this one. We are fully aware that this construction of the statute has been largely discussed and frequently criticised; but further consideration has only served to confirm the views expressed in those cases, and we can add little, if anything, to them. The first section of the chapter above named confers upon the personal representative of any person (save an employee) killed by the negligence of those operating a railway the right to sue and recover such damages as the injured party might have recovered if death had not ensued. Under it the personal representative may recover from a railway company compensatory damages for neglect less in degree than willful, just as the deceased might have done had he survived the injury. By the terms of the statute as originally enacted in 1854, the right to sue under either the first or third section was vested in the personal representative. This was subsequently changed by the legislature; and it undoubtedly intended to provide for different state of case by the third section from that provided for in the first section of the statute, or the two would not differ so essentially. The third one is not confined to deaths resulting from the willful negligence of railway companies, but embraces all persons and companies. Nor does it provide that the plaintiff may recover "in the same manner that the person himself might have done for an injury where death did not ensue." It authorizes the recovery of punitive damages, and gives the right to sue to "the widow, heir, or personal representative of the deceased."

We are again asked to decide that the word "heir," in the statute as amended since 1854, means "distributee," and not "child." The history of the law upon the subject of providing a civil remedy for the killing of a person, as well as the harmony of the law, which is always, of course, to be desired, and which it is to be presumed the legislature always has in view, forbids such an interpretation. Undoubtedly, the object of providing such a remedy is to benefit the family of the deceased, or those who had a direct and immediate interest in the continuance of his life. Compensation for an injury is always given to those who suffer the loss. This idea prompted the enactment in England of what is known as "Lord Campbell's Act" in 1846, and has led to the adoption of statutes in this

country more or less similar. The history of legislation upon the subject plainly shows that it was never intended that the recovery in such a case should be assets of the estate of the deceased. Nor can it be reasonably supposed that it was intended it should benefit those who might be removed many degrees in relationship from the deceased, and whom he may not have known, even from report. To construe the word "heir" as "distributee" would have this effect, and extend the benefit of a recovery to the remotest heirship. It is, of course, for the legislature to say how far the right shall extend; but, in construing the meaning of terms used by it, it is proper to consider the purpose of the statute, and the history of legislation upon the subject. The words "heir" and "distributee" are, when technically considered, not interchangeable. The first applies to an estate of inheritance. The heir takes the land, but not the personality. The word does not describe one who takes assets in the form of money from a personal representative, and in popular usage is more often used as meaning "child" than "distributee." Prior to the enactment of the statute in question, our legislature had given the widow and minor child of one killed in a duel a right of action against the surviving principal and all the promoters of it, with the right to also recover punitive damages. Then came the act of 1854 as to a killing by negligence; and in 1866 the legislature enacted a law by which "the widow and minor children" of one killed by the careless, wanton, or malicious use of fire-arms were given a right of action against the offender for reparation of the injury, with the right to the jury to give punitive damages. All of these statutes were incorporated into our General Statutes, which were designed to constitute a general system of law, and, being *in part materia*, should be construed alike, unless the language used forbids it. There is no good reason why the benefit of the recovery in the one case should be confined to the widow and children, and in the other reach to the remotest relative, who was in no way dependent upon the deceased, and who suffered no loss by his death. It follows that, as the deceased left no widow or child, this action cannot be maintained under the third section of the statute under consideration; and as the appellee, as father, had no right to sue under the first section of it any more than under the third section, the demurrer to the petition should have been sustained, and the action dismissed. It is so ordered, and judgment reversed.

DURST et al. v. AMYX et al.

(Court of Appeals of Kentucky. June 12, 1890.)

JUDGMENT—RES ADJUDICATA.

A judgment in an action brought against a husband to settle a boundary line of land owned by his wife, in which action the wife did not appear, and to which she was not made a party, will not divest her title to any part of the land, though the judgment purports to be rendered against both

herself and husband; nor will such judgment bar another action, involving the same question, brought by the wife against the plaintiffs in the former action.

Appeal from circuit court, Morgan county.
"Not to be officially reported."

Action by Caroline Amyx and others against Lula M. Durst and others to enjoin the execution of a writ of possession awarded to defendants by a judgment in another action. Before August 1, 1878, one J. W. Hazelrigg had sold by executory contract to A. J. Amyx, husband of Caroline, two adjoining tracts of land, one known as the "Kendall" and the other as the "Morgan" tract. Being unable to pay the purchase money due for the land, Amyx, on August 1, 1878, sold the Kendall tract to one Ambrose Allen, the father of defendant Lula M. Durst; Allen executing his note to the personal representatives of Hazelrigg in lieu of Amyx's notes, they agreeing to convey the Kendall tract to him on the payment of the notes. On the same day, Allen transferred to his daughter, the defendant Lula M. Durst, the benefit of his purchase from Amyx of the Kendall tract. By a deed bearing date the same day,—August 1, 1878,—the personal representatives of Hazelrigg executed a deed of the Morgan tract to Caroline Amyx and Angeline Whitt, wife of J. W. Whitt. Some dispute having arisen as to the boundary between the Morgan and Kendall tracts, Lula M. Durst, on October 28, 1879, brought an action against A. J. Amyx and J. W. Whitt, who then with their families resided on the Morgan tract, for a settlement of the line. Neither Caroline Amyx nor Angeline Whitt were made parties to that action, nor were they served with summons, nor did they ever appear therein. The court adjudged the boundary line to be as claimed by Lula M. Durst, and rendered judgment against A. J. Amyx, Caroline Amyx, J. W. Whitt, and Angeline Whitt. Lula M. Durst then sued out a writ of possession, and this action was brought to enjoin its execution. The court granted the injunction as prayed for by plaintiffs, and defendants appeal.

John T. Hazelrigg, for appellants. *Orear & Bigstaff*, for appellees.

PYOR, J. Upon the facts of this record, the injunction was properly perpetuated, because the facts show that the land of which the female plaintiffs are about to be evicted belongs to them, and not to their husbands. The former action, although litigated, determined no right affecting these married women. They were not parties to the action, or before the court by a summons or by an answer; and the mere fact that a judgment was rendered against them divested them of no right or title to the land. The former action, therefore, in which the husbands were parties, cannot be pleaded in bar of the present suit. By agreement between the owners and occupants of the several tracts of land, the division line as contended for by the appellees is the true boundary, and in fact it is.

The line was shown to Allen, the father of the appellant and vendee, as the line that divided the two tracts. There is no evidence to the contrary. The land was bought and paid for to this line. It appeared from the old suit that this land belonged to the female appellees, and still they were not made parties; and we perceive, therefore, no reason for holding that there is a bar to the recovery by reason of the judgment in that case. The judgment below is therefore affirmed.

STATE *ex rel.* v. DU BOSE.

(Supreme Court of Tennessee. May 10, 1890.)

DUELING—DISFRANCHISEMENT—CONSTITUTIONAL LAW.

Under Const. Tenn. art. 9, § 3, which provides that any person who shall fight a duel, or be an aider and abettor in fighting a duel, shall be deprived of the right to hold office, and shall be punished as the legislature may prescribe, a citizen of Tennessee is not disqualified from holding office by the fact that he acted as second in a duel fought in Arkansas between two citizens of Tennessee, where it is not shown that he did any act in regard to the duel, or even knew that it was impending, while he was in the state of Tennessee.

Appeal from chancery court, Shelby county; B. M. ESTES, Chancellor.

L. Lehman, for appellant. *J. H. Malone, H. Craft, W. M. Randolph Smith, Mr. Collin*, and *Hetskell & Hetskell*, for appellee.

TURNER, C. J. The bill charges that defendant was elected judge of the criminal court of Shelby county on the 5th day of August, 1886, and was commissioned by the governor, took the prescribed oath, and entered upon the discharge of the duties of the office. "That said Du Bose was engaged while he was a citizen of the state of Tennessee as a second in a duel, since the adoption of the constitution of 1835 and 1870. That in the month of June, 1870, a dispute arose between James Brizzolari and George R. Phelan, who were both then citizens of Shelby county, Tenn., and which resulted in hostile communications between them, from which, after one had challenged the other in writing, a duel resulted, which was fought in the state of Arkansas, in Crittenden county, a short distance south of the city of Memphis. That said duel was fought on the evening of 28th June, 1870. That when said duel was fought said J. J. Du Bose was present, and not only aided and abetted the same by giving encouragement thereto by his presence, but in said duel appeared and acted as the second of said James Brizzolari." There is no charge that he aided, abetted, or encouraged the combatants in this state, nor that he acted as second, or carried a challenge in this state. There is not so much as an intimation that he knew of or suspected, while in the state, a challenge or intended challenge. So far as the bill discloses, (and we must be governed by that,) his first knowledge of hostility between the combatants was acquired on the battle-field, in a sister state. The prayer of the bill is that said Du Bose be adjudged not entitled to fill or hold said office of

judge; that it be adjudged that he has held and now holds said office unlawfully; that he has usurped, and is now usurping, unlawfully the office; that he be removed from the same, and enjoined from exercising any of the powers or receiving the profits connected therewith," etc.

The complaint made and relief sought are based on section 3, art. 9, of the constitution of the state, in the words: "Any person who shall, after the adoption of this constitution, fight a duel, or knowingly be the bearer of a challenge to fight a duel, or send or accept a challenge for that purpose, or be an aider and abettor in fighting a duel, shall be deprived of the right to hold any office of honor or profit in this state, and shall be punished otherwise in such manner as the legislature may prescribe." And on sections 4146, 4161, Mill & V. Code, which provide: "Sec. 4146. An action lies under the provisions of this chapter in the name of the state against the person or corporation offending in the following cases: (1) Whenever any person unlawfully holds or exercises any public office or franchise within this state, or any office in any corporation created by the laws of this state." "Sec. 4161. When a defendant, whether a natural person or a corporation, is adjudged guilty of usurping, unlawfully holding, or exercising any office or franchise, judgment shall be rendered that such defendant be excluded from the office or franchise, and that he pay the costs." Returning to the clause of the constitution, and admitting the allegations of the bill to be true, is the defendant obnoxious to the charge of its violation? We think not. He did not bear, send, or accept a challenge in the state. He did not aid or abet in fighting a duel in the state. He had nothing whatever to do with a duel, its preparations, or ceremonials, in the state; and, from the charges, we may legitimately infer that he came to all the knowledge he ever had of a contemplated duel in the field in the state of Arkansas. The convention ordaining and the people adopting the constitution must be presumed to have intended to regulate and govern the conduct of those within the state. If there were any doubt of such purpose and intention, that doubt is removed by the closing paragraph of the article cited, to-wit, "and shall be punished otherwise in such manner as the legislature may prescribe." Of course, the convention did not undertake to clothe the legislature with authority to punish for an offense committed in a sister state or a foreign land. Construing the article as a whole, we conclude the offense specified is limited by the delegation of authority to punish. Each state necessarily has the exclusive jurisdiction to try and punish offenders within its territory. To fight a duel, to aid and abet in one, to give or bear a challenge in Arkansas is no offense against the laws of Tennessee. Of course, any of these acts inaugurated and participated in in the state to be consummated in another is a violation of our

constitution and laws, and the person so violating is amenable thereto. For the reasons given the decree of the chancellor dismissing the bill is correct, and will be affirmed.

VAUGHN v. VAUGHN et al.

(*Supreme Court of Tennessee.* May 8, 1890.)

HOMESTEAD—EMBLEMENTS.

Under Code Tenn. (Mill & V.) §§ 2943, 2944, and section 3250, which give a widow both homestead and dower in her husband's land, both estates to be assigned in the same manner and by the same commissioners, a widow is entitled to the crops growing at the time of her husband's death on the land assigned to her as homestead, just as she is under the common law in the land assigned to her as dower.

Error to circuit court, Tipton county; THOMAS J. FLIPPIN, Judge.

Simonton & Young, for plaintiff in error.
Baptist & Boals, for defendants in error.

CALDWELL, J. In August, 1885, R. A. Vaughn died intestate in Tipton county, Tenn., leaving his widow, Sallie L. Vaughn, but no children, him surviving. He owned 90 acres of land in that county, which, under decree of the county court, was, in September following, assigned to her as homestead. Crops of corn and cotton were growing upon this land when it was so allotted to the widow and when her husband died. Assuming that the crops passed to her with the land, she finished their cultivation, and, when they had matured, gathered and appropriated them as her individual property. She took out letters of administration on her husband's estate, and in due season made her report and settlement to the county court. In that report and settlement no notice of the crops was taken, and no charge was made against her for them.

The present proceeding (so far as its purpose need be stated in this opinion) is instituted by certain heirs and creditors of the deceased to charge her as administratrix with the value of the said crops, less her lawful exemptions in the same as a part of his estate. His honor, the circuit judge, was of opinion and adjudged that the crops were assets of the decedent's estate, and that they should be accounted for as such by the administratrix, after the retention by her of so much thereof as is exempt by law to widows of deceased persons. From this judgment the administratrix has appealed in error.

The question thus presented for determination is whether a widow, to whom a homestead has been assigned, is entitled to the crops growing upon the land at the husband's death, and when the assignment of homestead is made. It is an entirely new question in this state, and, so far as we are advised, has never arisen in any of the states of the Union. Such right or estate as that of homestead was not known to the common law; consequently we cannot hope there to find a solution of the inquiry, unless it be through the application of some general principle, or by some obvious analogy. By the common

law, as applied in this country, growing crops, when *fructus industriales*,—the product of annual planting,—are personal property, and as such are subject to sale by execution or by private agreement, without passing any interest in the land upon which they are being produced. 1 Benj. Sales, (Ed. 1883,) §§ 120, 127, inclusive; Carson v. Browder, 2 Lea, 701; Edwards v. Thompson, 85 Tenn. 721, 4 S. W. Rep. 913. If the owner of the land die intestate, such growing crops go to his personal representatives rather than to his heir. 1 Williamson, Ex'rs, (4th Amer. Ed.) 599; Shofner v. Shofner, 5 Sneed, 95. Nevertheless, they are so appurtenant to the land, and so partake of the nature of realty, that, if he die testate, they will pass with the land to the devisee, unless a contrary intention be manifested in the will. *Id.* So, if there be a sale of the land, whether private or judicial, the conveyance passing the title to the soil carries with it the growing crops, if they be not specially reserved or excepted. 4 Kent, Comm. (9th Ed.) 549; Pickens v. Reed, 1 Swan, 80; 1 Williams, Ex'rs, 599. It is equally well-settled that the dower is entitled to the emblements as against both the personal representative and the heir. Her right relates to the time of her husband's death, and when dower is assigned the growing crops pass with the soil, as appertaining to it, and become her absolute property. 1 Washb. Real Prop. (3d Ed.) p. 196, § 25; 1 Williams, Ex'rs, 599, 602; 5 Amer. & Eng. Enc. Law, 908; 4 Kent, Comm. 70.

The analogy between the estate of dower and the widow's right of homestead is very close. While differing widely in some important particulars, they are practically the same in many others. Each is created by the act of the law, and alike they are humane provisions, intended for the sure and competent support of the widow. Both become complete the moment the husband dies, and are subsequently assigned as a matter of legal right. Neither can be defeated or diminished, impaired or invaded, by the heir, the personal representative, or the creditor of the deceased husband; but each insures to the widow the full and uninterrupted use, enjoyment, and control of the land for life. In this state the widow is entitled to both homestead and dower, and by the terms of the statute both are to be "assigned and set apart in the same manner" and by "the same commissioners," the homestead first, and then the dower, out of the residue of the lands belonging to the husband. Code (Mill & V.) 2943, 2944, 3250. The similarity in the nature and the object of the two rights is so great that the established rule with respect to emblements in the one case, resting upon sound reason as it does, should be adopted in the other case. The assignment of dower carries the growing crops with the land, as we have seen, and for the same reason they should follow the allotment of homestead. Let the judgment below be reversed, and enter judgment here for appellant.

CITIZENS' INS. CO. v. AYERS.

(Supreme Court of Tennessee. May 8, 1890.)

FIRE INSURANCE—CONSTRUCTION OF POLICY.

An insurance policy contained the clause, "this policy, being for \$1,000, covers *pro rata* on each of the following amounts," followed by a list of the articles insured, with the sum for which each was insured, aggregating \$3,510. There was no other insurance on the property. *Held*, that the policy insured each article separately for 1000-8510 of the sum named for it in the list.

Error to circuit court, Shelby county; L. H. ESTES, Judge.

Posten & Posten, for plaintiff in error.
C. W. Hetschell, for defendant in error.

FOLKES, J. This was a suit by Ayers against the insurance company to recover for a total loss, the full sum of \$1,000 named in the policy, upon gin-house, machinery, etc. There was verdict and judgment for Ayers for the total amount of the insurance. Motion for new trial having been made and overruled, the company has appealed in error.

The error assigned is in the charge of the court, wherein the following language was used, to-wit: "The court charges you that it is his duty to construe this policy of insurance, and it charges you that the policy insured this plaintiff for one thousand dollars; and if you find from the evidence that $\frac{2}{3}$ of the value of the loss under this policy amounted to more than \$1,000, your verdict should be for the full amount of the policy. If you should find otherwise as to value, you should make the calculation, and allow on a *pro rata* of the amount." To determine whether the construction placed by the court upon the policy of insurance be correct or not, we must examine the policy itself. The policy reads as follows:

"In consideration of sixty-seven and 50-100 dollars, and of the agreements and conditions herein contained, the Citizens' Insurance Company does insure E. M. Ayers to the amount of one thousand dollars. This policy, being for \$1,000.00, covers *pro rata* each of the following amounts:

	Sum Insured.
On steam-power, two-story gin-house, built of cypress, and covered with cypress boards.	\$ 800 00
On two gin-stands, of 80 saws, \$400.00, (being \$200.00 on each); on two condensers, \$100.00, being \$50.00 on each..	800 00
On two feeders and breakers, \$100.00, (being \$50.00 on each).....	100 00
On engine and boiler, \$600.00; on press, \$200.00.....	800 00
On running gear and appurtenances, including belting.....	100 00
On cotton seed therein, \$150.00; on grist-mill attached, \$185.00.....	335 00
On assured cotton, ginned and unginned, packed and unpacked, in said gin-house	—
On cotton held in trust or on commission, for which assured may be liable, therein	500 00
On saw-mill attached.....	875 00
	\$3,510 00

"—All located on plantation," etc.

The policy contained what is known in insurance business as the "country, or three-

fourths clause," wherein it is stipulated "that, in case of any loss or damage under this policy, this company shall be liable only for three-fourths of said loss, not exceeding the sum herein insured, the other one-fourth to be borne by the insured; and, in case of other insurance permitted, this company to be liable only for its proportion of three-fourths of such loss or damage. * * * The amount of loss or damage to be estimated at the actual cash value of the property at the time of the fire, which loss or damage shall in no case exceed what it would then cost to repair or replace the same, deducting therefrom a suitable amount for any depreciation of such property."

The record shows that the assured had made application for \$3,510 of insurance upon property valued by him at \$5,600, the \$3,510 to be distributed upon each item for the amount therein stated, as indicated in the items and amounts we have already copied above. The application was not addressed to this company, but to a different company; and, as shown by Mr. Ayers' testimony, was sent to Murphy & Murphy, insurance agents at Memphis, to be placed. For some reason, not explained in the record, the agents were able to obtain but one policy,—the one sued on. The fact that other insurance was sought by the assured, and not obtained, does not affect the liability of this company one way or the other. There is nothing in the policy sued on concerning other insurance, except that, if any be obtained, it is to contribute to the loss, in proportion to its amount. The proof is conflicting as to the cash value of the property at the time of the loss. It is shown to have been a total loss, except as to the engine and boiler. The adjuster for the company presented a carefully prepared, tabulated statement of his estimate of such value as applied to each item enumerated in the policy, wherein he placed the actual loss, after deducting depreciation, and after deducting the one-fourth to be borne by the assured under the terms of the policy, at \$1,793.43. Applying to this valuation the interpretation by the company upon the *pro rata* clause or stipulation in the policy, he figured the total of assured's right to recover at \$510.42. The assured, on the contrary, undertook to establish, and his proof tends to show, that his loss has exceeded the full amount of the policy, upon any construction thereof, whereupon he insists that, even if the company's construction of the policy be correct, the verdict should stand as representing a proper result, even if the charge were erroneous. This would be so if there was no proof in the record other than that furnished by the assured; and the error of the court, if it be an error, might be said to be immaterial. But, as we have already shown, the proof offered by the company reduces the loss to such a figure that, if its construction of the policy be correct, the total amount is largely less than the face of the policy. Upon this conflict in the proof the company is entitled to go before the

jury under a proper charge. This renders it necessary for us to construe this policy.

It is elementary that, if there be any ambiguity in the policy, it will be resolved against the company issuing it, and will be so construed as to give to the assured that which is the sole object of insurance, so far as the assured is concerned, to-wit, indemnity. But is there any ambiguity about this policy? We think not. Its language is explicit: "This policy, being for \$1,000, covers *pro rata* on each of the following amounts," etc.; then follows, as we have seen, a carefully prepared statement of each item, with the sum insured thereon, upon, and among which the \$1,000 is to be prorated. The meaning and intention of the parties seems to us perfectly clear. It is that the sum of \$1,000 is to be distributed upon each item named, with reference to the insurable value placed thereon, in proportion that the \$1,000 of total insurance bears to the \$3,510 of aggregate value; that is, 1000-3510. To figure it out exactly upon each of the items, it would be as follows:

	Sum in Policy.	Pro Rata.
Gin-house.....	\$ 800 00	\$ 227 92
Gin-stand.....	500 00	142 45
Feeders.....	100 00	28 49
Engine and boiler.....	600 00	170 94
Press.....	200 00	56 98
Running gear.....	100 00	28 49
Cotton-seed.....	150 00	42 73
Grist-mill.....	185 00	52 71
Cotton.....	500 00	142 45
Saw-mill.....	875 00	246 84
	\$3,510 00	\$1,000 00

To hold otherwise would be to ignore altogether the special provision as to *pro rata*. While we are authorized to construe the policy, we are not at liberty to strike out absolutely a carefully inserted and detailed provision thereof. To construe it at all is to reach the conclusion that we have announced. We know of no other construction that can be given to the *pro rata* provision, where there is no other insurance to which the words can apply. The instruction as given by the learned trial judge would make the company liable for the full amount of the policy had there been no injury whatever to half of the articles insured, provided the actual loss on the half destroyed equaled \$1,000 in value, thus ignoring the fact that the policy does not contemplate a \$1,000 risk on \$3,510 of gross value, but a risk upon each of a number of enumerated articles; the amount of the policy to be *pro rata* upon each article, in the ratio already given. While it may be that a new trial will result in a verdict for the full amount of the policy, it is none the less our duty to reverse and remand where the proof is conflicting as to the actual loss upon each of the articles insured. This is not a case where the failure to ask further instructions will defeat the right to new trial. It is not a case of meager instructions, correct as far as they go, but is a positive misconstruction of the contract sued on. No question is made on the "three-fourths

clause," and it has, therefore, not been considered. Let the judgment be reversed, and new trial awarded.

ST. LOUIS, A. & T. RY. CO. v. HOOVER.

(Supreme Court of Arkansas. June 14, 1890.)

PRINCIPAL AND AGENT—IMPLIED AUTHORITY OF AGENTS.

1. A physician employed by the conductor of a train, after communicating with the general manager, to attend a person injured on the road, cannot recover compensation for his services from the railway company, in the absence of proof that the conductor was authorized to employ him.

2. Nor has the attorney for the company any authority to employ a physician on its behalf.

Appeal from circuit court, Columbia county; C. W. SMITH, Judge.

Suit in the Columbia circuit court for \$223 for services rendered as a physician and surgeon, and for board of one James McGregor, at the request of defendant, through and by one Keith, who was conductor and agent of the company, and Col. Ben Johnson and P. H. H., agents of the company, in October, 1886.

Montgomery & Moore and Sam H. West, for appellant. *H. P. Smeadham and Atkinson & England*, for appellee.

HEMINGWAY, J. Neither a conductor, station agent, nor solicitor of a railway company is authorized, in ordinary cases, to contract for surgical attendance upon a passenger or employe injured in operating the trains of the railway company, so as to bind the company. *Railroad Co. v. Rodrigues*, 47 Ill. 188; *Tucker v. Railroad Co.*, 54 Mo. 177; *Brown v. Railroad Co.*, 67 Mo. 122; *Railroad Co. v. Reinsner*, 18 Kan. 458; *Cooper v. Railroad Co.*, 6 Hun, 276; *Railway Co. v. McVay*, 98 Ind. 391; *Cox v. Railway Co.*, 3 Exch. 268. It has been held that, where such injury is done at a point distant from the chief offices of the company, and there is urgent necessity for the employment of a surgeon to render professional services to an injured employe, the conductor, if he is the highest agent of the company on the ground, has authority to bind the corporation by the employment of a surgeon to render the services required by the emergency. *Railway Co. v. McMurray*, 98 Ind. 358. The authority existing in such cases is exceptional. It grows out of the present emergency, and the absence, and consequent inability to act, of the railway's managing agent; its existence cannot extend beyond the causes from which it sprang. This exception states the law most favorably for the appellee, and we do not hold that it does not state it too favorably; but, conceding it to be correct, his cause must fail. Neither of the subordinate agents engaged the appellee to attend the injured party during the emergency, if there was one. The conductor notified the appellee that he could not bind the company for such services without instructions. He communicated with the general agent, and after such communication, if at all, engaged the appellee.

After the general agent was advised of the injury, and put himself in communication with the conductor on the subject, the emergency, which alone could have given the conductor implied authority, terminated, and his right to act in the matter thereafter must have been acquired by express authorization. The evidence shows that the conductor, after receipt of a telegram from the railway's manager, engaged the appellee to perform surgical services. What the contents of the telegram was does not appear, and hence the evidence fails to prove that the employment was authorized. No assistance is to be had in the alleged employment by the attorney, for it is said to have been made the next day, and he is not shown to have been authorized to make it. In this respect there is no evidence to support the verdict. It is not shown that after the alleged employment, and during the services, any general agent of the company knew of it, or that appellee was rendering service for which he would look to the company; there was no ratification of the contract. The employment of a surgeon to render professional service would not bind the employer to repay sums advanced by the surgeon for board of the patient. The latter liability is not included in, nor to be implied from, the contract for the former. *Mayberry v. Railway Co.*, 75 Mo. 492. For the error indicated the judgment will be reversed.

CAMERON et al. v. VANDEGRIFF.

(Supreme Court of Arkansas. June 14, 1890.)

PERSONAL INJURIES—NEGLIGENCE—EVIDENCE—MEASURE OF DAMAGES.

1. Contractors employed in constructing a railroad cannot claim the right of way as their own premises, and thus avoid liability to another working on the same road, injured by their negligence.

2. The court is prohibited from charging the jury as to the weight of the evidence by Const. Ark. § 23, art. 7.

3. The negligence of defendants in sending off a blast without notice, and thereby injuring plaintiff, need only be proved by a preponderance of evidence.

4. That plaintiff's employers failed to notify him that the blast was about to be set off does not excuse defendants from giving such notice.

5. Where the blast was fired in the Indian Territory, but the rock struck plaintiff in Arkansas, the cause of action accrued in the latter state.

6. Plaintiff can recover for impaired physical ability, pain, and suffering unavoidably incurred, even though it is increased by the want of proper care and medical attention.

Appeal from circuit court, Sebastian county; J. S. LITTLE, Judge.

Clayton, Brizzolari & Forrester, for appellants. *R. T. Kern and Duval & Cravens*, for appellee.

HEMINGWAY, J. The appellee recovered a judgment against the appellants for damages on account of personal injuries to him, occasioned by the alleged negligence of appellants while engaged in blasting rock near where the appellee was at work. It is contended that the appellants were not liable to the appellee, because he was upon their premises, and they owed no duty to him in the per-

formance of their work. If it were conceded that their contention as to the law was right, the facts would not justify its application in this case. All the parties were, at the time of the accident, on the premises of a third person, lawfully engaged in the construction of a railway track. If, by reason of employment, it was the premises of either, it was the premises of each. The charge, as given by the court, fairly submitted the cause to the jury upon the two material issues,—the negligence of appellants, and contributory negligence of appellee. The appellants' rejected prayers should not have been given. By their second they requested the court to charge the jury upon the weight of the evidence, which it is by the constitution prohibited from doing. Section 23, art. 7. Const.; *Keith v. State*, 49 Ark. 489, 5 S. W. Rep. 880. Their third prayer requested the court to charge the jury that the appellee was required to prove the negligence of appellants "to a moral certainty, to the exclusion of reasonable doubts." This does not correctly state the rule of evidence, which required only that negligence be proved by a preponderance of the evidence. The negligence of appellee's employers in failing to notify him that a blast would be fired, did not excuse the negligence of appellants in firing the blast which they had reason to believe would endanger his safety, without giving such timely notice thereof as would enable him to escape the danger. They knew his situation, and that the blasting endangered his safety. They should have used reasonable care and caution to prevent injury to him. *Bizzell v. Booker*, 16 Ark. 308. The rock which occasioned the injury was put in motion by the appellants in the Indian Territory; but, by the same force, its motion was continued, and the injury done in this state. The cause of action arose here. The seventh prayer excluded from the computation of damages all elements of impaired physical ability, and of pain and suffering unavoidably incurred, if it should be found that the injury was increased for want of proper care and medical attention on the part of appellee. Such is not the law, and the court properly refused to so charge. There was no error of law in the trial, and the verdict of the jury determines the issues of fact against appellants. Affirmed.

SMITH v. HALLIDAY.

(*Supreme Court of Arkansas*. April 26, 1890.)

EVIDENCE—AMENDED COMPLAINT—ANSWER—JUDGMENT.

In an action to recover possession of land, plaintiff introduced the record of a suit brought against the person under whom he claimed by the person under whom defendant claimed. In that suit the defendant therein answered the original complaint, denying that the plaintiff was the owner, and entitled to possession, of the land therein described. The complaint did not embrace the land in question; but, after the answer was filed, plaintiff filed, by leave of court, an amended complaint embracing the land. Defendant filed no other answer, and judgment was rendered for de-

fendant. The judgment did not describe the land. Held, that the answer was responsive to the amended as well as the original complaint, and the judgment covered the land described in the former.

Appeal from circuit court, Chicot county; C. D. Wood, Judge.

U. M. & G. B. Rose and J. F. Robinson, for appellant. *D. H. Reynolds*, for appellee.

HEMINGWAY, J. Benjamin H. Smith, the appellant, brought an action against the defendant to recover possession of a tract of land. It was alleged in the complaint that plaintiff derived title from one William H. Todd, and that defendant claimed title through one Abner L. Gaines. It was further alleged that, before either of the parties acquired a claim to the lands, Gaines, under whom the defendant claimed, had brought suit for the same land, in the Chicot circuit court, against Todd, from whom plaintiff acquired title, and that it was subsequently adjudged in said suit that the land belonged to Todd. The plaintiff filed as muniments of his title (1) the record in the case of *Gaines v. Todd*, showing a judgment of the Chicot circuit court in the defendant's favor, rendered January 19, 1874; (2) a deed from L. H. Springer as administrator of Todd, with the probate record pertinent thereto, dated January 20, 1883, conveying the land to plaintiff. The answer of the defendant denied that the land in controversy was adjudged to Todd in the suit of *Gaines v. Todd*, and alleged that the subject-matter of the suit was a tract of land not involved in this. It alleged that, if Todd ever had title to the land, he parted with it before his death, and that plaintiff acquired no title by the conveyance from L. H. Springer as administrator. It further alleged that defendant purchased the Yellow Bayou plantation under an execution against Todd, and took a sheriff's deed therefor dated August 28, 1877; that he went into possession of said plantation under said purchase, and has remained in possession ever since; that he thereby acquired, and has held, all of Todd's interest in the entire section of which the land in controversy is a part. It does not allege that the land in controversy was a part of the Yellow Bayou plantation, or that it was sold as such. It further alleged that on the 20th of December, 1880, the defendant purchased from the estate of Abner L. Gaines a tract of land embracing that in controversy, and took deed therefor; that the defendant had been in the peaceable, undisturbed, and adverse possession of the Yellow Bayou plantation, under his purchase in 1876, ever since that time, including all of the section, of which the tract in controversy is a part, that had been held or occupied by Todd prior to that time, but does not allege that the tract in controversy had been so held or occupied by him. It interposes the plea of limitation under sections 4471, 4474, Mansf. Dig. The defendant filed as muniments of his title (1) the deed from Holland as sheriff; and (2) the deed from

commissioners appointed by the probate court of Chicot county to make partition of the land of Abner L. Gaines, conveying the land in controversy to the defendant, which deed bears date January 10, 1881. The defendant filed exceptions to plaintiff's muniments of title,—to the first, because the tract of land involved in this suit is not the same tract involved in the suit of Gaines v. Todd; and to the second, because it did not appear that Todd had any title to the land in controversy, and hence none passed by the deed of his administrator. The plaintiff excepted to defendant's first muniment of title because the lands thereby conveyed did not embrace the land in controversy. He excepted to defendant's second muniment of title because (1) Abner L. Gaines had no title to the lands at the time of his death; and (2) the probate court had no jurisdiction to decree a partition of the lands of which Gaines died seised. The court sustained defendant's exceptions to plaintiff's muniment of title, and sustained plaintiff's exceptions to defendant's first, but overruled the exception to his second, muniment of title. The cause was then submitted to the court sitting as a jury, and there was a verdict and judgment for the defendant. Plaintiff made a motion for a new trial, and alleged as error (1) that the court sustained defendant's exceptions to plaintiff's muniments of title; and (2) that the court overruled plaintiff's exceptions to defendant's second muniment of title. The motion was overruled, and plaintiff has appealed.

1. The plaintiff's first muniment of title contains the entire record in the case of Gaines v. Todd. The complaint in that case was filed February 24, 1872. On March 26th, following, the defendant filed his answer, in which he denied "that the plaintiff is the owner, and entitled to the possession, of the certain forty-five acres of land described in the complaint." On September 24, 1872, the plaintiff therein presented a motion as follows: "To amend the complaint in this cause in this, that the E. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of section 10, as described in said complaint, be changed so as to read and be as follows, to-wit, the W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of section 10, in township 15 south, range 2 west, containing 50 acres of land, and ask that said cause be allowed to be continued and prosecuted for said last-mentioned tract of land." The leave was granted, and the cause continued. The amendment described the land in this suit. No further answer was filed; but the parties appeared at the January term, 1874, of the court, announced ready for trial, and there was a judgment that the title to the land was in defendant. What land was affected by the judgment? The judgment does not set it out, and what it was must be ascertained from the record. The description in the original complaint designated a different tract than that now sued for; but plaintiff obtained leave to strike out the descriptive words therein contained, and insert in lieu thereof words descriptive of the land in this suit.

That the court can, and in the exercise of its discretion should, grant such leave, it requires no argument to establish. Where the ends of justice require it, the amendment should be granted upon terms that will prevent surprise and injustice. Such was done in that case, but, whether that were so or not, the abuse of discretion would not avoid the judgment. The parties were before the court; and, if errors were committed, they enjoyed the usual opportunity to correct them, but chose to rest content with the court's action. It is insisted that there was no answer to the amended complaint. The amendment tendered no new issue, but simply substituted a correct for incorrect description of the property in controversy, and the answer filed was responsive to the issues after as well as before the amendment; and, if the parties therein so chose, they could proceed to trial on the pleadings already made. This they did. But, even if there had been no answer, the judgment would not have been void; and, if erroneous, this is not a proceeding in which the error can be reviewed. As the titles of both parties in this suit were derived from the parties to that suit, after its determination the judgment in that case was competent evidence; and the court erred in sustaining the exceptions to it.

2. The deed from Todd's administrator purported to convey to plaintiff Todd's estate in the land. The proceeding upon which the deed was based is not assailed, and we assume that it was valid. So the court erred in sustaining the exception to it as a muniment of title.

3. The deed from Holland as sheriff to appellee purports to convey a number of tracts of land regularly described according to the government surveys, but not including the land in controversy. After that description comes the following language: "Composing the plantation commonly known as 'Yellow Bayou.'" Whether such words in a sheriff's deed would be sufficient to pass title to any lands that were a part of Yellow Bayou, but not included in the particular description, we need not decide; for it is not alleged that the land in controversy was a part of Yellow Bayou.

4. As no title was shown in Gaines, the deed from the commissioners conveyed none to the appellee, whether the probate court had jurisdiction to decree the partition or not. The court's refusal to sustain plaintiff's exception to it neither prejudiced him, nor benefited the defendant. For the errors indicated the judgment will be reversed, and the cause remanded for a new trial.

JONES V. EUREKA IMP. CO.

(*Supreme Court of Arkansas.* April 26, 1890.)

IMPLIED TRUST—SUIT TO ESTABLISH—FRAUD.

Plaintiff alleged that he was in possession of a lot in Eureka Springs, before the town-site was patented to the mayor under Act Cong. March 2, 1867, providing that land occupied as a town-site might be entered by the mayor for the use of

the occupants under such rules as might be established by the state legislature; that, in a suit in the circuit court between defendant and the mayor, a consent decree was entered vesting title to the town in three trustees, one of whom was defendant's president, who were to hold the land for the use of the occupants, and execute deeds to them in pursuance of Act Ark. Feb. 16, 1885, p. 18, which barred all claims of persons who failed to procure deeds or bring suit within one year from the passage of the act; that plaintiff, having complied with the requirements of the act, received a deed from the other two trustees, but that defendant's president, the other trustee, having received the deed for the alleged purpose of making certain entries from it, and under an agreement to sign and return it to plaintiff, fraudulently withheld it until the time for signing it had expired, when he refused to sign it; that under the consent decree all property not deeded within one year vested in defendant. The complaint asked that the land be decreed to be held in trust for plaintiff by defendant. Held, that the complaint stated a cause of action, though the limitation had expired, since, if its allegations of fraud on the part of defendant's president were true, defendant would hold the land as trustee for plaintiff.

Appeal from circuit court, Carroll county;
J. M. PITTMAN, Judge.

Caruth & Erb, for appellant. *Crump & Watkins*, for appellee.

COCKRILL, C. J. This is a complaint in equity to declare a trust and compel a conveyance of real estate. According to the abstracts, the suit was dismissed upon demurrer to the complaint; and the question submitted is, does the complaint state a cause of action? It may be said to allege that the plaintiff's grantor settled upon the lot in question when it was a part of the public domain, and that they and he have since been continuously in possession; that the lot is in the city of Eureka Springs, and that the land upon which the city is located was patented December 30, 1884, to the mayor of the city under the town-site law, to be held by him in trust for the occupants of the several lots and parcels of ground; that the Eureka Improvement Company brought suit against the mayor in the United States circuit court at Fort Smith, Ark., to set aside title, and that on the 6th of April, 1885, the parties caused a consent decree to be entered in said cause divesting the mayor of title, and vesting it in three persons as trustees, viz., the mayor, the president of the Eureka Improvement Company, and one John Carroll, who were to hold the title for the use of the occupants, and to execute deeds to them within the time prescribed by the state statute passed to effect the object of the town-site location; that the decree further provided that, at the expiration of the time fixed by the act of the legislature known as the "Eureka Town-Site Act," all property remaining in the hands of the trustees should be conveyed to the Eureka Improvement Company without payment of any consideration; that plaintiff complied with all the regulations as to tender of the appraised value of his lot and proof of his right to a deed before the trustees named in the decree, and was then entitled to a deed; that a deed in proper form was signed by Carroll and the mayor as trustee,

for the purpose of conveying the lot in question to him, in pursuance of the directions of the decree, but that the president of the improvement company, who was the third trustee, delayed the execution of the deed by raising objections thereto from time to time; that the reasons for his objections were finally removed, and he consented to execute the conveyance; that the deed signed by the other trustees was thereupon delivered to him along with the plaintiff's evidence of his right of ownership of the lot, for the purpose of allowing him to make therefrom certain entries in the abstract book of the improvement company, and that it was agreed that when this was done the deed was to be delivered to the plaintiff; that this was near the expiration of the time prescribed for making deeds by the trustees; that the said president allowed the time to elapse without executing the deed, and that then, for the first time, the plaintiff was informed the title would not be made to him; that the acts of the trustees, and particularly those of the president of the improvement company, were a fraud upon his rights, and were intended to prevent, and did prevent, him from obtaining the deed to the property; that the presence of the president of the improvement company among the trustees, to determine whether he or the improvement company should have the land, was in itself a fraud; that the improvement company was claiming the land by virtue of the said decree or a conveyance from the trustees named, and that he was unable to ascertain which was true. Prayer that he be invested with the legal title. Conceding these facts to be true, the question is, ought the complaint to be dismissed?

The act of congress of March 2, 1867, provides that public land which has been settled and occupied as a town-site may be entered by the mayor of the town at the United States land-office "in trust for the several use and benefit of the occupants thereof according to their respective interests," and that the execution of the trust shall "be conducted under such rules and regulations as may be prescribed by the legislative authority of the state" in which the land is situated. In pursuance of this authority, the legislature enacted that the lands so acquired in trust by the mayor of Eureka Springs should be conveyed to the owners of the lots in that city upon payment to the city of such sums as the lots should be appraised at,—the appraisement not to exceed \$20 per lot. Act Feb. 16, 1885, p. 18. It was further provided that all persons who should fail to prove their claims and procure deeds to their lots within one year from the passage of the act, or bring suit to settle their rights within that time when a dispute arose, should be forever barred of any claim or interest in the same, and that title should in that event vest in the city of Eureka Springs, to be conveyed or sold by its authority. It is argued that, inasmuch as the plaintiff did not obtain his deed, or institute suit to establish his title, within the year

limited by the act, he can have no relief. When the patent issued to the mayor of Eureka Springs, the equitable title to lots in the town vested in the occupants by virtue of the act of congress under which the patent issued. *Stringfellow v. Cain*, 99 U. S. 610; *Mallard v. Anderson*, 86 La. Ann. 834; *Osfield v. McClelland*, 16 Wall. 331; *Rathbone v. Sterling*, 25 Kan. 444; *Clark v. Titus*, (Ariz.) 11 Pac. Rep. 312. But, under the power conferred by that act, the state placed a conditional limitation upon the occupant's right to own the property by providing that he should apply for a deed for his lot, or bring suit to have it executed, within a year. The time was reasonable, and it was within the power of the legislature so to limit the right. The end of the year without action by the occupant was the limit beyond which his equitable estate no longer existed. If the title was not perfected within that time, and no suit is brought to perfect it, the equitable title was determined by operation of law, and the occupant's right to become the owner was gone. But there are other considerations in this cause which invoke equitable principles that control it. The courts are not so fettered by this statutory limitation as to be powerless to do justice between the improvement company and the plaintiff. Under what circumstances, if any, an occupant who had failed to take action can procure relief from this limitation in a suit in equity against the city it is not essential to determine; for, according to the allegations of the complaint, the city claims no interest in the property, but is acquiescing in the consent decree entered in the United States court in the suit between the mayor and the improvement company, the terms of which purport to vest beneficial interest in the lands in the company upon the trustees' failure to execute a deed to the claimant. As between the improvement company and the plaintiff, the limitation placed upon the right to acquire title is unimportant. If the president of that company, through his fraudulent conduct as trustee, with a view to the company's profit, prevented the plaintiff from obtaining a deed to a lot to which he was entitled under the law, in order that the title might go to the company under the decree of the United States court, the benefit derived by the company therefrom cannot be withheld by it from the plaintiff. Whatever right or title the company may have acquired through such conduct of its president must be decreed to be held in trust for the plaintiff. 1 *Perry, Trusts*, § 181, and cases. The demurrer admits the allegations of the complaint, and, if they are true, the plaintiff is entitled to the relief sought against the company. How far the decree of the United States court against the mayor is binding upon the city, or whether it had any binding force upon the occupants of the lots who were not parties to the proceeding, we need not now inquire. It is only necessary to determine that whatever title the improvement company has acquired

through it, or by conveyance from the trustees designated in it, will inure to the benefit of the plaintiff, if the allegations of his complaint are true. Reverse the decree, and remand the cause, with instructions to overrule the demurrer.

ST. LOUIS, A. & T. RY. CO. v. JOHNSON.

(Supreme Court of Arkansas. May 17, 1890.)

CARRIERS OF GOODS—FAILURE TO DELIVER—STATUTORY PENALTY.

Under Act Ark. Feb. 27, 1885, § 3, providing that a railway company refusing to deliver freight at its destination upon payment or tender of the charges due by the bill of lading shall be liable to a penalty, the entire charges must be paid or tendered in order to fix the liability; and where a consignee declines to receive a portion of the goods because they are damaged, and the company refuses to deliver the undamaged freight upon a tender of its proportion of the charges, and it is thereupon replevied, and subsequently, after repairing the damage, the company refuses to deliver the remaining goods upon a tender of their proportion of the charges, but offers to do so upon the payment of the whole bill, no liability for the penalty is incurred.

Appeal from circuit court, Monroe county; M. T. SANDERS, Judge.

J. C. Hawthorne and Sam. H. West, for appellant. H. A. Parker, for appellee.

COOKRILL, C. J. This is a suit by the appellee to recover a statutory penalty of the railway for failure to deliver freight upon tender of charges. The statute under which the suit was brought is as follows: "Any railroad company, its officers, agents, or employees, that shall refuse to deliver to the owner, agent, or consignee any freight, goods, wares, and merchandise, of any kind or character whatever, upon the payment, or tender of payment, of the freight charges due as shown by the bill of lading, the said railroad company shall be liable in damages to the owner of said freight, goods, wares, or merchandise to an amount equal to the amount of freight charges for every day said freight, goods, wares, and merchandise is held after payment, or tender of payment, of the charges due as shown by the bill of lading, to be recovered in any court of competent jurisdiction." Section 3, p. 36, Act Feb. 27, 1885.

The undisputed facts are that the plaintiff purchased four wagons in St. Louis, Mo., and caused them to be shipped over the appellant's line of railway to his place of business in Arkansas. They were taken down, and shipped in parts, as one consignment of freight, the bill of lading calling for the list of articles which went to make up the four wagons. When they arrived it was discovered that one nut used to hold a wheel on the axle was missing. The appellee refused to receive the damaged wagon, or to pay its proportion of the freight charges, but demanded the other three, and tendered three-fourths of the amount of the freight due under the bill of lading, which the railway declined. The tender was repeated and refused on three several days, when the appel-

lee brought an action of replevin for the three uninjured wagons, and caused them to be taken from the custody of the railway. Thereafter the railway replaced the missing nut, when the appellee made a tender of one-fourth of the amount due under the bill of lading, and demanded delivery of the fourth wagon. The railway offered to deliver it on payment of the whole amount due under the bill of lading, and refused to surrender it upon tender of payment of a less amount. The appellee repeated his tender upon the two succeeding days, took the wagon by replevin, and brought this action to recover the penalty for each day's refusal to deliver the freight demanded; that is, for three times the amount of charges which the bill of lading showed to be due. He recovered judgment for the amount claimed.

The facts do not sustain the recovery. The action is upon a penal statute, and the plaintiff has not shown a violation of its letter or spirit. He could put the railway in default, and recover the penalty under the statute, only upon a tender of the amount due as freight under the contract evidenced by the bill of lading. That is the condition prescribed by the statute, and no penalty can be incurred in the absence of a sufficient tender. The fact that the carrier is not entitled to freight on goods which, through his fault, are not delivered, does not relieve the plaintiff's position. If the bill of lading and freight charge called for four wagons, and the carrier transported only three, freight could be legally demanded for the carriage of three wagons only, for no more would be earned; and it may be that in such a case the carrier would incur the penalty imposed by the statute by refusing to deliver the wagons actually carried upon tender of three-fourths of the charges called for by the bill of lading. But that is not this case. Four wagons were billed and charged for as one shipment of freight, and they were offered for delivery at their destination. One was in a damaged condition, and the injury may have occurred through the fault of the carrier. But it was still of value as a wagon, and was capable of being made whole at a trifling expense. The merchant had no right, therefore, to abandon it to the carrier, and hold the latter liable as for a conversion, (*Railway Co. v. Mudford*, 44 Ark. 439,) or deprive it of the right to receive pay for its service as carrier, even though the injury had occurred through the carrier's culpability, (*Dakin v. Oxley*, 15 C. B., N. S., 646, 109 E. C. L. 646.) In such a case the owner of the property has his action for damages for the injury; and, where it is clear that the injury is culpable, and the damage greater than the charge for carriage, it has been held that the owner is entitled to his goods without payment of freight. But that doctrine could not aid the appellee; for, if it could have application at all in a suit for a penalty, still the injury was inconsiderable as compared with the freight. The tender of three-

fourths of the amount of freight due was not sufficient to put the railway in default. The subsequent tender of one-fourth was inadequate as to the remaining wagon, because, the four having been shipped as one consignment, the freight for all was a lien on each, and, until the whole amount was discharged, the carrier could lawfully retain possession of either. Reverse the judgment, and remand the cause.

FRIZZELL v. TILLER.

(*Supreme Court of Arkansas. May 24, 1890.*)

Appeal from circuit court, Sebastian county; GEORGE A. GRACE, Special Judge.

Clayton, Brozzolara & Forrester and Clendenning & Read, for appellant. *B. H. Tabor*, for appellee.

PER CURIAM. This cause is controlled by the decision in *Commission Co. v. London*, ante, 513. Reverse and remand.

LUCK v. ATKINS et al.

(*Supreme Court of Arkansas. May 24, 1890.*)

GUARDIAN'S BOND—SUBROGATION.

1. Under Const. Ark. art. 9, § 3, providing that the homestead is not exempt from levy for debts due in his fiduciary capacity by the trustee of an express trust, and expressly mentioning a guardian as such a trustee, sureties on the bond of a deceased guardian are entitled to subrogation to the right of the wards to subject the homestead of the guardian to sale for the payment of claims owing by him in his fiduciary capacity.

2. And in such a case, where the deceased guardian was the father of the wards, and they were his sole heirs, such right of subrogation may be made available to defeat an action by the wards against the sureties on a claim due from the father as guardian.

3. A decree entered against minors upon the pleadings, without proof of every material allegation prejudicial to their rights, is erroneous.

Appeal from circuit court, Monroe county; M. T. SANDERS, Judge.

Action by T. B. Luck, guardian of the four minor children of W. M. Walkup, deceased, against J. H. Atkins and others, sureties on a bond which decedent had given in his lifetime as the guardian of the children, to recover a claim owing by the father as guardian. Judgment was given for defendants, and plaintiff appeals.

H. A. Parker, for appellant. *Pries & Green*, for appellees.

COCKRILL, C. J. The controlling question here in this case is settled by the judgment in *Gilbert v. Neely*, 35 Ark. 24. See, too, *Har. Subr. § 281 et seq*; *Sheld. Subr. § 89*; *Rice v. Rice*, 108 Ill. 199. In that case the sureties in a deceased guardian's bond, who were forced to make good the default of their principal, were held to be subrogated to the ward's right to subject the homestead of the guardian to sale for the payment of the debt contracted in his fiduciary capacity, as against the widow of the deceased guardian. The heirs being necessary parties, the cause was remanded in order that they might be brought in; and the opinion states that, if they should

prove to be minors, their right to the homestead would in like manner be subordinate to the sureties' remedy to subject it to the payment of their demand. The rights of the parties in that case were governed by the constitution of 1868, while this cause is controlled by the provisions of the constitution of 1874, but there is nothing in the latter instrument to alter the rule established by the case cited. By section 3 of article 9 of the constitution of 1874, the homestead is not exempt from sale under process issued for the collection of money due in his fiduciary capacity from a trustee of an express trust, and guardians are specially mentioned as such trustees. In that respect the provisions of the latter constitution are specific in their application to this class of cases. As explained in the former case, the right of the minors to the homestead is a derivative right. They succeed to it as their ancestor possessed it, subject to the liabilities which legally existed against it in his hands. His death does not displace the superior right of the creditor to condemn the homestead for the satisfaction of a debt incurred by violation of a trust, any more than for the satisfaction of the specific liens to which the same provision of the constitution renders the homestead liable.

But it is argued that the sureties must pay the debt due to the wards before they can be substituted to the benefit of their right to condemn the homestead of their guardian. That a surety cannot have subrogation till he pays the debt is the established rule. *McConnell v. Beattie*, 34 Ark. 118. But equity abhors a multiplicity of suits, and adjusts the rights of parties without circuity of action, when it is feasible to do so. The parties to whose rights the sureties in this cause would be substituted on payment of the debt are the plaintiffs, who are seeking its collection; and the only means by which the sureties could reimburse themselves after payment would be by sale of their principal's homestead, the right to the enjoyment of which the law has cast upon the plaintiffs. It would be unreasonable to require the sureties first to pay the plaintiffs the debt their father owed them, and then sue them to have the money back again. *Dugger v. Wright*, 51 Ark. 235, 11 S. W. Rep. 218. The assets of their father's estate have been exhausted in the course of administration. They are the sole heirs, and the value of the homestead exceeds the amount of the debt due. *Prima facie*, therefore, it is not to the interest to sacrifice the homestead. They may elect to collect the debt at the sacrifice of the homestead, but they cannot collect the debt, and retain the homestead.

The cause was submitted upon the pleadings without proof; and, there being no answer to the cross-complaint, it was taken as confessed, and a decree entered against the interest of the minors. This was erroneous. There must be an answer for the infants, and proof of every material allegation prejudicial to their rights, before the rendition of

judgment against them. *Pinchback v. Graves*, 42 Ark. 222; *Driver v. Evans*, 47 Ark. 300, 1 S. W. Rep. 518. For this error the judgment is reversed, and the cause will be remanded for further proceedings.

CAMPBELL *et al.* v. CARNAHAN *et al.*

(Supreme Court of Arkansas. May 24, 1890.)

WILLS—CAPACITY TO MAKE—EVIDENCE.

1. On the contest of a will on the ground of undue influence, evidence as to the feelings of the testatrix towards those related to her is competent.

2. Evidence that the husband of testatrix had made expression to her of unkind feelings towards contestant was competent, it appearing that the property devised had come to testatrix from the husband.

3. The court charged that neither sickness, debility, old age or infirmity, will disqualify one for making a will, if sufficient mind remains; that, if the jury should believe that the will was rational, and the bequests in accordance with expressed intentions, they might consider these things in determining the mental capacity of the testatrix; and that, if they should believe that she knew what she was doing, they should find in favor of the will. *Held*, that the instruction was not objectionable on account of the last clause, as read in connection with the rest of the charge, its meaning was clear, and in accordance with the law.

4. The improper admission of testimony is harmless error, where there is competent testimony in the case to the same effect.

Appeal from circuit court, Washington county; J. M. PITTMAN, Judge.

L. Gregg and *B. R. Davidson*, for appellants. *U. M. & G. B. Rose*, for appellees.

HEMINGWAY, J. The appellants, being of the next of kin of Mrs. Elizabeth McClure, resisted the probate of the instrument offered by the appellees in the probate court of Washington county as her last will. Their resistance was placed upon two grounds—*First*, that she did not possess the testamentary capacity at the time of the execution of said instrument; and, *second*, that she was induced to make it by undue influence. The appeal comes to us after a trial upon those issues and a judgment sustaining the instrument. Many causes are assigned for a reversal of the judgment, but we may conveniently consider them under three heads, as follows: *First*, that the court erred in the admission of evidence; *second*, that the court erred in rejecting the appellant's prayers for instructions; and, *third*, that the court erred in its declarations of law given in charge to the jury. A part of the evidence objected to fails to disclose any direct tendency to elucidate the matters involved; but, if it was irrelevant, it was equally without effect, and therefore without prejudice. That part which had any bearing upon the issues tended to establish the feeling of the testatrix towards those related to her, and thereby to determine whether the will represented her free and intelligent wish in the disposition of her property. In so far as it tended in such direction, it was proper matter for the jury to consider in determining the issues. In so far as it did not tend

in that direction, it had no tendency to benefit or prejudice either party. Miss Sally McCarry was permitted to detail statements made to her by the husband of Mrs. McClure, not in her hearing, as to his unkind feeling towards appellant Campbell, and his unwillingness that Campbell should ever receive any of his property. This should not have been admitted. But other testimony, uncontradicted, showed that he had made similar statements to Mrs. McClure, and, as her estate came from him, it was competent as tending to explain her reason for ignoring Campbell in the benefits bestowed by her will. This being properly in evidence, the improper admission of Miss McCarry's testimony, to the same effect, could not have been prejudicial. Some of the rejected prayers of the appellants correctly announced the law of the case, but all such as relate to the testamentary capacity of the testatrix were fully and fairly incorporated in the charge given. There was no evidence upon which the jury could have found that she was controlled by undue influence, and no error prejudicial to the appellant can be predicated upon the court's action in charging, or refusing to charge, the jury upon the law applicable to that issue. We are unable to discover any error in the charge given, prejudicial to appellants. In the main, it declared the law with accuracy and clearness, and in terms as favorable to the contention of appellants as they could demand. McCulloch v. Campbell, 49 Ark. 367, 5 S. W. Rep. 590. But they earnestly insist that the first instructions given on motion of the appellees incorrectly stated the law, to their serious prejudice. It is as follows: "No. 1. The jury are charged that neither sickness or debility, old age or infirmity, will disqualify one for making a will, if sufficient mind remains; and if the jury believe from the evidence that the will is rational on its face, and the bequests are reasonable and in accordance with previously expressed intentions, and the bequests were dictated by her, the jury may consider these things, in connection with all other evidence, in determining the mental capacity of the testatrix, Mrs. McClure; and, if they believe from all the evidence before them that she knew what she was doing, they will find in favor of the validity of the will." The instruction is by no means perfect in its structure, but, while we cannot approve it as a model, we are unable to agree with the contention of the appellant as to its effect. The last clause, if it stood alone, might be misleading; but, read as a part of the charge, its meaning is obvious. The jury could not have failed to understand from it that if they found from all the evidence before them that Mrs. McClure knew that she was making a disposition of all her property, to whom and in what proportion she was giving it, and from whom, of those nearly related to her, she was withholding it, and, so understanding, she executed the will, they should find in favor of its validity, al-

though they should further find that she was at the time sick and infirm. We find no error, and the judgment is affirmed.

McWHORTER v. ANDREWS.

(Supreme Court of Arkansas. May 24, 1890.)

PLEADING—RES ADJUDICATA.

1. Where a demurrer to an answer is sustained it is proper to strike out a paragraph of the amended answer on the ground that it sets up the same defense as the original answer.

2. Objection to the action of the court in sustaining a demurrer to an answer is not waived by filing an amended answer.

3. In an action for the wrongful conversion of certain bales of cotton, an answer was filed to the effect that theretofore defendant had sued plaintiff on an open account, in which the full value of a certain number of bales of cotton, including the cotton alleged to have been converted, was credited to plaintiff, and that it had been adjudged in such action that a balance was due defendant after the allowance of all credits. No special damage was alleged in the complaint. Held, that the answer stated a defense.

Appeal from circuit court, Pulaski county; J. W. MARTIN, Judge.

Compton & Compton, for appellant. Sanders & Watkins, for appellee.

HEMINGWAY, J. The appellee instituted this suit on the 18th day of July, 1887, seeking to recover of the appellant of the value of 38 bales of cotton, which, it was alleged, he had wrongfully converted. The appellant interposed the following answer: "That the plaintiff ought not to maintain his action herein, because, on the 9th day of March, 1887, the said plaintiff commenced his action against the defendant, in Hempstead circuit court, for the sum of \$1,520, for the conversion of the same cotton, and, on the 21st day of May, 1887, the defendant filed his answer, denying the allegations of the plaintiff's complaint, and alleging, as a counter-claim, that the plaintiff was indebted to him in the sum of \$1,838.50, for goods, wares, and merchandise sold and delivered to the plaintiff, and in said account he credited plaintiff with the sum of \$1,561, the value of forty-two bales of cotton delivered by the plaintiff to the defendant, in part payment of said account, together with other credits, leaving a balance due this defendant of the sum of \$179, and that, on the 21st day of October, 1887, the plaintiff dismissed his complaint, and filed an answer to the counter-claim of the defendant, denying that the statement of the account in the counter-claim was correct; and on said 21st day of October, 1887, plaintiff filed his motion for a change of venue, and the venue was changed to Nevada county; and afterwards, on the 16th day of November, 1887, said cause was tried in the Nevada circuit court, and a judgment rendered in favor of defendant for the sum of \$179.66 for his debt and damages, which judgment remains in full force and effect, as will more fully appear from a certified copy of the proceedings had in the circuit courts of said counties of Hempstead and Nevada, hereto attached, marked 'Exhibit A,' and

made a part hereof, which said action was between the same parties to this action, and the said thirty-eight bales of cotton herein sued for are covered by and included in the credits of forty-two bales of cotton credited to the plaintiff by the defendant in the said action so commenced and tried in the circuit courts of Hempstead and Nevada counties; and the defendant says that all question as to the cotton sued for herein, and liability for the same, were adjudicated and settled between the parties hereto in said action and by the judgment therein rendered, and is not open for adjudication in this action." The plaintiff demurred to the answer, and his demurrer was sustained. The defendant filed an amended answer in three paragraphs. The plaintiff moved the court to strike out the second paragraph, because it sought to renew a defense held insufficient by the former order of the court. The motion was sustained, and the defense stricken out. There was a trial of the issues presented on the remaining paragraphs of the answer, verdict and judgment for the plaintiff, and the defendant appealed.

The questions presented for our consideration are as follows: (1) Did the court err in striking out the second paragraph in the defendant's answer? (2) Did the defendant, by answering after demurrer sustained to his original answer, abandon his exception to the court's action in that regard? (3) Did the original answer set up facts sufficient to constitute a defense? To the first motion, assuming that the pleading stricken out was, in its legal effect, the same as the original answer, we respond in the negative. *Goodwin v. Robinson*, 30 Ark. 535. We so treat it, for it is not properly before us, and we take the order the court made as correctly interpreting its effect. It should have been brought here by bill of exceptions. *Walker v. Wills*, 5 Ark. 166. The second question must also receive a negative response. *Goodwin v. Robinson*, supra; *McElroy v. Buckner*, 35 Ark. 555. In proceeding to answer the third question we will first state what we understand to be the legal effect of the original answer, as follows: That theretofore, in a court of competent jurisdiction, McWhorter had sued Andrews on an open account for \$179.70, itemized, and showing charges for \$1,838.50, for goods sold, and bearing credits aggregating \$16,558.80, leaving a balance due as above, for which he claimed judgment; that Andrews answered, and denied that he owed the sum so claimed, but afterwards such proceedings were had that judgment went against him for said amount, and is in full force; that there was credited on said account the sum of \$1,561, proceeds of 42 bales of cotton received from Andrews, which was the full value thereof, and that the cotton now sued for was a part thereof; that it had been legally adjudged in that controversy, between these parties, that Andrews owed McWhorter the sum of \$179.70, after allowing him

certain credits, embracing one for the full value of the cotton now sued for. Thus interpreted, did the answer allege facts that constitute a defense? The answer to this must depend upon the legal extent of a judgment as an estoppel. It is said to cover the whole matter in dispute, in the cause in which it is rendered, and every point decided between the parties, in the course of the proceedings which led to the judgment. "The judgment itself operates as a bar, and the decision of a particular issue as an estoppel, but their conclusive effect is the same." 1 Herm. Estop. § 111, and cases cited; *Hanna v. Read*, 102 Ill. 596; *Hall v. Zeller*, 17 Or. 381, 21 Pac. Rep. 192. Applying this rule to the answer in this case, Andrews is estopped to deny, that after receiving the credits before mentioned, including the value of the cotton in controversy, he owed McWhorter a balance of \$179.70. The value of the cotton was not in controversy in that suit, and neither party was called to offer any evidence upon it. Andrews is therefore not estopped to show, either that the credit was for different cotton, or, if for the same, that its full value was not credited. In the latter event, instead of the former judgment being a competent bar, Andrews will be entitled to recover the amount of his damage less the sum credited. *Freem. Judgm. § 280*; *Minor v. Walter*, 17 Mass. 237; *McEwen v. Bigelow*, 40 Mich. 215; *Briggs v. Richmond*, 10 Pick. 392. Although it be true that McWhorter wrongfully appropriated the cotton, such part of its value as was credited on the account sued on went in liquidation of a debt of Andrews, and in his answer in the suit against him he made no objection to that application of it. If he had done so, and it turned out that the credit was unauthorized, McWhorter could have protected himself, and obtained judgment for the amount thereby remitted; it is now too late for him to meet that contingency, for he has taken the judgment thus reduced. If Andrews objected to the credit, he should have done so in his answer, and, falling therein, he should be held to have assented to it; to hold otherwise would be to effect a manifest wrong. Then if the value of the cotton converted was applied in liquidation of Andrew's debt, with his assent, this application extinguished his right to recover damages for its value. 2 Greenl. Ev. § 635a, and notes; *Sedg. Dam.* 613-615, 689, 690; *Wheelock v. Wheelwright*, 5 Mass. 104; *Kaley v. Shed*, 10 Metc. 317; *Squire v. Hollenbeck*, 9 Pick. 552; *Doolittle v. McCullough*, 7 Ohio St. 299; *Howard v. Cooper*, 45 N. H. 339; *Curtis v. Ward*, 20 Conn. 204; *Bates v. Courtwright*, 36 Ill. 518. No special damage was alleged in the complaint in this cause, and therefore the answer disclosed a complete defense. *Moon v. Raphael*, 2 Bing. N. C. 310. This is not the case in which one willfully converts another's property and applies it to the satisfaction of his debts, without his assent, and pleads this in justification or mitigation of the wrong. We have not

considered other matters occurring during the trial and argued here. For the error indicated the judgment will be reversed, and the cause remanded.

ROWLAND v. PHILLIPS.

(Supreme Court of Arkansas. May 24, 1890.)

GIFT—DELIVERY—EVIDENCE.

It was the intention of a widow to give her dower in the personality of her second husband to his children by a former marriage, and she so stated to various persons, though no actual delivery was made. On her death-bed she called her brother to her, and told him that the property in question belonged to these children, and that she wanted him to take charge of it for them, and see that they got it. *Held* not a sufficient delivery, and that there was no valid gift.

Appeal from circuit court, Grant county;
J. B. WOOD, Judge.

Sanders & Watkins, for appellant.

HUGHES, J. This action was brought in the probate court by appellant in his own right, and as guardian of three minor children of Thomas W. and Louisa Rowland, deceased, to recover the dower interest of the said Louisa in the personal estate of her second husband, Isaiah Phillips, whom she married on the 4th of February, 1884, and who died on the 31st day of January, 1885, leaving the said Louisa, his widow, and four children by a former wife, as his heirs at law. On the 22d day of February, 1885, the said Louisa died, leaving six children by her first husband, Thomas W. Rowland, as her heirs at law, and leaving no issue of the marriage with Isaiah Phillips, her second husband. The said Louisa, at the time of her decease, had not had assigned, nor had she received, dower in the estate of her said husband, Isaiah Phillips. The object of this suit was to compel the administrator of the estate of Phillips to pay over to plaintiffs four-sixths of one-third of the personal property of the estate of said Phillips, or, if sold, of one-third of the proceeds of the sale thereof, in lieu of the property. The answer of the administrator admitted the facts stated, but denied that the plaintiff was entitled to recover the property or its value, and averred that the said Louisa and the said Isaiah Phillips had made a verbal marriage contract before their marriage, in which they agreed that the property of each should remain separate, and at the death of each go to his or her children, respectively, and that the said Louisa had relinquished all right and claim to the property of Isaiah Phillips after his death. The plaintiff filed a demurrer to that part of the answer setting up the verbal marriage contract, which was overruled. A trial in the probate court resulted in judgment for the defendant, and an appeal was taken to the circuit court, where the plaintiff renewed his demurrer to the answer of defendant, which was sustained. The defendant then amended his answer, by stating that plaintiff was not entitled to recover because of the relinquishment, by Louisa

Phillips, after the death of Isaiah Phillips, of all right and claim to his property. Upon the answer thus amended a trial was had in the Grant circuit court upon an agreed statement of facts as set out in the judgment. The record of the agreed facts, and of the judgment, is as follows: "Comes on this case to be heard upon the complaint and answer, and the following agreed statement of facts, to-wit: Isaiah P. Phillips and Louisa Rowland, the mother of the plaintiffs, were married on the 4th day of February, 1884, and at the time of their marriage the said Isaiah had four minor children, to-wit, Marcus C., Marmaduke, Mary J., and Regina; and the said Louisa had six, to-wit, James W., John W., George T., Andrew I., Martha J., and Mary Ann W.; that the said Louisa was the sister of the mother of said Isaiah's children; that prior to said marriage the said Isaiah and the said Louisa entered into a verbal agreement that the property which each owned and possessed at the time of such marriage should remain the property of each, and should descend and go to their respective children,—that is to say, the property of the said Isaiah should go to his children at his death, and the property of the said Louisa should go to her children at her death; that the property claimed by the plaintiffs in this suit was owned by the said Isaiah at the time of such marriage; that the said Isaiah died on the 31st day of January, 1885, and the said Louisa died on the 22d day of February, 1885; that after the death of said Isaiah the said Louisa stated to various persons that she and the said Isaiah, prior to their marriage, made the agreement as above set forth, and that she intended to carry it out; that all the property which the said Isaiah owned at their marriage belonged to his said children, and that she would not have one dollar of it; that, as the said children were living with her, she intended to administer on the estate of the said Isaiah, and save all the said property for them; that she stated to two of the said children, after the death of the said Isaiah, that all of said property belonged to said Isaiah; that on her death-bed, when she knew that she must soon die, she called her brother to her, and stated to him that the property sued for here belonged to the said children of the said Isaiah, and that she wanted him to take charge of it for them, and see that they got it, as she wanted the said agreement strictly carried out. And upon these facts the court finds that the said children of the said Isaiah to-wit, Marcus, Marmaduke, Mary J., and Regina, are the owners of said property, and the plaintiffs ought not to recover. It is therefore considered, adjudged, and decreed that the complaint of plaintiffs be dismissed, and that the defendant have and recover all costs in and about this suit accrued. Plaintiffs excepted, and appealed.

In *Hill v. Mitchell*, 5 Ark. 608, it is held that a widow is entitled to one-third of all personal estate owned by her husband at his

death, including money or cash on hand and choses in action, absolutely, unless he leaves no children, in which case her interest is one-half of each, instead of one-third; that her dower is carved out of the specific estate of which her husband was possessed; and in *Menfee v. Menfee*, 8 Ark. 9, it is held that the administrator holds her dower in personalty in trust for her, and that if he sells it she is entitled to one-third of the proceeds of the sale. The verbal contract of marriage relied upon in the answer was within the statute of frauds, and void. Sections 3371, 4582, Mansf. Dig.; *Galbreath v. Cook*, 80 Ark. 417.

Was there a gift or relinquishment by Louisa Phillips to the children of Isaiah Phillips of her right or dower interest in the personal estate of said Phillips? It does not appear that there was any written relinquishment of her interest by Louisa Phillips; and while it does appear that it was her purpose and intention to give her interest in the estate of Isaiah Phillips to his children, and that she requested, when on her death-bed, her brother to take charge of it for them, and stated to him that the property here sued for belonged to them, it does not appear that he took charge of it; nor does it appear that there was any actual or effective delivery of the property, which is always necessary to support a verbal gift of personal property or of choses in action. "Delivery of the property in question, with the intention to give, is absolutely necessary to the validity of the gift." There must be an actual and positive change of possession. Words of gift are not sufficient. *Nolen v. Harden*, 48 Ark. 807; *Brantley v. Cameron*, 78 Ala. 72; *Scott v. Lauman*, 104 Pa. St. 598; and other cases cited in note 6, p. 1814, § 8, tit. "Gift," "Delivery," 8 Amer. & Eng. Enc. Law. Whether the gift be *inter vivos* or *causa mortis*, it must be shown, to sustain it, that there was an intention to presently pass the property, and that the intention was carried into effect by an actual or effective delivery. *Newton v. Snyder*, 44 Ark. 42. The proof in this cause fails to show a delivery of the property. The judgment is reversed, and the cause remanded.

BRAKEFIELD v. HALPERN.

(Supreme Court of Arkansas. May 10, 1890.)

BOND FOR TITLE—EQUITY—USURY.

The purchaser of a tract of land took possession under a bond for deed, leaving the legal title in his vendor as security for the purchase money, to pay which he subsequently obtained a loan at a usurious rate of interest, giving his note therefor, and causing a deed to be executed by his vendor to the payee as security. He afterwards rented the land of the payee, and later, in consideration of an agreement to surrender his note and forgive the rent, promised to release his equitable interest, but never did so. *Held*, in an action brought to declare a trust in the land, discharged of the lien, that he was still the owner thereof, and that the agreement to release his equity was void for want of consideration.

Appeal from circuit court, Monroe county; W. F. SANDERS, Judge.

John C. Palmer, for appellant. *Price & Green*, for appellee.

HEMINGWAY, J. The appellant purchased the land in controversy, paid a part of the purchase money, and took a bond for title from his vendor, who retained the legal title as a security for the deferred payment. The appellant was thereby vested with the equitable title to the land. Not being able to meet the deferred installment of the purchase money at its maturity, he borrowed from the appellee the money required, at a usurious rate of interest, gave his note therefor, and caused the legal title to be conveyed to appellee as security for the loan.

This suit was brought by appellant to declare a trust in the land discharged of the lien for the usurious loan. Although the learned judge who tried the cause below reached the conclusion above set out, he dismissed the bill because he found that, after the appellee received the conveyance, "the parties, by mutual consent and for a valuable consideration, canceled the land sale, and the appellant rented the land from appellee." In this conclusion we think he erred. The equitable title, having been vested in appellant, remained in him until he made a transfer of it. The land was in his possession, and the beneficial ownership was in him, not in the appellee. The compact of rental was a mere matter of form, by which he rented his own land from the appellee, who did not claim to own it, thereby intending to protect the usurious loan. The appellee had no valid claim for rent. There was no consideration for a promise to pay it, and no consideration for the subsequent arrangement not vitiated by the taint of usury. The appellant agreed to release his equitable title, in consideration that the appellee would remit his claim for rent, and surrender the note for the usurious loan; but he never executed such a release. The agreement to do so, founded upon the consideration indicated, does not estop appellant to assert his equitable title. The appellee did not allege, nor does his proof show, that he extinguished an incumbrance upon the land for which it was liable in the hands of appellant. For the error indicated, the judgment will be reversed, and the cause remanded, with direction to the circuit court to enter a decree vesting the title to the land in the appellant, free from any charge in favor of appellee on account of the usurious loan.

HANKS v. ANDREWS et al.

(Supreme Court of Arkansas. May 31, 1890.)

ATTACHMENT—FRAUDULENT INTENT—EVIDENCE.

On motion to discharge an attachment, there was evidence tending to show that the defendant made offers to secure the plaintiff's claim, apparently insincere, and prevaricated about going to the bank for money to pay it, and that, having assets which he stated to be worth three times his liabilities, he threatened that, in case the plaintiff

gave his claim to a lawyer for collection, he would make such a disposition of his property that nothing would be realized. Held sufficient evidence to sustain the attachment.

Appeal from circuit court, Phillips county; M. T. SANDERS, Judge.

A motion to discharge an attachment was overruled in the trial court. The defendant appeals.

J. J. & E. C. Horner, for appellant. *U. M. & G. B. Rose*, for appellees.

COCKRILL, C. J. The question in this case is not what inferences we might be most inclined to draw from the testimony on a trial of the issue of fact, but taking the finding of the trial court as conclusive as far as the evidence warrants, and deducing from the facts disclosed the strongest inference of fraud which their legal tendency will bear, do they sustain the court's finding? In that aspect, the case stands thus: A merchant who, according to his representations to the attaching creditor, was doing a prosperous business upon assets three times greater than his liabilities, in order to get an extension of time for the payment of a debt threatens his creditor that, in case he declines to allow the extension, and puts the claim in the hands of a lawyer for collection, he will make such a disposition of his property as that the creditor will realize nothing. Such a state of facts justifies the inference of fraud. No court, we take it, would disturb the verdict of a jury on such a showing. *Drake*, Attachm. § 75; *Bank v. Whitmore*, 104 N. Y. 297, 10 N. E. Rep. 524; *Anthony v. Stype*, 19 Hun, 265; *White v. Leszynsky*, 14 Cal. 165; *Livermore v. Rhodes*, 3 Rob. (N. Y.) 626. The case is to be distinguished from a threat merely to make an assignment, which, being a lawful act and standing alone, furnishes no evidence of an intended fraudulent disposition of property. *Bish. Insolv.* § 208. While the subsequent execution of the assignment is evidence that that was the step contemplated by the debtor when he made the threat, we cannot say that the evidence did not justify the court in drawing a different conclusion. It may have been the result only of after honest advice from his counselors. According to the debtor's representations, more than two-thirds in value of his assets were collectible choses in action. They are easily placed beyond the reach of creditors. The apparent insincerity of the debtor in his offer to secure the plaintiff's claim, and his prevarication about going to the bank to get money to pay it, were circumstances, the natural tendency of which was to produce the impression of an intent to gain delay for his private end. They do not well comport with a good motive. If his representations as to the value of his assets were true, it is not probable that any lawful disposition of them could have been made by a preferential assignment for the benefit of creditors, so as to exclude the plaintiff from participation. It is not improbable, therefore, that his threat implied

an unlawful disposition of his property. If his representations as to his assets were false, the falsehood does not increase confidence in his intention to make an honest disposition of them. These were all pertinent facts for the consideration of the court trying the issue, and warrant the conclusion reached.

Affirm.

PELICAN INS. CO. v. WILKERSON.

(Supreme Court of Arkansas. June 7, 1890.)

FIRE INSURANCE—"IRON-SAFE" CLAUSE.

1. The last inventory having been kept and exhibited to the adjuster of the company 10 days after the fire, and afterwards lost, there is a performance of the condition of the "iron-safe clause" in a fire policy requiring assured to keep and to produce the last inventory taken of his business, and avoiding the policy in the event of a failure to produce it.

2. If the books kept by the assured do not furnish the data necessary to enable the insurers to test the accuracy of the accounts delivered to them, nor afford any satisfactory idea of the amount of goods on hand and destroyed by the fire, he cannot recover on a policy containing an "iron-safe clause," avoiding it for failure to keep the last inventory and a set of books showing a record of all business transacted, including purchases and sales for cash and on credit.

Appeal from circuit court, Craighead county; J. E. REDDICK, Judge.

E. F. Brown, for appellant. *J. C. Hawthorne*, for appellee.

HUGHES, J. Appellee insured in the appellant company a stock of goods for \$1,000, which was destroyed by fire, and he brought suit against the company, alleging that he kept and performed all the requirements and conditions of the policy of insurance by said company issued to him. The answer admits the first paragraph in said complaint, but denies that appellee had kept, observed, and performed all the requirements and conditions contained in said policy, and alleged specifically that it was a condition in said policy, in the "iron-safe clause," that the assured promised and agreed to keep a set of books showing a record of all business transacted, including purchases and sales for cash and on credit, together with the last inventory taken of said business, and to keep said books and inventory locked in a fire-proof safe at night, and, at all times when the store was open for business, in some secure place not exposed to fire which would destroy the store-house or house of business, and to produce such books and inventory, and, in the event of failure to produce the same, the policy should be void; and appellant denied that he had performed this condition in said policy of insurance. The policy bore date 9th of November, 1887, and continued for one year. The fire occurred May 25, 1888. Appellee took inventories of his stock in November and December, 1887, and one in April, 1888, and exhibited them to the adjuster of the company 10 days after the fire, and they were afterwards lost. These were not produced at the trial, but their contents were proven by oral testimony.

Appellant contends that appellee was not only required to keep the last inventory till the fire and presentation of the same to the adjuster, but was required to keep and present the same when called for by the company, till losses were ascertained and settlement made, because it is a material feature of the contract, furnishing the best evidence of the extent of the loss and measure of appellant's liability. Upon this phase of the case the court gave the following instruction: "No. 6. If the plaintiff kept the books and inventory as required by 'iron-safe clause' in policy, and after the fire produced them to the agent of defendant's company authorized to settle losses, and since that time either of said books or inventory has been lost or destroyed without the fault or negligence of plaintiff, the failure to produce said books or inventory in court, under such circumstances, would not prevent recovery of plaintiff, if proof is sufficient in other respects." The appellant contends that this was error. It was entirely competent for the appellee to satisfy the jury of the extent of his loss by other legal testimony, it having been made to appear that his inventory was lost without his fault or negligence, after he had produced it to the agent of the appellant authorized to adjust the loss. *Insurance Co. v. Nichols*, 16 N. J. Law, 410; *Burnstead v. Insurance Co.*, 12 N. Y. 81. It is unnecessary to the determination of this case that the objection of appellant to the modification of instruction 8, by the court, should be considered.

Did the appellee keep books or a record "showing all business transacted, including purchases and sales for cash and on a credit," as he agreed to do in his contract with the insurance company? While it may be that, being a country merchant whose system of book-keeping was known to appellant, he was not required to keep a full set of commercial books, yet it was his duty to comply with his agreement contained in the policy. This the contract required as a condition upon the performance of which his right of recovery depended. *May, Ins. §§ 156, 184*. The books kept by appellee were not destroyed. He testified that he kept a credit or sale book, showing all credit sales; that he kept a cotton-book showing all cash and goods paid for cotton; that he kept a cash account showing all cash taken in, and kept all bills of purchase showing all goods purchased; that his last inventory was taken on the 1st of April, 1888, and showed the value of stock on hand to be \$1,811; that he estimated that goods of the value of \$1,874

were destroyed by the fire. The books and papers were all exhibited to the jury, except some invoices, which had been lost. Appellee testified that he kept a merchandise account and a cash account, which are copied in the bill of exceptions, and it appears that at the end of each month he entered the amount of purchases during the month; and that he kept a book in which he entered each day his cash sales, and that at the end of each month he entered the aggregate amount of cash received on his book. We give a specimen of the manner in which the books were kept: "Page 202, Taylor, Duffy & Co., Memphis, Tenn., 1887. June goods, \$855.01; July goods bought, \$435.96. * * * In stock at the first of June, 1887, up to April 1st, 1888. Page 203. W. Y. M. Wilkerson, 1887, June. To money taken in, \$40.00. July, to money taken in, \$90.00. Paid Taylor, Duffy & Co., paid June 10th, one bale of cotton that was lost in 1886, \$42. Sept., to money taken in, \$40.00," etc. It is impossible to obtain any correct or satisfactory idea of the amount of goods on hand, and destroyed by the fire, from this mode of book-keeping. For aught the books show, goods of the value \$400 may have been sold for \$40, as the items are not given, but only the aggregate amount of sales. In *Jones v. Insurance Co.*, 36 N. J. Law, 35, the court said: "In cases where the fire has not only consumed the goods insured, but all books and vouchers from which an account could be made, the insured has not been held to do what was vain and impossible, but only to such performance as the nature of the case would admit. In the present case the plaintiff's books were saved. He had many of the invoices and vouchers for his purchases. * * * The names of the persons from whom goods were alleged to have been bought, and the gross amounts, would not enable the insurers to test the accuracy of the account delivered to them. * * * A detailed list of the articles lost, where this is practicable, is the intent of the parties; and courts should only relax the requirement where the nature of the case does not admit of such particularity;" citing *Catlin v. Insurance Co.*, 1 Sum. 434; 2 Wood, *Ins.* § 449; *O'Brien v. Insurance Co.*, 63 N. Y. 111-118. This appears to be a sound rule, which we approve as applicable to this case. The appellee having failed "to keep a set of books, showing a record of all business transacted, including purchases and sales for cash and on a credit," as he undertook to do, was not entitled to recover. The judgment is reversed, and the cause remanded.

INDEX.

NOTE. A star (*) indicates that the case referred to is annotated.

Abandonment.

Of cemeteries, see *Cemeteries*.

ABATEMENT AND REVIVAL.

Plea in abatement, see *Pleading*, 2.

Death of party—Notice of revival of action.

Under Mansf. Dig. Ark. § 5237, which provides that revivor of actions shall be by order of the court that the action be revived in the name of the representative or successor of the party who has died, and section 5239, which provides that notice of such revivor shall be given to the adverse party by service of the order, a failure so to notify the adverse party does not defeat the revivor, but merely postpones the duty of such party to show cause why such revivor should not take place.—*Hodges v. Taylor*, (Ark.) 18 S. W. 129.

ABDUCTION.

Indictment.

1. An indictment under Gen. St. Ky. 1883, c. 29, art. 4, § 9, for detaining a woman against her will, with intent carnally to know her, may follow the words of the statute, and need not state the manner of detention.—*Cargill v. Commonwealth*, (Ky.) 18 S. W. 916.

Evidence.

2. On a trial for detaining a woman with intent carnally to know her, she testified that the accused had often tempted her virtue. Asked by the defense why she had not made complaint, she said because his wife (her aunt) had had so much trouble about him. *Held*, that it was error to allow her to detail his sexual offenses with other women, in response to questions by the state.—*Cargill v. Commonwealth*, (Ky.) 18 S. W. 916.

Acceptance.

Of deed, see *Deed*, 10-13.

negotiable paper as payment, see *Payment*, 4.

Accomplice.

Evidence, see *Criminal Law*, 40-43.

ACCORD AND SATISFACTION.

See, also, *Payment*; *Release and Discharge*.

What constitutes.

Defendants gave a note in payment of the amount of an assessment for a public improvement. Upon a subsequent and corrected assessment being made, it was found that their share of the cost was more than the amount stated in the note. *Held*, that such payment was not an accord and satisfaction of the entire amount assessed against them.—*Stengel v. Preston*, (Ky.) 18 S. W. 839.

Accounting.

Between partners, see *Partnership*, 6-8.

By executors, etc., see *Executors and Administrators*, 15-20.

guardian, see *Guardian and Ward*, 6.

v.13s.w.—70

ACCOUNT STATED.

What constitutes.

Where, under a contract to publish a book, the author has approved a statement of the account delivered to him by the publisher, subject to future examination and correction, his acceptance, several weeks later, of a draft in payment of the account, implies a promise to pay as upon an account stated, which can be corrected only for fraud or mistake.—*Weed v. Dyer*, (Ark.) 18 S. W. 592.

Accretion.

See *Riparian Rights*, 2.

Acknowledgment.

Of debt, effect, see *Limitation of Actions*, 16-21.
deed, see *Deed*, 6-9.
mortgage, see *Mortgages*, 3, 4.
wills, see *Wills*, 10.

Action.

Against municipal corporations, see *Municipal Corporations*, 84, 85.

—receivers, see *Receivers*, 3-5.

By and against infants, see *Infancy*, 6-12.

assignee, see *Assignment for Benefit of Creditors*, 17-23.

church trustees, see *Religious Societies*, 2.

executors, etc., see *Executors and Administrators*, 29, 30.

wife, see *Husband and Wife*, 16.

For breach of warranty, see *Sale*, 7, 8.

libel, etc., see *Libel and Slander*, 4.

nuisance, see *Nuisance*, 3-7.

price, see *Sale*, 13.

wrongful attachment, see *Attachment*, 16-19.

On bonds, see *Bath*, 11-13; *Bonds*.

contract, see *Contracts*, 7, 8.

guardian's bond, see *Guardian and Ward*, 5.

insurance policies, see *Insurance*, 23-28.

judgment, see *Judgment*, 33.

negotiable instruments, see *Negotiable Instruments*, 7-9.

sheriff's bonds, see *Sheriffs and Constables*, 8.

Particular forms, see *Action on the Case*; *Assumpsit*; *Creditors' Bill*; *Ejectment*; *Forcible Entry and Detainer*; *Partition*; *Quietting Title*; *Trespass*; *Trespass to Try Title*; *Trover and Conversion*.

To enforce assessment, see *Municipal Corporations*, 25-30.

Waiver of right, see *Decett*, 1, 2.

ACTION ON THE CASE.

When lies.

A petition which alleges that a tenant's wife was *enchanté*, and that, knowing that fact, and that excitement was likely to injure a woman in that condition, the landlord violently assaulted two negroes on the tenant's premises, and in his wife's presence, whereby she sustained a fright which eventually produced a miscarriage, and otherwise injured her health, states a cause of action.—*Hill v. Kimball*, (Tex.) 13 S. W. 59.

Adjoining Land-Owners.

See *Boundaries; Fences.*

Administration.

See *Executors and Administrators.*

Admissions.

See *Evidence, 12-14.*

ADVERSE POSSESSION.

See, also, *Boundaries, 4, 5.*

What constitutes.

1. A railroad company entered on lands, and, in the presence of the owner, and on his verbal promise to give a right of way, staked off a right of way of the usual width of 100 feet. The company constructed its tracks, and had actual, exclusive, and continuous possession of the 25 feet along the center of the right of way occupied by the tracks for the prescriptive period, claiming title to the whole strip, and exercising over it such usual acts of ownership as the nature of the property permitted. *Held*, in an action of ejectment by the grantee of the land, who purchased with knowledge of the existence of the road, that the company had title, under the statute of limitations, to the 100-foot strip.—*Hargis v. Kansas City, C. & S. Ry. Co., (Mo.) 13 S. W. 680.**

2. In trespass to try title, in which the issue was as to the true boundary between two surveys, defendant testified that the improvements made by one S., under whom he claimed, were near the line as claimed by him; that several acres had been inclosed around the house; and that he and his wife had held the land by inheritance since 1873, but that there never was a fence around the land until just before suit was brought. Other witnesses testified that S. occupied a small tract in the upper north-west portion of defendant's survey from 1841 to 1854, and some of the family remained until 1860. Plaintiff and defendant claimed under different grants. *Held*, that defendant's possession was not sufficiently continuous, open, and hostile to sustain the defense of the statute of limitations.—*Porter v. Miller, (Tex.) 13 S. W. 555.*

3. A city cannot recover a strip of land inclosed and occupied by defendants for 20 years, during which time the city had paved in front of the strip, and made no claim to it, recognizing defendant's title.—*Rosworth v. City of Mt. Sterling, (Ky.) 13 S. W. 920.*

— Notice of claim.

4. Act 1873, (Gen. St. Ky. 687,) requiring written notice from the person in possession of any street or alley to the town council that his possession is adverse, in order to start the running of the statute of limitations, applies to those in possession of any street at the time of its passage, if the possession had not then ripened into title.—*Bosworth v. City of Mt. Sterling, (Ky.) 13 S. W. 920.*

Presumption.

5. A widow, who after her husband's death remains in possession of land which he admittedly held subject to a certain lien, is presumed to hold as he did, in the absence of an express disclaimer or an express hostile occupancy, with the knowledge of the lien claimant.—*Oury v. Saunders, (Tex.) 13 S. W. 1030.*

Constructive possession.

6. Where one has made a survey of lands, for the purpose of pre-emption, which includes a prior survey by another person, his possession of that part of his survey outside of the former survey will not have the effect of extending such possession within the former survey, though there is no one in actual possession of it.—*King v. Hunt, (Ky.) 13 S. W. 214.*

Continuity of possession.

7. Where the evidence shows that a tenant of one C., who had been in possession of the land, and under whom plaintiff claims by adverse posses-

sion, moved off the land, and a stranger took possession and occupied it for several weeks, the possession of C., and his vendors and tenants, cannot help plaintiff, and he cannot connect their possession with the possession of himself and his immediate vendor.—*Warren v. Fredericks, (Tex.) 13 S. W. 643.*

Payment of taxes.

8. While "possession and payment of taxes" must concur, under Rev. St. Tex. art. 3193, which provides that every suit to recover land, as against any person having peaceable and adverse possession thereof, and paying taxes thereon, and claiming under a deed or deeds duly registered, shall be instituted five years next after the cause of action accrued, yet the taxes need not be actually paid during the continuance of possession. It is sufficient if the taxes are paid for the five years during which possession is held, though the payment is not made until after possession has ceased.—*Snowden v. Rush, (Tex.) 13 S. W. 189.*

9. Where tax-receipts show that the taxes were paid on lands granted to one Cole, while the land in controversy was granted to one Coles, but identify the land in other respects, they are properly admitted in evidence as bearing upon the question of payment of taxes.—*Seemuller v. Thornton, (Tex.) 13 S. W. 846.*

Color of title.

10. In an action for the recovery of land, where defendant claims title by adverse possession, a tax-deed under which he claims is properly admitted in evidence to show the basis for adverse possession, although by reason of its irregularities it is insufficient as evidence of title.—*Seemuller v. Thornton, (Tex.) 13 S. W. 846.*

Instructions.

11. An instruction which makes plaintiff's claim by adverse possession to all of the land, down to the time when he was evicted, dependent on the coverture of a married woman through whom defendant claims, is error where it appears that the married woman only had title to part of the land, and conveyed that interest 10 years before plaintiff's eviction.—*Warren v. Fredericks, (Tex.) 13 S. W. 643.*

Affidavit.

For attachment, see *Attachment, 6-8.*

Agency.

See *Principal and Agent.*

Alimony.

See *Divorce, 3, 4.*

ALTERATION OF INSTRUMENTS.**Of bail-bond by sheriff.**

1. The unauthorized alteration by the sheriff of a bail-bond which obligates the principal to appear at the next term of court, "A. D. 188," so as to make it read "1889," being material, discharges the obligor.—*Wegner v. State, (Tex.) 13 S. W. 608.*

Before delivery.

2. A note whose time of payment has been altered is admissible in evidence when it is shown that the alteration was made by the maker before delivery.—*Bell v. Boyd, (Tex.) 13 S. W. 232.*

Amendment.

Of bill of exceptions, see *Exceptions, Bill of, 4.*
judgment, see *Judgment, 30, 31.*
pleadings, see *Pleading, 9-11.*
records, see *Records, 2.*
statutes, see *Statutes, 2, 3.*

Ancient Instruments.

See *Evidence, 27.*

ANIMALS.

Stock-killing cases, see *Railroad Companies*, 80-82.

Crimes concerning—Driving from range.

1. One who is in charge of a large pasture owned by another, and who, under instructions from his employer, drives out of such pasture, at a point several miles from the place where they were turned in, cattle owned by a third person, and turned into such pasture without permission, is not guilty of "willfully driving cattle not his own from their accustomed range," within the meaning of Pen. Code Tex. art. 767, though the owner of the cattle owns a few acres inclosed in the pasture, where he consented to the inclosure thereof, without reserving any right of pasturage, as defendant's act is not "willful," and the cattle are not on "their accustomed range."—*Wells v. State*, (Tex.) 13 S. W. 889.

2. One who turns horses out of his pasture, and notifies their owner about them, is not guilty of a violation of Pen. Code Tex. art. 767, which makes it a misdemeanor for any one to "willfully" drive from its accustomed range live-stock not his own, without the owner's consent.—*Mahle v. State*, (Tex.) 13 S. W. 999.

Willful killing or wounding.

3. Although, in a prosecution under Pen. Code Tex. art. 680, for wantonly and willfully killing dumb animals, the ownership of the animals need not be alleged, if such allegation is made, proof of ownership must correspond with the allegation.—*McLaurine v. State*, (Tex.) 13 S. W. 992.

4. Where the indictment was for wantonly killing a dumb animal, under Pen. Code Tex. art. 680, it was error, in addition to an instruction upon this offense, to charge as to the offense denounced by article 679, which is for the protection of the owner.—*McCleskey v. State*, (Tex.) 13 S. W. 997.

5. Where one kills a dumb animal while trespassing upon his cultivated land, the land being insufficiently fenced, the offense is that denounced by Pen. Code Tex. art. 685, and a conviction could not be had under article 680.—*McCleskey v. State*, (Tex.) 13 S. W. 997.

6. On prosecution under Pen. Code Tex. art. 680, for wantonly wounding a hog, which the evidence tends to show was shot by defendant while trespassing on his crop, it is competent for defendant to show that his fence was a lawful one, which, by the stock law prevailing in his locality, was not required to turn hogs.—*Brewer v. State*, (Tex.) 13 S. W. 1004.

7. On prosecution, under Pen. Code Tex. art. 680, for wantonly killing a hog, where the evidence raises the issue whether the hog was wounded in defendant's insufficiently fenced inclosure, the jury should be instructed that, if they find this to be the fact, a conviction cannot be had under article 680, the punishment for such offense being provided by article 685.—*Brewer v. State*, (Tex.) 13 S. W. 1004.

Unlawful branding.

8. A conviction for unlawfully branding a horse without the consent of the owner, with intent to defraud, cannot be sustained, where the evidence shows that, while the branding was done without the consent of the owner, defendant did it to protect the owner, by preventing another person from taking possession of the horse.—*Montgomery v. State*, (Tex.) 13 S. W. 1000.

Answer.

See *Pleading*, 4-6.

APPEAL.

- I. APPELLATE JURISDICTION.
- II. REQUISITES.
- III. PRACTICE.
- IV. REVIEW.
- V. EFFECT OF APPEAL.
- VI. DECISION.
- VII. LIABILITIES ON APPEAL-BONDS.

See, also, *Certiorari; Exceptions, Bill of; New Trial*.

By administrator, see *Executors and Administrators*, 80.

In condemnation proceedings, see *Eminent Domain*, 9.

criminal cases, see *Criminal Law*, 76-90.

I. APPELLATE JURISDICTION.**When appeal lies.**

1. A controversy between creditors as to the priority of their executions on certain land is one involving the title to land, under the statute allowing appeals in such cases irrespective of amount, though the land has been sold by order of court pending the action.—*Clements v. Waters*, (Ky.) 18 S. W. 481.

Appealable judgment.

2. In partition proceedings a judgment for partition and order of sale are interlocutory merely, and are not final judgments, within the meaning of Rev. St. Mo. 1889, § 7184, providing that appeals and writs of error will lie from a final judgment in partition proceedings.—*Buller v. Linzee*, (Mo.) 18 S. W. 344.

II. REQUISITES.**Bonds.**

3. A surety on a bond for costs does not, on judgment in the action against his principal, become a party to the suit, and therefore incompetent as a surety on an appeal-bond.—*Sampson v. Solinsky*, (Tex.) 13 S. W. 67.

4. Rev. St. Tex. 1879, § 1689, provides that a party appealing from a judgment in a justice's court to the district court shall, within 10 days from the date of the judgment, file with the justice a bond payable to the appellee, "conditioned that the appellant shall prosecute his appeal to effect, and shall pay off and satisfy the judgment which may be rendered against him on such appeal." Held, that an appeal-bond conditioned that appellant should "prosecute its appeal to effect, or pay," etc., is a sufficient compliance with the statute.—*Southern Pac. Co. v. Staley*, (Tex.) 13 S. W. 480.

5. A misrecital of the date of a judgment in an appeal-bond is not fatal to the appeal when the court, names of the parties, amount and effect of the judgment, and number of the case are all correctly stated, as the other recitals sufficiently show that the bond is given in the identical case in which the judgment appealed from is rendered, which is all that is necessary.—*Southern Pac. Co. v. Staley*, (Tex.) 13 S. W. 430.

III. PRACTICE.**Assignment of errors.**

6. An assignment of error that "the court erred in rendering judgment for plaintiff under the law and evidence in the case," and that "the court erred in overruling motion for new trial," is not sufficiently specific.—*Anderson v. Horn*, (Tex.) 13 S. W. 24.

7. Where no exceptions have been taken during trial, an objection that the verdict is contrary to law is too general to be considered on appeal.—*Carlin v. Baird*, (Ky.) 18 S. W. 434.

8. An assignment of error in overruling special exceptions to a petition in an action for malicious prosecution, on the ground that the exhibits attached thereto show probable cause for the prosecution, and show that there is no cause of action by showing contradictory statements as to the cause of action, is too general; there being six exhibits, and no particular statements being specified.—*Cooper v. Langway*, (Tex.) 13 S. W. 179.

9. An assignment that "the court erred in refusing a new trial to plaintiff as asked for in its motion and amended motion for new trial, filed herein on the 7th and 10th of August, 1889," is too general.—*Guadalupe & San Antonio Rivers Stock Ass'n v. West*, (Tex.) 13 S. W. 807.

10. Assignments of error that the court erred in overruling plaintiff's motion for a new trial, that the verdict is not supported by the evidence, and that the verdict and judgment are contrary to

law and the evidence, are too general for consideration.—*Leach v. Wilson County*, (Tex.) 18 S. W. 618.

11. An exception that "the verdict is contrary to law" is too vague and general to entitle it to consideration by the appellate court.—*Jones v. Worcher*, (Ky.) 18 S. W. 911.

Record.

12. A transcript of certain papers and proceedings and written admissions not embodied in a formal statement of facts signed and approved by the trial judge constitutes no part of the record, and cannot be considered on appeal.—*Ficklin v. Strickland*, (Tex.) 18 S. W. 272.

13. In the absence of a statement of facts, the correctness of conclusions of fact filed by the trial court cannot be questioned, except in so far as the conclusions may contain contradictions.—*Snowden v. Rush*, (Tex.) 18 S. W. 189.

14. Evidence not appearing in the transcript will be disregarded, but that which appears in the transcript must be considered, as the transcript, if incorrect, should be corrected by *certiorari*.—*Bryson v. Johnson County*, (Mo.) 18 S. W. 239.

15. An entry, "General demurrer to plaintiff's trial amendment overruled. Special exceptions, except the one of injury to cattle, overruled," does not sufficiently show that any exception was sustained, or, if any, which one; there being several relating to the subject mentioned.—*Broussard v. Sabine & E. T. Ry. Co.*, (Tex.) 18 S. W. 68.

16. There is no statute in Kentucky requiring that, on an appeal to the circuit court from an order of the county court admitting a will to probate, a formal transcript of the proceedings, and copy of the judgment, of the latter be filed; and a statement filed in the circuit court, showing the parties, and who appeals, and that a judgment was rendered by the county court at a certain time, from which an appeal is taken, is sufficient.—*Williams' Ex'r v. Williams*, (Ky.) 18 S. W. 250.

— Bill of exceptions.

17. The refusal of the court to file conclusions of law and fact, on written request, will not be considered on appeal, unless there is a bill of exceptions to the court's action.—*Cotulla v. Goggan*, (Tex.) 18 S. W. 742.

18. A statement in a bill of exceptions that the court refused to give certain numbered instructions asked by defendant, "to which refusal of the instructions thus asked the defendant by its counsel then and there excepted at the time," will not be treated as a general exception to the action of the court in refusing the instructions as a whole, but will entitle defendant to have each refused instruction considered by the supreme court.—*Weber v. Kansas City Cable Ry. Co.*, (Mo.) 18 S. W. 537.

19. When a bill of exceptions contains the request "the clerk will here copy plaintiff's instructions as asked, leaving off the amendments of the court," and recites that the court gave certain of the instructions after adding specified clauses, and the transcript contains a paper writing indorsed, "Instructions for Plaintiff," divided into paragraphs and amended as recited in the bill of exceptions, its identity with the instructions called for is sufficiently established.—*Spratt v. New Orleans Ins. Ass'n*, (Ark.) 18 S. W. 799.

20. A charge of the court, which, though copied into the transcript, is not included in the bill of exceptions, will not be considered on appeal.—*Chesapeake, O. & S. W. R. Co. v. Foster*, (Tenn.) 18 S. W. 694.

— Time for preparing and filing.

21. Where a term of court does not adjourn for two weeks after judgment, and after motion for new trial is overruled, the facts that the court stenographer was unable to write out the testimony before court adjourned; that the term might by law have continued several days longer; and that its adjournment was unexpected,—do not excuse delay in preparing the statement of facts until after court adjourned, where it does not appear that the judge announced that the term would continue for the statutory time, but simply that the

clerk informed counsel to that effect.—*Rains v. Wheeler*, (Tex.) 18 S. W. 324.

22. A statement of facts filed two days after final adjournment of the trial court will not be considered on appeal, where no order is shown to have been entered during the term authorizing the statement to be made up in vacation, as required by Rev. St. Tex. art. 1379.—*Broussard v. Sabine & E. T. Ry. Co.*, (Tex.) 18 S. W. 68.

23. Under Rev. St. Tex. art. 1379, which provides that the court may, by an order entered of record during a term of court, authorize a statement of facts to be perfected in vacation, at any time not exceeding 10 days after adjournment of the term, a statement of facts, which was not filed until 7 days after adjournment, cannot be considered on appeal, where the transcript discloses no order allowing 10 days after adjournment for filing the same.—*San Antonio & A. P. Ry. Co. v. Moore*, (Tex.) 18 S. W. 295.

Petition for rehearing.

24. If the opinion of the supreme court on an appeal does not discuss, or in express language determine, any particular point in a case, its attention should be called to it by a petition for a rehearing; otherwise a judgment of affirmance must be taken to have determined all the questions below, which preceded and were involved in the judgment appealed from.—*Gray v. Dickinson*, (Ky.) 18 S. W. 209.

Appeal from inferior court.

25. Appellee applied to the county court, under Rev. St. Tex. c. 14, for an order withdrawing an estate from administration, which was granted. The administrator appealed to the district court, where, on a trial *de novo*, a similar order was entered, and the judgment was affirmed by the supreme court. Held that, since Rev. St. Tex. art. 2207, provides that an appeal to the district court from an order of the county court withdrawing an estate from administration must be tried *de novo*, the administrator continued to be such after his appeal, and since, at the time the appeal was determined the exhibit filed before commencement of the proceeding no longer represented the true condition of the estate, appellee could not maintain an action in the district court to compel the administrator to turn over the estate without first requiring him to file another exhibit in the county court.—*Houston v. Mayes*, (Tex.) 18 S. W. 1036.

IV. REVIEW.

In general.

26. Errors assigned cannot be considered where motion for new trial was not made.—*Klots v. Perteet*, (Mo.) 18 S. W. 955.

27. Refusal of trial by jury is only reviewable on exception.—*Klots v. Perteet*, (Mo.) 18 S. W. 955.

28. Refusal of change of venue is reviewable only on exception.—*Klots v. Perteet*, (Mo.) 18 S. W. 955.

29. Where there has been a misdirection, but for which the jury might have reached a different conclusion, the reviewing court cannot say that judgment was rightfully rendered for defendant.—*Cottrill v. Crum*, (Mo.) 18 S. W. 753.

Objections not raised below.

30. Objection to the admission of evidence cannot be made for the first time on appeal.—*Shornick v. Bennett*, (Tex.) 18 S. W. 992.

31. The testimony of the presiding judge, who was called as an expert on the value of plaintiff's services, cannot be objected to for the first time on appeal.—*Wright v. McCampbell*, (Tex.) 18 S. W. 293.

32. The failure, through a clerical error, to enter a credit which should have been allowed upon giving judgment in the circuit court, is not a ground for reversal, when no effort has been made to correct the error in the court below.—*Bell v. Mansfield's Assignee*, (Ky.) 18 S. W. 883.

33. The question of the authority of attorneys who signed and filed a pleading cannot be raised for the first time on appeal.—*Mollhenny v. Binz*, (Tex.) 18 S. W. 655.

34. In an action to set aside a conveyance as in fraud of creditors of the grantor, where the grantee's answer raises the single issue of the validity of the conveyance, it cannot be objected for the first time on appeal, that plaintiff did not take a preliminary step necessary to authorize the bringing of the action.—*Behan v. Warfield*, (Ky.) 18 S. W. 439.

35. The fact that the grantee died pending the action, and that some of her devisees, who were made parties, are infants, does not give them the right to raise such objection on appeal, where their guardian *ad litem* merely adopts the decedent's answer.—*Behan v. Warfield*, (Ky.) 18 S. W. 439.

Presumptions.

36. Where the record contains no statement of facts, and there is no bill of exceptions, it must be presumed that all proof necessary to sustain the judgment was produced.—*Gentry v. Schneider*, (Tex.) 13 S. W. 614.

Weight and sufficiency of evidence.

37. Where the evidence is conflicting, the findings of the trial judge will not be disturbed on appeal.—*Crabtree v. Bradbury*, (Ark.) 13 S. W. 935.

38. The supreme court will not reverse a chancellor's findings of fact, unless clearly against the weight of evidence.—*Morrison v. Howe*, (Ky.) 13 S. W. 244.

39. The findings of fact of the trial judge in an election contest are as conclusive on appeal as the verdict of a jury.—*Jones v. Glidewell*, (Ark.) 13 S. W. 723.

40. The findings of fact of the court, sitting as a jury, where the evidence is conflicting, will not be disturbed if there is evidence to support them.—*Scott v. Patterson*, (Ark.) 13 S. W. 419.

41. In Kentucky, the rule that, where the evidence is conflicting, the verdict will not be disturbed on appeal, applies as well in cases involving the validity of a will as in any other civil case.—*Williams' Ex'r v. Williams*, (Ky.) 13 S. W. 250.

42. Where a cause is tried before the court without a jury, the appellate court is bound by the finding of facts, to the same extent as though such finding was made by a jury.—*Handlan v. McManus*, (Mo.) 13 S. W. 207.

43. Nor does it affect this rule that the evidence was heard before one judge, and tried on a transcript thereof before another judge.—*Handlan v. McManus*, (Mo.) 13 S. W. 207.

44. Where no fact is shown by the record which will enable the supreme court, as matter of law, to declare that a grantee in a deed had notice of a pre-existing mortgage when the deed was executed, the same weight will be given to the finding of the lower court on the question of notice that would be on any other question of fact.—*Love v. Breedlove*, (Tex.) 13 S. W. 222.

45. Where there is a special finding of facts and no motion for a new trial, the sufficiency of the evidence to sustain the finding cannot be considered on appeal.—*Taylor v. Van Meter*, (Ark.) 13 S. W. 699.

46. The evidence being conflicting as to whether the logs sequestered were cut on land of defendant or intervenor, the verdict will not be disturbed on appeal.—*Irvin v. Ellis*, (Tex.) 13 S. W. 22.

47. Where the evidence, though conflicting, is sufficient to support the finding, the judgment will not be disturbed.—*O'Shaughnessy v. Moore*, (Tex.) 13 S. W. 570.

48. A finding that the grantee of land was the husband and father of defendants will not be disturbed though there is evidence that there were three persons of the same name, one of whom never came to Texas. Of another, there was no trace; but the husband and father of defendants came to the state before the grant, and died in Louisiana, having papers relating to land in Texas.—*Baker v. McFarland*, (Tex.) 13 S. W. 1042.

Rulings on evidence.

49. Refusal to exclude evidence on motion, made after it has been admitted, will not be disturbed, on appeal, where it does not appear why it was not objected to when offered, nor that the court abused its discretion by refusing on the ground that the

objection came too late.—*Missouri Pac. Ry. Co. v. Lamothe*, (Tex.) 13 S. W. 194.

Matters not apparent on record.

50. Where the district court, on appeal from a justice's court, overrules a plea to the jurisdiction of the justice, it cannot be reviewed if the record falls to show any evidence offered in support of the plea, or action taken on the question of jurisdiction.—*Cotulla v. Goggan*, (Tex.) 13 S. W. 742.

51. Error cannot be predicated on the refusal of the trial court to charge, on an inquiry made by the jury after they had retired, where it does not appear by the bill of exceptions, but only by an affidavit filed with the motion for a new trial, that the jury requested additional instructions.—*Taylor v. Davis*, (Tex.) 13 S. W. 642.

Harmless error.

52. The improper admission of testimony is harmless error, where there is competent testimony in the case to the same effect.—*Campbell v. Carnahan*, (Ark.) 13 S. W. 1093.

53. Where a judgment limits the recovery of compensation, in a suit by the surviving partner of a law firm, to the services which had been rendered before the death of one partner, the admission of evidence that the surviving partners rendered services after they had been notified of their discharge is harmless error.—*Wright v. McCampbell*, (Tex.) 13 S. W. 293.

54. The improper admission of evidence, especially in a case tried before the court, is not ground for reversal, where, on the uncontradicted testimony, no other judgment could have been rendered than that entered.—*Texas Land & Loan Co. v. Blacklock*, (Tex.) 13 S. W. 12.

55. An error in the admission of evidence is cured where appellants fail to object thereto, and its consideration is afterwards excluded from the jury by the instructions.—*Whitmore v. Supreme Lodge Knights & Ladies of Honor*, (Mo.) 13 S. W. 495.

56. The refusal of the court below to strike out incompetent evidence is not reversible error, where the facts sought to be proved thereby have been established by other and competent evidence.—*Roe v. City of Kansas*, (Mo.) 13 S. W. 404.

57. Error cannot be predicated on the improper admission of a deposition, where another deposition of the same witness states all the material facts contained in the deposition objected to.—*Ayers v. Harris*, (Tex.) 13 S. W. 768.

Objections waived.

58. Where, in trespass to try title, defendant withdraws his answer, and files a disclaimer of title to the land as described in plaintiffs' petition, after a report of survey made by order of the court has been filed, and does not object at the trial to the admission of the report in evidence, he cannot, on appeal, complain that the judgment against him, in addition to the description of the land contained in the petition, adds a more complete description taken from the surveyor's report.—*Etter v. Dignowity*, (Tex.) 13 S. W. 973.

59. Where a party to a suit has agreed to the admission of an affidavit as evidence for the purpose of trial, to prevent a continuance, he is estopped from assigning its admission as error.—*McClanahan v. West*, (Mo.) 13 S. W. 674.

60. Where a petition states a good cause of action, and the defendant makes default, he cannot object on appeal that the evidence was insufficient to sustain the judgment.—*Shornick v. Bennett*, (Tex.) 13 S. W. 932.

61. Defendant waives his demurrer to plaintiff's evidence by introducing his own.—*Hilz v. Missouri Pac. Ry. Co.*, (Mo.) 13 S. W. 946.

V. EFFECT OF APPEAL.

Supersedeas.

62. Where the term of office of the clerk and master of a chancery court had not expired when his successor was appointed, and the latter procured a warrant directing the seizure of the official books and papers, on application for a writ of ar-

ror from the judgment on which the warrant issued, a *supersedeas* will issue, though the warrant has been fully executed, with a direction to restore the books and papers; that being the only method for preserving the rights of the parties as they were before the making of the order.—*Stafford v. Williams*, (Tenn.) 18 S. W. 793.

VI. DECISION.

Affirmance—Damages.

63. Where appellants fail to prosecute their appeal, manifestly taken for delay, a 10 per cent. penalty may be added, though they suggest that they have paid the judgment since the transcript was filed.—*Anderson v. Goodwin*, (Tex.) 18 S. W. 31.

Dismissal.

64. An appeal will be dismissed where neither party has made out, or furnished the supreme court with, a statement of the case, as required by Rev. St. Mo. 1879, § 3778.—*Ebersole v. Rankin*, (Mo.) 18 S. W. 756.

Reversal.

65. Where there is evidence to sustain a finding as to a balance due for services as attorney, except as to a charge against them of the amount of a judgment, which does not appear to have been collected, the cause will be reversed as to that item alone.—*Williams v. Murrell's Adm'r*, (Ky.) 18 S. W. 1075.

Rendition of judgment.

66. In an action on a note, defendant pleaded an illegal agreement between the parties to the note, tainting it with fraud. A jury being waived, the court found for defendant, and dismissed the petition. On appeal it appeared that the only witnesses as to the existence of the agreement were plaintiff and defendant. The testimony of defendant failed to show any such agreement as he had alleged. *Held*, that it was within the province of the court to direct judgment for plaintiff, and to refuse to remand the case for a new trial.—*Rosenfeld v. Goldsmith*, (Ky.) 18 S. W. 8.

67. Upon appeal from an order of a justice of the peace, denying a motion to quash an execution on the ground that it had been paid, judgment should be rendered against the appellant, and the sureties on the appeal-bond, for costs only, and not for the amount of the original judgment on which such execution was issued.—*Woolum v. Kelton*, (Ark.) 18 S. W. 78.

Mandate and proceedings below.

68. When a plea in abatement has been decided adversely to defendant, he has no right to have it tried again, though on appeal the judgment on the main issue, which was tried at the same time as the plea in abatement, be reversed on some ground not affecting such plea.—*Tynberg v. Cohen*, (Tex.) 18 S. W. 315.

69. Where, in a suit against several, judgment is rendered against all the defendants but one, and such judgment is reversed on appeal, on a second trial judgment may be rendered against all the defendants even though the appeal-bond was not payable to the successful defendant as well as to the plaintiff, when such defendant made no objection to such bond, since the judgment reversed was thereby wholly vacated.—*Tynberg v. Cohen*, (Tex.) 18 S. W. 315.

VII. LIABILITIES ON APPEAL-BONDS.

Liabilities of sureties.

70. Though on appeal from a justice of the peace to the district court, in an action on a contract and to foreclose a chattel mortgage, defendants are successful to the extent of the mortgage, the sureties on their appeal-bond are liable on the judgment, under Rev. St. Tex. art. 1639, which requires the appeal-bond to be conditioned that the appellant shall prosecute the appeal to effect, "and" shall satisfy the judgment rendered against him.—*Cotulla v. Goggan*, (Tex.) 18 S. W. 742.

APPEARANCE.

Special appearance.

1. Under Rev. St. Tex. art. 1243, providing that, when citation or service thereof is quashed on motion of defendant, he shall be deemed to have entered his appearance to the succeeding term, a non-resident defendant, served with notice without the state, who appears specially, and files a motion to quash the service on a plea in abatement, thereby enters his appearance to the next term of the court. Following *York v. State*, 11 S. W. 869.—*Sam v. Hochstadter*, (Tex.) 18 S. W. 535.

Effect.

2. Where in an action to recover judgment on a note, and to foreclose a mortgage securing it, defendant appears, and has the recovery on the note reduced by equitable set-offs, he cannot object to a personal judgment against him that he was served with process in another county than that in which the judgment is rendered.—*Brown v. United States Home & Dower Ass'n*, (Ky.) 18 S. W. 1035.

3. Where a non-resident defendant appeals on the ground that the warning order against her was void, and the judgment is reversed, no further service on her is necessary, since her appearance by appeal brings her into court.—*Waggoner v. Fogleman*, (Ark.) 18 S. W. 729.

4. Where plaintiff filed with a justice a note indorsed "Paid," upon which he appeared as a co-maker with defendant, and an entry was made on the docket that plaintiff claimed he was surety for defendant, and had paid the note for him, and afterwards defendant obtained a change of venue, filed this record before a second justice, and entered his appearance, he cannot question the jurisdiction of the second justice.—*Buffington v. Sipe*, (Ark.) 18 S. W. 763.

5. In an action against a foreign corporation, the citation was served upon the corporation, in its own state, by delivery to the president of the corporation. The corporation answered by pleas to the jurisdiction, on the ground of non-residence and substituted service, and, reserving its right thereunder, filed a plea to the merits. *Held*, that its voluntary appearance by plea to the merits was a waiver of the objection to the jurisdiction.—*St. Louis, A. & T. Ry. Co. v. Whitley*, (Tex.) 18 S. W. 853.

Application.

For insurance, see *Insurance*, 4.

Appointment.

Of administrator, see *Executors and Administrators*, 1-3.
receivers, see *Receivers*, 1.

Appraisement.

In partition, see *Partition*, 2.

Argument of Counsel.

See *Criminal Law*, 19-28; *Trial*, 8-10.

ARREST.

Sufficiency of warrant, see *Homicide*, 24.

By reading warrant.

Where an officer executed a warrant by merely reading it to plaintiff while confined to her bed, there is an actual arrest.—*Shannon v. Jones*, (Tex.) 18 S. W. 477.

ASSAULT AND BATTERY.

Former jeopardy, see *Criminal Law*, 5.
With intent to kill, see *Homicide*, 19-26.
— rob, see *Robbery*, 1.

Criminal prosecution — Aggravated assault.

1. A boy of 17 years is not an "adult male," within the meaning of Pen. Code Tex. § 496, providing that an assault and battery becomes aggravated when committed "by an adult male upon the person of a female."—*Galbraith v. State*, (Tex.) 13 S. W. 607.

— Evidence.

2. Neither a pistol nor brass knucks are necessarily deadly weapons, and on trial of an indictment for an aggravated assault and battery, alleged to have been committed with a pistol and brass knucks, the same being "deadly" weapons, the state must show the deadly character of such weapons by proving their size or the manner of their use.—*Ballard v. State*, (Tex.) 13 S. W. 674.

3. Evidence that defendant assaulted a person, but used only his hands and knees,—striking him with his fist, throwing him down, and kneeling on him,—shows only a simple assault and battery, and is not sufficient to support a conviction of aggravated assault and battery.—*Buchanan v. State*, (Tex.) 13 S. W. 1000.

— Instructions.

4. Where, on a trial for assault and battery, there is evidence tending to raise the issue of self-defense, the court should fully and correctly instruct on that issue.—*Masters v. State*, (Tex.) 13 S. W. 999.

5. Defendant and prosecutor got into a religious discussion at breakfast. After going outside, defendant said: "You have raised a difficulty in my family." Prosecutor said he had not, whereupon they called each other liars. Defendant then drew a pistol. Prosecutor said defendant aimed at him, and snapped it. Defendant denied this, and said that, before he drew the pistol, prosecutor stooped to pick up a large stick, and that he then drew the pistol, and told prosecutor not to pick up the stick, or he would shoot him; that he did not intend to shoot, but only to prevent prosecutor from getting the stick. The only instruction on the subject of self-defense was that, if defendant provoked the difficulty, he could not claim that he acted in self-defense. *Held*, that it did not present the issue fairly and fully, and that, though the instructions requested by defendant were faulty, the request was sufficient to call the court's attention to its omission.—*Masters v. State*, (Tex.) 13 S. W. 999.

— Verdict.

6. Where, on a charge of aggravated assault, the jury determined on a conviction for simple assault, the verdict should have so specified.—*Bowen v. State*, (Tex.) 13 S. W. 787.

Assessment.

Of taxes, see *Taxation*, 8-11.

Assets.

See *Executors and Administrators*, 6, 7.

ASSIGNMENT.

See, also, *Assignment for Benefit of Creditors*.

Of errors, see *Appeal*, 6-11.

Insurance policy, see *Insurance*, 2, 3.

Judgment, see *Judgment*, 37.

Mortgage, see *Mortgages*, 19.

What is assignable.

1. The equitable interest of defendant in execution in land after its sale under the execution, and his right to sue to set the sale aside, can be sold and conveyed by him.—*Strickland v. Hardwicke*, (Tex.) 13 S. W. 978.

2. Since a cause of action for a trespass on land will survive and pass to the personal representative, under Rev. St. Mo. 1879, § 96, it is assignable.—*Chouteau v. Boughton* (Mo.) 13 S. W. 877.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See, also, *Insolvency*.

Appointment of receiver, see *Receivers*, 1.

Preferences, see, also, *Conflict of Laws*, 3.

Requisites and validity.

1. An insolvent firm executed two mortgages on its entire stock to two of its creditors, whose claims were past due, and delivered them to the latter's attorney, and then executed a third mortgage to all its other creditors. The attorney took possession, and sold enough goods to satisfy the first two mortgages, and delivered the remaining property to the creditors in the third mortgage. There was no agreement for the intervention of a trustee, nor were any of the mortgagees answerable for the proceeds of sales to any one but the mortgagors. *Held*, that the transaction was not an assignment.—*Fecheimer v. Robertson*, (Ark.) 13 S. W. 423.

2. An instrument conveying a stock of goods to plaintiff, "first to pay himself" a certain debt, and all necessary expenses incurred in converting the stock into cash, the surplus to be divided *pro rata* among other named creditors, is not a mortgage, but a valid assignment.—*Hart v. Blum*, (Tex.) 13 S. W. 181.

3. A deed of assignment for the benefit of creditors, which makes preferences, and provides that after the preferred creditors are paid all other creditors shall be paid *puri passu*, and directs the assignee to wind up the estate as the law directs, is not void for failure to specify the time within which the creditors are to accept its provisions and surrender their debts.—*Thornton v. Simon*, (Ark.) 13 S. W. 739.

— Filing inventory and giving bond.

4. Under Mansf. Dig. Ark. § 806, which provides that, before an assignee for the benefit of creditors shall be entitled to take possession of the property assigned, he shall file in court a complete inventory and description of such property and give a bond, the surrender of possession to an assignee under an agreement made at the time of the assignment, by delivering to him the key of the premises in which the assigned goods are stored for the purpose of making an inventory, and before the assignee has qualified by filing an inventory and giving bond, avoids the assignment.—*Gilkerson-Sloss Commission Co. v. London*, (Ark.) 13 S. W. 513; *Goodbar v. Mears*, Id. 515; *Frizzell v. Tiller*, Id. 1097.

Assignment by corporation—Use of seal.

5. The use of the corporate seal being necessary to convey land, under Rev. St. Tex. art. 600, an assignment by a corporation for the benefit of creditors, purporting to convey all its property, real and personal, is invalid without the seal, though the inventory shows only personality.—*Shropshire v. Behrens*, (Tex.) 13 S. W. 1043.

Preferences and reservation.

6. Under Gen. St. Ky. c. 44, art. 2, § 1, providing that every mortgage made in contemplation of insolvency, with the design to prefer one or more creditors, shall inure to the benefit of all the creditors of the mortgagor, but further providing that such statute shall not affect any mortgage made in good faith to secure any debt created simultaneously with such mortgage, a mortgage given by an insolvent to secure a debt, a portion of which is created at the same time, is a valid security for such portion, though the residue of the debt is a pre-existing one.—*McCutchen v. Caldwell*, (Ky.) 13 S. W. 1072.

7. But a mortgage given to secure a pre-existing debt, in pursuance of a verbal agreement made at the time of the creation of the debt months before, is not within the exception of the statute.—*McCutchen v. Caldwell*, (Ky.) 13 S. W. 1072.

8. A promise made by a debtor, to induce one of his creditors to accept a statutory assignment made by him, that he would pay the balance of such creditor's claim remaining after the distribution of the assigned estate, is fraudulent and void,

as being a secret agreement by which a preference is given by an assignor to one of his creditors.—*Dansby v. Freiberg*, (Tex.) 13 S. W. 231.

9. A stipulation for a release in a general assignment for the benefit of creditors, which is made only as a condition of preference, does not invalidate the instrument.—*Wolf v. Gray*, (Ark.) 13 S. W. 512.

10. An omission in the assignment of directions to the assignee to notify the creditors of the condition on which they may be preferred does not avoid the deed.—*Wolf v. Gray*, (Ark.) 13 S. W. 512.

11. An assignment for the benefit of creditors, purporting to convey all the property of the assignors, real and personal, individual and partnership, except that which is exempt, is void, where there is an intentional withholding of any property not exempt.—*Penzel Grocer Co. v. Williams*, (Ark.) 13 S. W. 736.

12. An agreement by the debtors to appropriate certain property in the hands of some of their creditors to the payment of their indebtedness to the latter, said creditors having a lien on the property to secure the debt, and the debt being greater than the value of the property, is not a fraudulent withholding of assets by the debtors.—*Wolf v. Gray*, (Ark.) 13 S. W. 512.

Effect.

13. An agreement, by a partner purchasing the partnership effects, to pay the firm debts, does not charge the goods with a trust, so that an assignment by him will carry only his interest remaining after payment of the firm debts.—*Hart v. Blum*, (Tex.) 13 S. W. 181.

The assignee—Bond.

14. Under Gen. Laws Tex. 1883, p. 47, which requires an assignee to give bond for the faithful discharge of his duties, and provides that creditors may sue for breach of such bond,—where an assignee abandons the entire assets to one creditor, and leaves the state, a creditor may sue the assignee and his sureties to recover the value of the assets, and to have a new assignee appointed.—*Becker v. Shayne*, (Tex.) 13 S. W. 1027.

15. *Sayles' Ann. St. Tex. art. 65*, provides that the bond of an assignee shall be approved by either the district or county judge, but contains no provision as to the approval of the bond of a substituted assignee. *Held* that, as the district judge is authorized by statute to remove an assignee and appoint his successor, he is the proper person to approve the bond of the successor.—*Perry v. Stephens*, (Tex.) 13 S. W. 984.

Removal.

16. There being no statutory provision for an appeal from an order of a district judge removing an assignee, such an order is not suspended by giving notice of appeal and filing bond.—*Perry v. Stephens*, (Tex.) 13 S. W. 984.

Actions by assignee.

17. Where an assignee is removed by the district judge, his successor has the right to sue for a tortious taking of the assigned property from the former assignee.—*Perry v. Stephens*, (Tex.) 13 S. W. 984.

18. The creditor of an insolvent, when sued by the assignee for attaching the assigned property, cannot convert the action into an equitable proceeding for the adjustment and distribution of the trust fund.—*Perry v. Stephens*, (Tex.) 13 S. W. 984.

19. An allegation that one of the payees on a note assigned all his estate to plaintiff for the benefit of creditors sufficiently alleges the assignee's right to sue in his own name in connection with the other payee.—*Bell v. Mansfield's Assignee*, (Ky.) 13 S. W. 838.

20. There is no variance between an instrument conveying property to plaintiff, "first to pay himself" a certain debt, and expenses incurred in converting the property into cash, the surplus to be divided among other creditors, and an allegation that "the property had been assigned, transferred, and conveyed, and delivered to plaintiff, * * * in trust to sell and dispose of the same."—*Hart v. Blum*, (Tex.) 13 S. W. 181.

21. A statement in a finding that the debtor "sold" the property to the assignee will not make the finding erroneous, where the instrument of assignment is set out in full therein.—*Hart v. Blum*, (Tex.) 13 S. W. 181.

For wrongful attachment.

22. Goods assigned for the benefit of creditors having been attached and purchased by the assignee at the sale, he is not estopped to sue for their value by having given notice at the sale that he owned the goods, and would hold the sheriff and attaching creditors liable.—*Hart v. Blum*, (Tex.) 13 S. W. 181.

23. Where goods assigned for the benefit of creditors are attached and sold, the fact that the assignee purchased the goods at the sale cannot affect the measure of damages he is entitled to recover for their wrongful attachment.—*Hart v. Blum*, (Tex.) 13 S. W. 181.

Associations.

See *Building and Loan Associations; Corporations; Insurance; Religious Societies.*

ASSUMPSIT.

When lies.

1. Where a person takes possession of land as "agent," without disclosing any principal, and afterwards applies to the owner to purchase the land, telling him he had been renting it out, such a privity arises between him and the owner as will entitle the latter to bring *assumpsit* against him for the rents afterwards accruing, and collected by him.—*Ward v. Small's Adm'r*, (Ky.) 13 S. W. 1070.

Pleading and proof.

2. Where the petition in *assumpsit* for goods sold and delivered to a married woman, for sale and use in a millinery store conducted by her, avers that the husband promised to pay for them, evidence of such a promise by him, though it was not in writing, is admissible.—*Jones v. Worcher*, (Ky.) 13 S. W. 911.

ATTACHMENT.

See, also, *Garnishment.*

Action for wrongful attachment, see, also, *Assignment for Benefit of Creditors*, 22, 23.
Rights of attaching creditor, see *Conflict of Laws*, 2.

Grounds.

1. Under Civil Code Ky. § 194, subsec. 2, authorizing an attachment on the ground that the debtor has no property in the state subject to execution, or not enough to satisfy the plaintiff's demand, and the collection of the demand will be endangered by delay in obtaining judgment, "an attachment will not lie unless it be alleged and shown, not only that the property is not sufficient to satisfy the demand, but also that the collection would be endangered by delay."—*Dunn's Trustee v. McAlpin*, (Ky.) 13 S. W. 863.

2. (On motion to discharge an attachment, there was evidence tending to show that the defendant made offers to secure the plaintiff's claim, apparently insincere, and prevaricated about going to the bank for money to pay it, and that, having assets which he stated to be worth three times his liabilities, he threatened that, in case the plaintiff gave his claim to a lawyer for collection, he would make such a disposition of his property that nothing would be realized. *Held* sufficient evidence to sustain the attachment.—*Hanks v. Andrews*, (Ark.) 13 S. W. 1102.

Action against several defendants.

3. Where the demand is against two or more obligors, attachment will not lie against one of them on the ground that he has no property sufficient to pay the demand; but it must be alleged and shown that the other obligors have no property, subject to execution, sufficient to pay the demand, and that it would be endangered by delay.—*Dunn's Trustee v. McAlpin*, (Ky.) 13 S. W. 863.

4. An allegation that such co-obligor had made an assignment for the benefit of his creditors is not a compliance with the provisions of the statute. —*Dunn's Trustee v. McAlpin*, (Ky.) 18 S. W. 863.

— Against firm.

5. Under Mansf. Dig. Ark. § 809, providing that a plaintiff may have an attachment against the property of the defendant for certain causes, but that, where there are several defendants, there shall be no attachment against those not embraced in such causes, the wrongful act of one partner, in the conduct of partnership business, which would warrant an attachment against his property, will not authorize an attachment against the individual property of the other partner, who did not participate in the wrongful act. —*Worthley v. Goodbar*, (Ark.) 18 S. W. 216.

Affidavit.

6. Under Carroll's Code Ky. § 249, an affidavit for a writ of attachment, wherein plaintiffs state "that they have reasonable grounds for believing, and do believe, that, unless prevented, the tobacco will be sold or concealed by the defendant, that their claim is just," etc., is sufficient, and need not state the amount they ought to recover, when the debt and credits have been set forth in the petition. —*Bell v. Mansfield's Assignee*, (Ky.) 18 S. W. 838.

7. Where the affidavit for an attachment alleges that defendant is indebted to plaintiff in a certain sum, but, though the petition shows that part of the debt was not due when the suit was brought, neither the petition nor affidavit states the amount due, and the amount to become due, the writ will be quashed, on motion. —*Avery v. Zander*, (Tex.) 18 S. W. 971.

8. An amended petition, afterwards filed by leave of the court, showing the amount due, and the amount to become due, cannot help plaintiff. —*Avery v. Zander*, (Tex.) 18 S. W. 971.

Levy and lien.

9. A sheriff's return, describing property as "a lot of dry goods * * * and an iron safe, situated in a storehouse occupied by" the attachment debtors, describes the property with sufficient certainty. —*Hilliard v. Wilson*, (Tex.) 18 S. W. 25.

— Priorities.

10. Suit by attachment was brought on notes in the name of the payees, without their knowledge, by attorneys acting for their surety. The payees subsequently ratified it, but meanwhile other creditors had levied a second attachment. *Held*, that the first attachment was not the suit of the payees until their assent to it, and the lien of the second attachment was entitled to priority. —*Caruth-Byrnes Hardware Co. v. Deere*, (Ark.) 18 S. W. 517.

Intervention.

11. Plaintiff sued defendant and attached his property. A creditor of plaintiff garnished defendant, and sought to intervene in the attachment suit. *Held*, that, in the absence of statute creating a specific lien by service of garnishment process, plaintiff's creditor had no such lien as entitled him to intervene. —*Noyes v. Brown*, (Tex.) 18 S. W. 38.

12. In a proceeding by intervenors against plaintiff in attachment, evidence that the proceeds of attached property, deposited in a bank to the credit of plaintiff, were drawn out on plaintiff's check by his brother-in-law, who went with the money in the direction of the bank of B.; that soon afterwards defendants were seen to enter the bank of B. by a back door; that an entry in B.'s bank's books shows a deposit made on the same day to the credit of defendants; and that next day B.'s bank sent to plaintiff a sum which, added to defendants' deposit, amounts to the same sum less six cents, drawn on plaintiff's check by the brother-in-law, — is sufficient to support a finding that plaintiff's attachment was the result of collusion between plaintiff and defendants. —*Heidenheimer v. Johnston*, (Tex.) 18 S. W. 46.

13. A verdict for each of several intervenors, and against plaintiff in attachment of a specific

sum, with interest from a certain date, at a certain rate, is sufficiently intelligible to authorize a judgment on it. —*Heidenheimer v. Johnston*, (Tex.) 18 S. W. 46.

14. Where plaintiff in an attachment proceeding receives money which properly belongs to intervenors, he is chargeable with interest from the time he received it. —*Heidenheimer v. Johnston*, (Tex.) 18 S. W. 46.

Sales—Action for purchase money.

15. Under Mansf. Dig. Ark. § 850, providing that all sales under attachment shall be subject to the confirmation of the court, such a sale is not complete, and no action can be maintained for purchase money, until such confirmation. —*Freeman v. Watkins*, (Ark.) 18 S. W. 79.

Action for wrongful attachment.

16. An action for wrongful attachment may be brought before termination of the attachment suit; the issues in the two cases being different. —*Tynberg v. Cohen*, (Tex.) 18 S. W. 315.

17. Under Rev. St. Tex. art. 1198, § 8, which provides that an action for a trespass may be prosecuted in the county in which the cause of action accrued, an action for the wrongful seizure of property under a writ of attachment may be brought in the county where the seizure took place, though none of the defendants are residents of such county. —*Perry v. Stephens*, (Tex.) 18 S. W. 984.

— Damages.

18. The facts that third persons refused to sell to defendants in attachment because they saw a newspaper statement that they had failed; that persons who had sold them goods which had not been paid for took them back; and that they were obliged to pay for other goods in order to keep them, — are immaterial, since the damages resulting therefrom are too remote. —*Tynberg v. Cohen*, (Tex.) 18 S. W. 315.

19. In an action for malicious attachment of part of a stock of goods, it appeared that the sheriff had possession of the goods only three hours, and that he did not interrupt the business of the store, or injure the goods. *Held* a verdict for \$150 actual damages was excessive, though the defendants in attachment testified that the levy interfered with their business, and caused them loss of credit. —*Tynberg v. Cohen*, (Tex.) 18 S. W. 315.

ATTORNEY AND CLIENT.

Advice of counsel, see *Malicious Prosecution*, 5.

Disbarment.

In a suit to obtain a decree for sale of certain land, it appeared that there was a prior lien on it to secure payment of rents to a receiver. The complaint asked to have this removed, alleging that it was obtained by the receiver for his personal security merely, he having been directed by the attorney for complainant in the suit in which he was appointed not to collect any rents from the owner, or force him to do anything, and that the receiver had been discharged on a report which stated that he had taken no steps as receiver. What purported to be a copy of this report was produced by the attorney, showing the facts above stated, but omitting, after the statement that he had taken no steps as receiver, the qualification, "except to obtain * * * a lien on certain property * * * to secure the payment of any rents that may be found due * * * on the property in controversy in this cause." *Held*, that, as the full report showed that persons not parties to the present suit were interested in the lien, the attorney, in presenting a mutilated copy, was guilty of an attempt to mislead the court, such as authorized his disbarment. —*In re Henderson*, (Tenn.) 18 S. W. 418.

BAIL.

Alteration of bail-bond, see *Alteration of Instruments*, 1.

Right to bail—Murder.

1. Bill of Rights Tex. § 11, provides that "all prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident." Pen. Code Tex. art. 609, makes murder in the first degree a capital offense; but article 35 provides that one who commits murder in the first degree, while under 17 years of age, cannot be punished capitally. *Held*, that one who is conceded to have committed murder in the first degree, while under 17, is entitled to bail.—*Ex parte Walker*, (Tex.) 18 S. W. 861.

2. Persons accused of murder in the first degree are entitled, on *habeas corpus*, to be released on bail, when it is not evident from the proof that they are guilty. Code Crim. Proc. Tex. art. 2.—*In re Wilson*, (Tex.) 13 S. W. 609.

3. On application for *habeas corpus* by one committed on the charge of murder, a witness who had been looking up evidence against defendant testified that he found a horse's track near where deceased was found, which appeared to have been made by a notched hoof; that defendant's horse had a notched hoof; and that a measurement of it taken by him agreed with the size of the track, but the measurement was thrown away. Witness stated in the presence of several persons that the track was made by a large horse, but defendant rode a small pony. He also stated, on applying a .32-caliber ball to the hole in deceased's hat, that it fitted tightly, but defendant's pistol was a .44-caliber. A witness for the state, whom defendant was prosecuting for a felony, testified that defendant had made threats against deceased. The only motive shown was that defendant and deceased had had trouble over a horse, in which, on arbitration, the former was successful. On the night of the killing, defendant stated that he would probably be arrested for the crime. The relatives of deceased, and many witnesses for the state, were bitter against defendant. Defendant had loaned deceased money, and helped him in various ways. *Held*, that defendant was entitled to bail.—*In re Foulk*, (Tex.) 13 S. W. 746.

Form of bond.

4. A bail-bond which obligates the principal to appear at the next term of court, "A. D. 1883," being on an impossible date, is fatally defective.—*Wegner v. State*, (Tex.) 18 S. W. 608.

5. In a prosecution under Pen. Code Tex. art. 759, prescribing the penalty for the marking and branding by a person of certain enumerated animals, "not being his own, and without the consent of the owner, and with intent to defraud," a bail-bond which simply describes the offense of the principal as "illegally marking and branding" cattle, without giving the essential elements of the offense, is insufficient; "illegal marking and branding" not being an offense *eo nomine* under the Code.—*Cresap v. State*, (Tex.) 18 S. W. 992.

6. Code Crim. Proc. Tex. art. 238, requires the bail-bond to state the time and place when and where the accused binds himself to appear, and provides that in stating the time it shall be sufficient to specify the term of court. The prior statute (Hart. Dig. art. 2389) merely required the bond to state that the obligor would "appear at the district court of the proper county at the next term thereof." *Held*, that the Code abrogated the rule which prevailed under the prior statute, and that an impossible date, designated in a bail-bond as the time of holding the next term of court, could not be stricken out as surplusage.—*Wegner v. State*, (Tex.) 18 S. W. 608.

Validity of bond.

7. Under Code Crim. Proc. Tex. art. 318, providing that witnesses may be required by the magistrate, "upon the examination of any criminal accusation before him," to give bail for their appearance, etc., a witness' bail-bond not executed till four days after the examination is concluded, and the examining court has adjourned, and where no order requiring the bond had been entered of record by the magistrate, is void.—*Foat v. State*, (Tex.) 18 S. W. 367.

8. A bail-bond which recites that the principal therein is charged with unlawfully altering a writ-

ten order for five dollars' worth of goods "by erasing 'five' and writing 'eight,' so as to make the said instrument fully appear as stated above," does not show that he is charged with forgery, since it fails to set out the tenor of the instrument after the alteration, and the bond is invalid.—*Bowman v. State*, (Tex.) 18 S. W. 1009.

Liabilities of sureties.

9. The liability of sureties on a bail-bond is both joint and several; and in an action thereon the fact that there is a variance between the judgment *nisi* and the citation describing it, one reciting a joint, and the other a joint and several, liability, does not render the judgment incompetent as evidence, the variance being immaterial.—*Allee v. State*, (Tex.) 18 S. W. 991.

10. A surety on a bail-bond conditioned that defendant shall render himself amenable to all orders and process of the court in the prosecution of the charge is not released by a change of venue; Mansf. Dig. Ark. § 3199, providing that, on a change of venue in a criminal case, defendant shall enter into recognizance, with security, to appear in the court to which the cause is removed, being merely directory.—*Beasley v. State*, (Ark.) 18 S. W. 733.

Actions on bonds.

11. Under Code Crim. Proc. Tex. art. 297, providing that sureties "may at any time relieve themselves of their undertaking by surrendering the accused into the custody of the sheriff of the county where he is prosecuted," a plea of surrender to the sheriff, prior to the forfeiture of the bail-bond, with notification that they desired to be released, is a good defense in an action on the bond.—*Hughes v. State*, (Tex.) 13 S. W. 777.

Evidence.

12. In an action on a bail-bond the sureties answered that the principal was in custody when the forfeiture was declared. In proof of this allegation they showed his conviction of the offense for which he was held, and subsequent incarceration in the penitentiary. *Held*, that it was competent for the state to show by evidence in rebuttal, without pleading it, that previous to declaring of the forfeiture he had escaped, and had since been at large.—*Allee v. State*, (Tex.) 18 S. W. 991.

13. Under Code Crim. Proc. Tex. art. 314, requiring an examining magistrate to certify to all the proceedings had before him, failure to certify that bail was required for appearance as a witness is fatal to the enforcement of the bail-bond, and parol evidence of the fact is inadmissible to supply the omission.—*Foat v. State*, (Tex.) 18 S. W. 367.

BAILEMENT.

See, also, *Carriers; Innkeepers; Pledge.*

What constitutes.

Plaintiff and others bought shares of stock which were included in a certificate standing in the name of E. Each purchaser paid his share of the purchase to defendants, who paid it over to E., and received the certificate from him. Defendants then signed a paper, stating that they had received from plaintiff the number of shares bought by him, and agreeing "to forward the same to W., [the office of the company,] for the purpose of transfer, and * * * to deliver new certificate to him [plaintiff] as soon as received." *Held*, that the receipt showed a bailment to, and not a sale by, defendants.—*Coquard v. Wernse*, (Mo.) 18 S. W. 341.

Bankruptcy.

See *Assignment for Benefit of Creditors; Insolvency.*

BANKS AND BANKING.

Liability of depositary, see *Depositaries*.
Set-off against deposit of insolvent, see *Set-Off and Counter-Claim*, 2.

Forged checks.

Where forged checks on a bank, purporting to be drawn in the name of one of its principal depositors, and running through a period of five months, before the forgery is discovered, are accepted and paid by the drawee bank to other banks, which accepted and paid them in good faith, after inquiry of the drawee as to the depositor's account, the drawee bank must stand the loss.—*Deposit Bank v. Fayette Nat. Bank, (Ky.) 18 S. W. 839.*

BASTARDY.**Contract for support of child.**

Mansf. Dig. Ark. § 445, et seq., enabling the mother of a bastard child to cast the legal liability for its support on the father, furnishes a sufficient consideration for the father's promise to pay her for the maintenance of the child.—*Davis' Estate v. Herrington, (Ark.) 18 S. W. 215.*

BENEVOLENT SOCIETIES.

Mutual benefit insurance, see *Insurance*, 29-34.

Action by members against corporation.

1. Members contributing to a charitable corporation organized to provide a home for the orphans and widows of Confederate soldiers from Missouri, not being peculiarly interested in nor trustees of the fund, cannot maintain an action against the corporation and its officers for non-user or misuser of the franchise, and for a receiver to distribute the fund among the beneficiaries, the proper remedy being, under Rev. St. Mo. § 984, by *quo warranto* by the attorney general or circuit attorney on the relation of any person desiring to prosecute; and it is not enough that the attorney general is made defendant on his refusal to become party plaintiff, it not appearing that any written complaint was ever made to him as required by that section.—*Tyree v. Bingham, (Mo.) 18 S. W. 952.*

Expulsion of members.

2. Where the constitution of a charitable corporation reserves to a member expelled by the board of trustees the right to appeal to the members of the corporation at a corporate meeting, *mandamus* will not issue in favor of an expelled member who has taken no appeal from the action of the board, though the order of expulsion may be contrary to law and void.—*Screwmen's Ben. Ass'n v. Benson, (Tex.) 18 S. W. 379.*

Best and Secondary Evidence.

See *Evidence*, 2-10.

Bill of Exceptions.

See *Exceptions, Bill of.*

Bills and Notes.

See *Negotiable Instruments.*

Bona Fide Purchasers.

See *Sale*, 14; *Vendor and Vendee*, 28-28.

BONDS.

See, also, *Principal and Surety.*

Bail-bond, see *Bail*, 4-13.

Liabilities of sureties on appeal-bond, see *Appeal*, 70.

Of administrator, etc., see *Executors and Administrators*, 5.

assignee, see *Assignment for Benefit of Creditors*, 14, 15.

corporation, see *Municipal Corporations*, 83.

county treasurer, see *Counties*, 8-17.

guardians, see *Guardian and Ward*, 2-5.

Of sheriffs, see *Sheriffs and Constables*, 8.
state treasurer, see *States and State Officers.*
On appeal, see *Appeal*, 3-5.

Actions on.

1. In an action against the sureties on a bond conditioned that the principal should promptly account for, and pay over and apply, all sums of money received for plaintiff, plaintiff need not show that before bringing suit there had been a settlement of accounts between it and the principal, and the balance due plaintiff ascertained.—*German Ins. Co. v. Smead, (Ark.) 18 S. W. 832.*

2. Under Civil Code Ky. § 26, providing that sureties, severally liable on the same or separate instruments, may all or any of them be included in the same action, the state may bring one action on the official bonds of the state treasurer for several successive terms, against the treasurer and those of his sureties who are the same on all the bonds, and recover the whole amount of the treasurer's defalcations during the several terms; and it is not necessary to include in such action those of the sureties who are not on all the bonds.—*Commonwealth v. Tate, (Ky.) 18 S. W. 117.*

Pleading.

3. In an action on the official bonds of a state treasurer for two successive terms, though the sureties are the same, each bond should be set out in a separate paragraph, to show the contract by which they became severally bound.—*Commonwealth v. Tate, (Ky.) 18 S. W. 117.*

4. Where each bond is thus set out in a separate paragraph, but the amount of defalcation for the term covered by each bond cannot be ascertained and is not set out, there may be an *addendum* or continuation of these two paragraphs, relating to both, and stating the total defalcation during the two terms; but it is error to make such statement by the addition of a third separate paragraph.—*Commonwealth v. Tate, (Ky.) 18 S. W. 117.*

5. The addition of such third paragraph, where the three paragraphs state a cause of action, is merely an error in form, and may be cured by amendment.—*Commonwealth v. Tate, (Ky.) 18 S. W. 117.*

Books of Account.

See *Evidence*, 25, 26.

BOUNDARIES.

On navigable waters, see *Riparian Rights*, 1.

Artificial.

1. In trespass to try title the disputed question was as to the location of one line of the M. grant. The order for the survey was made in September, 1838, and the title was issued to M. in October, 1838. The surveyor to whom the order was directed testified that he made the survey "in 1838," that he kept a field-book of the lines then run, and that he was never on the land afterwards. The commissioner of the land-office testified that the original field-notes of the surveyor were in the archives of the land-office, and that the original field-notes of the M. survey were attached to his deposition, marked "Exhibit A." Exhibit A showed a survey made in April, 1838, for one S., and the description in the survey was the same as the description in the grant to M., except with regard to the number and distances of some of the objects called for. *Held*, that the survey mentioned in the field-notes as made for S. was a survey of the same land as that granted to M., and that the surveyor, having made the survey for S. but a few months before, adopted it when ordered to make a survey for M., without making a resurvey.—*Ayers v. Harris, (Tex.) 18 S. W. 768.*

2. It is not prejudicial error to charge that, if the jury can fix the lines of the survey in harmony with its calls and known corners, then the fact that the lines would include more than the area called for in the grant becomes immaterial, and the extent of the area should not be considered "further than as a circumstance to aid you, in connection with all the evidence in the case, in

following the footsteps of the original surveyor, and fixing the true boundaries of said grant," where the lines as claimed by plaintiff include more than was intended to be conveyed by the grant.—*Ayers v. Harris*, (Tex.) 18 S. W. 768.

Recognition.

8. Plaintiff's father, who conveyed the land to him as a gift, while owner caused the boundary line to be established and permanently marked, and defendant, while the line was so recognized, bought the adjoining tract, relying on such boundary, and made improvements, and occupied the land for many years without adverse claim by plaintiff. *Held*, that the latter was estopped to deny that such line is the true boundary.—*Anderson v. Jackson*, (Tex.) 18 S. W. 80.

Adverse possession.

4. In ejectment, it appeared that P., as owner of a city lot 50 feet wide, conveyed the east half to S., and the west half to C. S. built a brick house on his half, the wall being exactly on the west line of his lot. R., as grantee of C., built on the east half, using the west wall of S.'s house as a support for his floor timbers, under a license from S. There were just 25 feet between this wall and the west line of R.'s lot. More than 10 years afterwards, defendant, as grantee of R., removed the old house, and built a new one, placing the beams in the S. wall, as before. Beneath this wall, and five feet below the surface of the ground, was a footing course, extending out from the wall five or six inches, and this defendant removed in underpinning the new house. *Held*, that as this five inches of ground had been on the inside of the house erected by defendant's grantor, and consequently held by him under adverse possession for over 10 years before suit was brought, plaintiff could not recover.—*Handlan v. McManus*, (Mo.) 18 S. W. 207.

5. And, as the west face of the wall of S.'s house was exactly on the line of the lot, the license to R. to rest his floor beams on that wall cannot be construed as an acknowledgment of S.'s ownership of the five inches of ground sued for, in the absence of anything to show that R. knew that the footing course of the wall extended five inches on his lot.—*Handlan v. McManus*, (Mo.) 18 S. W. 207.

Evidence.

6. In trespass to try title it appeared that the north-east corner of plaintiff's land was the north-west corner of defendant's land, but no natural or artificial object was called for by the field-notes. Plaintiff's north-west corner and defendant's south-west corner were well identified, and, following course and distance from the corners, located the boundary line as claimed by plaintiff. Defendant's land was surveyed in 1838, and the line located where he claimed it, which was recognized until 1860, when a new survey was made, and the line established about 347 feet east of the line as first located. At that time, commencing at the well-established south-west corner of defendant's land, defendant's west line could be traced by marks and trees, as called for in the field-notes, to about three-fourths of a mile from the point where the divergence begins. Afterwards another survey was made, beginning at plaintiff's well-established north-west corner, and course and distance were followed for the north-east corner, defendant's north-west corner, and the line was found to be as claimed by plaintiff. Defendant surveyed again in 1887, and located the line as claimed by him. *Held*, that a judgment for defendant was without evidence to support it.—*Porter v. Miller*, (Tex.) 18 S. W. 555.

7. In trespass to try title the contention between the parties depended on the proper quantity of land in the original grant under which defendants claimed. The official maps of the county, and the testimony of those who had been the county surveyors for many years, and others who had made surveys of the grant, showed that it cornered at a stone, and at a tree marked with the grantee's initials, which were, according to testimony, established by the colonial surveyor, and had been for

50 years recognized as the true monuments. According to this evidence the grant was as claimed by defendants. Plaintiffs' evidence consisted of old surveys, maps, and field-notes purporting to have been made by the colonial surveyor, giving courses and distances, and monuments not easily distinguishable, showing the grant as claimed by plaintiffs. *Held*, that defendants' evidence should prevail.—*Withers v. O'Connor*, (Tex.) 18 S. W. 743.

Instructions.

8. Where the right of plaintiff, in ejectment, to recover depended on the establishment of a line, made by the "Ross" survey, as the true boundary, an instruction that, if such survey was substantially correct, and in accordance with a prior survey, the jury should find the Ross line to be correct, was error, there being nothing to warrant the declaration, as a matter of law, that the prior survey was the true dividing line.—*Robertson v. Drone*, (Mo.) 18 S. W. 405.

Branding.

Cattle unlawfully, see *Animals*, 8.

BREACH OF MARRIAGE PROMISE.

Pleading.

1. In an action for breach of promise of marriage, allegations that, by reason of the breach, plaintiff has lost an advantageous matrimonial connection, defendant being a man of wealth and social position, and that her affections have been disregarded and blighted, her feelings lacerated, and her spirits wounded, resulting in mental distress and humiliation, are sufficient to show damage.—*Daggett v. Wallace*, (Tex.) 18 S. W. 49.

Evidence.

2. Testimony of plaintiff that "she became engaged to defendant" is not objectionable as stating conclusions, and not facts, where the other evidence shows beyond question that the promise of marriage was repeatedly made by defendant subsequent to the time referred to in plaintiff's statement.—*Daggett v. Wallace*, (Tex.) 18 S. W. 49.

Instructions.

3. A charge to find for defendant unless there was a mutual agreement to marry existing within a year of the commencement of the action, is sufficient, where defendant does not request an instruction that the promise must have been to be performed within a year.—*Daggett v. Wallace*, (Tex.) 18 S. W. 49.

Damages.

4. In an action for breach of promise of marriage, seduction may be alleged and proved as an element of damage.—*Daggett v. Wallace*, (Tex.) 18 S. W. 49.

5. Defendant was a man of wealth and social position, and had seduced plaintiff; and she alleged wounds and injuries to the affections, and mental distress and humiliation. *Held*, that a verdict for \$7,500 would not be set aside as excessive.—*Daggett v. Wallace*, (Tex.) 18 S. W. 49.

BRIBERY.

What constitutes.

1. At a trial for receiving a bribe to vote for a certain candidate for congress, the testimony for the commonwealth was that of a single witness, who testified that he loaned defendant five dollars, but not to influence his vote, though he did not know that he would have loaned it but for the election; and that the accused entertained the same political views as witness. *Held*, that a motion to dismiss should have been granted.—*Johnson v. Commonwealth*, (Ky.) 18 S. W. 520.

2. Defendant requested an instruction that the jury must believe that the money was given accused to influence his vote, and that for such money the accused did vote as requested, and that if the money was in good faith loaned the accused

was not guilty. *Held*, that it was improperly refused.—*Johnson v. Commonwealth*, (Ky.) 13 S. W. 520.

BRIDGES.

Contract of bridge company to sell tickets, see *Contracts*, 3.
Over navigable waters, see *Navigable Waters*.
Toll-bridges, see *Turnpikes and Toll-Roads*.

BUILDING AND LOAN ASSOCIATIONS.

Withdrawal of members.

Plaintiff, a stockholder in a building and loan association, sued to recover the amount which he had paid in on his stock, pleading a by-law of the association permitting stockholders to withdraw after due notice filed, and to receive the amount actually paid in, etc. But there was a proviso in the by-law, which he did not set out, that at no time should more than one-third of the funds in the treasury be applied to the demands of withdrawing stockholders without the consent of the directors. *Held* that, even if the variance had not been material, and the by-law had been admissible, plaintiff could not have recovered, there being no proof that there were any funds in the treasury, nor that the directors consented to the application of funds to plaintiff's demand.—*Texas Homestead Building & Loan Ass'n v. Kerr*, (Tex.) 13 S. W. 1020.

BURGLARY.

What constitutes.

1. One who, with criminal intent, enters a house in the night-time by an open door does not enter burglariously.—*Williams v. State*, (Tex.) 13 S. W. 609.

2. The front door of a house was locked, with the key on the inside, but the back doors were left open, when the occupants retired. Defendant, accused of burglary, was discovered in the house with no shoes on, and immediately ran out of a back door, near which, next morning, his shoes were found. *Held* insufficient evidence to support a finding of forcible entry.—*Williams v. State*, (Tex.) 13 S. W. 609.

Indictment.

3. An indictment for burglary, which alleges that defendant "willfully, feloniously, and maliciously broke into the depot belonging to and in the possession of the L. & N. R. Co., with intent to steal," is not vitiated by the omission of the word "forcibly."—*Cunningham v. Commonwealth*, (Ky.) 13 S. W. 104.

4. An indictment for burglary, which charges a breaking and entry by means of force, is good, whether the offense was committed in the day-time or night-time.—*Finlan v. State*, (Tex.) 13 S. W. 866.

Evidence.

5. Evidence to support such an indictment must show an entry by the use of actual force applied to the house, though it is immaterial whether the entry was made in the day-time or night-time.—*Finlan v. State*, (Tex.) 13 S. W. 866.

6. On a trial for burglary, it appeared that defendant was staying at the house of K., that he had previously worked at the burglarized premises; that at sundown, on the evening before the night of the burglary, he was seen with K., in an empty wagon, going in the direction of the place burglarized; that the next morning, at sunrise, K., who was then with another person, sold the wheat stolen, taking in part payment a sack of flour. The purchaser of the stolen wheat did not identify defendant as the person with K., but other witnesses, who knew defendant, testified that they met him and K. in a wagon, in which was a sack of flour, between 9 and 10 o'clock of that morning. One of the sacks stolen from the burglarized premises was shortly afterwards found in defendant's house, and he did not attempt to explain its possession. *Held*, that the evidence showed a conspiracy between K.

and defendant, and warranted a conviction.—*Jackson v. State*, (Tex.) 13 S. W. 451.

7. In a prosecution for burglary, evidence of what occurred at the finding of property, stolen from the burglarized premises, in defendant's house was admissible, though defendant was not present.—*Jackson v. State*, (Tex.) 13 S. W. 451.

8. Where a conspiracy between K. and defendant, to burglarize premises, was shown, evidence of the finding of some of the stolen property at K's house shortly after the burglary was admissible against defendant, though neither he nor K. was present.—*Jackson v. State*, (Tex.) 13 S. W. 451.

Instructions.

9. On a trial for burglary, at which defendant was charged with having stolen a saddle, testimony by a witness that he arrested defendant on a charge of stealing a saddle and a gun does not warrant an instruction that the theft of the gun may be considered by the jury in arriving at defendant's intent in stealing the saddle, in the absence of any evidence that the saddle and gun were supposed to have been stolen at the same time and place.—*Eley v. State*, (Tex.) 13 S. W. 998.

10. Under an indictment charging a burglary by force, threats, and fraud, an instruction as to an entry effected by each of such means is reversible error where the evidence conclusively shows that it was accomplished by the use of force alone.—*Miller v. State*, (Tex.) 13 S. W. 646.

11. Where the indictment charges the entry to have been effected with intent to commit theft, but the evidence strongly tends to show that it was with intent to commit robbery, crimes differing in their essential elements and punishment, (Pen. Code Tex. arts. 722, 724,) it is error to omit to instruct that the entry must have been made with the specific intent charged in the indictment.—*Miller v. State*, (Tex.) 13 S. W. 646.

Cancellation of Contracts.

See *Equity*, 8-15.

CARRIERS.

See, also, *Horse and Street Railroads; Railroad Companies; Shipping*.

Carriage of goods.

1. The mere fact that a railroad company receives goods marked for a place beyond its own line does not import an agreement to transport the goods to the destination named as a common carrier.—*Hunter v. Southern Pac. Ry. Co.*, (Tex.) 13 S. W. 190.

2. A railroad company is not liable as a common carrier beyond its own line, unless it assumes such liability.—*Hunter v. Southern Pac. Ry. Co.*, (Tex.) 13 S. W. 190.

3. Under Rev. St. Tex. art. 277, which declares that the duties and liabilities of carriers in Texas shall be the same as at common law, except where otherwise provided, a common carrier is not liable for depreciation in the value of goods, resulting solely from inevitable delay in their transportation, caused by a mob of rioters. Overruling 12 S. W. 677.—*Gulf, C. & S. F. Ry. Co. v. Levi*, (Tex.) 13 S. W. 191.

Liability of connecting line.

4. By a contract between plaintiff and a railroad company whose line connected with that of the defendant, it was agreed that plaintiff's cattle should be transported to a point beyond the line of such road, the liability of the contracting road to cease at its terminus. From that point the cattle were hauled over several roads, and were finally delivered to the defendant road, which delivered them at their destination, and collected all charges for carriage from plaintiff. Rev. St. Tex. art. 4251, provides that every railroad company shall, for a reasonable compensation, draw over its road without delay the passengers, merchandise, and cars of every other railroad company which may enter and connect with its road. *Held* that the facts were

insufficient to fix any liability upon defendant, as member of a partnership, or as joint contractor, for injuries received by the cattle on roads other than its own; its action in hauling such cattle, as it was required to do by law, not of itself amounting to a ratification of the contract. Following *Railway Co. v. Baird*, (Tex.) 12 S. W. 530.—*Ft. Worth & D. C. Ry. Co. v. Williams*, (Tex.) 18 S. W. 687.

Carriage of goods—Penalty for failure to deliver.

5. Under Act Ark. Feb. 27, 1885, § 3, providing that a railway company refusing to deliver freight at its destination upon payment or tender of the charges due by the bill of lading shall be liable to a penalty, the entire charges must be paid or tendered in order to fix the liability; and where a consignee declines to receive a portion of the goods because they are damaged, and the company refuses to deliver the undamaged freight upon a tender of its proportion of the charges, and it is thereupon replevied, and subsequently, after repairing the damage, the company refuses to deliver the remaining goods upon a tender of their proportion of the charges, but offers to do so upon the payment of the whole bill, no liability for the penalty is incurred.—*St. Louis, A. & T. Ry. Co. v. Johnson*, (Ark.) 18 S. W. 1096.

— Discrimination.

6. A shipper to whom a railway company falsely represented that the rate charged him was the through rate agreed upon by the connecting lines, cannot recover the difference between the rate agreed on by the companies and that charged him, on the ground that the false representations and the payment of the higher rate constitute extortion.—*Arkansas & L. Ry. Co. v. Smith*, (Ark.) 18 S. W. 929.

Personal injuries to passengers.

7. A railroad company is liable to a passenger for slight negligence, and is bound to furnish a reasonably safe and sufficient track, rolling stock, and service, so far as can be provided by the utmost human skill, diligence, and foresight, which is such skill, diligence, and foresight as is exercised by a very cautious person; but it does not insure safety.—*Furnish v. Missouri Pac. Ry. Co.*, (Mo.) 18 S. W. 1044.

8. The fact that a railway car ran off the track, causing an injury to a passenger, is evidence of negligence, which, if unexplained, will justify a recovery; and it is not substantial error to charge that it shifts to the carrier the burden of proof that the injury did not occur through any omission to discharge its legal duty.—*Furnish v. Missouri Pac. Ry. Co.*, (Mo.) 18 S. W. 1044.

9. A passenger aged 67, and in good health, was directed to get off defendant's train, a freight carrying passengers, before reaching his station. His duties requiring haste, he started on beside the train, the roadbed being closely fenced with barbed wire, but soon came to a bridge, to cross which he had to mount a flat-car, as did also another passenger. Reaching the front of the car, and being anxious lest the train might start, he, having first examined the ground, jumped from the coupling outward, with one hand on the car in front, and on landing broke his leg. *Held*, that it was for the jury to determine whether defendant's wrongful act was the proximate cause of the injury.—*Adams v. Missouri Pac. Ry. Co.*, (Mo.) 18 S. W. 509.

10. In an action against a carrier for personal injuries, where it appears that a freight train was forbidden to carry passengers, and the conductor so informed plaintiff, and told him he could not carry him, but a brakeman afterwards told him to get on, and he was injured while the train was being made up, it is error to refuse to charge that, if such were the facts, he cannot recover, and that if the train was forbidden to carry passengers the conductor could not relax the rule without the consent of the company.—*Gulf, C. & S. F. Ry. Co. v. Campbell*, (Tex.) 18 S. W. 19.

CARRYING WEAPONS.

Punishment.

On a trial for carrying a pistol about the person, it is error to charge that, if defendant did, on or about September 16, 1888, or on any day within two years prior to that time, carry a pistol about his person, he must be fined and imprisoned within the limits fixed by law, since, prior to the act of February 24, 1887, the penalty was by fine only, and the offense might have been committed prior to that time, and yet within the two years.—*Perkins v. State*, (Tex.) 18 S. W. 790.

CEMETERIES.

See, also, *Dedication*, 1.

Abandonment—Reversion.

1. Land dedicated to a city for a cemetery, which has no longer the character and name of a grave-yard, but is used as a public park, reverts to the donor, who may recover in ejectment against the city, which in defense denies the abandonment.—*Campbell v. City of Kansas*, (Mo.) 18 S. W. 397.

2. In 1857 land, in a city, dedicated and used as a cemetery was by ordinance "vacated for grave-yard purposes." In 1866 the council, by published notice, required all who had friends buried there to move the remains. Many removals were made, but the majority of the remains were left to be taken away by the city. In 1869 it was used by the work-house force, breaking rock. In 1870 earth was taken from it, and used to fill a street. In 1877 the city engineer was instructed by ordinance "to grade the old grave-yard, and get it into shape for a public park." This was done the next year. The grading went below all the graves, except, perhaps, a few in the low part, on which four to ten feet of earth were placed. Trees were planted, grass grown, and walks laid out. It was named and recognized by the city as a park. No visible grave or monument remained. During the final grading, in 1878, the removal of remains exhumed was stopped, and the bones of from 11 to 84 bodies reinterred, in small boxes, as near the places from which taken as possible. Small stones, bearing numbers but no names, were at these points either put five or six inches under ground, or they had sunk to that depth at the time of the trial, shortly before which the location of many of them was brought to light, by agents of the city, by "prospecting" through the park with a sharp iron rod. *Held*, sufficient evidence of abandonment.—*Campbell v. City of Kansas*, (Mo.) 18 S. W. 397.

CERTIORARI.

Time of suing out writ.

1. A writ of *certiorari* to bring up a bill of exceptions will not be quashed for delay in suing it out, when the return thereto shows that the bill certified does not conform to that originally filed.—*Martin v. St. Louis, I. M. & S. Ry. Co.*, (Ark.) 18 S. W. 765.

2. Acts Tenn. 1869-70, c. 64, relating to unlawful entry and detainer, provides that proceedings in such actions may, by writ of *certiorari* and *supersedeas*, be removed to the circuit court within 30 days after judgment, upon a petition showing merits. *Held*, that, where such petition is not filed until after the 30 days have elapsed, it must, in addition to showing merits, show a good and sufficient cause for the delay, and such as would entitle the petitioner to relief under the general rules of removal on such writs.—*Rogers v. Wheaton*, (Tenn.) 18 S. W. 689.

CHARITIES.

Right of church to hold land, see *Religious Societies*, 1.

Power to take bequest.

1. Mill. & V. Code Tenn. §§ 2006, 2007, which provides for the acquisition and holding of land

for the purpose of public worship, by religious denominations, whether incorporated or not, do not empower an unincorporated local religious association to take a bequest of personal property.—*Rhodes v. Rhodes*, (Tenn.) 18 S. W. 590.

Uncertainty of bequest.

2. A bequest of a \$1,000 bond to a church, "the interest to be applied to the church annually, or as fast as due," being to an unincorporated local religious association, and failing to define how the interest should be applied, would be void for indefiniteness, even though the executor had been expressly appointed trustee, and therefore it cannot be saved by the appointment of a trustee by a court of equity.—*Rhodes v. Rhodes*, (Tenn.) 18 S. W. 590.*

Cy pres doctrine.

3. Where land dedicated as a cemetery is no longer used for that purpose the question will not be considered whether the land can be appropriated and used for other charitable purposes, germane to the original one, in accordance with the equitable doctrine of *cy pres*.—*Campbell v. City of Kansas*, (Mo.) 13 S. W. 897.

CHATTEL MORTGAGES.

Lien—To what attaches.

1. The lessee of a building, who was about to fit it with furniture, executed a mortgage on the furniture that should be contained in the building. The mortgage set out and recited the lease, and both were executed at the same time; the mortgage being for the purpose of securing the payment of the rent. *Held*, that the lien of the mortgage attached to furniture put in the building by an assignee of the lease.—*Keating v. Hannenkamp*, (Mo.) 18 S. W. 89.

— Notice.

2. The lessee of a building, who was intending to fit it up with suitable furniture for a restaurant, but who had not yet purchased or put it in the building, executed a mortgage on all the furniture that should be contained in the building. *Held*, that the mortgage was good in equity, and that the lien which attached when the furniture was put in the building was valid against the mortgagor and a subsequent mortgagee with notice.—*Keating v. Hannenkamp*, (Mo.) 18 S. W. 89.

Sale by mortgagees.

3. Where, by virtue of a mortgage of after-acquired property, an equitable lien thereon is created, and the mortgagee takes possession of the property for a default under the terms and stipulations of the mortgage, he has the right to sell and execute the powers contained in the mortgage without the aid of a court of equity, and his sale passes a legal as well as equitable title.—*Keating v. Hannenkamp*, (Mo.) 18 S. W. 89.

Disposition of property—Criminal prosecution.

4. On a trial for the fraudulent disposition of mortgaged property, evidence that defendant had previously sold property other than that charged in the indictment, but covered by the mortgage, is admissible on the question of defendant's motive in subsequently disposing of the property, for which he was being tried.—*Martin v. State*, (Tex.) 13 S. W. 151.

CLERK OF COURT.

Fees.

The revenue law, (Rev. St. Mo. 1879, § 6362,) providing that "the following fees and compensation shall be allowed to the several officers and persons herein named for services rendered under the provisions of this chapter," etc., provides for all fees that are to be allowed; and, since none are therein provided for such work, the clerk is not entitled to fees for entering the assessment lists, under section 6683, which provides that the assessment lists "shall be by the assessor, after he has completed his assessor's books, filed in the

office of the county clerk, and by him, after entering the filing of the same thereon, be preserved and safely kept."—*Hubbard v. Texas County*, (Mo.) 13 S. W. 1035.

Collector.

Of taxes, deputies, see *Office and Officer*.

Community Property.

See *Husband and Wife*, 17-20.

Complaint.

See *Pleading*, 1.

Concealed Weapons.

See *Carrying Weapons*.

Confession.

Evidence of, see *Criminal Law*, 87-89.
Judgment by, see *Judgment*, 4.

CONFLICT OF LAWS.

Exemption laws.

1. Where a debtor and creditor are domiciled in different states, and the creditor proceeds by attachment in the courts of the state of his domicile against the property of his debtor, the courts of the debtor's domicile will not interfere by injunction, on the ground that the property is exempt by the law of the debtor's domicile, though the creditor be temporarily found within their jurisdiction.—*Griffith v. Langedale*, (Ark.) 18 S. W. 733.

Attaching creditor's rights.

2. The collection by a creditor, under attachment in his state, of a debt due the debtor, who is domiciled in another state, after the latter has filed his complaint in his state asking an injunction, and a temporary restraining order has been improvidently granted, is no ground for a personal judgment against the creditor for the amount so collected.—*Griffith v. Langedale*, (Ark.) 18 S. W. 733.

Preferences by insolvent.

3. A transfer of property, made in contemplation of an assignment for the benefit of creditors, with intent to prefer a particular creditor, which is valid in Ohio, where it is made, will be enforced in Kentucky, unless it appears that some citizen of Kentucky will be prejudiced by it.—*Matthews v. Lloyd*, (Ky.) 18 S. W. 106.

Consideration.

Of deed, see *Deed*, 3.
mortgage, see *Mortgages*, 11.

Constable.

See *Sheriffs and Constables*.

CONSTITUTIONAL LAW.

License of peddlers, etc., see *Hawkers and Peddlers*, 2, 3.

Police power, see *Intoxicating Liquors*, 1.

Legislative powers — Interpretation of laws.

1. Act Ky. Sept. 17, 1861, § 2, amending the act incorporating the board of education of a college, which provides that "nothing contained in the act incorporating said board * * * shall be construed so as to prevent or hinder said board or their successors from moving the seat of their college," is not unconstitutional as being declaratory of the meaning of the former act, and thus in its nature judicial, but gives the power of removal, where that power was not expressly given by that act.—*Bryan v. Board of Education*, (Ky.) 13 S. W. 276.

Judicial powers.

2. The new city charter of Dallas, (Act Tex. March 13, 1889, § 25), as amended by Act March 27, 1889, creates the city court of Dallas, and provides that it shall "have exclusive jurisdiction over disorderly houses and female vagrants." Const. Tex. art. 5, § 22, provides that "the legislature shall have power by local or general law to increase, diminish, or change the civil and criminal jurisdiction of county courts; and in cases of any such changes of jurisdiction the legislature shall also conform the jurisdiction of the other courts to such change." *Held*, that it was not necessary that the act should directly provide that the county court should no longer have jurisdiction of such offenses; it was sufficient that it gave the city court exclusive jurisdiction.—*Corey v. State*, (Tex.) 18 S. W. 778.

3. Const. Tex. art. 5, § 1, provides that the judicial power of the state shall be vested in certain courts, and "such other courts as may be established by law." *Held*, that the judicial power of the state could be vested in a city court as distinguished from state courts with jurisdiction of offenses against the Penal Code.—*Corey v. State*, (Tex.) 18 S. W. 778.

Titles of laws.

4. Act Ky. Jan. 12, 1860, § 11, entitled "An act to incorporate the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church South," which repeals Act Feb. 16, 1858, incorporating the "Millersburg Male and Female Collegiate Institute," conflicts with Const. Ky. art. 2, § 37, as its object is not expressed in the title of the act.—*Bryan v. Board of Education*, (Ky.) 13 S. W. 276.

5. The title of Act Mo. March 30, 1887, (Laws Mo. 1887, p. 272), entitled "An act fixing the number of directors in public school boards in certain cities, and providing for election of such directors, and for districting said cities therefor," is not within the prohibition of Const. Mo. art. 4, § 23, which declares that no bill shall contain more than one subject, which shall be clearly expressed in the title.—*State v. Miller*, (Mo.) 13 S. W. 677; *Same v. Macklin*, *Id.* 680.

6. Act Tex. April 2, 1889, provides that "the jury convicting shall say in their verdict whether the convict shall be sent to the reformatory or the penitentiary," and limits the punishment of a convict under 16 years whose term of imprisonment is not more than 5 years, to confinement in the reformatory. *Held*, that said provision is subsidiary to the main subject as expressed in the title, "An act to provide for the more efficient government and maintenance of the House of Correction and Reformatory at Gatesville," and does not violate Const. Tex. art. 3, § 35, which provides that no bill shall contain more than one subject, which shall be expressed in its title.—*Washington v. State*, (Tex.) 18 S. W. 606.

Local and special laws.

7. The act of 1887, prescribing the number of school directors "in all cities of this state now having, or hereafter attaining, a population of over three hundred thousand inhabitants," is not a special or local law, within the meaning of Const. Mo. art. 4, § 53, which declares that the general assembly shall not pass any local or special law regulating the management of public schools. *Distinguishing St. Joseph Pub. Schools v. Gaylord*, 86 Mo. 406.—*State v. Miller*, (Mo.) 13 S. W. 677; *Same v. Macklin*, *Id.* 680.

Ex post facto laws.

8. Act Tex. March 7, 1889, amending Rev. St. Tex. art. 3597, and reducing from one dollar to fifty cents the rate per day allowed a county convict as credit on his fine and costs when working the same out by manual labor, does not apply to a judgment which was rendered, and in process of execution, prior to the passage of the act; since under Const. Tex. art. 1, § 16, every law which changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed, is *ex post facto*.—*In re Hunt*, (Tex.) 13 S. W. 145.

Monopolies and privileges.

9. Pen. Code Tex. art. 35, exempting persons under 17 years old from the death penalty, is not objectionable, as being in the nature of class legislation, and is valid.—*Ex parte Walker*, (Tex.) 13 S. W. 831.

10. The provision in the charter of a corporation, which is authorized to act as an administrator, that its capital stock shall be taken and considered as the security required by law for the faithful performance of its duties, and that other security shall not be required on its appointment as administrator except when required by the court or parties in interest, is constitutional.—*Coleman's Adm'r v. Parrott*, (Ky.) 13 S. W. 525.

Obligation of contract.

11. An institution of learning, as at first projected, was intended to be a local seminary, established and sustained by citizens of the locality; and the charter provided that, in case the corporation was dissolved, or its charter was amended or repealed, its property should vest in its stockholders. Afterwards the plan was changed so as to endow and support a first-class college, under control of a church conference. The original stock was commuted for scholarships therein. Scholarships were sold to, and donations made by, persons residing elsewhere; and the original property passed to the board of education appointed by the conference as part of the endowment fund. There was no express condition, either in the contract between the stockholders and the board of education, or in the act incorporating the latter, that the college should not be removed. *Held*, that there was no contract that the college should not be removed, and therefore Act Ky. Sept. 17, 1861, § 2, conferring the power of removal, could not be assailed, after 25 years' acquiescence therein, on the ground that it impaired the obligation of a contract.—*Bryan v. Board of Education*, (Ky.) 13 S. W. 276.

Vested rights.

12. Const. Tex. art. 7, § 6, giving to actual settlers on school lands the right of pre-emption, is not repugnant to the constitution of the United States, as being an infringement of the vested right of the counties.—*Baker v. Dunning*, (Tex.) 13 S. W. 617.

Regulation of commerce.

13. Gen. Laws Tex. 1889, p. 27, which provides for the collection of an occupation tax, from every person or firm who peddles out cooking stoves or ranges over the county, \$250 for the state, and \$100 for each county in which they make a sale, does not restrict commerce between the states, within the meaning of Const. U. S. art. 1, § 8.—*In re Butin*, (Tex.) 13 S. W. 10.

14. Act Mo. March 18, 1881, §§ 1, 2, require railroad companies to furnish double-decked cars for the shipment of sheep, and provide that for the shipment of a car-load of sheep in a single-decked car they shall receive only half of the legal rate of freight on a car-load of stock. Defendant carried sheep for plaintiff to a point in Illinois in single-decked cars, and charged him the full legal rate per car. *Held*, that plaintiff cannot recover the excess, for the statute, as to shipments out of the state, is void, being an infringement of the power to regulate interstate commerce vested in congress by the constitution.—*Stanley v. Wabash, St. L. & P. Ry. Co.*, (Mo.) 13 S. W. 709.

Taxation.

15. Manst. Dig. Ark. § 5647 et seq., provides that the governor, secretary of state, and auditor shall constitute a board of railroad commissioners; that all railroads doing business in the state shall file a schedule showing the miles of track, and the value of all improvements, station-houses, railroad track, etc.; that, for the purpose of taxation, all such property shall be classed as real estate, and shall be assessed annually; that the board of commissioners shall appraise the railroad track, etc., and certify to each county assessor the value of that portion lying in the county, and the assessor shall list and assess the same. *Held*, that, under Const. Ark. 1874, art. 16, § 5, providing that the value of property assessed for taxation shall be ascertained

In such manner as the general assembly shall direct, but shall be equal and uniform throughout the state, such statute is not unconstitutional on the ground that it employs a different instrumentality for the assessment of railroad property from that employed to assess other property.—*St. Louis, I. M. & S. Ry. Co. v. Worthen*, (Ark.) 18 S. W. 254.

16. It is competent for the legislature to provide that such property shall be assessed annually, while ordinary real estate is assessed but once in two years; the fact that it is denominated "real estate" not changing its true character.—*St. Louis, I. M. & S. Ry. Co. v. Worthen*, (Ark.) 18 S. W. 254.

17. Nor does the failure to provide for an appeal from the valuation of the board render the statute unconstitutional.—*St. Louis, I. M. & S. Ry. Co. v. Worthen*, (Ark.) 18 S. W. 254.

18. And, since the statute fixes the time at which the board of commissioners shall meet to appraise the value of such property, it is not necessary that the railway companies should be notified of such meeting.—*St. Louis, I. M. & S. Ry. Co. v. Worthen*, (Ark.) 18 S. W. 254.

— Municipal assessments.

19. The provision of Const. Mo. 1875, art. 2, § 21, that private property cannot be taken or damaged for public use until compensation has been actually paid, applies only to the exercise of eminent domain, and it is no defense to special tax-bills for street improvements that the property was damaged by the improvement and no compensation has been made therefor.—*Keith v. Bingham*, (Mo.) 18 S. W. 683.

Fines—Damages.

20. Mansf. Dig. Ark. § 2471, providing that in criminal actions, where the execution of a judgment for a fine is suspended pending an appeal, and the judgment is affirmed, 10 per cent. damages shall be awarded against defendant, is constitutional.—*Wellington v. State*, (Ark.) 18 S. W. 184.

Contempt.

Violation of injunction, see *Injunction*, 4.

Contest.

Of election, see *Elections and Voters*, 2.
wills, see *Wills*, 11-20.

Continuance.

In criminal cases, see *Criminal Law*, 14; *Homicide*, 62, 68.

CONTRACTS.

See, also, *Assignment; Assignment for Benefit of Creditors; Bailment; Bonds; Carriers; Chattel Mortgages; Covenants; Deed; Due Bills; Factors and Brokers; Frauds, Statute of; Fraudulent Conveyances; Guaranty; Insurance; Interest; Landlord and Tenant; Marriage; Mortgages; Negotiable Instruments; Partnership; Pledge; Principal and Agent; Principal and Surety; Sale; Specific Performance; Usury; Vendor and Vendee.*

Damage for breach of, see *Damages*, 8, 4.
Hiring out convicts, see *Convicts*.

Obligation of, see *Constitutional Law*, 11.

Of cities, see *Municipal Corporations*, 10-18.

corporations, see *Corporations*, 5, 6.

counties, see *Counties*, 18-21.

minors, see *Infancy*, 1-5.

schools, etc., see *Schools and School-Districts*, 4.

wife, see *Husband and Wife*, 13, 14.

Reformation, see *Equity*, 5-7.

Rescission and cancellation, see *Equity*, 8-15.

Validity—Public policy.

1. J. and M. entered into a partnership for the construction of a railroad, and in their own names, and the names of their clerks, as stockholders, formed a railroad corporation the capital stock v. 13s.w.—71

of which was to be used and controlled by J. and M. to accomplish the ends of the partnership. The corporation then issued its bonds, and executed a deed of trust on its franchise and property to secure them. Afterwards the corporation, under the direction of J. and M., entered into a contract with the partnership by which the latter agreed to construct the road, and the corporation agreed to give the partnership therefor all the bonds, stock, donations of land, subscriptions, and subsidies that might come into its possession. Held, that the contract was contrary to public policy and void, and a court of equity will not compel an accounting by one of the partners to his co-partner of the profits realized thereunder.—*Jackson v. McLean's Ex'rs*, (Mo.) 18 S. W. 898.

Interpretation.

2. Where defendant agreed to assume "the payment of [plaintiff's] portion of the indebtedness of the firm [of which plaintiff was a member] and all obligations or contracts of said firm," the words, "and all obligations or contracts of said firm," must be construed as simply defining the liability with certainty, and not as extending defendant's liability beyond the plaintiff's proportionate share of indebtedness.—*Adams v. Urquart*, (Ark.) 18 S. W. 78.

Performance.

3. A contract between a city and a bridge company by which the latter agrees to sell for one dollar packages of 100 tickets, each good for one passage over the bridge, is substantially complied with by the issue for one dollar of five cards, each good for 20 passages.—*City of Newport v. Newport & C. Bridge Co.*, (Ky.) 18 S. W. 720.

Rescission.

4. Where a building contract provides that the contractor shall erect the building "in the best, most substantial, and workman-like manner," and authorizes the owner to terminate it if the work is not done in accordance with its terms, the incapacity of the contractor to do the work properly, arising from his ignorance and dissipation, and the incompetency and dissipation of his workmen, justifies the owner in terminating the contract.—*Rector v. McDermott*, (Ark.) 18 S. W. 884.

5. A contract for the manufacture of barbed wire by plaintiff for defendant which provides that "any judicial or legal interference shall act as a cancellation of this contract, if either party so desire," is not canceled by the mere fact that an action was brought to enjoin defendant from selling the wire, but it was necessary for defendant to give notice of his intention to cancel it on account of such suit.—*Crescent Manuf'g Co. v. N. O. Nelson Manuf'g Co.*, (Mo.) 18 S. W. 508.

6. A refusal on the part of defendant to go on with the contract because of alleged excessive and deceptive weights would not be an exercise of the right of cancellation reserved in the contract.—*Crescent Manuf'g Co. v. N. O. Nelson Manuf'g Co.*, (Mo.) 18 S. W. 508.

Actions—Evidence.

7. A petition alleging that defendant inclosed part of plaintiff's land, and has since, by plaintiff's permission, occupied and used it, having promised to pay the reasonable value thereof, states a cause of action on an implied contract, and evidence of an express contract is incompetent.—*Shiner v. Abbie*, (Tex.) 18 S. W. 618.

— Defenses.

8. It is no defense to plaintiff's action for breach of a contract, by which he was to manufacture certain goods for defendant, that he might have made a contract with another party on equally as good terms.—*Crescent Manuf'g Co. v. N. O. Nelson Manuf'g Co.*, (Mo.) 18 S. W. 508.

Contribution.

Between sureties, see *Principal and Surety*, 13, 14.

Contributory Negligence.

See *Master and Servant*, 31-34; *Negligence*, 5, 6.

Conveyances.

See *Chattel Mortgages; Deed; Fraudulent Conveyances; Judicial Sales; Mortgages; Sale; Vendor and Vendee.*

CONVICTS.

Competency as witnesses, see *Witness*, 1-8.

Contract of hiring.

1. In an action on a bond to pay \$25 for the services of a convict hired from a county, evidence of a contemporaneous verbal contract with the sheriff, whereby defendant was to be permitted to deduct the cost of medicine and clothing furnished the convict, is inadmissible.—*Hyatt v. State*, (Ark.) 13 S. W. 215.

2. In an action on a bond to pay a sum of money for the services of a convict hired from a county, the fees paid by defendant to the sheriff for making the contract of hire, and preparing and approving the bond, are a proper set-off to the claim of the county, as *Mansf. Dig. Ark. § 1225*, provides that these fees are to be paid in advance by the person hiring the convict, to be repaid, when demanded, out of the convict's wages.—*Hyatt v. State*, (Ark.) 13 S. W. 215.

3. A contract made by the county judge in vacation for the hire of a county convict is void under Act March 23, 1881, (*Mansf. Dig. Ark. § 1226*), which gives such power to the county court only; and the convict can recover of the hirer the value of his services.—*Greer v. Critz*, (Ark.) 13 S. W. 764.

CORPORATIONS.

See, also, *Banks and Banking; Building and Loan Associations; Carriers; Horse and Street Railroads; Insurance; Municipal Corporations; Railroad Companies; Telegraph Companies; Turnpikes and Toll-Roads; Water Companies.*

Action against foreign corporations, see *Appearance*, 5.

Elevator company, see *Elevators*.

Privileges of corporation, see *Constitutional Law*, 10.

Taxation of corporate stock, see *Taxation*, 3-8.

Use of seal, see *Assignment for Benefit of Creditors*, 5.

Incorporation—Vested rights.

1. Where the object of an act incorporating the board of education, appointed by a church conference for an incorporated college under control of the conference, was to effectuate a contract between the board of education and the stockholders of the institution, though the power to amend or repeal is reserved, the legislature cannot exercise that power to the prejudice of vested rights.—*Bryan v. Board of Education*, (Ky.) 13 S. W. 276.

License tax.

2. Const. Mo. art. 10, § 21, provides that no corporation or association, other than those formed for benevolent, religious, scientific, or educational purposes, shall be created unless the incorporators shall first pay into the state treasury \$50 for the first \$5,000 of capital stock, and \$5 for every additional \$10,000. By Rev. St. 1889, § 2821, associations may be incorporated for benevolent, religious, scientific, fraternal, beneficial, and educational purposes; and section 2825 provides for the incorporation of any association which tends to the public advantage in relation to education, literature, history, or skill among the learned professions. *Held*, that an association for the "encouragement of debating, reading, and literature, and the enjoyment of rational and social amusements, and the playing of ten-pins, chess, and checkers, and other lawful games of the kind," but which excludes all drinks, and has no connection with business purposes, nor politics, nor has in view any pecuniary profit, may be incorporated without the payment of the tax.—*State v. Lesueur*, (Mo.) 13 S. W. 287.

3. So much of Rev. St. Mo. 1889, § 2834, as undertakes to allow corporations to be created for other than benevolent, religious, scientific, or educational purposes, without payment of the tax, violates Const. Mo. art. 10, § 21, requiring that corporations other than those mentioned shall provide for a capital stock, and pay a tax.—*State v. Lesueur*, (Mo.) 13 S. W. 287.

Forfeiture of charter.

4. An attempt by a corporation to change its corporate name in a manner not authorized by law does not avoid its charter.—*O'Donnell v. C. R. Johns & Co.*, (Tex.) 13 S. W. 876.

Contracts ultra vires.

5. Plaintiff corporation, having shown no violation of duty to itself, cannot complain of the acts of defendant corporation on the ground of *ultra vires*. Only the state or defendant's stockholders can maintain an action on that ground.—*Beicher's Sugar Refining Co. v. St. Louis Grain Elevator Co.*, (Mo.) 13 S. W. 823.

6. Where a turnpike company issued bonds, secured by a mortgage on its road, for money borrowed to extend and complete its road, stockholders who have acquiesced therein until the money was expended cannot be heard to complain for the first time, upon suit to foreclose the mortgage, that the bonds were unauthorized and *ultra vires*.—*Browning v. Mullins*, (Ky.) 13 S. W. 427.

Members and stockholders.

7. An incorporator of a turnpike road company who takes an active part in effecting a change in the route of the road, and after the change is made promises to pay his subscription to the stock of the company, cannot repudiate his subscription on the ground of the indefiniteness of the object of incorporation as expressed in the articles.—*Owenton, S. & B. L. Turnpike Road Co. v. Smith*, (Ky.) 13 S. W. 426.*

8. Stockholders of an incorporated college under control of a church conference, who have accepted the plan of a board of education appointed by the conference, by contracting with it, cannot object to the validity of an act incorporating such board of education for the purpose of carrying out its plan.—*Bryan v. Board of Education*, (Ky.) 13 S. W. 276.

Foreign corporations.

9. Act Tex. April 2, 1887, § 1, requires a foreign corporation, desiring to do business in the state, to file an application with the secretary of state, containing, among other things, a stipulation that the permit to be issued, without which no business can be transacted in the state, shall be subject to all the provisions of the act. Section 3 provides that, when such corporation is in any manner sued in the courts of the state, on removal of the cause for any reason to a federal court, the permit shall be forfeited. *Held*, that the statute is void, since it makes the permit conditional on the surrender by the corporation of a privilege secured to it by the constitution and laws of the United States.—*Texas Land & Mortgage Co. v. Worsham*, (Tex.) 13 S. W. 884.

10. Though the failure to obtain a permit as required by statute may preclude a foreign corporation from transacting further business in the state, it cannot be made to divest the right of such corporation to go into court and assert rights and recover property already acquired.—*Texas Land & Mortgage Co. v. Worsham*, (Tex.) 13 S. W. 884.

11. Under Acts Tex. 1885, p. 79, providing that foreign corporations doing business in the state may be sued in any county where such company may have an agent or representative, such corporation can be sued only in counties where it has an agency or representative.—*St. Louis, A. & T. Ry. Co. v. Whitley*, (Tex.) 13 S. W. 858.

COSTS.

Liability for.

1. A garnishee who permits costs to accumulate upon a judgment rendered against him cannot charge his creditor with such costs.—*Berry v. Davis*, (Tex.) 13 S. W. 973.

2. Where, in trespass to try title, a disclaimer is filed after answering, judgment for costs is properly rendered against defendant. — *Etter v. Dignowity*, (Tex.) 13 S. W. 973.

3. Where defendant, in trespass to try title, after pleading "not guilty," files an amended answer claiming only a part of the land sued for, and recovers such part, he will be adjudged to pay those costs only which accrued before the filing of the amended answer. — *Keyser v. Meusebach*, (Tex.) 13 S. W. 967.

In criminal cases.

4. Under the provisions of Mansf. Dig. Ark. § 2469, that, in criminal actions, upon affirmation of a judgment on appeal of defendant, \$20 shall be allowed as attorney fee for the prosecuting attorney, and taxed as costs, an allowance of such amount is proper. — *Wellington v. State*, (Ark.) 13 S. W. 134.

5. The tax imposed by Mansf. Dig. Ark. § 5535, levying a tax of three dollars on each criminal conviction in a court of record, is a valid exaction, and properly taxed in the costs. — *Wellington v. State*, (Ark.) 13 S. W. 134.

6. Under rule 23 of the supreme court of Arkansas, which provides that the cost of printing abstracts and briefs on appeal, not to exceed \$15 on each side, shall be taxed against the losing party, an allowance for that purpose is properly taxed against defendant defeated on appeal in a criminal prosecution. — *Wellington v. State*, (Ark.) 13 S. W. 134.

Enforcement.

7. Under Act. Tenn. 1889, c. 130, entitled "An act to provide revenue for the state," and imposing a tax on the unsuccessful party in civil suits, and on each indictment or presentment, and that all such taxes "shall be taxed in the bills of costs, and are hereby declared part of the costs in the case," the tax thus imposed on defendant upon conviction in a criminal proceeding cannot be collected, as costs, by imprisonment. — *Ex parte Griffin*, (Tenn.) 13 S. W. 75.

Co-Tenancy.

See *Tenancy in Common and Joint Tenancy*.

Counter-Claim.

See *Set-Off and Counter-Claim*.

COUNTIES.

See, also, *Highways; Schools and School-Districts*.

Depository of money, see *Depositaries*.

County board — Contracts for erection of jail.

1. An award of a contract to build a county jail is not an "allowance," within the meaning of Const. Ark. 1874, art. 7, § 51, which extends to citizens and resident tax-payers the right to appeal from allowances made for or against counties, cities, or towns. — *Armstrong v. Truitt*, (Ark.) 13 S. W. 984.

2. Under Mansf. Dig. Ark. §§ 1091-1103, relating to the building of court-houses and county jails under the direction of the court, and the supervision of commissioners appointed by it, and which provide that the court shall order the payment of installments as they fall due to contractors, but that no payment shall be made except upon the certificate of the commissioners that a due proportion of the agreement has been performed, the court has no power to order the payment of a sum stipulated to be payable upon the filing of the bond, and in advance of the performance of any part of the contract. — *Armstrong v. Truitt*, (Ark.) 13 S. W. 984.

County treasurer.

8. Where, under authority from the county treasurer to the county tax collector, a bank cashier, to hold and disburse the county funds, the latter reports the collection of county funds to the former and gives him a check therefor, and re-

ceives from the treasurer a receipt and the check to be deposited in the cashier's bank and to be paid out on county warrants, the treasurer is chargeable with the money, and is estopped to deny its receipt as against the county. — *Kempner v. Galveston County*, (Tex.) 13 S. W. 460.

4. The county court, before which Rev. St. Mo. 1879, § 5378, makes it the duty of a county treasurer, or the personal representative of a deceased county treasurer, to settle his accounts, does not, in such examination, act in a judicial capacity, but merely as an auditor of public accounts, or as financial agent of the county. — *Cole County v. Dallmeyer*, (Mo.) 13 S. W. 637.

5. Rev. St. Mo. 1879, § 5379, requires certain officers, not including county treasurers, to settle their accounts with the county court at each term, and pay into the treasury any balance found due; and section 5330 gives the county court authority, if they neglect to render true accounts, to adjust their accounts according to the best information it can obtain, and ascertain the balance due, for which, under section 5333, it may enter judgment. *Held*, that these sections do not provide for or contemplate a judgment against the personal representative of a deceased officer. — *Cole County v. Dallmeyer*, (Mo.) 13 S. W. 637.

6. For any balance due a county from its treasurer, the county may either sue on his official bond or sue the treasurer in *assumpsit*; or, if the treasurer is dead, it may enforce its claim in the probate court against his estate. — *Cole County v. Dallmeyer*, (Mo.) 13 S. W. 637.

7. Rev. St. Mo. 1879, § 5378, requiring the outgoing county treasurer, or, if he be dead, his administrator, to deliver to the successor in office all moneys belonging to the county, does not require suits for such moneys against the outgoing treasurer or his administrator to be brought in the name of such successor; but, under sections 5356, 5357, giving counties express authority to sue in their own names for money due them, the suit should be brought in the name of the county. — *Cole County v. Dallmeyer*, (Mo.) 13 S. W. 637.

Bond.

8. Const. Tex. art. 7, § 5, provides that the available school fund shall be distributed to the several counties and applied as may be provided by law. *Held*, that a suit on a county treasurer's bond for misappropriation of such a fund is properly brought in the name of the county, rather than that of the state. — *Burk v. Galveston County*, (Tex.) 13 S. W. 455.

9. A county treasurer's bond, which is in the language prescribed by statute for bonds given by him for the available school fund, and complies in all other respects with the bond required to be given to secure that fund, is not defective for failure to recite, in terms, that it is the available school fund that it is intended to secure. — *Burk v. Galveston County*, (Tex.) 13 S. W. 455.

10. An objection that the bond, if construed to embrace the available school fund apportioned to the county by the state, should not be held to secure so much of the available fund sued for as was not derived from the state, but from county securities, as the law requires one bond for the county school fund, permanent and available, and another for the state available fund, is untenable. Following *Kempner v. County of Galveston*, 11 S. W. 188. — *Burk v. Galveston County*, (Tex.) 13 S. W. 455.

11. The sureties on the bond cannot defend on the ground that the county represented, and they understood, their liability to be different from that incurred according to the terms and legal effect of the bond. — *Burk v. Galveston County*, (Tex.) 13 S. W. 455.

12. In an action on the bond of a county treasurer for misappropriation of the school fund, evidence tending to show that part of the school fund for a certain year was not paid to the treasurer, and that the taxes were not collected therefor, till after the expiration of his term of office, but that the treasurer, during his term of office, gave vouchers therefor to the tax collector for advances made to him that the tax collector used

the vouchers in his settlement with the comptroller, and used the taxes afterwards collected to reimburse himself for the advancements,—was properly excluded, as the sureties cannot defend on the ground that the tax collector advanced the school fund and received the vouchers before he collected the taxes for the fund, and did not reimburse himself till after the treasurer's term of office expired.—*Burk v. Galveston County*, (Tex.) 18 S. W. 455.

13. The Texas Statutes (Sayles, Civil St. art. 5724,) require the state superintendent to issue to the county treasurers certificates for the amount of the available school fund, which certificate shall be signed, countersigned, attested, etc. The county treasurers are required to indorse on the certificates the amounts paid, and to deliver duplicate receipts, and, when the whole amount is paid, to deliver the certificate "to the collector, in whose hands it shall be a voucher." * * * in his settlement with the comptroller. Defendant treasurer used, in the place of the duplicate receipts, coupons, in the form of orders, attached to the certificate. *Held*, that the delivery of these coupons was not conclusive evidence of receipt of the funds, and it was error to charge that if the coupon, in a particular instance, was delivered, it made no difference, as to the liability of the treasurer's sureties, what disposition the collector made of the money.—*Burk v. Galveston County*, (Tex.) 18 S. W. 455.

14. If, however, the money was delivered to the treasurer, or disbursed by his authority, the instruction was harmless.—*Burk v. Galveston County*, (Tex.) 18 S. W. 455.

15. The coupon was proved to have been delivered, thus establishing *prima facie* the payment. The collector testified that all the installments for that year were paid. The only opposing evidence was that of the treasurer, who did not directly contradict the payment, but said that the collector told him that the coupon "was there to my credit, and that he would take it and cash it, but at the settlement which he made with the county that warrant was not settled for, and no account of it was given." The settlement referred to was an attempted settlement of his own account after the treasurer had abandoned the country, without having settled. *Held*, that the actual payment to the treasurer of the sum represented by the coupon was sufficiently shown.—*Burk v. Galveston County*, (Tex.) 18 S. W. 455.

16. It is also immaterial that the money was not charged to the treasurer on the collector's books till after the expiration of the treasurer's term of office.—*Burk v. Galveston County*, (Tex.) 18 S. W. 455.

17. Plaintiff was properly allowed to read in evidence the deposition of the state comptroller to prove the amount of funds apportioned to the county and received by the treasurer, and also attached certified copies of certificates and vouchers; the latter tending to show that the full amount of the apportionment evidenced by the certificates was received by the treasurer.—*Burk v. Galveston County*, (Tex.) 18 S. W. 455.

Contracts.

18. Plaintiff contracted in writing with the bridge commissioner to build abutments to a bridge according to plans and specifications, but, under a subsequent oral agreement with the commissioner, the abutments were built up square to the surface of the ground, instead of being battered, as required in the written contract, and were made of better material. *Held*, that as the better work was done in keeping with the spirit of the written contract, and was a substantial compliance with its terms, plaintiff could recover for the value of the work, under Rev. St. Mo. 1879, § 1218, which provides that, if a claim against a county be for work done under contract with the county authorities, the claimant shall be entitled to recover, though the authorities may not have pursued the form of proceeding prescribed by law.—*Bryson v. Johnson County*, (Mo.) 18 S. W. 289.

19. Rev. St. Mo. 1879, c. 84, as amended by Laws 1883, p. 81, provides that a contract for building a bridge shall be let to the lowest bidder, and, when approved by the county court, it is then the duty

of the court to make an appropriation, and "order the commissioner to contract therefor at the price let." *Held*, that a written contract which recites that it is made by one "ex officio road and bridge commissioner of the county," which is signed by the contractor, but not signed by the commissioner, is the contract of the county; as the order of the court approving the bid, and the contract as signed by the contractor, when read together, shows a binding contract.—*Bryson v. Johnson County*, (Mo.) 18 S. W. 289.

20. Rev. St. Mo. 1879, § 5360, requiring all contracts with counties to be in writing, and subscribed by the parties thereto, not having been re-enacted by a revised bill in 1879, but being simply collated by the revision committee, is controlled by section 1218, so far as the two sections are in conflict, as section 1218 was re-enacted in 1879, and is therefore the last expression of the legislative will.—*Bryson v. Johnson County*, (Mo.) 18 S. W. 289.

21. As it is the duty of the county court to make an appropriation to pay for work done on a bridge, when it orders the commissioner to enter into the contract, it will be presumed that the court performs its duty until the contrary is proved.—*Bryson v. Johnson County*, (Mo.) 18 S. W. 289.

Liabilities.

22. Where the county court, under legislative authority, assumes the liability of tax-payers for attorney's fees incurred in a suit by the tax-payers to defeat the collection of a tax on a subscription to railroad stock, and levies a tax for the payment or such fee, it cannot refuse to pay interest on the debt so assumed, on the ground that it is an ordinary appropriation not arising from contract.—*Washington County Court v. McKee*, (Ky.) 18 S. W. 909.

COURTS.

See, also, *Justices of the Peace*.

Judicial powers, see *Constitutional Law*, 2, 8.

Term-time—Special terms.

1. Section 1042, Rev. St. Mo. 1879, providing, "if any court shall not be held on the first day of the term, such court shall stand adjourned from day to day until the evening of the third day," applies to special as well as to regular terms.—*State v. Harkins*, (Mo.) 18 S. W. 830.

Convening before time fixed.

2. The fact that a court convened before the time fixed by statute does not invalidate an order made by it on the subsequent rightful convening of the court.—*Shumard v. Philips*, (Ark.) 18 S. W. 510.

Place of holding court.

3. Act Tex. Feb. 27, 1889, (Laws 1889, p. 152,) divides the county of Dallas into two judicial districts by the line of a given railroad, deviating therefrom only in one place, for the purpose of running the line through the court-house. The act further directs that the court of each district shall be held "therein," and the courts of the northern and southern districts were held in rooms north and south of the line running through the court-house. The court-house was burned, and the county commissioners furnished temporarily, in its stead, a building situated wholly south of the line, and assigned a room therein as the place of holding the district court for the northern district. *Held*, that such court may lawfully sit at the place designated, as all other laws relating to district courts, whose jurisdiction extends over the whole county, contemplate that they shall be held at the court-house of the county, which, under Rev. St. art. 705, is to be provided by the commissioners of the county.—*Wheeler v. Wheeler*, (Tex.) 18 S. W. 305.

State courts.

4. Where the court of appeals has acquired jurisdiction because a question of title to a freehold is involved in one feature of a case, it will determine all questions arising therein.—*Pittman v. Wakefield*, (Ky.) 18 S. W. 525.

5. Gen. St. Ky. p. 849, provides that the superior courts shall not have appellate jurisdiction "where there is involved * * * the title to a freehold," etc. *Held*, a superior court has jurisdiction as to the loss by laches of a judgment lien, and as to the priority between a judgment and a mortgage lien upon a freehold, even though another feature of the case involve a question of title thereto.—*Pittman v. Wakefield*, (Ky.) 18 S. W. 535.

6. Where persons holding liens under judgments rendered in a county court intervene in attachment in the district court against the same defendants, and attack it for fraud, the district court, having jurisdiction of the original action, will retain it to finally dispose of the matters in litigation, though the claims of some of the intervenors are less than the amount necessary to give the district court jurisdiction. Following *Petitecolas v. Carpenter*, 53 Tex. 23.—*Heidenheimer v. Johnston*, (Tex.) 13 S. W. 46.

7. In a proceeding by *quo warranto* against the mayor and officers of a city, who are alleged to unlawfully hold office, the district court will be presumed to have jurisdiction, in the absence of objection below, where, from the pleadings, it appears that the area, population, and property rights of the city are such that the taxes must annually amount to over \$500.—*Largen v. State*, (Tex.) 13 S. W. 161.

8. Since the district courts in Texas alone have power to enforce liens against land, they have jurisdiction to foreclose the lien created by a city charter for the cost of a street improvement, though the amount is less than \$500.—*Wood v. City of Galveston*, (Tex.) 13 S. W. 227.

County courts.

9. The new city charter of Dallas, (Act Tex. March 13, 1889, § 26,) as amended by act March 27, 1889, creates the city court of Dallas, and provides that it shall "have exclusive jurisdiction over disorderly houses and female vagrants." *Held* that, there being no saving clause, and no provision for cases of that nature then pending in the county court, the jurisdiction of the latter was ousted when the amendment went into effect.—*Corey v. State*, (Tex.) 13 S. W. 778.

Probate courts.

10. The proceeding provided by Rev. St. Mo. 1879, §§ 5379, 5380, 5383, by which the county court may settle the accounts of certain county officers, is special and summary, and does not oust the circuit and probate courts of their general jurisdiction.—*Cole County v. Dallmeyer*, (Mo.) 13 S. W. 687.

11. The probate court made an order adjourning until August 26th, across the entry of which was written, "Vacated;" this being a method of setting aside orders once entered on the record. On August 22d an order was entered adjourning the regular term, and providing for an adjourned term on August 26th, on which day another order was entered adjourning, and providing for another adjourned term on September 11th. *Held*, that the probate court had jurisdiction to allow demands at either of the adjourned terms, under Rev. St. Mo. 1879, § 1044, providing that adjourned sessions may be held in continuation of the regular terms, where so ordered in term-time, and section 198, providing that demands may be allowed by the probate court at an adjourned term.—*Cole County v. Dallmeyer*, (Mo.) 13 S. W. 687.

12. Rev. St. Mo. 1879, § 192, giving probate courts jurisdiction of suits against executors and administrators on demands against deceased persons, gives them jurisdiction of claims by a county against the personal representative of a deceased county treasurer.—*Cole County v. Dallmeyer*, (Mo.) 13 S. W. 687.

Conflicting state and federal jurisdiction.

13. When the act of congress under which a draw-bridge was built provides that, where any litigation arises from any obstructions or alleged obstructions to the free navigation of the river, the cause may be tried in the district court of the United States, etc., such provision does not divest the

state courts of jurisdiction of such causes.—*Silver v. Missouri Pac. Ry. Co.*, (Mo.) 18 S. W. 410.

COVENANTS.

Action for breach.

1. A grantee who is threatened with ejectment may surrender possession and sue his grantor for breach of covenant, but he assumes the risk of showing that the person to whom he surrendered possession had the paramount title.—*Lambert v. Estes*, (Mo.) 13 S. W. 234.

2. A grantor cannot set up the insufficiency of the description in his deed to escape liability on his covenants.—*Lambert v. Estes*, (Mo.) 13 S. W. 234.

Damages.

3. In an action for breach of covenant of title, evidence as to whether the grantee paid the consideration expressed in the deed is admissible to show the amount of damages suffered.—*Lambert v. Estes*, (Mo.) 13 S. W. 234.

4. The measure of damages in an action for breach of covenant of title is the purchase price, with 6 per cent. interest from the time of surrendering possession.—*Lambert v. Estes*, (Mo.) 13 S. W. 234.

Credibility.

Of witness, see *Witness*, 11-21.

CREDITORS' BILL.

When lies—Return of execution.

1. Under Civil Code Ky. § 439, which provides that after a return on an execution of "No property" by the proper officer an equitable action may be brought for discovering and subjecting any property of the debtor, the equitable action may be maintained after a return of "No property," though there was property liable to the levy.—*Clements v. Waters*, (Ky.) 18 S. W. 481.

2. Code Prac. Ky. § 667, provides that "every process in an action * * * shall be directed to the sheriff of the county," and, if he be interested in the suit, then to the coroner. *Held* that, where an execution was directed to the sheriff of another county, but, there being none at the time in the county, it was received and returned by the coroner "No property found," there was no return of *nulla bona* upon which to base an action to set aside a fraudulent conveyance.—*Johnson v. Elkins*, (Ky.) 18 S. W. 448.

CRIMINAL LAW.

See, also, *Bail*; *Convicts*; *Grand Jury*; *Habeas Corpus*; *Indictment and Information*; *Witness*.

Adding damages to fines, see *Constitutional Law*, 20.

Costs in criminal cases, see *Costs*, 4-7.

Crimes concerning animals, see *Animals*.

Particular crimes, see *Abduction*; *Assault and Battery*; *Bribery*; *Burglary*; *Disorderly House*; *Dueling*; *Embezzlement*; *False Pretenses*; *Forgery*; *Gaming*, 1-9; *Homicide*; *Incest*; *Indecent Exposure*; *Intoxicating Liquors*, 10-12; *Larceny*; *Malevolent Mischief*; *Perjury*; *Prostitution*; *Rape*; *Receiving Stolen Goods*; *Robbery*; *Seduction*; *Wrecking Trains*.

Penalty for carrying weapons, see *Carrying Weapons*.

Prosecution for selling mortgaged property, see *Chattel Mortgages*, 4.

Principal and accessory.

1. One cannot be convicted as an accomplice where there is no evidence that the principal committed the crime charged.—*Armstrong v. State*, (Tex.) 13 S. W. 864.

2. On a trial for murder, where defendant was charged as principal in some of the counts, it was error to dismiss, over his objection, a count which charged a co-defendant as principal, and defendant

as accessory after the fact, when there was evidence tending to prove such charge.—*State v. Miller*, (Mo.) 18 S. W. 832.

Jurat to complaint—Clerical error.

8. A clerical error as to the month, in the jurat to a complaint for selling intoxicating liquor without a license, does not vitiate either the complaint or the information, and on the trial the state may show when the jurat was in fact made.—*Allen v. State*, (Tex.) 18 S. W. 993.

Former jeopardy.

4. On a trial for forging an order for the payment of money, evidence that defendant had increased the amount for which it was drawn by the insertion of an additional figure will sustain a conviction under an indictment charging him with forging the entire instrument; and, after a withdrawal of the case from the jury, defendant cannot again be tried under another indictment charging him with having forged the order by increasing its amount.—*Colliver v. Commonwealth*, (Ky.) 18 S. W. 922.

5. One who has been convicted, before a justice of the peace, of an aggravated assault, and fined and imprisoned therefor, cannot afterwards be tried on an indictment for assault with intent to kill for the same offense, under Const. Ark. art. 2, § 8, which provides that "no person, for the same offense, shall be twice put in jeopardy of life and liberty."—*State v. Smith*, (Ark.) 18 S. W. 891.

6. Defendant pleaded former jeopardy to an indictment for the murder of John Dee, and alleged that on the former trial the jury was discharged by the court without his consent, and over his protest, and without legal cause. It was proved that he was put on trial, but the witnesses testified that it was for the murder of John Dee. There was no proof that he was tried on a valid indictment. The testimony as to the length of time the jury was out varied from two to twenty-four hours. There was no evidence that the jury was discharged over the protest or against the consent of the defendant. *Held*, that jeopardy being a special defense, and the burden of proof being on defendant, the jury were properly instructed to find the plea untrue.—*O'Connor v. State*, (Tex.) 18 S. W. 14.

Venue.

7. Where property is acquired in one county by means of false and fraudulent representations made in another county, the venue of the offense must be laid in the county in which the property was delivered.—*Sims v. State*, (Tex.) 18 S. W. 653.

Proof.

8. Where the record fails to show that the venue was proved as alleged, the judgment must be reversed.—*Strickland v. State*, (Tex.) 18 S. W. 865.

Change.

9. Mansf. Dig. § 2195, provides that any criminal cause pending in a circuit court may be removed to the circuit court of another county whenever it shall appear that the inhabitants of the county in which the cause is pending are so prejudiced against defendant that an impartial trial cannot be had. Act Dec. 15, 1875, which establishes separate courts in the county of Yell, provides that they "may change the venue of cases from one district to another, or to any other county in the judicial circuit, in like manner as changes of venue are granted in this state." *Held* that, where an application for a change of venue states that the inhabitants of Yell county are prejudiced against defendant, the cause should be removed to another county, and not to another district of Yell county.—*Wells v. State*, (Ark.) 18 S. W. 787.

10. In an application for change of venue on the ground that the inhabitants of the county in which the cause is pending are prejudiced, an averment that a similar prejudice exists in another county is surplusage.—*Wells v. State*, (Ark.) 18 S. W. 737.

Transfer from district to county court.

11. A plea to the jurisdiction of the county court, on the ground that, in the order transferring the cause from the district court, the word "county"

was omitted before the word "court," is properly overruled where it appears that only the county court had jurisdiction of the cause.—*Johnson v. State*, (Tex.) 18 S. W. 1005.

12. An amendment of the certificate of transfer by affixing thereto the seal of the district court was proper.—*Johnson v. State*, (Tex.) 18 S. W. 1005.

13. Code Crim. Proc. Tex. art. 415, provides that, when an indictment is presented in court, that fact shall be entered on the minutes, noting the style and the "file number" of the indictment, but omitting defendant's name, unless he is in custody or under bond. Article 436 provides that, in transferring indictments from the district to the county court, the judge shall make an order of transfer, stating the cause transferred, and to what court transferred. Article 437 provides that the clerk of the district court shall deliver the indictment, together with the papers in the cause, to the proper court, accompanying the case with a certified copy of all the proceedings taken therein in the district court, and also with a bill of costs. *Held* that, there being no other statutory provision as to form, the cause was sufficiently designated in the order of transfer and in the certificate as "The State of Texas v. —, No. 645."—*Lynn v. State*, (Tex.) 18 S. W. 867.

Continuance.

14. An application for continuance on account of the absence of a material witness must state the facts to which such witness would testify. It is not enough to state that his testimony was "material."—*State v. Stratman*, (Mo.) 18 S. W. 814.

Conduct of trial.

15. Where property stolen from burglarized premises, and found at defendant's house, was brought into court and examined by witnesses while under examination, and such witnesses differed as to the existence of certain marks thereon, by which it was identified, it was proper to allow the jury to inspect it.—*Jackson v. State*, (Tex.) 18 S. W. 451.

16. Where the jury returned into court and stated that they were unable to agree because of a certain difficulty, it was proper to give additional instructions thereon; and it will be presumed, in the absence of any showing to the contrary, that defendant was then present.—*State v. Miller*, (Mo.) 18 S. W. 832.

Reception of evidence.

17. Code Crim. Proc. Tex. art. 661, permitting the introduction of testimony at any time before the conclusion of the argument, if in the interest of justice, makes it discretionary for the court to allow the prosecution on a murder trial, to examine a witness in rebuttal as to matters independent of the rebuttal after defendant has closed his testimony; and such discretion is not reviewable, except in case of manifest abuse.—*Hendricks v. State*, (Tex.) 18 S. W. 672.

18. Under Willson's Crim. St. Tex. § 2311, providing that "the court shall allow testimony to be introduced at any time before the argument of a cause is concluded, if it appear that it is necessary to a due administration of justice," it is not error to permit a state's witness to testify to independent matter after evidence for the state and defendant had closed.—*Nalley v. State*, (Tex.) 18 S. W. 670.

Remarks of prosecuting attorney.

19. On objection by defendant to a question asked a state's witness, the district attorney stated, in the presence and hearing of the jury, that he expected to show that the brother of defendant had induced the witness to leave the county so as not to testify. There was no attempt to connect defendant with such effort to suppress testimony, and the jury were not instructed to disregard the statement. *Held*, that defendant was entitled to a new trial.—*Nalley v. State*, (Tex.) 18 S. W. 670.

20. Defendant testified in his own behalf, and counsel for the state used some very harsh expressions as to the credibility of persons so testifying. The court charged: "You are by law made

the exclusive judges of the credibility of all the witnesses before you in this case, and of the weight you should give to their testimony; and, after you have considered all the evidence before you, if you have in your minds a reasonable doubt as to the guilt of this defendant, you should acquit him." *Held* that, while the conduct of counsel was improper, the effect was neutralized by the charge, and there is no ground of reversal.—*Habel v. State*, (Tex.) 18 S. W. 1001.

21. A conviction will be set aside where counsel for the state persisted in asking improper and prejudicial questions, and was allowed to cross-examine the accused as to other offenses, though he was told that he need not answer, and the closing speech to the jury was of an extraordinary and reprehensible character, and it is evident that there has not been a fair and impartial trial.—*Cargill v. Commonwealth*, (Ky.) 18 S. W. 916.

22. The making of the statement by the prosecuting attorney in his closing argument, "Gentlemen, you know these assaults with intent to kill are becoming too common in this country, and in south-east Missouri," furnishes no ground for reversal of a judgment convicting the defendant of such an assault.—*State v. Elvins*, (Mo.) 18 S. W. 987.

23. It was not improper for the prosecuting attorney, in his argument, to comment on the fact that defendant's father was present during the trial, and could have been called as a witness.—*Crumes v. State*, (Tex.) 18 S. W. 863.

24. The prosecuting attorney, in his closing argument, said that defendant knew that he was guilty, and challenged defendant to get up, and deny his statement. On defendant's counsel whispering to defendant, the prosecuting attorney said: "That's right. Tell him to get up, and tell me that I have lied." *Held*, that a new trial should be granted.—*Hardy v. State*, (Tex.) 18 S. W. 1008.

25. Statement by counsel that "the only object of the law in allowing evidence of defendant's good character is to show that a man did not do the act, * * * and evidence of good character cannot do this defendant any good," will not require a reversal where the sentence, as shown by the bill of exceptions, indicates a probable omission, and counsel makes affidavit that he said that good character was not an excuse for the commission of crime; and in this case the evidence was clear that defendant did the shooting, and as there was no reasonable cause for his doing it, evidence of good character could not do him any good.—*State v. McNamara*, (Mo.) 18 S. W. 983.

26. Improper and uncalled-for remarks by counsel for prosecution in argument are not ground for reversal, where they could not, under the circumstances, have been prejudicial to defendant.—*Walker v. State*, (Tex.) 18 S. W. 860.

27. A remark by the prosecuting attorney, in argument, that he could strengthen the state's case by an absent witness, is not reversible error, where the testimony given is amply sufficient to sustain the verdict.—*Hudson v. State*, (Tex.) 18 S. W. 888.

28. The fact that the prosecuting attorney made objectionable remarks in the absence of the judge, to which, therefore, no exceptions could be taken, must nevertheless be established in some appropriate manner in order to be effectual on appeal.—*State v. Harkins*, (Mo.) 18 S. W. 830.

Evidence.

29. Evidence of a magistrate that he made certain entries on his docket from a complaint; that he kept a correct docket; and that he knew from the entries in his handwriting that the complaint was signed by a certain person,—is admissible, though he has no personal recollection of the transaction.—*Kimbrough v. State*, (Tex.) 18 S. W. 218.

30. Code Crim. Proc. Tex. arts. 42, 234, having vested the county judge with power to issue warrants of arrest, and such a warrant having been issued by a county judge, and signed officially by him, defendant in a prosecution for an assault with intent to kill, committed upon one attempting to serve the warrant, cannot object to it as evidence

on the ground that it does not show that it was issued by the county judge as a "committing magistrate."—*Graham v. State*, (Tex.) 18 S. W. 1013.

31. After certain state witnesses had testified, on cross-examination, that they had not been paid by D. to testify in this case, they were asked if at the time of taking their depositions in a civil suit, at which time he told them they would be called as witnesses in this case, he had not paid them money, though he owed them nothing at the time. *Held*, that such evidence was irrelevant, and was properly excluded.—*O'Connor v. State*, (Tex.) 18 S. W. 14.

32. Defendant offered in evidence a petition in a civil suit instituted by him against one D., which was excluded. *Held* that, in the absence of anything to connect D. with the prosecution, or to show that it had been proved, or would be proved, that he had attempted to influence witnesses to testify falsely in this case, such evidence was irrelevant and incompetent.—*O'Connor v. State*, (Tex.) 18 S. W. 14.

33. Rev. St. Tex. art. 2357, provides that an instrument of writing required by law to be recorded may be read in evidence without proof of its execution, provided it has been filed among the papers of the cause at least three days before trial. *Held* that, on a trial for the theft of an animal, the execution by defendant of an attested bill of sale for the animal, which has not been filed in the case, cannot be proved by secondary evidence, without accounting for the non-production of the subscribing witness; a bill of sale being required by law to be recorded. *Morrow's Case*, 2 S. W. 624, followed.—*Graves v. State*, (Tex.) 18 S. W. 149.

34. On the trial of certain negroes for the murder of certain white men, a white man testified that a negro had told him that he heard one of the negroes say that they were going to kill off the whites. *Held* incompetent, as hearsay, and prejudicial to defendants.—*Wicks v. State*, (Tex.) 18 S. W. 748.

35. On the trial of certain negroes for the murder of certain white men, testimony as to statements made by some of the negroes, not on trial, in the absence of defendants, was hearsay as to defendants, and incompetent, in the absence of proof of a conspiracy to murder between defendants and those who made the statements, and that the statements were made pending the conspiracy, in furtherance of the common design.—*Wicks v. State*, (Tex.) 18 S. W. 748.

36. Under the rule that, "when the opinion is the mere short-hand rendering of the facts, then the opinion can be given subject to cross-examination as to the facts upon which it is based," evidence that, after the shooting, deceased spoke to and "identified" defendant as the man who shot him, is competent, and not a mere expression of opinion.—*Fulcher v. State*, (Tex.) 18 S. W. 750.

Confessions.

37. Where it appears that defendant made a confession of the crime of incest to the daughter's husband under duress, but afterwards made the same confession to another when not threatened or menaced, such confession was properly admitted.—*Mathis v. Commonwealth*, (Ky.) 18 S. W. 860.

38. Defendant, while in jail under arrest for murder, told the sheriff that he wanted to tell him all about the case. The sheriff informed defendant that "whatever he said would be used in evidence against him, [defendant,] but if he would tell him all about it, so that he could get all the parties, he would do all he could for him in his case." *Held*, that the confession was not admissible, under Code Crim. Proc. Tex. art. 749, because of the positive and persuasive promise of the sheriff, which was calculated to make defendant believe that his condition would be bettered by making the confession.—*Searcy v. State*, (Tex.) 18 S. W. 782.

39. Where the evidence consists almost entirely of confessions of the accused, which contain statements in his favor not proved to be false, it is error to refuse to instruct that the state is bound by such statements, unless they are shown by the evidence to be untrue.—*Jones v. State*, (Tex.) 18 S. W. 990.

Evidence—Accomplices and co-defendants.

40. It was proper to admit the testimony of the co-defendant's wife as to a conversation she overheard between defendant and her husband tending to show that defendant participated in the crime, when she gave all of the conversation, or all that she heard.—*State v. Miller*, (Mo.) 18 S. W. 832.

41. Where two persons were accused of murder in the first degree, it was error to admit the testimony of one against the other upon an agreement "to testify against" him, in consideration of the prosecuting attorney's accepting a plea by the witness of murder in the second degree.—*State v. Miller*, (Mo.) 13 S. W. 832.

42. While the uncorroborated testimony of an accomplice should be received with great caution, yet, if the jury are fully satisfied of its truth, and the state of facts sworn to establishes the guilt of the defendant, they may convict on that alone.—*State v. Harkins*, (Mo.) 18 S. W. 830.

43. Where a state's witness, by his own testimony, shows himself to be an accomplice in the killing, and his testimony is prejudicial to defendants, it is error to refuse an instruction as to the weight to be given the testimony of an accomplice.—*Wicks v. State*, (Tex.) 13 S. W. 743.

— Character.

44. Testimony as to the good character of defendant subsequent to the commission of the assault was properly excluded.—*Graham v. State*, (Tex.) 13 S. W. 1018.

— Sufficiency.

45. Circumstantial evidence alone will not warrant a conviction, when it does not exclude every reasonable hypothesis except that of defendant's guilt.—*Finlan v. State*, (Tex.) 18 S. W. 866.

Instructions.

46. In the trial of an indictment for arson the court, instructing the jury, made use of the words "willfully" and "maliciously," without defining them. Held not error where they were used in their ordinary sense, and the evidence was clear, as it will be presumed to have been where it does not all appear in the bill of exceptions.—*State v. Harkins*, (Mo.) 18 S. W. 830.

47. A charge that, if the jury believe that defendant did not commit the theft as charged, they must find him not guilty, is error, since it bases his right to acquittal on the jury's belief in his innocence, instead of his guilt.—*Moore v. State*, (Tex.) 13 S. W. 153.

48. Under Gen. Laws Tex. 1889, p. 37, providing that a defendant in a criminal case may testify in his own behalf, "but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause," it is not prejudicial error to charge that "the law allows the defendant to testify in his own behalf, but a failure to do so is not even a circumstance against him, and no presumption of guilt can be indulged in by the jury on account of such failure on his part." It is in the court's discretion to refer to defendant's rights, and it will not be presumed that he was injured by a correct statement of the law.—*Fulcher v. State*, (Tex.) 13 S. W. 750.

49. On indictment for placing obstructions on a railroad track, there was testimony that defendant placed another obstruction on the track, about three-fourths of a mile from the one charged, and very soon after the first. Held, that failure of the court to instruct the jury that the evidence was admitted only to show motive or intent, and to restrict their consideration of it to that purpose, was fundamental error, which, even if there had been no exception, would require a reversal.—*Barton v. State*, (Tex.) 18 S. W. 783.

— Circumstantial evidence.

50. Where, on indictment for theft, a witness, though he be an accomplice, testifies directly that defendant confessed the theft to him, a charge on circumstantial evidence is not required.—*Wampler v. State*, (Tex.) 13 S. W. 144.

51. Where the evidence of a theft is entirely circumstantial, the omission to instruct the jury upon the law of circumstantial evidence is fundamental error.—*Deaton v. State*, (Tex.) 13 S. W. 1009.

52. The following charge is erroneous, because it is upon the weight of evidence: "Circumstantial evidence, when fully and clearly made out, is sufficient to sustain a conviction for crime; but the circumstances must not be of a vague, indefinite, shadowy character, and the facts constituting the chain must be clearly defined. * * * In cases depending upon circumstantial evidence, the mind seeks to explore every possible source from which any light, however feeble, may be derived; and it is peculiarly proper that the jury should have before them every fact and circumstance, however slight. * * *"—*McCleskey v. State*, (Tex.) 13 S. W. 997.

— On accomplice testimony.

53. On a trial for murder, certain Mexicans were witnesses for the state. At the time of the murder, which they witnessed, they were among strangers, hundreds of miles from their homes. They were hired hands, assisting in driving cattle to a distant market. They did not know the English language, and defendant and deceased were Americans, in whom they had no particular interest. Held, that the mere fact of their having remained silent as to the murder did not call for instructions on accomplice testimony.—*O'Connor v. State*, (Tex.) 13 S. W. 14.

54. Upon the subject of accomplice testimony, a charge in general terms as to the necessity of corroborating the evidence of an accomplice, and defining an "accomplice" in the language of the statute, is sufficient, in the absence of a request for an instruction applying the law to the facts in the case.—*Lockhart v. State*, (Tex.) 13 S. W. 1012.

55. It was error to charge that the testimony of a person aiding and abetting a crime "is admissible; yet such evidence, when not corroborated by the testimony of others not implicated in the crime, as to matters material to the issues, ought to be received with great caution," without explaining the meaning of "matters material to the issues," and stating that the corroboration must go to the extent of identifying the person of the prisoner against whom the accomplice speaks.—*State v. Miller*, (Mo.) 13 S. W. 832.

— Character.

56. An instruction that, "if the jury, from all the evidence, have any doubt of defendant's guilt, and further believe from the evidence that defendant has for a long time and now possesses a good moral character for peace, sobriety, and honesty, then such fact of good character, coupled with the presumption of innocence, is sufficient upon which to find a verdict of not guilty," is properly refused.—*State v. McNamara*, (Mo.) 13 S. W. 938.

57. It is not error to neglect to give a proper instruction as to evidence of good character, though an improper one was asked and refused, and the statutes require the court to declare the law applicable to the case.—*State v. McNamara*, (Mo.) 13 S. W. 938.

— As to punishment.

58. An instruction that "the punishment for an aggravated assault is by fine of * * * and by imprisonment, * * * or by such fine without imprisonment," does not permit the jury to assess imprisonment without fine, and is therefore erroneous, under Pen. Code Tex. art. 493.—*Graham v. State*, (Tex.) 13 S. W. 1013.

59. Such error is a reversible one though no exception was reserved to the instruction, and though defendant was not convicted of aggravated assault, but of assault with intent to kill.—*Graham v. State*, (Tex.) 13 S. W. 1013.

— Harmless error.

60. Where a charge was properly rejected as being an incorrect statement of the law applicable to a certain state of facts, and the court erroneously failed to give any instruction as to such facts, the error was not prejudicial, when it appears that, if a proper instruction had been given,

its only effect must have been to induce the verdict actually returned.—*Habel v. State*, (Tex.) 13 S. W. 1001.

Custody of jury—Separation.

61. Code Crim. Proc. Tex. art. 687, provides that, "after the jury has been sworn and impaneled to try any case of felony, they shall not be permitted to separate until they have returned a verdict, unless by permission of the court, with the consent of the attorneys representing the state and defendant, and in charge of an officer." Article 23 provides that "the defendant to a criminal prosecution for any offense may waive any right secured to him by law, except the right of trial by jury in a felony case." Const. Tex. art. 1, § 15, provides that "the right of trial by jury shall remain inviolate. The legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency." *Held*, in a felony case, that defendant could not waive the provision that, when the jury separated, each juror should be accompanied by a court officer.—*English v. State*, (Tex.) 13 S. W. 775.

62. On a criminal trial, a separation of the jury by which, while some of the jurors took their dinner in the dining-room of a hotel, the others remained in the office because there was not room at the table for them all, is ground for reversal.—*State v. Gray*, (Mo.) 13 S. W. 806.

63. During the adjournment of one hour after the commencement of a trial on indictment for rape, a juror, without the consent of the court, the defendant, or any officer, left the jury-box and court-room, and for 45 minutes mingled with a crowd, which was excitedly discussing the case, freely expressing their opinions of its merits, some denouncing and others exonerating the accused. *Held*, his conduct was a violation of section 1909, Rev. St. Mo., prohibiting the separation of jurors during the trial of a criminal action without permission of the court, and a new trial will be ordered.—*State v. Witten*, (Mo.) 13 S. W. 871.

Verdict.

64. "Pententiary" instead of "penitentiary" in a verdict will not require a reversal.—*State v. McNamara*, (Mo.) 13 S. W. 938.

65. A verdict of "Guilty as charged in the indictment" is proper in form without specifying the degree of the offense, as required by Rev. St. Mo. § 1927, where the offense found is inferior to that charged.—*State v. Elvins*, (Mo.) 13 S. W. 987.

66. Rev. St. Tex. art. 1502, provides that terms of the criminal district court shall be held in Galveston on the first Monday in January, March, May, July, and November. "The terms of said courts may continue four weeks." *Held*, that the terms expire at 12 o'clock Saturday night of the fourth week, and that a verdict and judgment rendered on the next day were void.—*In re Juneman*, (Tex.) 13 S. W. 783.

67. Rev. St. Mo. 1879, § 1891, which provides that the verdict of the jury may be received by the court, and be entered upon the records in the absence of the defendant, when such absence is willful or voluntary, and shall have the same force and effect as if received and entered in the presence of such defendant, is not in conflict with Const. Mo. 1875, art. 2, § 22, which provides that "in criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him, face to face."—*State v. Hope*, (Mo.) 13 S. W. 490.

Impeachment.

68. A verdict for assault with intent to kill cannot be impeached by affidavit of a juror that he intended a verdict for carrying concealed weapons.—*State v. McNamara*, (Mo.) 13 S. W. 938.

Judgment and sentence.

69. A verdict of "guilty" means guilty of the offense charged by the indictment; and where, upon a verdict of guilty under an indictment for the theft of a horse, the judgment and sentence were for the "fraudulent conversion of a horse," such judgment and sentence will be reformed to cor-

respond with the indictment.—*Parcelley v. State*, (Tex.) 13 S. W. 998.

70. A sentence fixing the commencement of the sentence at a period about two years subsequent to the date of the sentence, no reason appearing why it was so made to commence, is erroneous, and it will not be presumed, in favor of it, that it was cumulative.—*Lockhart v. State*, (Tex.) 13 S. W. 1012.

71. Under Code Crim. Proc. Tex. art. 800, providing for cumulative sentences, where there are two or more convictions of the same person at the same term, the judgment in the second or subsequent convictions must be so rendered as to provide that the punishment shall begin when the judgment and sentence in the preceding convictions shall have ceased to operate; otherwise the judgments as to the term of imprisonment will be concurrent, and will be treated as one judgment, and will cease to have any further effect when the first term of imprisonment has been served out.—*In re Hunt*, (Tex.) 13 S. W. 145.

72. On trial of a defendant under 16 years of age for theft, the court charged the jury that, if they found defendant guilty of the theft of property of the value of \$20, they should assess his punishment at confinement in the penitentiary. The jury found him guilty, and assessed his punishment at 4 years in the penitentiary. The court gave judgment that he be confined in the house of correction and reformatory for said term. *Held*, that the charge was reversible error, since Act Tex. April 2, 1889, provides that "the jury convicting shall say in their verdict whether the convict shall be sent to the reformatory or the penitentiary," and limits the punishment of a convict under 16 years of age, whose term of imprisonment is assessed at not more than 5 years, to confinement in the reformatory.—*Washington v. State*, (Tex.) 13 S. W. 606.

73. Act Tex. April 2, 1889, provides that "the jury convicting shall say in their verdict whether the convict shall be sent to the reformatory or the penitentiary," and limits the punishment of a convict under 16 years, whose term of imprisonment is not more than 5 years, to confinement in the reformatory. *Held*, that the act is mandatory, and it is the duty of the court, on trial of defendants under 16 years of age, to give it in his charge to the jury.—*Washington v. State*, (Tex.) 13 S. W. 606.

New trial.

74. When defendant has cross-examined a witness, he cannot object, on motion for new trial, that the witness was not sworn, where there is nothing in the record to show when the fact was discovered by defendant.—*State v. Hope*, (Mo.) 13 S. W. 490.

75. A new trial will be granted on the ground of bias and prejudice on the part of a juror, where defendant and his attorneys swear that such bias was unknown to them before the trial, and affidavits that such juror had said before the trial "that defendant was guilty of the crime charged, and ought to be punished," and that it was a "bad case against the defendant," are not controverted.—*Graham v. State*, (Tex.) 13 S. W. 1010.

Appeal and error.

76. Where a judgment is rendered when the court is not in session, it is not the act of the court, and consequently is not appealable. *Habens corpus* is the proper remedy to avoid the judgment.—*In re Juneman*, (Tex.) 13 S. W. 783.

77. Where a denial of the right of suffrage and to hold public office is annexed to the punishment imposed on conviction of a misdemeanor, an appeal will lie to the court of appeals, though the fine imposed is insufficient to give the court jurisdiction.—*Johnson v. Commonwealth*, (Ky.) 13 S. W. 520.

78. Where an order allowed 10 days from the end of the term for filing a statement of facts, a statement filed after the expiration of that time cannot be considered.—*Perkins v. State*, (Tex.) 13 S. W. 790.

79. Though the record shows that a bill of exceptions, filed in term-time, was filed more than 10

days after the trial, it will be presumed, in the absence of anything to the contrary, that the bill was regularly presented to the judge within the 10 days prescribed by law, as it is the presentment, and not the filing, that is required within that time.—*Childers v. State*, (Tex.) 13 S. W. 650.

Appeal and error—Record.

80. Where there are two complaints in the record, one of them being filed before, and the other after, the presentment of the information, the latter complaint should be stricken from the record.—*Hardy v. State*, (Tex.) 13 S. W. 1008.

81. Where the record contains no bill of exception to the court's action in overruling an application for a continuance, the matter cannot be considered on appeal.—*Wampler v. State*, (Tex.) 13 S. W. 144.

82. A paper purporting to be a statement of facts signed by opposing counsel, but not authenticated by the trial judge, as provided by Willson, Crim. St. Tex. § 2562, will not be considered on appeal.—*Lynn v. State*, (Tex.) 13 S. W. 867.

Review.

83. Exceptions to the exclusion of certain evidence, which fail to disclose the purpose of the proposed evidence, will not be considered on appeal.—*Graham v. State*, (Tex.) 13 S. W. 1010.

84. An exception to the refusal of the trial court to permit a witness to answer certain questions will not be considered where it fails to show the testimony expected to be elicited.—*Miller v. State*, (Tex.) 13 S. W. 644.

85. An objection to the conduct of counsel for the state in expressing his personal belief in defendant's guilt will not be considered, when no written request was made for an instruction that the jury must not allow themselves to be influenced thereby.—*Habel v. State*, (Tex.) 13 S. W. 1001.

86. Under Rev. St. Mo. 1879, § 1907, which declares that "the provisions of law in civil cases, relative to compelling the attendance and testimony of witnesses," and their examination, "shall extend to criminal cases so far as they are in their nature applicable thereto," exceptions to the admission of testimony in a criminal case cannot be considered when the reasons for excluding it were not stated to the court with the objection.—*State v. Hope*, (Mo.) 13 S. W. 490.

87. A conviction will not be set aside because the charge as to a reasonable doubt was not as definite as it should have been, when the charge was not excepted to, and no additional charge was asked.—*Garner v. State*, (Tex.) 13 S. W. 1004.

88. Failure to instruct the jury on the defense of *alibi* is not reversible error, when no objection is made below.—*Finlan v. State*, (Tex.) 13 S. W. 866.

89. When the record shows that arguments were made to the jury both for the state and the defense, it will be presumed that the accused was allowed the benefit of counsel.—*Noble v. Commonwealth*, (Ky.) 13 S. W. 429.

90. On a trial for murder, testimony explaining defendant's absence from the neighborhood directly after commission of the act is admissible, but its exclusion is no ground for reversal of a judgment of conviction, if it appears, in view of the other evidence, that its character was not such as could reasonably have benefited defendant.—*Self v. State*, (Tex.) 13 S. W. 602.

CURTESY.

See, also, *Dower*.

Right to curtesy.

F. devised certain land to J. in fee, subject to the defeasance that, if she should die without leaving lawful issue, or the descendants of such issue, the land should be sold, and the proceeds divided between certain charities. J. married defendant, and had one child by him, which died in infancy. Afterwards J. died, having no other children. *Held*, that defendant had an estate by curtesy in the land.—*Webb v. Trustees of First Colored Baptist Church*, (Ky.) 13 S. W. 362.

Cy Pres Doctrine.

See *Charities*, 3.

DAMAGES.

Excessive, as ground for new trial, see *New Trial*, 2.

For breach of covenant, see *Covenants*, 3, 4.

—marriage promise, see *Breach of Marriage Promise*, 4, 5.

causing death, see *Death by Wrongful Act*, 10-15.

malicious prosecution, see *Malicious Prosecution*, 17.

nuisance, see *Nuisance*, 3-7.

taking appeal for delay, see *Appeal*, 63.

wrongful attachment, see *Attachment*, 18, 19.

In condemnation proceedings, see *Eminent Domain*, 10-18.

Exemplary damages.

1. In an action against a railroad company for personal injuries sustained while attempting to drive over a crossing, plaintiff's evidence showed that defendant's engine was standing on the crossing, partially obstructing it, and that, when plaintiff's team was just in front of the engine, steam spurted out under his mules, causing them to run away, and throwing him out of the wagon. Defendant's engineer testified that he noticed the approach of the team, but paid no particular attention to it; that, on receiving a signal from a brakeman to move the engine back a little, he did so, not to exceed a foot; and that he thought plaintiff's team had crossed. *Held* that, as there was no evidence to show that defendant's engineer was guilty of willful or conscious indifference of consequences, it was error to permit the jury to take into consideration the element of exemplary damages.—*St. Louis, I. M. & S. Ry. Co. v. Hall*, (Ark.) 13 S. W. 188.

2. In an action for breach of contract, a general allegation that defendant broke the contract "willfully, fraudulently, and with malice" is not sufficient to authorize a recovery of exemplary damages.—*Hooks v. Fitzenrieter*, (Tex.) 13 S. W. 230.

For breach of contract.

3. In an action by a contractor for damages sustained by the termination of the contract, it appeared that he had done some extra work not called for by the specifications, and that the owner afterwards finished the building. *Held*, that the contractor was entitled to recover, if the cost of completing the building was less than the contract price and the value of the extra work; but that, if the cost of completing the building was greater than the contract price and the value of the extra work, the owner is entitled to recover.—*Rector v. McDermott*, (Ark.) 13 S. W. 384.

4. Where defendant refused to go on with a contract by which plaintiff was to manufacture barbed wire for defendant, and to furnish wire to be manufactured as provided by the contract, plaintiff's measure of damages is the difference between the contract price and the cost of manufacture on the minimum amount of wire defendant agreed to furnish during the unexpired term of the contract.—*Crescent Manuf'g Co. v. N. O. Nelson Manuf'g Co.*, (Mo.) 13 S. W. 508.

Damages for torts.

5. In an action against a sheriff for the unlawful seizure of mill machinery which caused a delay of 10 days in putting the machinery in operation, it is proper to show the value of the use of the machinery during that time in order to estimate the damage.—*Halcomb v. Stubblefield*, (Tex.) 13 S. W. 231.

Personal injuries.

6. An allowance for physician's services, in case of a railroad accident, can only be for their reasonable value, and not for a larger sum, in view of a prospective lawsuit and the necessity of testifying as an expert.—*Gulf, C. & S. F. Ry. Co. v. Campbell*, (Tex.) 13 S. W. 19.

7. Plaintiff can recover for impaired physical ability, pain, and suffering unavoidably incurred, even though it is increased by the want of proper care and medical attention.—*Cameron v. Vandegriff*, (Ark.) 18 S. W. 1092.

8. In an action for personal injuries, probable future disability to earn money is an element of damages proper to be considered; and it is not error to permit the plaintiff, who was injured while acting as an engineer, to testify that he was not a skillful engineer, but intended to become one, and to follow the business as a permanent occupation.—*Howard Oil Co. v. Davis*, (Tex.) 18 S. W. 665.

9. In fixing the amount of damages, the jury should take into consideration plaintiff's age and condition in life, the nature and extent of the physical injuries,—whether permanent or temporary,—and the bodily pain and mental anguish, and any and all such damage which it appears will reasonably result to him from such injuries in the future.—*Ridenhour v. Kansas City Cable Ry. Co.*, (Mo.) 18 S. W. 889.

Inadequate and excessive damages.

10. Plaintiff, in an action for false imprisonment, testified as to the discomforts of the prison; that when arrested he was employed at \$35 a month and board; that he suffered "both bodily and in mind, and felt degraded, shamed, and humiliated at being put in jail;" and that the employment which he lost was worth \$250. He did not state that he could not have gotten equally good employment after he was discharged, nor that he had not lost his employment before he was arrested. *Held*, that a verdict for \$50 would not be set aside as inadequate.—*Taylor v. Davis*, (Tex.) 18 S. W. 642.

11. A verdict for plaintiff, an engineer, of \$15,000 is not excessive, in view of the facts that before the injury, which completely incapacitated him from labor, and rendered him deaf, he was in good health, but 34 years old, and earning from \$165 to \$195 a month.—*Texas & P. Ry. Co. v. Johnson*, (Tex.) 18 S. W. 463.

12. A woman 58 years old, a passenger on defendant's railway, was injured in a wreck. There was a great deal of tenderness in the small of the back, but no external evidence of injury, except that in a day or two there was some discoloration. She had suffered a great deal from the injury, been unable to walk or attend to any of her household duties, and would probably be unable to walk for a long time, and always have a weak back. Seven years before she had been in delicate health for two or three years, and to within two years of the accident she had had attacks of neuralgia, often complaining of her back. \$15,000 damages were awarded. *Held* excessive, and set aside, unless the sum of \$5,000 be remitted.—*Furnish v. Missouri Pac. Ry. Co.*, (Mo.) 18 S. W. 1044.

13. The injury consisted of a severance of the nervous connection in the left arm, resulting in a paralysis and contraction of the fingers, though he still had the use of his arm to the elbow. *Held*, that a verdict of \$8,500 was not excessive.—*Ridenhour v. Kansas City Cable Ry. Co.*, (Mo.) 18 S. W. 889.

14. Where the evidence shows that plaintiff's wrist was broken, and was, in the opinion of a physician, permanently injured, and that although, after the accident, he earned his board by waking up workmen in the morning, he was unable to work, and received no wages, for six weeks, a verdict of \$700 is not excessive.—*City of Sherman v. Nairey*, (Tex.) 18 S. W. 1028.

15. Where the evidence showed total disability for six months, and probable partial disability for life, and there was no fact indicating passion or prejudice on the part of the jury, a verdict for \$6,000 is not so clearly excessive as to warrant the appellate court in setting it aside.—*Howard Oil Co. v. Davis*, (Tex.) 18 S. W. 665.

16. A verdict of \$7,500 will not be set aside as excessive, where it appears that plaintiff's foot was cut off crosswise from the instep to the heel; that two operations had been performed; that the wound had not entirely healed nine months after

the injury was received; that plaintiff had suffered intense pain; that the leg was scarred and shriveled nearly to the knee; and that the whole of the foot was gone, except the rear part of the heel.—*Texas & P. Ry. Co. v. Overheiser*, (Tex.) 18 S. W. 468.

17. Deceased was postmaster and express agent at a station on defendant's railroad. He was killed by an engine running ahead of the express train, and on the same schedule, at about 30 miles an hour. At that point all persons having business with trains were obliged to cross the track in front of them. The view of the track was obstructed. Deceased, supposing that the train which struck him was the regular train, and would stop, attempted to cross the track. Deceased was a prudent man, and the engineer was very reckless. *Held*, that a verdict for \$15,000 would not be disturbed.—*Chesapeake, O. & S. W. R. Co. v. Hendricks*, (Tenn.) 18 S. W. 694.

Pleading.

18. Where the complaint, in an action for the cancellation of a deed for failure to comply with the conditions on which the deed was given, contains also an alternative prayer for damages, but fails to allege that plaintiffs have sustained any special damages, the supreme court will not grant a new trial for the action of the lower court in dismissing the complaint, since, on the allegations in the complaint, plaintiffs are entitled to only nominal damages.—*Buckner v. Pacific & G. E. Ry. Co.*, (Ark.) 18 S. W. 332.

Evidence.

19. In an action for the value of a horse killed in Arkansas, evidence of the value of the horse in Michigan was properly rejected, where the absence of a local market was not disclosed by the case, nor any reason given why such evidence was competent.—*Jones v. St. Louis, I. M. & S. Ry. Co.*, (Ark.) 18 S. W. 416.

Presumption.

20. Where the amount expended by plaintiff for medical services is shown, and it further appears that he was in bed five months, during which time he was nursed by ladies about the house, a verdict which does not appear to be excessive will not be set aside on account of an instruction that plaintiff is entitled to recover for medical services and nursing, though there is no evidence as to the value of the nursing; the presumption being that jurors were reasonably familiar with the value of such services. *Duke v. Railway Co.*, 12 S. W. 686, distinguished.—*Murray v. Missouri Pac. Ry. Co.*, (Mo.) 18 S. W. 817.

Remittitur.

21. Where the jury, in addition to compensatory damages for plaintiff's expenses, suffering, etc., has been erroneously allowed to consider the element of exemplary damages, the supreme court has no right to permit a remittitur from a verdict in plaintiff's favor as a consideration for the affirmation of the judgment below, but will remand the case for a new trial.—*St. Louis, I. M. & S. Ry. Co. v. Hall*, (Ark.) 18 S. W. 138.

DEATH BY WRONGFUL ACT.

Parties.

1. In Kentucky an action cannot be maintained by a personal representative for negligence resulting in the death of an intestate, leaving neither a widow nor children.—*Kentucky Cent. R. Co. v. Wainwright's Adm'r*, (Ky.) 18 S. W. 438.

2. Gen. St. Ky. c. 57, § 3, providing that "the widow, heir, or personal representative" of one whose life is lost by the wilful neglect of another may sue the person causing the death, limits the right to the widow and children, or to the administrator for their benefit.—*Cincinnati, N. O. & T. P. Ry. Co. v. Adam's Adm'r*, (Ky.) 18 S. W. 428.

3. Gen. St. Ky. c. 57, § 1, providing that the personal representative of a person not in the employ of a railroad company, and killed by the negligence of its employees, may recover damages for such death, gives no right to an administrator of

an employe of a railroad company to recover damages for the negligent killing of such a person by said company, though decedent lives two days after the injuries were received.—*Cincinnati, N. O. & T. P. Ry. Co. v. Adam's Adm'r*, (Ky.) 18 S. W. 428.

4. Gen. St. Ky. c. 57, § 3, provides that, if the life of any person is lost by the willful neglect of another person, company, or corporation, then the widow, heir, or personal representative of deceased shall have the right to sue, etc. *Held*, that the word "heir," in such section, is equivalent only to "child," and hence no right of action exists in favor of the father of deceased.—*Louisville & N. R. Co. v. Coppage*, (Ky.) 18 S. W. 1066.

5. Act Ark. Feb. 3, 1875, providing that when a minor is killed by a railroad train the father, if living, may sue, and that if the father be dead the mother or guardian may sue, is superseded by act March 6, 1883, (Manuf. Dig. §§ 5225, 5226,) which provides that every action for the death of a person by the wrongful act, neglect, or default of another shall be brought by the personal representative of the deceased, and shall be for the benefit of the widow and next of kin, and an action for loss of services accruing after a minor's death must be brought by the administrator.—*Davis v. St. Louis, L. M. & S. Ry. Co.*, (Ark.) 18 S. W. 801.

6. Rev. St. Ark. 1883, (Manuf. Dig. § 5223,) provides that an action "for wrongs done to the person or property of another * * * may be brought by the person injured, or after his death by his executor or administrator." Act March 6, 1883, provides (Manuf. Dig. § 5225) that, whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, which would have entitled the person injured to sue for damages if death had not ensued, an action may be brought against the person who would have been liable if death had not ensued; and (Manuf. Dig. § 5226) that such action shall be brought by the personal representative of the deceased, and shall be for the benefit of the widow and next of kin. *Held*, that the administrator of a person whose death is caused by the wrongful act, neglect, or default of another may maintain two actions,—one under the act of 1883, for the benefit of the estate, and the other under the act of 1883, for the benefit of the next of kin.—*Davis v. St. Louis, L. M. & S. Ry. Co.*, (Ark.) 18 S. W. 801.

Willful neglect.

7. Failure of a coal company to repair the timbers supporting a trestle on which its employes work, and which has been in use for 15 or 20 years, where the timbers appear sound, and can only be found defective on cutting into them, is not such willful neglect as will render it liable for the death of an employe caused by the breaking of such timbers, under Gen. St. Ky. c. 57, § 3, giving the widow, heir, or personal representative of a person whose life is lost through the "willful neglect" of a company a cause of action against such company.—*Reinder's Adm'r v. Blick & Philips Coal Co.*, (Ky.) 18 S. W. 719.

Evidence—Expectation of life.

8. It is proper to allow a witness to testify from mortality tables the number of years that the deceased would probably have lived.—*San Antonio & A. P. Ry. Co. v. Bennett*, (Tex.) 18 S. W. 819.

9. The parent need not introduce evidence of her expectancy of life in order to recover for loss of services after majority of the son.—*Gulf, C. & S. F. Ry. Co. v. Compton*, (Tex.) 18 S. W. 667.

Damages.

10. Under Rev. St. Mo. 1879, § 2121, fixing the amount of recovery for injuries resulting in death "caused by the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employe, whilst running any locomotive or train of cars," at \$5,000, it was proper to instruct the jury that, if they found that the injury resulted from the failure to light the head-light of the locomotive, they should give the plaintiff a verdict for \$5,000.—*Becke v. Missouri Pac. Ry. Co.*, (Mo.) 18 S. W. 1053.

11. Under Rev. St. Tex. art. 2699 et seq., allowing a parent to recover damages for the death of a child by negligence, the amount of recovery by the mother, being the sole surviving parent, is not limited to the value of the services of the deceased during minority.—*Gulf, C. & S. F. Ry. Co. v. Compton*, (Tex.) 18 S. W. 667.

12. The parent cannot recover exemplary damages, especially where no accident had occurred on defendant's road for many years, and the water train on which the son was killed had been for a year sent out without a conductor, as at the time of the accident.—*Gulf, C. & S. F. Ry. Co. v. Compton*, (Tex.) 18 S. W. 667.

13. Where gross negligence is shown in an action against a railroad company for killing plaintiff's intestate, exemplary damages may be recovered, though death was instantaneous. Following *Haley v. Railroad Co.*, 7 Baxt. 242.—*Kansas City, Ft. S. & M. R. Co. v. Daughtry*, (Tenn.) 18 S. W. 698.

14. It is not error to allow plaintiff, the widow of deceased, to testify as to the number of her infant children, as deceased was bound for their support, and his death cast the burden on her.—*Soeder v. St. Louis, L. M. & S. Ry. Co.*, (Mo.) 18 S. W. 714.

15. It is not reversible error to allow plaintiff to testify that she had an infant child by a former marriage, where the verdict was for \$3,500, as such evidence does not appear to have influenced the amount of damages.—*Soeder v. St. Louis, L. M. & S. Ry. Co.*, (Mo.) 18 S. W. 714.

DECEIT.

Waiver of right of action.

1. Where the business manager of a panorama company made false representations to plaintiff, a stranger to the enterprise, whereby he was induced to trade valuable property for stock of the company at an exorbitant valuation, the lapse of five months between the purchase of the stock and the bringing of an action against the manager for false representations does not operate as a waiver of the right of action.—*Cottrill v. Crum*, (Mo.) 13 S. W. 753.

2. Where the business manager of a panorama company made false representations to plaintiff, a stranger to the enterprise, whereby he was induced to trade valuable property for stock of the company at an exorbitant valuation, the fact that plaintiff offered to sell such stock at the price falsely represented by the manager to be its value, constituted no waiver of his right to sue the latter for damages.—*Cottrill v. Crum*, (Mo.) 13 S. W. 753.

Instructions.

3. In a suit for damages for false representations by the business manager of a panorama company to plaintiff, a stranger to the enterprise, whereby he was induced to trade valuable property for stock of the company at an exorbitant valuation, it was error to charge that, if plaintiff might by diligent inquiry have ascertained the falsity of such representations, and did not inquire, he could not recover. It was not plaintiff's duty to make diligent inquiry.—*Cottrill v. Crum*, (Mo.) 13 S. W. 753.

4. The words "diligent inquiry" were used in their ordinary meaning, and required no explanation from the court.—*Cottrill v. Crum*, (Mo.) 13 S. W. 753.

Declaration.

See *Pleading*, 1.

Declarations and Admissions.

See *Evidence*, 12-14.

DEDICATION.

Cemeteries, reversion on abandonment, see *Cemeteries*.
Of right of way, see *Easements*.

What constitutes—Platting.

1. A square was marked "donated for graveyard" on an original plat, not signed or acknowledged by the proprietors of a town-site, but filed with the recorder of titles by one of them, who soon after used it at a public sale of lots. The plat, and the use of the land for interments, were acquiesced in by the proprietors. *Held* sufficient evidence of a dedication *in pais*.—*Campbell v. City of Kansas*, (Mo.) 13 S. W. 897.

Rights of donors—Ejectment.

2. The donors of land dedicated to a city for a graveyard have, while the public use lasts, no right to a concurrent possession subject to a reasonable use by the public, and cannot maintain ejectment against the city to recover such a possession.—*Campbell v. City of Kansas*, (Mo.) 13 S. W. 897.

DEED.

See, also, *Covenants; Fraudulent Conveyances; Vendor and Vendee*.

Absolute when mortgage, see *Mortgages*, 1, 2.

By wife, see *Husband and Wife*, 14.

Divesting dower, see *Dower*, 2.

Estoppel by, see *Estoppel*, 1, 2.

Reformation, see *Equity*, 5-7.

What constitutes.

1. An instrument in writing, executed and acknowledged by a person in the manner provided for conveyances of real estate, which recites that, in view of his approaching marriage, "it is his will" that his proposed wife shall at his death be the absolute owner of certain lands, "with the condition that they shall not be sold by her until after his death," and, in the event of his surviving her, they shall "revert to him or his heirs," but in case they do not marry the "legacy or gift" shall be void, is a deed, notwithstanding a declaration therein that it is a "last will and testament."—*Chavez v. Chavez*, (Tex.) 13 S. W. 1018.

Identity of grantor.

2. In the absence of evidence casting doubt on the identity of a grantor in a deed, it is sufficient to show the identity of his name with that of the grantee in the preceding conveyance in the chain of title.—*Robertson v. Du Bose*, (Tex.) 13 S. W. 800.

Consideration.

3. Where a grantee, in consideration of the conveyance to him, extinguishes a debt due to him by a third person, to whom his grantor is indebted in an equal amount, and the claim against the grantor is also canceled by the third person, the deed is supported by a valuable consideration.—*Smith v. Westall*, (Tex.) 13 S. W. 540.

Description.

4. A deed described the property conveyed as "all that certain tract or tracts, parcel or parcels, of land by me inherited by, through, or from my deceased parents, * * * situated in the county of Brazoria or state of Texas, and all right that I now have, have had, or may have to any estate or property that is or might be due me, whether real, personal, or mixed, in this county or state. This conveyance is meant to convey and carry with it every possible interest that I now have or may have to any property in this county, or any other county in the state of Texas." *Held*, that the description was sufficient to convey all lands in the state vested at that time in the grantor by inheritance.—*Smith v. Westall*, (Tex.) 13 S. W. 540.

5. S. executed a deed of his home place, absolute in form, but as security for a debt, in which his wife did not join. Afterwards his wife joined in a conveyance of part of the land in settlement of the debt, and at the same time the creditor deeded the balance to "Helen S., wife of S., and her children." The land was sufficient to secure the debt without the wife's relinquishing her dower right, and the deed to the wife of S. made no mention that it was in consideration of her relinquishing her dower in the part conveyed to the creditor. After the death of S. his wife devised

her entire interest to one child. *Held*, that the intention of S. was to provide for his family, and that his wife took the whole of it for life, remainder to the children.—*Smith v. Upton*, (Ky.) 13 S. W. 721.

Acknowledgment.

6. Laws Ark. 1883, Act 69, substantially re-enacted in 1885, p. 191, provides that all deeds and other conveyances recorded prior to the 1st day of January, 1883, purporting to have been acknowledged before any officer, and which have not been invalidated by judicial proceeding, shall be held valid to pass the estate which such conveyance purports to transfer, although such acknowledgment is defective. Another curative act, passed March 14, 1885, (Laws 1883, Act 79), provides that all conveyances authorized by law to be recorded, or which have been recorded, the proof of execution whereof is insufficient because the officer certifying such execution omitted any words in his certificate, shall be as valid as though the certificate of acknowledgment or proof of execution was in due form. *Held*, that these statutes have no application to a deed by a husband and wife, intended to convey the wife's land, but which conveys only a dower interest, the deed being properly executed and acknowledged.—*Bowden v. Bland*, (Ark.) 13 S. W. 420.

7. In Kentucky, where only the county clerk and his deputies are authorized to take acknowledgments of deeds, the clerk may take the acknowledgment of a deed in which he is grantee.—*Stevenson v. Brasher*, (Ky.) 13 S. W. 242.

—By married woman.

8. Where the county clerk who takes the acknowledgment to a deed is a party in interest, it is competent for him to testify that the husband was present when the wife acknowledged the deed, though he could not testify to this if he was not a party in interest, unless fraud on the part of the person benefited was charged, and such evidence was germane to the investigation.—*Stevenson v. Brasher*, (Ky.) 13 S. W. 242.

9. As the law requires that a wife's acknowledgment shall be taken separate and apart from her husband, the failure of a county clerk who took the acknowledgment to do this cannot be excused by ignorance of his duty, and he and his co-vendees will not be permitted to profit by his failure to perform his duty.—*Stevenson v. Brasher*, (Ky.) 13 S. W. 242.

Delivery and acceptance.

10. In an action to quiet title it appeared that plaintiff's grantor, having frequently expressed the desire that plaintiff should have her land, brought a notary to her house that she might execute and acknowledge a deed therefor to plaintiff, which she did, saying that it was for past services rendered her, stating the items, and requiring the notary to cast them up, and to put the result into the deed as its consideration. The notary then, in the grantor's presence, handed the deed to plaintiff, who locked it up in a box containing papers belonging to him, and put the box in a wardrobe, which he also locked, though the grantor kept its key, with others, she and plaintiff living in the same house. *Held*, that there was a sufficient delivery and acceptance of the deed.—*Hubbard v. Cox*, (Tex.) 13 S. W. 170.

11. Certain citizens entered into a bond to furnish a right of way to defendant railroad free of charge. They obtained a deed from plaintiff running direct to defendant, conveying a right of way, but subject to certain conditions to be performed by it. Defendant refused to accept the deed when tendered by the citizens. Subsequently it built its road across this land. *Held*, in an action for breach of the conditions of the deed, that defendant was not obliged to notify plaintiff that it would not accept the deed, and that its failure to give such notice raised no presumption of acceptance.—*St. Louis, I. M. & S. Ry. Co. v. Ruddell*, (Ark.) 13 S. W. 418.

12. A deed was delivered by the grantor to a third person, who had it recorded, but who had no express authority to receive it. He was not grantee's

general agent, though he had been attending to various matters for him, as the grantor knew. He testified that it might have been two or ten years before he received the deed since he had transacted business for the grantee, and that, though he had no communication with the grantee in regard to the deed, he thought he had authority to receive it. The grantee subsequently demanded rent for the land. *Held*, that the delivery and acceptance were sufficient.—*Ward v. Small's Adm'r*, (Ky.) 18 S. W. 1070.

13. A father conveyed land to his children jointly. He afterwards canceled the conveyance, and divided the land among them, but conveying a life-estate only to his son H., with remainder to his children. At the time of the first conveyance H. was a minor, and he never assented thereto. *Held*, that H. had no title under the first deed, and hence the only interest in the land that could be sold at the suit of his creditors was the life-estate.—*Owings v. Tucker*, (Ky.) 18 S. W. 1078.

Construction and effect.

14. A wife having joined her husband in a deed of trust releasing her dower, and having taken after his death an assignment of the debt secured, her deed, made in consideration of its payment, releasing and quitclaiming the land to a vendee at a sale by the husband's administrator, conveys all interests pledged for the payment of the debt, including her dower.—*Bray v. Conrad*, (Mo.) 18 S. W. 957.

15. A city condemned a strip of land for railroad and sewer purposes, and, after constructing a road-bed along this, it conveyed to a railroad company "its title to the road-bed, bridges, and right of way" along the entire route, and "all the land belonging to the city," between certain streets, "for depot purposes." The company had formerly occupied a right of way for a double track on other streets, and the city, in consideration of the change of the railway to the street forming the line of the road in the conveyance, agreed to furnish the company a road-bed. *Held*, that outside of the part conveyed for depot purposes nothing but the road-bed was conveyed.—*Long v. Louisville & N. B. Co.*, (Ky.) 18 S. W. 8.

16. A grantor conveyed land to his daughter for life, remainder to her children, or, in case she should die without leaving children or their descendants, to the grantor's heirs on the death of the daughter and her husband: provided, that if she and her husband should sell the land the purchase money should be invested in other land, the title to which should be secured to the daughter in the same manner as was the title to the land originally conveyed. *Held*, that the deed conferred on the daughter a power of sale which enabled her to convey a fee-simple title.—*Fritsch v. Klausling*, (Ky.) 18 S. W. 241.

17. In trespass *quare clausum fregit*, plaintiff and defendant claimed under a common grantor, who had owned a tract which included a parcel of bottom-land. He conveyed the tract to C., who conveyed it to defendant. The deed to C. contained a reservation of "the bottom at the ford of the creek, which bottom is now under fence, and supposed to contain nine acres, more or less." In fact the fence included only five acres, but there was a strip running along the edge of the creek outside of the fence, and containing one and a quarter acres. C. testified that he never considered this strip as belonging to him. *Held*, that the words "now under fence" should be considered as descriptive, merely, and not as limiting the boundary of the reservation.—*Jones v. Motley*, (Ky.) 18 S. W. 482.

Proof of execution.

18. Where an affidavit is filed attacking a deed offered in evidence as a forgery, its execution must be proven before it is received, but, if no evidence is introduced by the impeaching party, its genuineness is established by the testimony of the subscribing witnesses as to its execution.—*Robertson v. Du Bose*, (Tex.) 18 S. W. 800.

Default.

Judgment by, see *Judgment*, 5.

Delivery.

Of deed, see *Deed*, 10-13.
gifts, see *Gifts*.
goods, see *Sale*, 4.
mortgage, see *Mortgages*, 10.

Demurrer.

See *Pleading*, 8.
To evidence, see *Trial*, 6.

DEPOSITARIES.

Liabilities.

A bank duly selected as the depositary of money collected by way of taxes, to satisfy county bonds issued in aid of a railroad company, cannot be held responsible for money which it pays out by order of the committee appointed by the county court to take charge of and pay out the fund, on the ground that an excess of bonds had been illegally issued, in the absence of fraud or collusion between it and the committee in an appropriation of the fund to a purpose known to be unauthorized.—*Deposit Bank v. Davless County Court*, (Ky.) 18 S. W. 101.

DEPOSITION.

Objections—Clerical defects.

It is not error to receive a deposition on the ground that the initial letter "T." of a party's name was, in the style of the cause, given as "Y." by the officer, where the judge in signing the bill of exceptions states that, on looking to the entire writing, it was clear that the letter was intended as the true initial.—*Anderson v. Jackson*, (Tex.) 18 S. W. 80.

DESCENT AND DISTRIBUTION.

See, also, *Executors and Administrators*; *Wills*.

Rights of heirs.

1. An agreement between heirs to divide the estate according to law, which is based on a misconstruction of the law of inheritance, whereby one renounces a part of her legal share on the erroneous supposition that the others are entitled to it, and without receiving any consideration therefor, does not bind her to that construction.—*Pegues v. Haden*, (Tex.) 18 S. W. 171.

Delivery of land to heirs.

2. The delivery of land by executors to the heirs is sufficient evidence that it was not needed for the purposes of administration.—*Hall v. Haywood*, (Tex.) 18 S. W. 612.

Judicial sale of heir's interest.

3. Intestate's entire estate was a tract of land already mortgaged for over a third of its value to secure a debt of one of his three heirs, who was insolvent. Defendant, with knowledge of these facts, bought at execution sale the interest of the insolvent heir in the fund which was left after foreclosure and payment of the mortgage debt. *Held*, that, as the debtor had no interest in the fund, the purchaser acquired none.—*Wilson v. Slaughter*, (Ark.) 18 S. W. 515.

Description.

In deed, see *Deed*, 4, 5.
judgment in ejectment, see *Ejectment*, 7.
mortgage, see *Mortgages*, 5-9.

Devise and Legacy.

See *Wills*.

Disbarment.

Of attorney, see *Attorney and Client*.

Discharge.

Of receiver, see *Receivers*, 6-9.
servant, see *Master and Servant*, 1.

Dismissal.

Of appeal, see *Appeal*, 64.

petition of intervenor, see *Partition*, 8.

Without prejudice, see *Pleading*, 8.

DISORDERLY HOUSE.**License by city.**

1. Pen. Code Tex. arts. 839-841, prohibit houses of prostitution in the state. The special charter of the city of San Antonio, (Act Tex. Aug. 18, 1870,) by sections 72, 78, and 98, confers on the city power "to suppress and restrain" disorderly houses and houses of prostitution, and authorizes the city council, by ordinance, to "restrain and punish" prostitutes, to "prevent and punish" the keeping of houses of prostitution, and to adopt summary measures for "the removal or suppression, or regulation and inspection, of all such establishments." By these and other sections, which also confer the power to regulate, the power to license other occupations is expressly conferred. *Held*, that the charter does not confer on the city power to license houses of prostitution.—In re Garza, (Tex.) 18 S. W. 779.

Indictment.

2. Pen. Code Tex. art. 839, defines a "disorderly house" to be one "kept for the purpose of public prostitution, or as a common resort for prostitutes and vagrants." *Held* that, in an indictment following the language of the statute with the exception that the word "vagrants" is used instead of "vagrants," such word should be stricken out as surplusage; it not being the equivalent of the word "vagrants."—Johnson v. State, (Tex.) 18 S. W. 1005.

Evidence—Sufficiency.

3. Defendant kept a house, as he was licensed to do, for the purpose of selling beer, cigars, etc., and for a variety theater. He had disreputable women in his employment, and such women visited his house for the purpose of seeing the theatrical performances, and buying beer, etc.; but not for the purpose of prostitution. *Held*, that a conviction could not be sustained.—Johnson v. State, (Tex.) 18 S. W. 1005.

4. On indictment for keeping a disorderly house, it was shown that defendant, a teamster, rented a house for one N., and moved her from another town, and put her into it, where she afterwards kept a disorderly house; but it was not shown that defendant was ever there, or was in anywise interested in it. *Held*, that the evidence was insufficient to support a conviction.—Rabbi v. State, (Tex.) 18 S. W. 1000.

5. On indictment for keeping a house of ill fame, the time embraced in the prosecution being limited to the period between June 1st and July 16th, two of the state's witnesses, one of them a policeman, testified that the house was closed during June and July, and defendant was absent. The owner of the house testified that he thought it was closed for repairs during June and July, and defendant's witnesses testified to the same. One witness for the state testified that he thought it was closed during the latter part of June and July. *Held*, that the evidence did not support the allegation as to the time of the commission of the offense.—Harris v. State, (Tex.) 18 S. W. 608.

Punishment—Validity of statute.

6. Act Tex. April 4, 1889, (amending Pen. Code Tex. art. 841, and adding article 841a thereto,) provides in article 841 a punishment for any owner, lessee, or tenant of a building who shall keep, or allow to be kept, therein, a disorderly house, and prescribes as the penalty a fine of \$200, for each day the house is kept. Article 841a provides that every owner of a theater, dance-house, or house where liquors are kept for sale, who shall knowingly employ in such theater, etc., "any prostitute, * * * or who shall permit any prostitute * * * to conduct herself therein in a lewd, lascivious, or indecent manner, shall be deemed guilty of keeping a disorderly house," and prescribes a fine therefor, of not less than

\$100 nor more than \$200, for each day the offense is committed. *Held* that, while the offense prohibited in each article is the same, in contemplation of law, the acts constituting it in each case, and the persons by whom the acts are committed, are different, and the act is not void for uncertainty in that it prescribes different penalties for the same offense.—In re Garza, (Tex.) 18 S. W. 779.

Dissolution.

Of corporation, see *Municipal Corporations*, 1, 2. partnership, see *Partnership*, 6-8.

District and Prosecuting Attorneys.

Signature of indictment, see *Indictment and Information*, 2.

DIVORCE.**Pleading.**

1. Under Gen. St. Ky. 728, providing that "no petition for divorce shall be taken for confessed, or be sustained by the admissions of the defendant alone, but must be supported by other proof," an answer in a suit for alimony, which avers that plaintiff's former husband is still alive, and that she is not, therefore, the wife of defendant, and which asks that the contract of marriage be annulled, cannot be taken as true by the fact that it is not put in issue by a reply or otherwise.—Freeman v. Freeman, (Ky.) 18 S. W. 246.

2. A prayer for alimony is, in effect, a prayer for a decree of separation.—Freeman v. Freeman, (Ky.) 18 S. W. 246.

Alimony.

3. Where defendant is worth no more than \$3,000, and is able to do but little work by reason of old age, an allowance for alimony of \$410 a year is unreasonable and excessive.—Freeman v. Freeman, (Ky.) 18 S. W. 246.

4. Plaintiff and defendant had been married 33 years, and by industry and economy had accumulated an estate worth about \$12,000. Plaintiff, who was 57 years old, and in delicate health, had always been a faithful wife, but defendant had treated her with great brutality, and had been guilty of adultery. Defendant was 54 years old, and in robust health, and was making money in his business, and the wife had no means of support, and from the condition of her health could not earn anything. *Held*, that an allowance of \$6,000 as alimony was not excessive.—Gerke v. Gerke, (Mo.) 18 S. W. 400.

Rights of divorced persons.

5. In an action for divorce, where, in view of the separation, the husband and wife had in writing agreed upon the division of the property, judgment was rendered accordingly, investing the wife with the right and title to certain lands. *Held*, that the judgment invested the wife with the fee of the land, and it could not be subjected to the payment of a debt of the husband contracted subsequent to the rendition of the judgment.—Farris v. Goins, (Ky.) 18 S. W. 2.

Documents.

See *Evidence*, 19-27.

Domicile.

Non-resident pupils in schools, see *Schools and School-Districts*, 5.

Donatio.

See *Gifts*.

DOWER.

See, also, *Curtsey*.

Right to dower.

1. Plaintiff's husband exchanged land with defendant, and one of them, who was the county

clerk, took plaintiff's acknowledgment in the presence of her husband. She joined her husband in mortgaging the land received in exchange. This land, including her dower right therein, was afterwards sold to satisfy the mortgage debt. *Held*, that she could recover the full value of her dower in the land sold to defendant.—*Stevenson v. Brasher*, (Ky.) 18 S. W. 242.

How divested—By deed.

2. A man executed a mortgage without joining his wife. He then gave a deed of trust on the same land, in which his wife joined and relinquished her dower right. The mortgagee foreclosed, and bought in the land for half of his debt. The grantee in the trust-deed sought to subject the dower interest relinquished in his conveyance to the payment of his debt. *Held*, that the wife's relinquishment of dower is not a conveyance of it, and is inoperative to convey any interest if the deed containing it fails.—*Smith v. Howell*, (Ark.) 18 S. W. 929.

DUE-BILLS.

Liability.

Where there is no evidence that defendant assumed payment of a due-bill given by a third person, the fact that he did pay part of it does not render him liable for the balance.—*Walker v. Noell*, (Tex.) 18 S. W. 281.

DUELLING.

Punishment—Disqualification for holding office.

Under Const. Tenn. art. 9, § 3, which provides that any person who shall fight a duel, or be an aider and abettor in fighting a duel, shall be deprived of the right to hold office, and shall be punished as the legislature may prescribe, a citizen of Tennessee is not disqualified from holding office by the fact that he acted as second in a duel fought in Arkansas between two citizens of Tennessee, where it is not shown that he did any act in regard to the duel, or even knew that it was impending, while he was in the state of Tennessee.—*State v. Du Bose*, (Tenn.) 18 S. W. 1088.

Dying Declarations.

See *Homicide*, 47-49.

EASEMENTS.

Creation—Dedication.

1. A will authorized the executor to sell certain lands, "with the understanding, in the sale of all the tracts, there is to be a passway, at least fifteen feet wide, near or where the present lane is, to the public road." Plaintiff and defendant each purchased part of said lands, the lane passing over defendant's tract. *Held* that, where the existing lane had been used as a matter of right, there was a sufficient dedication of the passway, and defendant could make no change in its location.—*Wickliffe v. Magruder*, (Ky.) 13 S. W. 523.*

2. The use of a strip of ground as a passway for more than 15 years constitutes a dedication, and its location cannot be changed by the owner of the fee.—*Wickliffe v. Magruder*, (Ky.) 13 S. W. 523.*

3. The fact that such passway is reserved in the will is sufficient to bind the purchaser of the fee, even though no such reservation is made in the deed from the executor to him.—*Wickliffe v. Magruder*, (Ky.) 13 S. W. 523.*

EJECTMENT.

By dedicator, see *Dedication*, 2.

Title to support.

1. The right to recover in ejectment is not affected by plaintiff's having parted with his title after the action was brought.—*Smith v. Price*, (Ky.) 13 S. W. 428.

2. Plaintiff and defendant in ejectment owned adjoining tracts each claiming up to the division line, wherever that might be, and both held under the same patent. Defendant had inclosed the disputed tract, but there was no evidence showing that it had been so inclosed for 15 years. *Held*, that it was error to instruct that the jury should find for plaintiff, "unless they find from the evidence that defendant, and those under whom he claims, have been in actual possession of the land, by themselves or their tenants, with claim of title, holding openly, notoriously, continuously, and adversely, for 15 years, in which case the jury should find for the defendant."—*Holmes v. Herringer*, (Ky.) 13 S. W. 359.

3. In ejectment it appeared that one J. had entered the lands in suit at the state land-office on time; that after his death his son W. was appointed administrator *de bonis non*, and as such, in order to avoid the payment of back interest on the purchase price, surrendered the certificates of entry; that by preconcerted arrangement the lands were immediately entered by a friend of W.'s. A short time afterwards this friend assigned the certificate of entry to W. individually, and not as administrator. W., and the rest of the family of J., lived on the land for some years. It appeared that W. had no means with which to purchase the land individually, his only income being from the estate of which he was administrator, and that he paid the taxes out of the proceeds of the estate; that he had claimed that the land belonged to the estate, though plaintiff testified that he had represented to him, for the purpose of obtaining credit, that he owned the land. *Held*, that W. did not acquire any interest in the land individually, but his title was that of administrator only.—*Reeves v. Barrett*, (Ark.) 13 S. W. 77.

Parties.

4. In ejectment, plaintiff cannot bring in parties who assert no claim against him, so that they, by filing cross-petitions, may in the same suit recover from defendant land outside of the line claimed by plaintiff.—*Long v. Louisville & N. R. Co.*, (Ky.) 13 S. W. 8.

5. Fraud in the conveyance of land cannot be set up as a defense in a suit by the vendee, unless the vendor is made a party.—*Masterson v. Little*, (Tex.) 13 S. W. 154.

Instructions.

6. In ejectment, where the matter in dispute is the location of the boundary line, an instruction that the jury should find for plaintiff, unless they found that defendant had possession of the land in dispute for a given length of time, is erroneous, where there is no evidence that defendant ever inclosed any of the land, since, in contemplation of law, both parties are in possession up to the dividing line; and it is prejudicial to defendant in assuming that plaintiff had title to the land in dispute, while there is no question of title in the case.—*Holmes v. Herringer*, (Ky.) 13 S. W. 918.

Judgment.

7. In ejectment the only question was the location of a boundary line. The jury found for plaintiff, and that "the Ross survey is the correct line, being seven and nine feet south of the hedge as shown by the evidence." There was nothing in the petition to show where the boundary was, or ought to be. *Held*, that a judgment for the land described in the petition, and for possession "not further south than the boundary line in said verdict described," was too vague and indefinite.—*Robertson v. Drone*, (Mo.) 18 S. W. 405.

Election.

Of counts, see *Indictment and Information*, 10.

ELECTIONS AND VOTERS.

Validity of election—Intimidation.

1. Const. Ark. art. 3, §§ 2, 3, provide that "all elections by the people shall be by ballot;" that "elections shall be free and equal;" and that "no power civil or military shall ever interfere to pre-

vent the free exercise of the right of suffrage." *Held*, that a widespread, systematic plan, whereby all negro voters in the county, under threats of personal violence, of social ostracism, and of expulsion from the community, were compelled to vote open tickets for the purpose of disclosing to their fellows any negro who might try to vote for a Democratic candidate, will avoid the election, though there is no proof that a majority voted against their wishes by reason of the plan, and though it was also partly designed as a means of testing the returns of the election officers.—*Jones v. Glidewell*, (Ark.) 18 S. W. 723.

Contest—Evidence.

2. In an election contest, the only question to be determined is the right of the contestant to the office; and the fact that part of the returns, showing a majority in his favor, were stolen from the county clerk's office before the official canvass was made, gives him no title to the office, where it has been proved that these returns were in fact false.—*Jones v. Glidewell*, (Ark.) 18 S. W. 723.

ELEVATORS.

Charter right of elevator company.

By its act of incorporation an elevator company was given power to acquire, free from condemnation, any real estate on the Mississippi river "not exceeding 500 feet frontage * * * in any one locality; * * * and the said corporation may also erect one or more grain elevators upon the public wharves," with the consent and under the direction of the city authorities. *Held*, that, although defendant owned and occupied 500 feet of river frontage, it had power to lease and occupy a portion of the public wharf contiguous thereto.—*Belcher's Sugar Refining Co. v. St. Louis Grain Elevator Co.*, (Mo.) 18 S. W. 822.

EMBEZZLEMENT.

Evidence.

On indictment for conversion of \$150, defendant, who had, as constable, collected the money alleged to have been converted, testified that he had been robbed, and the evidence showed that he was found insensible on the road. He further testified that when he recovered consciousness all the money was gone, except \$7.15. It was shown that he converted this amount. *Held*, that the evidence justified an instruction as to a conversion of less than \$20, which is a misdemeanor.—*Knight v. State*, (Tex.) 13 S. W. 598.

EMINENT DOMAIN.

The right.

1. The fact that a railroad company has already appropriated land does not affect the validity of proceedings to condemn the same subsequently instituted.—*Corey v. Chicago, B. & K. C. Ry. Co.*, (Mo.) 18 S. W. 846.

2. Under Const. Tex. 1876, art. 1, § 17, providing that property shall not be taken or damaged for public use without just compensation, a railroad company cannot convey to another company part of the interest in land which it has acquired by purchase of a right of way, so as to enable the latter company to build and operate an additional road over such right of way, without the consent of the owner of the fee, unless by condemnation proceedings.—*Fort Worth & R. G. Ry. Co. v. Jennings*, (Tex.) 13 S. W. 270.

3. Where such a sale is made, the owner of the fee may enjoin the second company from building its road until compensation has been made to him.—*Fort Worth & R. G. Ry. Co. v. Jennings*, (Tex.) 13 S. W. 270.

Procedure.

4. The general railroad law of Missouri, (1 Rev. St. 1855, pp. 414-417, §§ 13, 14, incorporated into Gen. St. Mo. 1865, pp. 351, 352, §§ 1-3,) making provision for the appropriation of lands "by any road, railroad, or telegraph corporation, created under v. 18s.w.—72

the laws of this state," gives to a railroad company created by special charter a mode of procedure to condemn land in addition to that given by its charter, and it may resort either to the provisions of its special charter, or to those of the general law.—*Corey v. Chicago, B. & K. C. Ry. Co.*, (Mo.) 18 S. W. 846.

Notice.

5. Under Gen. St. Mo. 1865, p. 351, § 2, requiring 10 days' notice to the owner of the time when the petition will be heard, it is sufficient if the notice be given 10 days before the hearing. The law does not require it to be given before the damages are assessed.—*Corey v. Chicago, B. & K. C. Ry. Co.*, (Mo.) 18 S. W. 846.

Parties.

6. A railroad company which has begun the construction of its road can in its own name institute proceedings to condemn land, though it has sold and conveyed its rights. Such case is not within Rev. St. Mo. § 3462, requiring actions to be brought in the name of the real party in interest.—*Corey v. Chicago, B. & K. C. Ry. Co.*, (Mo.) 18 S. W. 846.

Petition.

7. Gen. St. Mo. 1865, p. 351, authorizes the company to apply to the circuit court to have the land condemned when "such corporation and the owners cannot agree upon the proper compensation to be paid," and where the petition avers the failure to agree it is sufficient. The company need not sustain the averment by oral proof; nor can the owner, after proceedings have been had, and the land has been condemned, deny the truth of such assertion.—*Corey v. Chicago, B. & K. C. Ry. Co.*, (Mo.) 18 S. W. 846.

8. Under Gen. St. Mo. 1865, p. 351, § 1, requiring the petition for the condemnation of lands of a private person by a railroad company to set forth the general directions in which it is desired to construct the road over such lands, and a description of the real estate which the company seeks to acquire, it is sufficient if it sets forth the particular tract over which the road is to be constructed, gives the general direction in which it is to run, and for a more particular description refers to a map filed therewith. Following Railroad Co. v. Story, 10 S. W. 203.—*Corey v. Chicago, B. & K. C. Ry. Co.*, (Mo.) 18 S. W. 846.

Appeal.

9. Condemnation proceedings, under Mill. & V. Code Tenn. §§ 1549-1566, being begun by petition by the party seeking to appropriate land, on which a jury is impaneled, and the trial or appeal from the verdict of the jury being *de novo*, the petitioner, on such appeal, has the right to open and close, though the right to condemnation is conceded, and the land-owner appeals only on the question of damages.—*Alloway v. City of Nashville*, (Tenn.) 13 S. W. 123.

Compensation.

10. The right to damages for taking land under the power of eminent domain belongs to the owner of the land at the time it is taken, and does not pass to his grantee by quitclaim deed without an express conveyance.—*Smith v. Nashville & K. R. Co.*, (Tenn.) 18 S. W. 123.

11. The construction along a city street, to a point five miles in the country, of a railroad whose cars are propelled by a dummy steam-engine, and whose trains carry passengers only, and stop at all street crossings, is an additional servitude upon the street, for which the owner of the fee is entitled to compensation.—*East End St. Ry. Co. v. Doyle*, (Tenn.) 13 S. W. 986.

12. Under Const. Tenn. art. 1, § 21, which forbids the taking of private property for public use without just compensation, the fact that a railroad is constructed along a city street under a charter from the state, and a contract with the city and county, does not deprive the owner of the fee of his right to compensation therefor.—*East End St. Ry. Co. v. Doyle*, (Tenn.) 13 S. W. 986.

13. Act Ky. April 13, 1888, closing an alley over which abutting owners have a right of way, is in-

valid in that it does not provide for compensating such owners, or obtaining their consent to the vacation.—*Bannon v. Rohmelsner*, (Ky.) 18 S. W. 444.

14. Under Gen. St. Mo. 1865, p. 851, in regard to the duties of the commissioners appointed to assess damages, "who, after having viewed the land, shall forthwith return, under oath, such assessment of damages to the clerk of such court," it is not required that they be sworn before entering upon their duties, but it is sufficient if their affidavit be attached to their return.—*Corey v. Chicago, B. & K. C. Ry. Co.*, (Mo.) 18 S. W. 846.

Compensation—Measure of damages.

15. In condemnation proceedings by a city to obtain a reservoir site, it is proper to reject evidence as to its particular value as a reservoir site, and to charge that the jury cannot single out and estimate the value for a special purpose, they being instructed to consider all the constituent elements that make up the market value, its availability, adaptability, and capacity for different uses and purposes.—*Alloway v. City of Nashville*, (Tenn.) 18 S. W. 128.

16. In assessing incidental damages to the residue of the tract not condemned, as allowed by Mill. & V. Code Tenn. § 1562, it is to be assumed that land appropriated for a reservoir will be used in a skillful and proper manner, though reasonable apprehension of danger from inherent defects and unavoidable accidents may be considered.—*Alloway v. City of Nashville*, (Tenn.) 18 S. W. 128.

17. Where, after proper proceedings by a railroad company, land has been condemned, title thereto passes to the company; and the only measure of the owners' damages is the amount assessed by the commissioners.—*Corey v. Chicago, B. & K. C. Ry. Co.*, (Mo.) 18 S. W. 846.

Interest.

18. Though the Code is silent as to interest in condemnation proceedings, and no instructions as to it were given or refused, the court should add interest to the verdict, on motion therefor; damages being assessed for the value of the land at the time it was taken.—*Alloway v. City of Nashville*, (Tenn.) 18 S. W. 128.

Equalization.

Of taxes, see *Taxation*, 12.

EQUITY.

See, also, *Creditors' Bill*; *Fraudulent Conveyances*; *Injunction*; *Mortgages*; *Partition*; *Partnership*; *Quieting Title*; *Receivers*; *Specific Performance*; *Trusts*.

Jurisdiction.

1. A court of equity may either direct a re-execution of a lost instrument affecting the title to land, or make a declaratory decree establishing the existence of the instrument.—*Bohart v. Chamberlain*, (Mo.) 18 S. W. 86.

2. Where a judgment in partition proceedings is void on its face, there is no necessity for an equity suit to set it aside; there is an adequate remedy in ejectment.—*McClanahan v. West*, (Mo.) 18 S. W. 674.

3. Where it appears that a warrant illegally issued by a town has already been called in and canceled, it is within the powers of a court of equity to grant affirmative relief by an order restraining the future reissue of such warrant.—*Russell v. Tate*, (Ark.) 18 S. W. 180.

4. Defendant presented to the county court, for examination, county warrants to the amount of \$95,000; and, the court having ordered the cancellation of certain of the warrants, defendant appealed to the circuit court from the order. The warrants had come into defendant's hands in payment of taxes collected by him while sheriff of the county. He had never rendered any account of the taxes collected by him, or made any settlement with the county court. The court thereupon adjusted the account, and found a balance due the county of \$118,000. From this judgment

defendant also appealed. Defendant was insolvent, and his official bond was lost. *Held*, that an action in equity would lie to restrain the collection and reissue of a warrant, and to declare such warrants as were valid a set-off against the balance found to be due the county for taxes collected by the defendant.—*Pride v. State*, (Ark.) 18 S. W. 135.

Reformation of contracts.

5. Where a man purchases land with the intention of having the deed made to himself and wife as joint grantees, so as to convey an estate by the entirety, and so instructs the conveyancer, but through mistake the deed is made to the wife alone, a court of equity will, after the wife's death, vest the title in the husband, though the deed, when made, was read to him, and he thought it was sufficient to convey an estate by the entirety.—*Corrigan v. Tiernay*, (Mo.) 18 S. W. 401.

6. Where a husband and wife join in a conveyance of the wife's land, but, by mistake of the parties and of the draughtsman, the deed is so worded as to purport to convey only a dower interest, and the deed is properly executed and acknowledged, a court of chancery has no power to reform the deed to make it convey the fee.—*Bowden v. Bland*, (Ark.) 18 S. W. 420.

7. The court will correct an error in the description contained in the report of a surveyor appointed to locate and mark a line dividing a body of land in partition proceedings, and a corresponding error in the commissioner's deeds referring thereto, where it appears that the bidders at the sale, and the transferees of one of them, all purchased with reference to the line as actually located and marked, and in ignorance of the errors in describing it.—*Wilson v. Jasper*, (Ky.) 18 S. W. 883.

Rescission and cancellation of contracts.

8. A deed obtained by fraud and misrepresentation is void, *ab initio*, and will be canceled on showing in equity.—*Crabtree v. Bradbury*, (Ark.) 18 S. W. 935.

9. In an action for the rescission of a contract for the sale of land, whereby the plaintiff agreed to make a deed to defendant as soon as a survey of the land was made, for default in the payment of purchase money, where the petition shows that plaintiff has not executed such deed, he is not entitled to a rescission without an allowance to defendant of the excess of the purchase money already paid, and permanent improvements put on the land, over the value of the use and occupation of the land while he was in possession of it.—*Moore v. Giesecke*, (Tex.) 18 S. W. 290.

10. Plaintiff conveyed to defendant land in Texas in consideration of the conveyance by defendant to him of land in Tennessee, and the payment of \$200. In an action for the cancellation of plaintiff's deed to defendant on the ground that defendant had misrepresented the value of the land in Tennessee to induce him to make the exchange, defendant answered, alleging that plaintiff had misrepresented the value of the land in Texas, by which defendant was misled. *Held*, that exceptions to such allegations in the answer were properly sustained.—*Chaney v. Coleman*, (Tex.) 18 S. W. 850.

11. In an action to cancel a deed, and recover land obtained by defendant through fraud, defendant had the right to recover for valuable improvements made by him on the land.—*Chaney v. Coleman*, (Tex.) 18 S. W. 850.

12. In an action to cancel a deed on the ground that the land received in exchange was not of the value represented, testimony to the effect that the land conveyed by defendant had prior to the conveyance been offered at auction, and the highest bid therefor was so low that no sale was made, was improperly admitted; there being nothing to show that there were more than two or three persons present, or that the bid was made in good faith.—*Chaney v. Coleman*, (Tex.) 18 S. W. 850.

13. In an action to cancel two mortgages it appeared that the first was a forgery by plaintiff's son; that plaintiff gave the second to secure the forged notes, in consideration of defendant's agreement not to prosecute. *Held*, that the first would

be canceled, but that as to the second, plaintiff having entered into the illegal contract, and not having withdrawn from it until his son was prosecuted by other persons, equity would not interfere.—*Shattuck v. Watson*, (Ark.) 13 S. W. 516.

14. In an action by minors to recover land sold under a power of attorney given by them, defendants answered that plaintiffs obtained title through a deed of gift from their mother, at the time of the execution of which the state had a valid judgment which was a lien on the land; that plaintiffs, after the execution of the deed to them, gave a power of attorney to sell the land to satisfy the judgment; and that their said attorney, in consideration of \$100, and the balance due on the judgment, conveyed the land to defendants, who on account of such conveyance paid off the judgment. *Held*, that the defense was good, since plaintiffs, though they may not have been bound by their power of attorney, and the deed executed thereunder, could not annul it, and recover the land, without repaying to defendants the amount paid by them in discharging the judgment.—*Folts v. Ferguson*, (Tex.) 13 S. W. 1037.

15. Where a railroad company has built its road on a right of way granted to it in reliance on its contract to erect machine-shops and a round-house in a certain town, and to build its road to a certain point, the deed for the right of way will not be canceled, though the company has failed to perform its contract, since the parties cannot be placed *in statu quo*.—*Buckner v. Pacific & G. E. Ry. Co.*, (Ark.) 13 S. W. 332.

Pleading—Bill.

16. A petition, by the equitable owners of swamp land, seeking to cancel deeds thereof to defendants on the ground of fraud and want of consideration, alleged that defendants, as attorneys, associated themselves with plaintiffs' attorney to secure a patent for the land from the county, and obtained the deeds on the express understanding that, if successful, they would pay one-half the notes given by plaintiffs' ancestor to the county for the purchase price, and \$1,000 in money, and also deed back to plaintiffs' attorney one-half of the land in trust for plaintiffs; that defendants thereafter repudiated the agreement, and, by collusion with the judges of the county court, wrongfully procured an order recognizing them as owners, and that they then went into possession to the exclusion of plaintiffs. *Held*, that the petition stated a cause of action, though it failed to allege that defendants intended to defraud plaintiffs in the first instance, when the deeds were executed.—*Sayer v. Devore*, (Mo.) 13 S. W. 201.

—Multifariousness.

17. Plaintiff sued for the title and possession of two tracts of land. His petition alleged that he was sole owner of one tract, and joint owner with one of the defendants of the other, and prayed for the possession of both tracts, and partition of the latter one. His co-owner answered, joining in the prayer and allegations of the petition. Another defendant—who was in possession of both tracts, claiming title—pleaded not guilty; and the rest of the defendants disclaimed. *Held*, that the petition was not multifarious; the issues being the same as to both tracts.—*Yellow Pine Lumber Co. v. Carroll*, (Tex.) 13 S. W. 261.

Practice.

18. Where defendants' grantor alleged that a trust-deed from plaintiff's grantor was contrived and made to defraud creditors, a finding to that effect, and a judgment declaring the deed null and void, confirmed the title of defendants' grantor as a purchaser at an execution sale, against plaintiff's grantor made after the trust-deed was executed, without any decree to that effect.—*Macklin v. Allenberg*, (Mo.) 13 S. W. 350.

19. Mere informalities or defective modes of statement in a petition are waived where no demurrer, or motion of any sort, is interposed, and, after answer, the introduction of any evidence is objected to on the ground that the petition fails to state a cause of action.—*Sayer v. Devore*, (Mo.) 13 S. W. 201.

20. In equity cases, the supreme court is not concluded by the chancellor's findings of fact; and remarks in former cases that the supreme court will defer somewhat to his findings, where the witnesses testify orally, apply only where the testimony is conflicting or evenly balanced, and the finding of the chancellor appears to be correct.—*Benne v. Schnecko*, (Mo.) 13 S. W. 82.

21. Under the Civil Code of Kentucky, a suit brought in equity, which should have been brought at law, will not be dismissed, but the court may, on motion of plaintiff or defendant, or on its own motion, transfer it to the proper docket or court; and if neither party moves to transfer it, and it is not transferred on the court's own motion, it is the duty of the court to render judgment according to the rights of the parties.—*Kentucky Mutual Security Fund Co. v. Turner*, (Ky.) 13 S. W. 104.

—Decree.

22. The final decree fixing a title to land in defendants' grantor was rendered in October, 1878, and he obtained a writ of possession thereunder. In March, 1879, he executed a deed of trust, under which defendants acquired title. In a year thereafter, lacking a few days, plaintiff's grantor sued out a writ of error, under which the decree first mentioned was reversed. *Held*, that while the reversal of the decree entitled the plaintiff's grantor to restitution, as against defendants' grantor, it did not affect the rights of an innocent third person claiming under him; the writ of error being a new action.—*Macklin v. Allenberg*, (Mo.) 13 S. W. 350.

23. Defendants' grantor had purchased the land in dispute at an execution sale against plaintiff's grantor. Prior to such sale plaintiff's grantor had executed a trust-deed, conveying the property for the use and benefit of his wife. Defendants' grantor sued in equity to set aside the trust-deed, and obtained a decree declaring the deed null and void, and vesting all the right, title, and interest in the property in himself. *Held*, that under Rev. St. Mo. 1879, § 3692, providing that, in all cases where judgment is given for the conveyance of real estate, the court may by such judgment pass the title of such property without any act to be done on the part of the defendant, such decree passed the title to the property to defendants' grantor.—*Macklin v. Allenberg*, (Mo.) 13 S. W. 350.

24. In an action by the equitable owners of swamp land to cancel deeds thereof to defendants, it was alleged that defendants, as attorneys, associated themselves with plaintiff's attorney to secure a patent for the land from the county court. Plaintiffs' attorney testified that the deeds did not contain defendants' names when they were executed by plaintiffs, but that they were given him to fill out and deliver to whomsoever should get the land; that he (plaintiffs' attorney) did not pretend to own it, and that no consideration was ever paid to plaintiffs; that, having failed to obtain a patent from the court, he was induced to execute the deeds by one of defendants, who represented that he could procure the patent by reason of his relationship to the presiding judge. Plaintiffs' evidence showed that they had intrusted the matter entirely to their attorney. The evidence as to the credibility of the latter was conflicting, but his testimony, which was occasionally inconsistent, was corroborated, as were also the allegations of the petition, by defendants' first petition for the patent, which was irreconcilable with their answer. Subsequently defendants filed another petition in their own right, not recognizing the interest of plaintiffs' attorney, and obtained an order recognizing them as owners. Meanwhile, and on the day the present suit was commenced, one of defendants anxiously sought to transfer the land, and, on failing therein, remarked that, if he could have gotten it out of his hands before commencement of the suit, he would have made \$5,000. The other defendant, on two occasions, declared that he intended to and had robbed plaintiffs' attorney of his interest. Defendants' answer and testimony showed that their undertaking was not to get a patent, but to obtain the recognition of a claim which the court seemed to have sufficiently recognized by accepting the purchase-money notes of

plaintiffs' ancestor. *Held*, that a finding for plaintiffs would not be disturbed on appeal.—*Sayer v. Devore*, (Mo.) 18 S. W. 201.

ESTATES.

See, also, *Curtesy*; *Dower*; *Easements*; *Homestead*; *Tenancy in Common and Joint Tenancy*.

Devised, see *Wills*, 25-33.

Life-tenant — Purchase of outstanding claim.

1. Testator left all his property to his wife for life, remainder to his children. There was an adverse claim to part of the land in testator's possession, on which his dwelling was located, which after his death his wife compromised, taking a deed in her own name, and paying for it with money obtained from her father's estate, though she had money left by testator. Plaintiff, one of the children, after selling and conveying all her interest in the land and personalty left by her father, brought action for the land deeded to her mother, claiming it under a deed from her. *Held*, that the mother did not obtain title against the estate, and that plaintiff's conveyance had passed all her interest in the land.—*Scott v. Proctor*, (Ky.) 18 S. W. 790.

Rights of remainder-man.

2. Where defendant had an estate by curtesy in certain lands devised, and the fee of a part of such lands in another state was mortgaged by him to third parties to secure a debt, it was proper for the court of chancery, at the instance of the remainder-men, to put defendant's curtesy right, in that part of the lands in this state, in the hands of a receiver, for the purpose of paying the indebtedness on the lands so mortgaged.—*Webb v. Trustees of First Colored Baptist Church*, (Ky.) 18 S. W. 362.

ESTOPPEL.

Res adjudicata, see *Judgment*, 6-21.

By deed.

1. In an action against the sheriff by persons claiming under defendants in execution, for the proceeds of the property sold in excess of the debt, where it is shown that plaintiffs' agent bought the property for them, and gave the sheriff a receipt for such excess, and received a deed to plaintiffs, they cannot recover.—*State v. Finn*, (Mo.) 18 S. W. 712.

2. A mortgagee's wife, who joined in the execution of the mortgage, which covered the homestead, cannot complain that it was given for future advancements, where these are less than the sum to secure which the mortgage purports to be given.—*Louisville Banking Co. v. Leonard*, (Ky.) 18 S. W. 521.

By record.

3. A recital in an agreed statement of facts, in ejectment, that plaintiff's grantor "died in 1871 intestate, and her husband in 1864 intestate," is not such a precise affirmation that plaintiff's grantor was a *feme covert* at the time of her husband's death as to estop defendants, in a subsequent partition proceeding of the same land, from showing that she had been divorced in 1860, before she executed a deed of trust of the land to defendants.—*Sutton v. Dameron*, (Mo.) 18 S. W. 497.

4. A decree of another state found that an exchange of land owned by complainant in that state for land of defendant in Texas was obtained by fraud, and directed reconveyances. *Held*, that complainant was not estopped from claiming the land in Texas where it appeared that he never complied with the terms of the decree, that he afterwards assumed to own the land by conveying it, and it did not appear that he ever claimed the land which he exchanged.—*Fryer v. Meyers*, (Tex.) 18 S. W. 1025.

5. Testimony by a witness that he became book-keeper for a corporation at a time when it had no minute-book; that he wrote up, in a cer-

tain book, minutes of meetings of directors, purporting to have been held in previous years, from memoranda and dictation furnished by the president, and that he did not know of such meetings, though he would have known of them if they were held, and was satisfied that they were not held,—is not admissible to rebut, when offered by the corporation, evidence from the book, which is identified by the corporation's secretary as the only book in which records of the directors' meetings are kept, of what purports to be a record of a certain meeting of the directors.—*McIlhenry v. Binz*, (Tex.) 18 S. W. 655.

In pais.

6. Where land in which a minor has an interest has been exchanged by his co-tenant for other land, and he, after reaching majority, and with a full knowledge of the facts, demands and receives part of such other land, he cannot claim an interest in the land given in exchange.—*Manney v. Allep*, (Tex.) 18 S. W. 989.

7. Where bonds belonging to a married woman are received and sold by her husband as her trustee, and the money is loaned to a firm of which the husband is a member, the note being made payable to the husband as trustee for his wife, the firm is estopped to deny the trust.—*Martin Brown Co. v. Perrill*, (Tex.) 18 S. W. 975.

8. Where a contract for publishing a book fixes its cost at \$1.39 per page, each page to contain 43 lines, consent by the author to a change of 39 lines to the page, after being informed by the publishers that it would not increase the cost, does not estop him from resisting an increased demand by the publishers on account of the change.—*Weed v. Dyer*, (Ark.) 18 S. W. 592.

9. The fact that personalty belonging to the estate of a decedent is divided between the heirs in accordance with a mistaken construction of an agreement between the heirs for a division of the estate, does not estop an heir to claim that she is not bound to divide the realty.—*Pegues v. Haden*, (Tex.) 18 S. W. 171.

— By declarations and conduct.

10. Where one has taken the proceeds of a partition sale, and receipted therefor, with knowledge of the source of the proceeds, she cannot repudiate the transaction, though the partition proceedings were void for irregularities.—*McClanahan v. West*, (Mo.) 18 S. W. 674.

11. An attachment was levied on lumber which had been loaded by defendant and consigned to the H. L. Co. under a contract. After the levy was made, the agent of the H. L. Co. told plaintiff's agent that the company did not claim the lumber, and would settle for it if plaintiff would be responsible to defendant. The H. L. Co. on the next day gave bond and retained the lumber, of which plaintiff was notified. The levy was not released in consequence of this statement, nor did plaintiff in any way act upon it. *Held*, that the H. L. Co. was not estopped by the declaration of its agent to claim the lumber.—*Hope Lumber Co. v. Foster & Logan Hardware Co.*, (Ark.) 18 S. W. 731.

12. Oral promises of a person in interest, who is not joined as a party to a suit for land, that, if he is not so joined, he will hold himself bound by the judgment, as if he had been made a party, cannot estop him to afterwards set up that he was not a party, and that the judgment did not bind him, where it appears that, if he had been made a party, he had a good defense, since in such case failure to make him a party did not prejudice the party relying on his promises.—*Masterson v. Little*, (Tex.) 18 S. W. 154.

— Silence and acquiescence.

13. In an action to recover certain real estate, it appeared that the land had been sold under a mortgage executed by plaintiff, and purchased by the mortgagee, who conveyed to one H., with a stipulation that H. should reconvey to the plaintiff on the payment of a certain sum. Afterwards defendant entered upon the land as agent for plaintiff, and plaintiff having failed to make the payment required, H. sold the land to defendant. Plaintiff consented to the sale, and knew defendant had

taken possession and made improvements, and acquiesced therein for a number of years. *Held*, that he could not now attack defendant's possession on the ground that he held as agent merely.—*Bowen v. Stone*, (Ky.) 13 S. W. 361.

14. Where one owning an undivided interest in land purchased the dower interest, and was a party to a suit in which "his undivided interest in the dower" was sold, it being included in the decree by an amendment, and received pay therefor, without taking any steps to correct the decree, it will be presumed, after the lapse of 30 years, that he consented to the amendment, and he cannot question the purchaser's title.—*Gill v. Buckner*, (Ky.) 13 S. W. 908.

15. P., as agent for H., sold certain land to C., taking notes therefor. By mistake an unpaid note was delivered by P. to C., and P., believing all the notes were paid, delivered the deed for the lands. Upon the discovery of the mistake, P. agreed with H. that he would be responsible for the unpaid purchase money, if it could not be recovered from C.; and H. took no steps to have the deed canceled, but acquiesced in the arrangement. *Held*, that one claiming under H. was estopped from claiming that no title passed under the deed, it being delivered by mistake.—*Crossland v. Powers*, (Ark.) 13 S. W. 722.

16. Where a father in embarrassed circumstances buys land, and takes a deed in the name of his son, with the understanding that the latter should hold the title for his benefit, and on the faith of such understanding builds on the land, plate it, and sells many of the lots, the widow and heirs of the son, after 25 years of non-claim, are estopped to assert title to the land as against the father's grantees, though they have made no improvements on the land, and though the deed to the son was duly recorded.—*Olden v. Hendrick*, (Mo.) 13 S. W. 821.

Pleading.

17. A father bought land and had the title conveyed to his son. The father afterwards conveyed part of the land, the widow and heirs of the son making no claim to the land for 25 years. The father's grantees, on their own motion and without objection, were made parties to an action of partition between the widow and children of the son, and by their answer set up these facts, and averred that by reason thereof the widow and children were estopped. No objection was taken by way of demurrer, or motion to make more definite and certain. *Held*, after judgment, to sufficiently plead the estoppel.—*Olden v. Hendrick*, (Mo.) 13 S. W. 821.

EVIDENCE.

See, also, *Deposition; Witness*.

Admissibility, see *Malicious Prosecution*, 6-12; *Trespass to Try Title*, 9-27; *Trover and Conversion*, 1.

Burden of proof of contributory negligence, see *Negligence*, 6.

Conclusions, see *Breach of Marriage Promise*, 2. Expectation of life, see *Death by Wrongful Act*, 8, 9.

In actions on bail-bonds, see *Bail*, 12, 13.

— contracts, see *Contracts*, 7.

— insurance policies, see *Insurance*, 25-28.

— note, see *Negotiable Instruments*, 8, 9.

criminal cases, see *Abduction*, 2; *Assault and Battery*, 2, 3; *Burglary*, 5-8; *Criminal Law*, 29-45; *Disorderly House*, 3-5; *Embezzlement*; *Forgery*; *Gaming*, 7-9; *Homicide*, 32-49; *Incest*, 2, 8; *Larceny*, 12-27; *Malicious Mischief*; *Perjury*, 3-5; *Prostitution*; *Receiving Stolen Goods*, 1-3; *Robbery*, 2-4; *Seduction*, 1. election contest, see *Elections and Voters*, 2. will contest, see *Wills*, 18-20.

Objections to, see *Trial*, 6.

Of master's negligence, see *Master and Servant*, 22-25.

testamentary capacity, see *Wills*, 5-7.

Pleading and proof, variance, see *Pleading*, 12-14. Presumption as to possession, see *Adverse Possession*, 5.

Reception, see *Criminal Law*, 17, 18; *Trial*, 2-5. Review of weight and sufficiency, see *Appeal*, 37-48.

Judicial notice.

1. The situation of a city with reference to the boundary lines of the county in which it is situated is a matter of public notoriety, of which the courts will take judicial notice.—*Forehand v. State*, (Ark.) 13 S. W. 723.

Best and secondary.

2. Parol evidence of the contents of a letter, which is not produced or accounted for, is not admissible.—*Mugge v. Adams*, (Tex.) 13 S. W. 830.

3. The fact that an officer has made return to a writ of attachment showing his action in the premises does not prevent him from testifying, in an action brought by one not a party to the writ, as to his seizure and disposition of the goods levied on.—*Perry v. Stephens*, (Tex.) 13 S. W. 984.

4. Secondary evidence of the contents of a letter addressed to plaintiff is admissible on testimony of his daughter that she took charge of it when received; that she was in charge of the house, and did all the business in caring for her parents, who were very old; that she had searched the house for the letter before coming to the trial, and could not find it; and that she supposes it was among some letters she destroyed some time ago, there being nothing to show that it was willfully destroyed.—*Henry v. Diviney*, (Mo.) 13 S. W. 1057.

5. An affidavit by plaintiff's attorney that an original recorded deed is lost, and that plaintiff has made diligent search without being able to find it, is sufficient to authorize the introduction in evidence of a certified copy of the deed.—*Foot v. Silliman*, (Tex.) 13 S. W. 1032.

6. A decree of partition, made on the report of commissioners based on the consent of the parties when no want of jurisdiction in the court to make partition is shown, is admissible in evidence without introducing the written agreement between the parties showing such consent, or the report of the commission.—*Warren v. Fredericks*, (Tex.) 13 S. W. 643.

7. Under Rev. St. Tex. art. 586, which requires corporations to keep a record of all business transactions, and article 601, which makes such records, or copies thereof, authenticated by the signatures of the president and secretary under the seal of the corporation, competent evidence in any action or proceeding to which such corporation may be a party, the best evidence of an assessment made by a board of directors is the record of the order of the board, which must be produced in an action by the corporation to collect the assessment, unless some sufficient reason is shown why it cannot be produced.—*Guadalupe & San Antonio Rivers Stock Ass'n v. West*, (Tex.) 13 S. W. 807.

8. Under Rev. St. Tex. art. 2252, providing that certified copies of the records of all public officers shall be admissible as evidence in all cases where the records themselves would be admissible, a certified copy of title from the general land-office is admissible, though the original is not produced or accounted for.—*Van Sickle v. Catlett*, (Tex.) 13 S. W. 81.

9. Rev. St. Tex. art. 2256, provides that certified copies of conveyances which were filed in the office of any alcalde or judge in Texas prior to the first Monday in February, 1837, shall be admissible in evidence, and have the same force and effect as the originals. *Held*, that a copy of an act of sale, dated September 5, 1835, certified by the clerk of the county of which the original was an archive, is admissible, though the original was not produced, nor its execution proved.—*Van Sickle v. Catlett*, (Tex.) 13 S. W. 31.

10. Evidence of a rule of defendant which was printed on its applications for employment, and was required to be signed by every applicant who obtained a position, and was supposed to be known to him, is inadmissible, in an action for the death of an employee, in the absence of an offer to produce the writing itself, or to account for its absence, or to show that decedent had signed it, or

that he knew of the existence of the writing or rule.—*Missouri Pac. Ry. Co. v. Lamothe*, (Tex.) 13 S. W. 194.

Hearsay.

11. In an action on a due-bill, evidence of an admission by one not shown to be an agent of defendant, that he had told plaintiff before purchasing the due-bill that it was all right, is incompetent.—*Noel v. Denman*, (Tex.) 13 S. W. 318.

Declarations and admissions.

12. An entry against interest made by one who is not connected with the litigation, is admissible in evidence when it is offered after his death, if he could have been examined as to it in his life-time.—*Heidenheimer v. Johnston*, (Tex.) 13 S. W. 46.

13. Declarations of plaintiff's agent, made to a third party when defendant was not present, are inadmissible in evidence against defendant.—*Shiner v. Abbie*, (Tex.) 13 S. W. 618.

14. A prisoner released upon a bail-bond made by his brother absconded. It appeared that after his arrest certain lands were conveyed by his father to the bail for an expressed consideration of \$2,000, and after his release were reconveyed for the same expressed consideration. The bondsman would have been unable to qualify except as owner of such lands. *Held* that, in a suit to set aside the reconveyance to satisfy a judgment on the bond, the bondsman not being a witness, it was proper, in the absence of proof that he was a party to the alleged conspiracy, to exclude evidence as to his declarations in his father's absence, that the conveyance was made to him to enable him to go on the bond; that afterwards a reconveyance was executed, and was to be delivered if the accused appeared for trial, otherwise not; but that the father obtained the deed under the pretense of having the land listed for taxation, and, without the bondsman's knowledge or consent, had it recorded.—*Commonwealth v. Cremins*, (Ky.) 13 S. W. 884.

Opinion evidence.

15. In an action for injuries caused by a defective bridge, a non-expert witness cannot testify that, judging from its appearance and his inspection of the bridge, he should think it needed repairs.—*Baldrige & Courtney Bridge Co. v. Cartrett*, (Tex.) 13 S. W. 8.

16. Evidence of a witness who testifies: "I don't know anything about a bridge of that kind. It seemed to be good, except the sidings, which were shabby,"—is not admissible.—*Baldrige & Courtney Bridge Co. v. Cartrett*, (Tex.) 13 S. W. 8.

Expert testimony.

17. An hypothetical question to an expert as to the number of persons who should be put in charge of a water train where there were four regular trains, each day, passing over the road, is properly allowed, though it appears that only two of the trains would be met by the water train, as the opposite party can embody that fact, if material, in a question put on cross-examination.—*Gulf, C. & S. F. Ry. Co. v. Compton*, (Tex.) 13 S. W. 667.

18. Expert evidence, by one who has been a sailor nearly all his life, and who is acquainted with a certain locality, as to the size of the waves that would be caused in such locality by a wind blowing 60 miles an hour, is admissible, though other persons actually saw the waves.—*Smith v. Sabine & E. T. Ry. Co.*, (Tex.) 13 S. W. 165.

Documents.

19. The bank pass-book of a state treasurer, which, according to the proof, was regularly and accurately kept by him in connection with the discharge of his duties, was competent to go to the jury as a part of his official transactions, in a suit against his sureties for a defalcation.—*Commonwealth v. Tate*, (Ky.) 13 S. W. 113.

20. A lease of San Jacinto donation lands, though void, and the mesne conveyances based on it, may be introduced in evidence to show the right of those claiming under them to have the purchase money refunded, though the mesne conveyances attempt to convey an absolute title.—*Williams v. Wilson*, (Tex.) 13 S. W. 69.

21. A photographic copy of the field-notes of a survey is admissible as bearing on the question whether a certain line was actually measured.—*Ayers v. Harris*, (Tex.) 13 S. W. 768.

22. Though Rev. St. Tex. art. 4389, required that decrees of probate courts, when offered as evidence of title, must have been recorded in the county where the land lies, such decrees, showing distribution of land among heirs of one through whom title is claimed, are admissible to show acts of ownership, though not so recorded.—*Rodriguez v. Hayes*, (Tex.) 13 S. W. 296.

23. The admission in evidence of a deed through which defendant derails title is not objectionable on the ground that it does not come from the proper custody, where it appears that the deed is over 30 years old, and that, on search suggested by the recitals in a power of attorney, found among the grantee's papers, executed by the grantor, authorizing certain persons to make a valid conveyance if the deed should prove defective, it was found by the attorney of the grantee's heirs among papers labeled in the grantee's name, in the county clerk's office, which was the repository of colonial grants, and that since then it has been in the custody of such attorney and the heirs.—*Warren v. Fredericks*, (Tex.) 13 S. W. 643.

24. In an action by a banker to recover an alleged overdraft of defendant's account, plaintiff's evidence was that defendant had deposited only \$509.65, while defendant's evidence was that he had deposited \$1,700. The books of the bank showed a credit in defendant's favor of \$509.65, and a debit of \$1,700. *Held*, that a letter written to defendant by the bank's book-keeper, who had been employed after the transaction had taken place, which stated that the books had not been kept correctly, is not incompetent in evidence, because it was written a month after the new book-keeper had been in charge of the books, and just as he was leaving, and because it was in proof that he was short in his accounts.—*Ellis v. Garvey*, (Tex.) 13 S. W. 320.

Books of account.

25. In a contest between an attaching creditor of a firm and other creditors, who have intervened, the books of the firm are not competent evidence on behalf of the intervenors.—*Martin Brown Co. v. Perrill*, (Tex.) 13 S. W. 975.

26. Nor are the books made competent as declarations of the firm, on the ground that there was a conspiracy between the firm and the attaching creditor to defraud intervenors, until such conspiracy is proved.—*Martin Brown Co. v. Perrill*, (Tex.) 13 S. W. 975.

Ancient instruments.

27. A deed, over 30 years old, coming from the proper custody, under which title has long been asserted, is admissible in evidence without producing the power of attorney under which, according to its recitals, it was executed.—*O'Donnell v. C. R. Johns & Co.*, (Tex.) 13 S. W. 376.

Parol evidence.

28. A receipt by a succeeding treasurer, purporting to be in full of the balance due the county from a deceased treasurer on a certain fund, is only *prima facie* evidence of payment in full; and the county can show the amount due, and the treasurer's personal representative the amount paid, by other evidence.—*Cole County v. Dallmeyer*, (Mo.) 13 S. W. 687.

29. In approving official bonds the county court acts in a ministerial capacity; and, though it is required to keep a record of its proceedings, parol evidence of what was said and done when it approved the bond is admissible to show that it had knowledge of the fact that the name of one of the sureties had been erased therefrom without the knowledge or consent of his co-sureties.—*State v. McGonigle*, (Mo.) 13 S. W. 758; *McGonigle v. State*, *Id.* 761.

30. In an action on notes given for the purchase price of land by a *bona fide* indorser, parol evidence that the sale was conditional is inadmissible.—*Heffron v. Cunningham*, (Tex.) 13 S. W. 259.

81. Though notes of a vendee were executed to the vendor, and this is shown by the deed, it is competent to show that, in pursuance of an agreement made or existing at their execution, they were at the same time indorsed to the creditors of the vendor, as this does not contradict the fact of their execution to the vendor.—*Traders' Nat. Bank v. Clare*, (Tex.) 13 S. W. 188.

82. In an action on a note, answers alleging that defendants were induced to sign it as sureties by false representations, made by the payee's agent, that the note was given for money to be borrowed by the maker to purchase cattle, and that the money should not be delivered to him until he had purchased the cattle, and executed a mortgage thereon to defendants, are not allowable, as they would destroy the written contract by parol evidence.—*Lanius v. Shuler*, (Tex.) 13 S. W. 614.

83. Though a mortgage purports to be given for a fixed sum, parol evidence is admissible to show that it was given to secure future advances, and their amount.—*Louisville Banking Co. v. Leonard*, (Ky.) 13 S. W. 521.

84. An instrument reciting that plaintiff had sold to defendant land for a certain price, part cash, and "the balance in seven payments of \$200 each," payable at stated times, with interest, and that plaintiff was to make defendant a deed as soon as the land was surveyed, is plain and unambiguous; and parol evidence that it was intended that notes should be given for such deferred payments, a vendor's lien reserved, and the giving of the notes, made a condition precedent to the delivery of the deed, is not made admissible by plaintiff's allegation that the parties were ignorant of the form and effect of legal documents, and supposed the terms of the one in question had the effect sought to be shown.—*Moore v. Giesecke*, (Tex.) 13 S. W. 290.

Proof of handwriting.

85. A witness who has not qualified himself to testify to a signature to a letter which is not produced, cannot testify that the signature was similar to that to a paper in the case.—*Mugge v. Adams*, (Tex.) 13 S. W. 880.

Examination.

Of witness, see *Witness*, 9, 10.

EXCEPTIONS, BILL OF.

Part of record on appeal, see *Appeal*, 17-20.

Settlement and signing.

1. A bill of exceptions which the trial judge refused to sign, but certified was not true, and which was not signed by the by-standers, is not a bill within Rev. St. Mo. § 3635 *et seq.*—*Klotz v. Perteet*, (Mo.) 13 S. W. 955.

Time of filing.

2. Under Rev. St. Mo. 1879, § 3636, as amended by act of March 28, 1885, providing that exceptions may be written and filed during the term of the court at which they are taken, "or within such time thereafter as the court may by an order entered of record allow," the judge has no authority to make an order in vacation extending the time for filing a bill of exceptions, without the consent of the opposing party.—*State v. Mayors*, (Mo.) 13 S. W. 88.

3. Under Mansf. Dig. Ark. § 5157, providing that time to reduce exceptions to writing shall not be given beyond the succeeding term of court, an order fixing the time in which a bill of exceptions shall be signed and filed is final, and the court has no authority to shorten or extend the time at a subsequent term.—*Davies v. Nichols*, (Ark.) 13 S. W. 129.

Amendment.

4. A bill of exceptions, when signed and filed, becomes part of the record, and may be amended like any other record; and where a bill showed on its face that the judge intended to cause certain written charges given, and others refused, to be inserted therein, and this, through mistake, was not

done, it was error, on petition to amend the bill, to exclude parol evidence to identify such written charges, on the ground that the time for filing a bill of exceptions had elapsed.—*Martin v. St. Louis, I. M. & S. Ry. Co.*, (Ark.) 13 S. W. 765.

Necessary contents.

5. Where the bill of exceptions shows that a judgment and petition in a case between plaintiff and a third person were offered in evidence, but they are not made part of the bill, papers in the record, purporting to be the judgment and petition in an action between plaintiff and such third person, but not identified as the papers referred to in the bill of exceptions, do not form part of the bill.—*Taylor v. Davis*, (Tex.) 13 S. W. 642.

EXECUTION.

See, also, *Attachment; Garnishment; Judicial Sales.*

In whose name issued.

1. Under Rev. St. Tex. art. 2231, providing that executions shall correctly describe the judgment, stating the names of the parties, an execution issued in the name of C. alone, on a judgment rendered in favor of C. and L. as partners, is not authorized by the judgment, and a sale of lands thereunder is invalid.—*Cleveland v. Simpson*, (Tex.) 13 S. W. 851.

Claims by third persons.

2. Where property seized under an execution is claimed by a third person, it is immaterial whether its value is properly estimated in the return, if it is properly assessed on the claimant's bond.—*Carney v. Marsalis*, (Tex.) 13 S. W. 636.

3. Failure to indorse on an execution the name of the court to which a bond of a claimant was returned is harmless error, when such indorsement is made on the bond itself, and the claimant finds the proper court, and duly defends the suit there.—*Carney v. Marsalis*, (Tex.) 13 S. W. 636.

Sales.

4. In ejectment it appeared that the land had been defendant's homestead, but that, at the time of its sale under execution, he was absent, and did not make the proper claim before the sale as required by Mansf. Dig. Ark. § 3006. Under plaintiff's direction notice of sale was published as required by section 3049, but in a remote paper of small circulation, and posted in obscure places on the premises. Defendant set up these facts, and prayed the cancellation of plaintiff's deeds. *Held*, that the sale was collusive and fraudulent, and plaintiff's title should be canceled.—*Jennings v. Carter*, (Ark.) 13 S. W. 800.

5. A judgment entry foreclosing a lien on land provided that it should not be enforced unless so directed by plaintiff, and the case should remain on the docket for further orders. No sale having been directed, an order was made four years later that the case be filed away, "subject to being redocketed." After four years more the land was sold by plaintiff's direction. *Held* no such laches as would destroy his lien as against the debtor.—*Pittman v. Wakefield*, (Ky.) 13 S. W. 525.

6. The fact that plaintiff caused the land to be sold without first having the case redocketed gives the debtor no ground of objection thereto, when he was notified that the sale would be ordered, and suffered no injury from the omission.—*Pittman v. Wakefield*, (Ky.) 13 S. W. 525.

7. In an action to set aside a sale of land under execution for irregularities and inadequacy of price, it appeared that plaintiff had sued defendant to recover the land, and recovered judgment. On appeal the judgment was reversed, with costs against plaintiff. Plaintiff's interest in the land, of the value of \$1,200, was sold under execution for the costs, for \$55 only, to a third person, who after the sale conveyed one-third to defendant, and one-third to the wife of defendant's attorney. The evidence showed that there was no agreement between the purchaser and his grantees before the sale, and that the conveyances were made solely as a compromise of defendant's claim of title to.

the land. *Held*, that the judgment of the court refusing to set the sale aside would not be disturbed.—*Jones v. Pratt*, (Tex.) 13 S. W. 887.

Sales—Rights of purchasers.

8. A quitclaim deed under an execution sale which was void for fraud, confers no title to one who purchased through his attorney, as notice of the fraud to the attorney who placed the proceedings of sale on foot is notice to the client.—*Jennings v. Carter*, (Ark.) 18 S. W. 800.

9. A judgment entry foreclosing a lien on land provided that it should not be enforced unless so directed by plaintiff, and the case should remain on the docket for further orders. No sale having been directed, an order was made four years later that the case be filed away, "subject to being re-docketed." After four years more the land was sold by plaintiff's direction. *Held*, that the purchaser under the sale, and persons who took a mortgage after the filing away of the case, must be held to have had notice of all the proceedings, and are bound thereby.—*Pittman v. Wakefield*, (Ky.) 13 S. W. 525.

EXECUTORS AND ADMINISTRATORS.

See, also, *Descent and Distribution; Wills*.

Delivery of land to heirs, see *Descent and Distribution*, 2.

Appointment.

1. A petition for letters of administration, by a person not related to deceased, recited that deceased was a transient person, and had no permanent domicile in Texas, that he was entitled to land from the government, and that there were no kindred of deceased known to petitioner. Letters were granted, and land of deceased was sold by order of the court. The inventory showed that the land was acquired under a bounty warrant issued to deceased's estate for his faithful services "in the army of the republic, and having been massacred with Fannin at Goliad." *Held* that, since Pasch. Dig. Tex. art. 1398, (Act Tex. Jan. 14, 1841,) prohibited administration on the estate of such a soldier unless the person applying was next of kin, or had authority from the heirs or next of kin, the administration was a nullity.—*Templeton v. Falls Land & Cattle Co.*, (Tex.) 13 S. W. 964.

2. The consent of minor heirs is not necessary to the appointment of an administrator of an estate, and where there are no relatives of decedent living in the state the appointment is within the discretion of the probate court.—*Beddinger v. Smith*, (Ark.) 18 S. W. 784.

3. Plaintiff was appointed temporary administrator to sue for the recovery of land belonging to the estate of a deceased person, under Rev. St. Tex. art. 1887. Under section 1880 such temporary appointment ceased to operate at the next regular term of the county court, unless an order was made at that time continuing the appointment. More than one term of the county court intervened between the appointment of plaintiff and the trial of the cause. *Held*, that defendant could not compel plaintiff to show his authority to prosecute the suit under a general denial or plea of not guilty, but only under a special plea denying plaintiff's authority.—*Dignowity v. Coleman*, (Tex.) 13 S. W. 857.

Sole executor.

4. Where one of the two executors of an independent will, after qualifying and executing two deeds, refuses to have anything more to do with the estate, the remaining executor may be treated by creditors of the estate as sole executor.—*Bennett v. Kiber*, (Tex.) 13 S. W. 220.

Bond—Discharge of sureties.

5. Plaintiff, as administrator *de bonis non*, obtained judgment against a former administrator and his sureties. Execution was issued on the judgment, and levied on property of the principal and the sureties sufficient to satisfy the judgment; but the execution was recalled by plaintiff, who extended time to the principal and took a deed of

trust from him as additional security, and notified the sureties that they were released. The sureties acted on the assurance that they were released, and the principal became insolvent. *Held*, that plaintiff, as administrator, had the power to extend the time, and give the release, and that the sureties were thereby discharged.—*West v. Brison*, (Mo.) 13 S. W. 95.

Assets.

6. Where land sold upon a judgment recovered by an executor is bid in by him at execution sale, and by mistake the sheriff's deed is made out to the heirs of the testator, the land becomes an asset of the estate, and the fact of the mistake may be shown in a subsequent suit between the devisees of the testator and parties deriving title from the executor.—*Bennett v. Kiber*, (Tex.) 13 S. W. 220.

7. In order to enable plaintiff to raise the purchase price of land which he had agreed to buy of several co-tenants, they conveyed to one of their number under a parol trust to procure a loan of the required amount, and then to convey to plaintiff, subject to the mortgage. She procured the loan, but died before executing a deed to plaintiff. *Held*, that the land was subject to administration as her estate for the purpose of paying the mortgage debt, though all the other tenants, who were her heirs, had conveyed to plaintiff, also an heir, in accordance with the original agreement.—*Cooper v. Loughlin*, (Tex.) 13 S. W. 87.

Allowance of claims.

8. Where a valid judgment has been rendered on a note, the note is no longer a demand to be presented for allowance against a decedent's estate.—*Wernse v. McPike*, (Mo.) 13 S. W. 809.

9. Service of the process of a court not having jurisdiction of an action against an administrator is not an exhibition of a demand against the estate which can be amended after the time limited for exhibiting the demand.—*Wernse v. McPike*, (Mo.) 13 S. W. 809.

10. Gen. St. Mo. 1865, p. 502, § 5, provides that any person may exhibit his demand against an estate, by serving on the executor or administrator written notice of his claim, with a copy of the instrument or account on which the claim is founded; and such claim shall be considered legally exhibited from the time of serving such notice. Page 502, § 8, provides that any person having a demand against an estate may establish it by the judgment of some court of record, in the ordinary course of proceedings, and exhibit a copy of such judgment to the court having probate jurisdiction. Page 504, §§ 26, 27, provide that the clerk of the probate court shall keep an abstract of all judgments of other courts filed, and of all demands established, in said court against such estate, which shall show their amount, date, class, and to whom payable; and that if any "judgment" of a court of record "be filed" in said court, and when "demands" are "allowed" against an estate, such court shall determine its class, and the clerk shall make an entry thereof in his abstract, and, when thus classed, the executor or administrator may satisfy such demand according to such classification. *Held*, that where a judgment was rendered against an administrator on an intestate's note, in a circuit court, the filing of the judgment in the probate court for classification was sufficient, without a presentation for allowance, as in case of simple "demands." Overruling *Bryan v. Mundy*, 14 Mo. 458; *Ewing v. Taylor*, 70 Mo. 894; and *Wernse v. McPike*, 76 Mo. 249.—*Wernse v. McPike*, (Mo.) 13 S. W. 809.

11. Under Rev. St. Mo. 1879, § 658, providing that "all contracts which, by the common law, are joint only, shall be construed to be joint and several," demands against a partnership are several as well as joint; and, under sections 184, 213, providing for the classification of all demands against the estate of a decedent, and the payment of the demands so classified "*pro rata*," according to classification, a demand against a partnership is entitled to share equally with the individual debts of one of the partners, in the administration of his estate.—*Hundley v. Farris*, (Mo.) 13 S. W. 892.

12. Act Tex. 1870 provides that at each term of court all claims against a decedent's estate which have been allowed and filed shall be examined and approved or disapproved by an order duly entered, and that the order of approval of a claim has the force and effect of a judgment. Act May 27, 1873, authorizes the clerk of the district court to approve and disapprove such claims in vacation, and requires the approval to be entered on record. *Held*, that the allowance of an account by the clerk during vacation, and the indorsement of his approval thereon, sufficiently establishes it as a claim to stop the running of the statute of limitations during the pendency of administration, though it is not entered on the record; such requirement being merely clerical.—*Wygal v. Woodlief's Heirs*, (Tex.) 13 S. W. 569.

13. Under the above provisions, an account which was not approved by the district court until after it was barred is not a claim against the estate; the order of approval being necessary to establish it as such.—*Wygal v. Woodlief's Heirs*, (Tex.) 13 S. W. 569.

14. The maker of a note, after the payee's death, gave a new one to his legatee, which he paid. He then sued the legatee to recover usury paid the payee. *Held* that, the action being solely against his legatee, the affidavit and proof required by Gen. St. Ky. p. 451, § 35, of demands against the estates of deceased persons, is not required.—*Eggen v. Huston*, (Ky.) 13 S. W. 919.

Settlement and accounting.

15. On final settlement the administrator took credit for \$436.59, and took a receipt from the widow as guardian of the minor children; but it appeared that he paid her no money at that time, and had only advanced her before then, in supplies and money, for the use of the children, \$140.35. *Held*, that the credit was improper except as to \$140.35.—*Ambleton v. Dyer*, (Ark.) 13 S. W. 926.

16. After the second annual settlement an administrator applied for an order of sale of the realty to pay allowed claims, which, had his account been properly stated, could have been paid out of the personality. *Held*, that there was no necessity for such sale, nor for keeping open the administration, and that all expenses thereafter incurred, including administrator's commissions, should be disallowed.—*Ambleton v. Dyer*, (Ark.) 13 S. W. 926.

17. The administrator is not entitled to credit for taxes paid on land sold to pay debts after its sale.—*Ambleton v. Dyer*, (Ark.) 13 S. W. 926.

18. In an action by the heirs of an estate to surcharge and falsify the accounts of the administrator, it appeared that in his first annual settlement the administrator charged himself with \$329.83 rents collected, and took credit for \$101.80 paid to the widow as her share. The evidence did not show the exact amount of the rents collected. *Held* that, as the widow was only entitled to one-third of the rents, it would be presumed that they amounted to three times what was paid her; hence the account should be charged with \$75.57 additional.—*Ambleton v. Dyer*, (Ark.) 13 S. W. 926.

19. An administrator, on appeal to the district court from an order of the county court refusing to allow an exhibit filed therein, asking for an allowance for extra services, cannot amend his pleadings in the district court, and set up other claims against the estate not embraced in his exhibit, since Rev. St. Tex. art. 2193, requires such claims to be filed in the county court, and there entered on the claim docket.—*Houston v. Mayes*, (Tex.) 13 S. W. 1036.

— Review.

20. The approval by the probate court of the final account and settlement of an administrator is a judgment, and, in the absence of appeal, *certiorari*, or bill of review, conclusive on the distributees and creditors. It cannot be reviewed or annulled by the district court in a suit by a creditor on the administrator's bond, alleging a waste of assets by the payment of claims already barred by limitation.—*Jose San Roman Sobrinos v. Chamberlain*, (Tex.) 13 S. W. 634.

Liabilities.

21. The land sold to pay the debts of the estate brought \$400; but the purchaser failed to pay for it, and conveyed it to the administrator, who sold it for \$475. *Held*, that he was liable to the estate for the amount he obtained for the land.—*Ambleton v. Dyer*, (Ark.) 13 S. W. 926.

22. Pending the administration, a widow, as guardian of the minor children, obtained an order of sale of their land, and conveyed one tract to the administrator, receiving her own paper in payment, and he subsequently conveyed it to a third person. *Held*, that the wards could recover the purchase price from the administrator.—*Ambleton v. Dyer*, (Ark.) 13 S. W. 926.

23. She also sold him another tract, of which he took possession, but for which he never paid, and the sale was never approved. *Held*, that the wards could recover their interest in the tract.—*Ambleton v. Dyer*, (Ark.) 13 S. W. 926.

Sales under order of court.

24. A purchaser at an administrator's sale, where the records show want of jurisdiction, acquires no title.—*Templeton v. Falls Land & Cattle Co.*, (Tex.) 13 S. W. 964.

25. In an action for the recovery of real estate, where defendant's title was based upon an administrator's sale and deed, the record of the probate court did not show any petition for the appointment of the administrator except the statement, in the order of appointment, that on a certain day the petition came on to be heard. *Held*, that it would be presumed that the probate court had jurisdiction, and that sufficient facts were before the court to authorize the appointment of the administrator.—*Mills v. Herndon*, (Tex.) 13 S. W. 854.

26. A report of sale by an administrator, showing that land belonging to his decedent's estate had been sold to a designated person, is not conclusive as to who the purchaser was, but the real purchaser may be shown by parol, though the decree of confirmation directed that conveyance be made to "the purchaser."—*Dodd v. Templeman*, (Tex.) 13 S. W. 187.

27. An administrator's sale cannot be collaterally attacked on the ground that the administrator himself was indirectly the purchaser of the land; the remedy being direct and timely proceedings by the persons interested in the estate. *Rutherford v. Stamper*, 60 Tex. 447, followed.—*Dodd v. Templeman*, (Tex.) 13 S. W. 187.

Widow's allowance.

28. An order of the probate court setting apart certain land of a decedent to his widow as an allowance in gross, free from all claims against the estate, does not give the widow the right to sell the interest of decedent's children in such land.—*Manney v. Allen*, (Tex.) 13 S. W. 989.

Actions.

29. The administrator, and not the heirs, of a deceased grantor of land, is the proper person to bring suit for the unpaid purchase money.—*Rachford v. Rachford*, (Ky.) 13 S. W. 1076.

— Appeal.

30. An administrator may take an appeal from a judgment of the probate court, and prosecute it to the same extent his intestate might have done.—*Davies v. Nichols*, (Ark.) 13 S. W. 129.

Exemplary Damages.

See *Damages*, 1, 2.

EXEMPTIONS.

See, also, *Conflict of Laws*, 1.

From garnishment, see *Garnishment*, 4-8.

taxation, see *Taxation*, 7.

Of pension money, see *Pension*.

Proceeds of insurance policy.

1. In an action to subject the proceeds of a life insurance policy to the payment of the debts of the deceased, it appeared that the deceased, as

guardian of plaintiff, had received funds belonging to his estate; that at the time he was perfectly solvent; that he insured his life, for the benefit of his wife and children, in the sum of \$33,000, paying the premiums for several years, and then taking a paid-up policy; that he afterwards died insolvent. *Held* that, under Act Ky. 1870, providing that life insurance made by a husband for the benefit of his wife and children, whether insolvent or not, is valid as against creditors unless made with intention to defraud creditors, plaintiff was not entitled to have such insurance money applied on his demands.—*Hise v. Hartford Life Ins. Co., (Ky.)* 18 S. W. 367.

Burden of proof to show exemptions.

2. Under the provisions of Mansf. Dig. Ark. § 3006, requiring a debtor who claims property to be exempt from execution to schedule the same, and file the schedule with the officer levying the writ, the burden is upon such debtor, or one claiming under him, to show affirmatively that the property levied on is exempt.—*Blythe v. Jett, (Ark.)* 13 S. W. 137.

Experts.

See *Evidence*, 17, 18.

Ex Post Facto Law.

See *Constitutional Law*, 8.

FACTORS AND BROKERS.

Factor's lien.

1. A merchant who has made advances on wool which he expects to buy acquires no right thereto, before its delivery to him, as against a mortgagee of the owner; the wool being all the time in possession of a third party.—*Frost v. Deutsch, (Tex.)* 13 S. W. 981.

Right to commissions.

2. Where a real-estate agent, employed to sell land, introduces the owner to a purchaser, and negotiations are commenced through such introduction, the agent is entitled to his commissions, though a sale is not effected at first, and the owner declares the transaction off, but afterwards makes the sale himself, without the aid of the agent.—*Scott v. Patterson, (Ark.)* 13 S. W. 419.

FALSE IMPRISONMENT.

When action lies.

An action for false imprisonment will not lie where the arrest and imprisonment are made, in due course, on regular proceedings of a court having jurisdiction of the offense charged.—*Finley v. St. Louis Refrigerator Co., (Mo.)* 13 S. W. 87.

FALSE PRETENSES.

Indictment.

1. An indictment for swindling, which fails to allege the ownership of the property acquired by the swindle, is fatally defective.—*Mays v. State, (Tex.)* 13 S. W. 737.

2. An indictment under Rev. St. Mo. § 1561, for obtaining property by false pretenses, which substituted "valuable thing" for "property," in the form prescribed thereunder, and, after the recitals, concluded with a separate paragraph, beginning, "All and singular, by means and by use of a trick," etc., thus failing to connect the charge with what had gone before by proper words, is bad.—*State v. Clay, (Mo.)* 13 S. W. 827.

3. In an indictment for falsely obtaining an option of purchase and power of attorney, the fact that the instrument, which is copied in full, recites that "the said parties of the first part * * * own, in the right of said Mrs. Eliza Splitlog, certain real estate and land situated," etc., does not supply the lack of a charge that defendant obtained the "property," as required by Rev. St. Mo. § 1561.—*State v. Clay, (Mo.)* 13 S. W. 827.

Obtaining option to purchase realty.

4. In an indictment for obtaining an option on real estate from a married woman, where the instrument relates to lands situated in Kansas, and no showing is made to the contrary, the common law is presumed to prevail therein; and as by the common law a married woman's contract to convey could not be enforced, the option contract was neither "property" nor a "valuable thing."—*State v. Clay, (Mo.)* 13 S. W. 827.

5. As the power of attorney was invalid, the indictment is not good under Rev. St. Mo. § 1335, which defines the crime of obtaining a written instrument, etc., with intent to cheat and defraud another.—*State v. Clay, (Mo.)* 13 S. W. 827.

6. It was also invalid because at common law a married woman's power of attorney was void, although executed jointly with her husband.—*State v. Clay, (Mo.)* 13 S. W. 827.

False Representations.

See *Decett.*

Fees.

Of clerk of court, see *Clerk of Court*.

Fellow-Servant.

Negligence of, see *Master and Servant*, 27, 28.

FENCES.

Prosecution for preventing removal.

One cannot be convicted under Pen. Code, Tex. art. 495b, of unlawfully preventing another from moving and rebuilding a fence, where there is any doubt, under the evidence, whether the prosecuting witness had the right to move the fence.—*Boyd v. State, (Tex.)* 13 S. W. 864.

FERRY.

Authority to grant license.

1. A state has authority to grant a license to operate a ferry across a stream constituting the boundary between it and a foreign country.—*Tugwell v. Eagle Pass Ferry Co., (Tex.)* 13 S. W. 654.

Enjoining rival ferry.

2. In a suit to enjoin the operation of a rival ferry, plaintiffs, on showing that they are licensed by law to operate their ferry, and have paid their tax, and that defendant has no license, are entitled to an injunction, though they allege in their petition that they have the exclusive ferry privilege; the commissioners' court, which granted the exclusive privilege, having no power to do so.—*Tugwell v. Eagle Pass Ferry Co., (Tex.)* 13 S. W. 654.

Findings.

Of court, see *Trial*, 28-30.

Fires.

Liability of railroad company, see *Railroad Companies*, 83.

Fixtures.

Lien, removal, see *Mechanics' Liens*.

FORCIBLE ENTRY AND DETAINER.

Defenses—Right of defendant to possession.

It is no defense to an action for forcible entry, where defendant entered into possession by means of threats amounting to force, that he was entitled to the possession under a lease from the owner; the remedy of such action being designed to protect the actual possession, whether right or wrong.—*Logan v. Lee, (Ark.)* 13 S. W. 422.

Foreclosure.

Of mortgages, see *Mortgages*, 21-33.

Foreign Corporations.

See *Corporations*, 9-11.

Foreign Judgment.

See *Judgment*, 26, 27.

Foreign Will.

See *Wills*, 21.

Forfeiture.

For non-payment of taxes, see *Taxation*, 15.

FORGERY.

Former jeopardy, see *Criminal Law*, 4.

Evidence.

On prosecution for forgery, the forged instrument must be put in evidence, or satisfactorily accounted for; and where the record only shows that it was offered, but not that it was read, it cannot be presumed that it was in evidence.—*Strickland v. State*, (Tex.) 18 S. W. 865.

Former Jeopardy.

See *Criminal Law*, 4-6.

FRAUD.

See, also, *Decett*; *Fraudulent Conveyances*.

Avoidance of sale.

In an action for the purchase price of a distiller's brand, an answer setting up that defendant purchased on the faith of plaintiff's representation that the brand was of good repute, and that plaintiff fraudulently concealed from defendant the fact that he had destroyed the value of the brand by the manufacture of a large quantity of inferior whisky, states a good defense.—*Dant v. Head*, (Ky.) 18 S. W. 1073.

FRAUDS, STATUTE OF.**Sufficiency of memorandum.**

1. Letters written by L. to defendant in reply to letters inclosing a written contract containing the terms of an oral agreement by which L. was to convey land to defendant, and asking L. to sign it, which acknowledge the receipt of the written contract, giving an excuse for not signing it at that time, though not disputing the correctness of it, and assuring defendant that there will be no trouble about his getting his share of the land, are not such memoranda in writing as will take the oral contract out of the statute of frauds.—*Masterson v. Little*, (Tex.) 18 S. W. 154.

Agreements relating to lands.

2. The fact that an agreement by a vendee to assume and pay the vendor's debts, made in consideration of the conveyance, was by parol, does not invalidate the transaction.—*Traders' Nat. Bank v. Clare*, (Tex.) 13 S. W. 183.

3. As the statute of frauds requires some memorandum of a contract for the sale of land to be in writing, signed by the party to be charged therewith, parol evidence that an agreement to sell land was part of a contract, the only part of which reduced to writing was an agreement to sell goods, is properly excluded.—*Westmoreland v. Carson*, (Tex.) 18 S. W. 559.

4. Under Rev. St. Tex. art. 548, providing that no estate of inheritance or freehold shall be conveyed from one to another unless the conveyance be in writing, subscribed and delivered by the party disposing of the same, an oral contract by one who owns land certificates, and who has located the land intending to apply for patents, whereby

he agrees to convey a part of such land to another in consideration of his rendering services as an attorney in respect to the land, and a decree of partition obtained by the latter setting off the land to him, cannot be pleaded as a defense by the attorney in a suit against him by one who received a deed of the land from the owner before the suit for partition was begun.—*Masterson v. Little*, (Tex.) 18 S. W. 154.

Who may raise objections.

5. One to whom a deed of land has been executed has the right to object that a contract to convey the land, previously executed by his grantor to a third party, is void under the statute of frauds.—*Masterson v. Little*, (Tex.) 18 S. W. 154.

Agreements not to be performed within a year.

6. Gen. St. Ky. c. 22, § 1, providing that no actions shall be brought on oral agreements not to be performed within one year from the making thereof, applies only to agreements not to be performed by either party within a year, and therefore such statute cannot be set up as a defense to an action for the second annual installment of the purchase price of certain personality, the use of which as his property the defendant has had from the beginning.—*Dant v. Head*, (Ky.) 18 S. W. 1073.

7. A contract to board a person for life, and one to let him retain property until he is reimbursed from the rents for the cost of an improvement, are not within the statute of frauds, as they may be performed within a year.—*Dailey v. Cain*, (Ky.) 18 S. W. 424.

FRAUDULENT CONVEYANCES.

See, also, *Creditors' Bill*, 2.

In fraud of marital rights, see *Husband and Wife*, 5, 6.

What constitutes.

1. The facts that the grantee was the grantor's mother and a non-resident; that the recited consideration was one-third only of the fair value of the property; that the conveyance was made after suit brought against the grantor; that the grantor exercised control over and improved the property after the conveyance; and that neither grantor nor grantee testified in the case,—show that the conveyance was fraudulent.—*Behan v. Warfield*, (Ky.) 13 S. W. 439.

Consideration.

2. A prisoner released upon a bail-bond made by his brother absconded. It appeared that after his arrest certain lands were conveyed by his father to the bail for an expressed consideration of \$2,000, and after his release were reconveyed for the same expressed consideration. The bondsman would have been unable to qualify except as owner of such lands. Held that, in a suit to set aside the reconveyance to satisfy a judgment on the bond, the uncontradicted testimony of the father and a third brother that in both cases the money was actually paid must be taken as true, and the reconveyance upheld.—*Commonwealth v. Cremins*, (Ky.) 18 S. W. 884.

3. Where several persons execute a joint note for borrowed money, which is divided among them, it is a sufficient consideration for a transfer of land by one of them to the others that they assume and agree to pay his share of the note, and his creditors cannot attack the transfer for the reason that he is not relieved of his liability as surety for the others.—*Traders' Nat. Bank v. Clare*, (Tex.) 13 S. W. 183.

4. When the amount of a debt recited in a conveyance as the consideration thereof is overstated through a mistake of law or fact, and the value of the property conveyed does not exceed the actual amount of the debt, the conveyance is not fraudulent.—*Freybe v. Tiernan*, (Tex.) 13 S. W. 870.

5. A sale of goods by an insolvent to a creditor in consideration of a debt, and of payments by the creditor of debts due those from whom the

goods were purchased for a fair price, is not fraudulent.—*Jacobs v. Totty*, (Tex.) 18 S. W. 372.

6. A mortgage given by an insolvent debtor for \$5,500, \$4,500 of which represent past indebtedness, and \$1,000, money advanced on the execution of the mortgage, is fraudulent, as to other creditors, where the mortgagee knew at the time that the debtor was insolvent.—*Wallis v. Adoue*, (Tex.) 18 S. W. 68.

What constitutes—Knowledge of grantee.

7. In consideration of the transfer of lands, the vendee agreed to pay certain liens thereon, and also certain other debts of the vendor, executing his notes for the amount of these debts to the vendor, who, under the conditions of the sale, at the same time indorsed them to the creditors whose claims the vendee was to pay. The vendee was surety for all these debts. *Held* that, the price being adequate, the transfer would not be set aside in favor of the vendor's creditors, though the vendee knew of the vendor's insolvency.—*Traders' Nat. Bank v. Clare*, (Tex.) 18 S. W. 133.

8. A sale by an insolvent debtor, in which the purchaser, knowing such insolvency, is allowed an indefinite credit, is fraudulent.—*Jacobs v. Totty*, (Tex.) 18 S. W. 372.

—Transactions between husband and wife.

9. In an action to set aside a conveyance by a husband in trust for his wife, as in fraud of creditors, it appeared that the conveyance embraced all of the husband's land as well as his personality, consisting of farming implements, household furniture, farm stock, etc.; the expressed consideration being \$12,000. The evidence showed that the land was worth only \$5,000 or \$6,000, and that it was incumbered by a deed of trust for \$2,500. The husband and wife testified that on their marriage in 1865, 15 years before the conveyance was made, the wife had \$3,000 in money, and also land which she then sold for \$2,000; that the husband borrowed this money; and that he made the conveyance to repay her for the loan. *Held* that, in view of the discrepancy between the actual value of the land and the price mentioned in the deed, and of the fact that the transfer embraced all of the husband's property, as well as of the further fact that in 1865 the husband acquired title to all the wife's personality in possession by virtue of the marriage relation, as at common law, the conveyance would be set aside.—*Benne v. Schnecko*, (Mo.) 18 S. W. 82.

10. On the same day that plaintiff's judgment by default was recovered against the husband, a third person, by "mutual consent," also recovered a judgment against him. A motion to set aside the default in plaintiff's case was made in behalf of the husband, and matters were so managed that the "consent" judgment obtained a priority over plaintiff's. *Held*, that the wife's purchase of the land for \$145 at the execution sale under the "consent" judgment was in furtherance of and tainted with the original fraud.—*Benne v. Schnecko*, (Mo.) 18 S. W. 82.

Rights of vendee.

11. Where a son agrees to convey a tract of land to his father in consideration of the father's buying a lot and building a house for him in a neighboring town, and the father performs his part of the contract, he has such an equity in the tract agreed to be conveyed as cannot be divested by a sale of the land under execution at the suit of a creditor of the son, whose debt was contracted after the making of the agreement, at which time the son had no debts.—*Caffee v. Smith*, (Mo.) 18 S. W. 1050.

Rights of creditors.

12. Where the title to land purchased by a judgment debtor is taken in the name of a third person, the judgment creditor may sue to transfer the title from such third person to the debtor, and subject the land to satisfy his judgment, though the judgment may not, for want of registration or other-

wise, be a lien on the land.—*Arbuckle Bros. Coffee Co. v. Wenar*, (Tex.) 18 S. W. 963.

Action to set aside defenses.

13. Where the title to land purchased by a judgment debtor is taken in the name of a third person, and the judgment creditor sues to transfer the title from such third person to the debtor, and subject the land to satisfy his judgment, defendants cannot plead that since the suit was brought the land has been sold under execution. Such plea is only available to the purchaser at such sale, or his privies.—*Arbuckle Bros. Coffee Co. v. Wenar*, (Tex.) 18 S. W. 963.

Gambling Contracts.

See *Gaming*, 10, 11.

GAMING.

What constitutes offense.

1. Act Tenn. April 8, 1889, imposing a privilege license on book-making at horse-races, does not extend the law authorizing persons to bet on horse-races run on a licensed track within the state, so as to legalize book making on races taking place in other states.—*Brown v. State*, (Tenn.) 18 S. W. 236.

2. Act Tenn. April 8, 1889, entitled "An act to provide revenue for the state," etc., imposing a license fee "upon each person * * * engaged in selling pools upon any running, trotting, or pacing race in this or in any other state," does not extend the law authorizing the sale of pools on races run on licensed tracks within the state, so as to legalize the selling of pools on races taking place out of the state.—*Palmer v. State*, (Tenn.) 18 S. W. 233.

3. One who keeps watch for the purpose of guarding against detection of others, who are playing cards in a public place, is himself a principal in the offense.—*Earp v. State*, (Tex.) 18 S. W. 833.

4. The game of "oontz," played with dice on a table or other surface by betters, does not come within the meaning of the terms, "other machine or contrivance," used in Act Ky. March 25, 1886, making it a felony to "set up, carry on, or conduct * * * a keno-bank, faro-bank, or other machine or contrivance used in betting, whereby money or other thing may be won or lost."—*Commonwealth v. Kammerer*, (Ky.) 18 S. W. 103.

5. A room furnished and occupied as a sleeping apartment only, no other room in the house being occupied, is an "outhouse," within the meaning of Pen. Code Tex. art. 355, prohibiting card-playing in "outhouses."—*Slak v. State*, (Tex.) 18 S. W. 847.

6. A school-house is a "public house" within Pen. Code Tex. art. 355, prohibiting the playing of cards in public houses, and is none the less so on a day when there is no school, and the building is temporarily vacant, or being used for other purposes.—*Cole v. State*, (Tex.) 18 S. W. 859.

Evidence.

7. Where the evidence is sufficient to establish the fact that the building where the card playing was done was a school-house, as charged in the indictment, it is immaterial that the state was allowed to show, for the purpose of establishing the public character of the building, that on the day in question it was used for religious services.—*Cole v. State*, (Tex.) 18 S. W. 859.

8. On indictment for playing cards "in a house for retailing spirituous liquors," in violation of Pen. Code Tex. art. 355, proof that defendant played cards in a "saloon" does not sustain the allegation.—*Springfield v. State*, (Tex.) 18 S. W. 752.

9. A conviction for playing cards in a public place will be set aside where there is no evidence connecting defendant with the offense.—*Gatlin v. State*, (Tex.) 18 S. W. 993.

Gambling contracts—Future options.

10. Act Tenn. March 30, 1883, §§ 1-3, provide that any contract for the sale of grain for future delivery, where either party is dealing simply on

a margin, and there is no intention of actual delivery, is gaming; and the making of such contract is declared a misdemeanor. Code Tenn. 1884, § 2438, provides that all contracts founded in whole or in part on a gaming or wagering consideration are void to that extent. *Held*, that a promissory note given to cover losses sustained by the maker in dealing in futures is void.—*Snoddy v. American Nat. Bank*, (Tenn.) 18 S. W. 127.

11. Contracts between customers and commission merchants or stock speculators, which consist of bets and wagers on the future rise and fall in the price of petroleum, grain, provisions, and stocks, by means of purchases or sales which do not contemplate a delivery, followed by periodical settlements of differences between the agreed and the market prices, are within the purview of Gen. St. Ky. c. 47, art. 1, which provides that gambling contracts are void, and money or property lost thereunder may be recovered.—*Lyons v. Hodgen*, (Ky.) 18 S. W. 1076.

GARNISHMENT.

Persons and property subject to.

1. Where funds belonging to a defendant are held by the clerk of court to await the result of the suit, and, on judgment being rendered against defendant, it is satisfied out of such funds, defendant is entitled to the immediate possession of any surplus remaining without any further order of court, and therefore such surplus in the hands of the clerk is subject to garnishment by defendant's creditors.—*Leroux v. Baldus*, (Tex.) 18 S. W. 1019.

2. A final judgment for conversion is subject to garnishment in a suit in a different court, where it appears that, although some of the property converted was exempt from forced sale, all of it was not, there being nothing to show how much of the judgment proceeded from exempt property.—*Burke v. Hance*, (Tex.) 18 S. W. 168.

3. C., having obtained a judgment against plaintiff, garnished a judgment which plaintiff had obtained against defendant in another court. Defendant answered the writ of garnishment, setting up that he had appealed from the judgment obtained by plaintiff, and denying that he was indebted to plaintiff; but judgment on the garnishment was entered against him, from which he failed to appeal, and afterwards plaintiff obtained final judgment against him on his appeal. *Held*, that though the judgment on the garnishment was erroneous, yet defendant, having failed to prosecute his remedies for relief against it, cannot enjoin the collection of plaintiff's judgment by pleading the judgment in the garnishment proceeding, nor can C. intervene and prevent plaintiff from collecting his judgment.—*Burke v. Hance*, (Tex.) 18 S. W. 168.

Exemptions.

4. A railroad company garnished in another state for a debt owing by one of its brakemen residing in Tennessee is under no obligation to claim for him the benefit of Mill. & V. Code Tenn. § 2981, which exempts \$80 of the wages of every laboring man from seizure by garnishment or otherwise.—*Carson v. Memphis & C. R. Co.*, (Tenn.) 18 S. W. 588.

5. As exemption laws have no extraterritorial force, the brakeman himself could not have successfully set up the exemption law as a defense to the garnishment proceeding in the other state, and consequently the railroad company is not liable for its failure so to do.—*Carson v. Memphis & C. R. Co.*, (Tenn.) 18 S. W. 588.

6. Sayles' Civil St. Tex. art. 2385, provides that current wages for personal service shall be exempt from attachment or execution. Plaintiff, a resident of Texas, was indebted to defendant, also a resident of Texas, and was employed by a corporation doing business in Texas, and also in Missouri. Defendant, in order to secure payment of his claim, brought suit against plaintiff in Missouri, and garnished his wages in the hands of the corporation. *Held*, that injunction would lie to restrain defendant from prose-

cuting his claim in Missouri by a garnishment of wages exempt by the laws of Texas.—*Moton v. Hull*, (Tex.) 18 S. W. 849.

7. The allegations of plaintiff's petition, to the effect that on the day the garnishment proceedings were begun plaintiff and defendant were residents of Texas, and had been for several years past, and were now residents of Texas, are sufficient as to the residence of the parties.—*Moton v. Hull*, (Tex.) 18 S. W. 849.

8. Under Rev. St. Tex. art. 218, which provides that "no current wages for personal services shall be subject to garnishment," a garnishee who is indebted to the principal defendant for current wages is bound to disclose the facts showing the exemption where the principal defendant has not voluntarily appeared, and has not been formally cited to appear, in the garnishment proceeding; though articles 188, 189, in terms, require the garnishee to answer only as to the fact of indebtedness.—*Missouri Pac. Ry. Co. v. Whipker*, (Tex.) 18 S. W. 639.

Non-resident defendant.

9. Where the garnishee and the plaintiff are both residents of the state, and process is personally served on the garnishee, who admits an indebtedness to the defendant, the fact that the latter is a non-resident, and is cited only by publication, does not deprive the court of jurisdiction to render a judgment against the defendant that will bind the fund in the garnishee's hands.—*Berry v. Davis*, (Tex.) 18 S. W. 978.

GIFTS.

Delivery—Inter vivos.

1. In an action to recover money alleged to have been given to plaintiff by defendant's testator, two witnesses testified that when one of them paid testator certain money she expressed the intention of giving it to plaintiff; that the testator was expecting to die, and said she had already given all her property to plaintiff; but at the witness' suggestion she made a will to that effect. Plaintiff testified that before she died she gave the money to him, and he put it in a box with papers belonging to him. *Held*, that the evidence was not sufficient to show delivery of the money; plaintiff's testimony as to a transaction with a decedent being inadmissible.—*Hubbard v. Cox*, (Tex.) 18 S. W. 170.

Causa mortis.

2. It was the intention of a widow to give her dower in the personality of her second husband to his children by a former marriage, and she so stated to various persons, though no actual delivery was made. On her death-bed she called her brother to her, and told him that the property in question belonged to these children, and that she wanted him to take charge of it for them, and see that they got it. *Held* not a sufficient delivery, and that there was no valid gift.—*Rowland v. Phillips*, (Ark.) 18 S. W. 1101.

GRAND JURY.

Procedure—Construction of statute.

1. Code Crim. Proc. Tex. art. 377, provides that an objection to a grand juror shall be heard in no other way than by challenge. *Held*, on motion to set aside indictment on the ground that one of the grand jurors was not qualified to serve, that article 523, subd. 2, providing, as a ground for motion to set aside an indictment, "that some person not authorized by law was present when the grand jury were deliberating upon the accusation against the defendant, or were voting upon the same," referred only to persons other than grand jurors. *Woods v. State*, 10 S. W. 103, explained.—*Doss v. State*, (Tex.) 18 S. W. 738.

Review of action of jury.

2. Crim. Code Ky. tit. 8, c. 1, § 107, providing that the grand jury can receive none but legal evidence, and are not bound to hear evidence for the

defendant, but that it is their duty to weigh all evidence before them, and, if they believe other evidence within their reach will explain away the charge, to order such evidence produced, is directory merely and does not confer on the trial court the power to review the action of the grand jury in respect to evidence received by them.—*Commonwealth v. Minor*, (Ky.) 18 S. W. 5.

GUARANTY.

Continuing guaranty.

1. Defendant's intestate agreed with plaintiff's firm to guaranty, to the amount of \$250, the account of G., who was about to go into business, provided they would allow G. credit to a like amount on his own responsibility; and some time afterwards, G. having in the mean time bought and paid for several times the amount of the guaranty, defendant's intestate executed another guaranty, agreeing to become G.'s surety to the amount of \$500, "instead of \$250, as heretofore." *Held*, that the agreement was a continuing guaranty.—*Gardner v. Watson*, (Tex.) 18 S. W. 89.

Release.

2. The guarantor of an open account is released, where the creditor, without his consent, takes property from his debtor, which is credited on the debt, and a note for the balance, for a definite length of time, stipulating for a higher rate of interest, and secured by a transfer of choses in action; and the burden is on the creditor to show the guarantor's consent.—*Gardner v. Watson*, (Tex.) 18 S. W. 89.

GUARDIAN AND WARD.

Bonds, subrogation of sureties, see *Subrogation*, 1, 2.

Guardian *ad litem*, see *Infancy*, 6-12.

Seduction of ward, see *Seduction*, 8, 4.

Appointment of guardian.

1. Mansf. Dig. Ark. § 3462, authorizes the clerk of the probate court to appoint guardians in vacation, subject to the approval of the court. *Held*, that, though no subsequent confirmation of the appointment was shown, the guardian's authority could not be attacked collaterally, where it appeared that she had rendered her accounts to, and had been recognized by, the probate court, as guardian.—*Shumard v. Philips*, (Ark.) 18 S. W. 510.

Bonds—Release of sureties.

2. Where a deceased guardian unlawfully loaned his ward's money to a firm composed of himself and one of the sureties on his bond, and the surviving partner subsequently made an assignment both of his individual and the partnership property for the benefit of creditors, an acceptance by the ward, after attaining majority, of a dividend on his claim from the assignees, with full knowledge of all the facts, releases the surviving partner from liability on the guardian's bond.—*Roberson v. Tonn*, (Tex.) 18 S. W. 835.

3. This release is not affected by the fact that the ward's claim was presented to and allowed by the assignees as a demand against the partnership, instead of against the surviving partner as surety, since both the partnership property and the individual property of the surviving partner were liable for the debt.—*Roberson v. Tonn*, (Tex.) 18 S. W. 835.

4. Where a guardian's bond is given to secure the faithful performance of the duties of guardian as to the estates of two minors, the guardian's discharge as to one of them does not release the sureties from liability for the guardian's misconduct in managing the estate of the other.—*Roberson v. Tonn*, (Tex.) 18 S. W. 835.

— Actions.

5. Where a guardian's bond is made payable to the county judge, and is conditioned for the faithful performance of the duties of guardian of

the estates of two minors, as to one of whom the guardian is subsequently discharged, neither the county judge nor the discharged minor is a necessary party to an action by the other minor against the sureties on the guardian's bond.—*Roberson v. Tonn*, (Tex.) 18 S. W. 835.

Accounting by guardian.

6. A guardian who had received rent for land devised to his wards, and had sold it under order of court, was directed to execute deeds to the purchasers on their severally executing mortgages to secure the deferred payments. After receiving the first payments and additional rent, he, together with his wife and oldest ward, delivered quitclaim deeds to the purchasers. No guardian's deed was executed nor did the purchasers execute mortgages for the deferred payments, or ever pay any of them. The will under which the wards claimed the land was subsequently set aside, and, in a suit for partition between the heirs, including the guardian, he was charged with converting the rents, and answered, setting up the sale, and praying that it be set off against his share of the estate. The decree directed payment of other claims out of his share. There was evidence that the balance was paid out on sundry accounts, and that the purchasers, who had again purchased at the partition sale, were reimbursed out of the guardian's share to an unknown extent. *Held*, that the facts failed to show that the guardian had received any money belonging to his wards.—*State v. Radcliff*, (Mo.) 18 S. W. 285.

Sale of ward's realty.

7. Gould, Dig. Ark. 184, granting jurisdiction to the probate courts in the matter of the estates of wards, gave no express authority to sell the ward's lands for his maintenance. *Held*, that the general chancery jurisdiction of the circuit court to order the sale of an infant's lands for his maintenance, on the petition of the statutory guardian, was not thereby taken away.—*Shumard v. Philips*, (Ark.) 18 S. W. 510.

8. Carr. Code Ky. § 493, relating to the sale of land of persons under disability, provides that the guardian of each infant shall execute a bond with at least two sureties; and that, if the bond be not given, any order of sale and any sale or conveyance shall be absolutely void. Land was conveyed to the grantor's daughter for life, remainder to her children, or, if she died without leaving children or their descendants, to the grantor's heirs on the death of the daughter and her husband; provided, that if she and her husband should sell the land the purchase money should be invested in other land, the title to which should be secured to the daughter in the same manner as the land originally granted. *Held*, that the power of sale conferred by the deed was exhausted by a sale of the land originally granted, and the interest of the minor children in the land purchased with the proceeds did not pass to the purchaser under the decretal sale in an action which the grantee, their mother, instituted to pass their title without having executed the requisite bond.—*Fritsch v. Klausning*, (Ky.) 18 S. W. 241.

9. Where the contingent rights of the grantor's heirs are secured in the reinvestment, their interest is too remote to make them necessary parties in an action to pass the title of the grantee's children in the purchased land.—*Fritsch v. Klausning*, (Ky.) 18 S. W. 241.

10. All parties having a vested interest in such action being represented therein, and the adult children having elected to take title in the purchased land by their failure to assert any claim, the commissioner's deed passes title to all interests in such land except those of the infants.—*Fritsch v. Klausning*, (Ky.) 18 S. W. 241.

11. Under Gen. St. Mo. 1895, c. 116, § 80, relating to sales of real estate by a curator, providing that "no real estate of any minor, sold under the provisions of this chapter, shall be sold for less than three-fourths of its appraised value," a deed showing a sale for a less amount is void on its face.—*Carder v. Culbertson*, (Mo.) 18 S. W. 88.

HABEAS CORPUS.

When lies, see *Criminal Law*, 76.

When writ lies.

1. It is error for the district court to award the writ of *habeas corpus*, in cases pending before a magistrate sitting as an examining court, until the magistrate, after an examination, has refused to discharge the accused.—*Ex parte McCorkle*, (Tex.) 18 S. W. 991.

Hearing.

2. Under Code Crim. Proc. Tex. arts. 171, 174, 296, the court is required, in *habeas corpus* proceedings for admission to bail, to hear evidence of the nature of the offense, and the circumstances under which it was committed.—*In re Campbell*, (Tex.) 18 S. W. 141.

Handwriting.

Proof of, see *Evidence*, 85.

Harmless Error.

See *Appeal*, 52-57.

HAWKERS AND PEDDLERS.

Licenses.

1. Gen. Laws Tex. 1889, p. 27, provides for the collection of an occupation tax, from every person or firm who peddles out cooking stoves or ranges over the county, \$250 for the state, and \$100 for each county in which they make a sale. *Held*, that where a range company pays the state tax, and the tax for the county in which it does or proposes to do business, the number of teamsters or wagoners it employs to do the peddling is discretionary with the company, and its teamsters or wagoners are not liable for the tax as individual peddlers, where they are paid wages for their services, and receive no other compensation.—*In re Butin*, (Tex.) 18 S. W. 10.

—Constitutional law.

2. Gen. Laws Tex. 1889, p. 27, which provides for the collection of an occupation tax from every person or firm who peddles out cooking stoves or ranges over the county, \$250 for the state and \$100 for each county in which they make a sale, does not conflict with Const. Tex. art. 8, § 1, which exempts persons engaged in agricultural or mechanical pursuits from the payment of occupation taxes.—*In re Butin*, (Tex.) 18 S. W. 10.

3. Nor does it violate Const. Tex. art. 8, § 2, which provides that all occupation taxes shall be uniform upon the same class of subjects.—*In re Butin*, (Tex.) 18 S. W. 10.

Hearsay Evidence.

See *Evidence*, 11.

HIGHWAYS.

Establishment by statutory proceedings—Notice.

1. Under Rev. St. Tex. art. 4870, as amended February 5, 1884, which provides that the jury appointed to lay out a road shall give notice to the persons through whose land the road will run, the failure to give such notice renders the report of the jury, and the action of the court thereon, void for want of jurisdiction.—*McIntyre v. Luker*, (Tex.) 18 S. W. 1027.

2. Appearing before the commissioners' court to protest against the report of the jury is not a waiver of such notice.—*McIntyre v. Luker*, (Tex.) 18 S. W. 1027.

Liability of overseer for removing fence.

3. A road overseer who removes a fence on plaintiff's land in pursuance of a valid order of the county court opening a road across it is not liable for injury occasioned by stock entering plaintiff's

premises thereby.—*Cockrum v. Williamson*, (Ark.) 18 S. W. 592.

Hiring.

Of convicts, see *Convicts*.

HOMESTEAD.

Acquisition and enforcement.

1. W. purchased certain premises in 1878, and moved into the house the following spring. He occupied it for several months, but, finding it inconvenient, moved to another house, belonging to his wife. While so occupying the premises, a judgment was rendered against him. W. afterwards sold the land to plaintiff, who in time sold to defendants. The land was sold under an execution on the judgment against W., and purchased by defendants. In an action to enforce plaintiff's lien on the land as vendor, defendants set up their title as purchasers at the execution sale. On the trial, W. and others testified to his occupancy of the premises as a homestead, and also that he had intended to rebuild the house. *Held*, that the question whether the premises were the homestead of W. or not was one of intention, and a finding that the land was such homestead would not be disturbed.—*Steenburgen v. Greenwood*, (Ark.) 18 S. W. 702.

2. The homestead law of Missouri provides that, where execution is levied on a tract of land exceeding in value the amount allowed for a homestead, the debtor may designate and choose the part to be exempt, but, in case he refuses to designate such part, the sheriff shall designate three disinterested appraisers, duly sworn to a discharge of their duties, who shall fix the boundaries of the homestead, and the sheriff shall then proceed with the levy on the remainder. Defendant claimed the entire 80 acres owned and occupied by him as a homestead, and neglected to designate any part of it as exempt. The sheriff then appointed appraisers, who set off 45 acres, including the dwelling, which they estimated to be of the full value allowed for a homestead; and the sheriff then proceeded with the levy on the remainder. *Held*, on motion to quash the levy, that defendant's neglect to make a selection was a refusal, and that it was not necessary for the sheriff thereafter to give him any notice of his right of exemption, as provided in Rev. St. Mo. 1879, § 2347, in case of levy on certain kinds of property, not including homesteads.—*Meyer v. Nickerson*, (Mo.) 18 S. W. 904.

3. It was not necessary that the appraisers should set off with the homestead any part of the woodland, which was on the part furthest from the dwelling.—*Meyer v. Nickerson*, (Mo.) 18 S. W. 904.

4. Mansf. Dig. Ark. § 3006, providing for the issuing of a *supersedeas* to stay a sale of land, under execution, which is claimed by defendant as his homestead, declares that, if any party entitled to exemptions shall desire to claim them, he shall prepare a schedule, verified by affidavit, of all his property, specifying that which he claims as exempt, and file the same with the clerk or justice issuing the execution. *Held*, that a schedule and affidavit claiming real estate levied on as exempt, and alleging that it is all of defendant's real estate, but averring nothing as to any other property, is insufficient to warrant the issuing of a *supersedeas*.—*Brown v. Peters*, (Ark.) 18 S. W. 729.

5. It should appear by the affidavit, in such case, that the debtor is a resident of the state.—*Brown v. Peters*, (Ark.) 18 S. W. 729.

6. An answer which claims certain attached property as defendant's homestead is insufficient, where the only allegations as to acquirement and possession thereof are that at the date of the answer defendant was occupying and claiming the land as a homestead, as he must have acquired it before the creation of the debt, and been a *bona fide* housekeeper with a family, and in possession, when the levy was made, to entitle him to the exemption.—*Caldwell v. Truesdell*, (Ky.) 13 S. W. 101.

Nature and extent of right.

7. Const. Tex. art. 16, § 50, exempts from forced sale "the homestead of a family;" and section 53 provides that the homestead shall not be partitioned among the owner's heirs so long as it is used as such by the surviving husband or wife, or so long as the guardian of minor children may use and occupy the same. *Held*, that a further provision in section 53, that on the owner's death his homestead "shall descend and vest in like manner as other real property," does not subject the homestead to administration in favor of creditors, so long as it is used as such by the constituents of the owner's family.—*Childers v. Henderson*, (Tex.) 13 S. W. 431.

8. A debtor who has children, strangers in blood, residing with him, and whom he is under no natural or legal obligation to support, is not a housekeeper with a family so as to entitle him to the benefit of the homestead law.—*Bosquett v. Hall*, (Ky.) 13 S. W. 244.

9. A husband, continuing to live on the homestead after divorce, is the head of a family, though the decree did not give the custody of minor children to either party, and they are now living with their mother; and it is immaterial for whose fault the divorce was granted.—*Zapp v. Strohmeier*, (Tex.) 18 S. W. 9.

10. Under Gen. St. Ky. c. 83, § 9, exempting from forced sale, as a homestead, a debtor's land, including the dwelling-house and appurtenances, not exceeding \$1,000 in value, a debtor who occupies his wife's land as a homestead, in which he has an estate by the curtesy exceeding \$1,000 in value, cannot claim, in addition, a homestead in adjoining land to which he has title in fee.—*Vanmeter v. Vanmeter's Assignee*, (Ky.) 13 S. W. 224.

11. Under Const. Tex., art. 16, § 50, which provides that "no mortgage, trust-deed, or other lien on the homestead shall ever be valid except for the purchase money therefor, or improvements made thereon," an attachment levied on the store-house of an insolvent debtor, used as a business homestead by him, does not create a lien on the property; and a conveyance of the property by the debtor to his son, though voluntary, passes title free from the claim of the creditor of the father.—*Willis v. Mike*, (Tex.) 13 S. W. 58.

12. In Texas, the sale of a homestead for the purpose of reinvestment in another homestead is a voluntary conversion of the exempt property into money, which becomes subject to garnishment. *Mann v. Kelsey*, 12 S. W. 43.—*Kirby v. Giddings*, (Tex.) 13 S. W. 37.

Rights of wife and children.

13. The county court has no authority to set apart to a minor child of a deceased wife the homestead of the surviving husband, or to order a sale thereof to make up an allowance for the child in lieu of exempt property; and such order may be attacked collaterally.—*Watts v. Miller*, (Tex.) 13 S. W. 16.

14. Wag. St. Mo. p. 693, § 5, provides that, on the death of the head of a family without minor children, his homestead, to the value of \$1,500, if situated in the country, or in a town of less than 40,000 inhabitants, or to the value of \$3,000, if situated in a town of over 40,000, shall pass to and vest in the widow. *Held*, that a widow who, under her husband's will, has accepted property, whether real or personal, greater in amount than that to which she would otherwise be entitled by law, cannot insist on her homestead, if repugnant to the terms of the will. *Davidson v. Davis*, 86 Mo. 440, followed.—*Burgess v. Bowles*, (Mo.) 13 S. W. 99.

15. Under Code Tenn. (Mill & V.) §§ 2943, 2944, 3250, which give a widow both homestead and dower in her husband's land, both estates to be assigned in the same manner and by the same commissioners, a widow is entitled to the crops growing at the time of her husband's death on the land assigned to her as homestead, just as she is under the common law in the land assigned to her as dower.—*Vaughn v. Vaughn*, (Tenn.) 13 S. W. 1089.

16. Rev. St. Tex. art. 1933, provides that the court shall set apart for the use of the widow

and minor children and unmarried daughters remaining with the family of the deceased all such property of the estate as may be exempt from forced sale by the constitution and laws of the state. Article 2002 provides, if the estate is insolvent, the title of the widow and children to all the property and allowances set apart or paid to them under the provisions of this and the preceding chapter shall be absolute, and the property shall not be taken for any debts of the estate except for certain liens and preferred claims. Article 2007 provides that the homestead shall not be liable for any debts of the estate, except for the purchase money thereof, taxes, etc. *Held*, that the homestead of a decedent is wholly exempt from the claims of the general creditors of the estate, if a constituent of the family survives the decedent, but that so much of article 2002 as attempts to pass the homestead of an insolvent absolutely to the widow and minor children, to the exclusion of the adult, was in violation of Const. Tex. art. 16, § 52, providing that the homestead shall descend and vest as other real property of the deceased.—*Zwerneemann v. Von Rosenberg*, (Tex.) 18 S. W. 435.

17. A widowed daughter who returns to her father's home, and is domiciled there, as a member of his family, when he dies, is entitled to hold her father's homestead exempt from the claims of his creditors, under Rev. St. Tex. art. 1933, which provides that there shall be set apart for the use of the widow and minor children, and "unmarried daughters remaining with the family of deceased," all property exempt from execution or forced sale.—*Childers v. Henderson*, (Tex.) 13 S. W. 431.

18. Const. Tex. art. 16, § 52, provides that on the death of the husband or wife, or both, the homestead shall descend as other real property of the deceased, but it shall not be partitioned among the heirs of the deceased so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same. Rev. St. art. 1936, provides that when there is no widow the possession of the homestead shall be delivered to the guardian of the minor children. *Held*, that the possession of the homestead by the minor children after the death of both parents can be protected from partition only through the agency of a regular guardian under the authority and permission of the probate court.—*Osborn v. Osborn*, (Tex.) 13 S. W. 538.

19. Where, in partition of a homestead among the heirs after the death of both parents, it appears that one of the heirs is a minor without any guardian, and the probate court has never determined his right to occupy the homestead, it is the duty of the court to arrest the proceedings until a guardian can be appointed, and the court can determine whether he shall be permitted to occupy it for his ward.—*Osborn v. Osborn*, (Tex.) 13 S. W. 538.

20. Under Gen. St. Mo. 1835, p. 450, § 5, providing that on the death of the head of a family his homestead shall vest in his widow or minor children, or, if there be both, in his widow and minor children, without being subject to deceased's debts, unless legally charged thereon in his life-time; and they shall take therein the same estate of which deceased died seized: provided, that such children shall, by force of this statute, only have an interest in such homestead until they shall attain their majority,—where deceased leaves no widow, the property becomes subject to deceased's debts on the arrival of the children at majority.—*Quinn v. Kinyon*, (Mo.) 13 S. W. 873.

21. An insolvent debtor died, leaving a widow and several children. Subsequently the widow died, leaving the children in possession of the homestead, valued at \$1,000, which had been allotted to the debtor in an action against him. The homestead was of little value; and, on petition of the guardian of the infant children, he was authorized to divide the same into town lots, for the purpose of sale. The proceeds of the sale thus made amounted to \$5,400. *Held*, that the children were entitled to the interest on the whole amount realized from the sale until the youngest became of age, and were not limited to the interest on the

original value of the homestead.—Turner's Guardian v. Turner's Heirs and Creditors, (Ky.) 18 S. W. 6.

Abandonment.

23. A farm occupied as a homestead does not lose that character by the purchase of a house and lot in a city, occupied by the wife partly for the purpose of sending her children to school, and partly on account of her health, the husband remaining on the farm, and continuing to cultivate it, neither husband nor wife intending to abandon it as a homestead.—Reinstein v. Daniels, (Tex.) 18 S. W. 21.

23. In ejectment to recover land sold plaintiff under execution, the evidence showed that defendant, who claimed the land as his homestead, had left it, renting it for a year, and afterwards for five years, and moved into another county, where he afterwards lived, and kept an hotel, and voted. Defendant testified that he intended to return to the land, and several witnesses testified that he so stated his intention when he left. *Held* that, the case having been submitted to the court, its finding that defendant abandoned the land as his homestead will not be disturbed on appeal.—Smith v. Mattingly, (Ky.) 18 S. W. 719.

24. Defendant purchased two adjoining lots, which were for a long time embraced in a common inclosure, and occupied by him. He afterwards built a house on one of the lots, separated it from the other by a division fence, and rented it. The day before an attachment was issued against the leased premises he persuaded the tenant to surrender possession, removed the fence, and resumed occupancy and control of the premises. He testified that he did so with the *bona fide* intention of holding it as a part of his homestead against his creditors. The court instructed the jury: "If you believe from the evidence that defendant had abandoned the lot in controversy for home use, and appropriated it for other than home purposes, then you will find for plaintiff, unless you believe that at the time of the levy the defendant had reappropriated said lot for homestead purposes, and was using and occupying the same with the intention of permanently using and occupying the same as a home; then, in that event, you will find for defendant. If you believe from the evidence that the defendant had abandoned the lot in controversy, for the purpose of a home, and that at the time of the levy he was using and occupying it as a sham and pretext to shield it from his creditors, then you will find for plaintiff." *Held*, that the charge fully presented the issues of the case.—Milburn Wagon Co. v. Kennedy, (Tex.) 18 S. W. 28.

25. A lot was purchased by the head of a family with the expressed intention of making it a homestead. It had on it a residence, barn, and other outbuildings, all inclosed by a single fence. The purchaser converted the barn and outbuildings into dwellings, removed them to one side of the lot, placed them upon temporary foundations, built a fence between them and his residence, and rented them to tenants; but all this was done with the expressed intention of selling such buildings, and having them removed from the lot, and it was proved that he had several times offered them for sale, and always required that the purchaser should remove them. *Held*, the evidence justified a finding that the part set off was not abandoned as a homestead.—Rollins v. O'Farrell, (Tex.) 18 S. W. 1021.

26. It was not error to charge that a homestead will not be held to be abandoned unless "from all the testimony it clearly appears that the same was permanently abandoned," etc.—Rollins v. O'Farrell, (Tex.) 18 S. W. 1021.

27. Where an abstract of a judgment rendered in the district court was duly registered in the county clerk's office, and the question was as to whether certain lands bought by plaintiff at execution sale thereunder had been abandoned by the debtor as a homestead, the effect of such registration was sufficiently indicated to the jury by a charge that, if such lands had been abandoned, then plaintiff should recover.—Rollins v. O'Farrell, (Tex.) 18 S. W. 1021.

v. 18 s. w.—73

Mortgage.

28. Under Const. Tex. art. 16, § 50, providing that "no mortgage, trust-deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon," a trust-deed for borrowed money given on land actually occupied by the borrower and his family as a homestead is invalid, though the borrower states in his sworn application for the loan that the land was not his homestead, and that he owned another tract therein described, which he and his family occupied as a homestead, and he is not estopped by such statement to deny the validity of the deed.—Texas Land & Loan Co. v. Blacklock, (Tex.) 18 S. W. 12.

29. Const. Tex. art. 16, § 50, providing that no mortgage, trust-deed, or other lien on the homestead shall ever be valid, whether created by the husband alone or together with his wife does not prohibit an unmarried man from mortgaging his homestead, though others are living with him as a family.—Smith v. Hutton, (Tex.) 18 S. W. 18.

30. In Texas a surviving husband may give a deed of trust, with power of sale, on the homestead, though it is partly community property, to secure payment of a debt against the community property.—Watts v. Miller, (Tex.) 18 S. W. 16.

31. A mortgage executed by husband and wife, and duly acknowledged by her, which stipulates that they relinquish all rights of dower and homestead in the land mortgaged, effectually divests her of any homestead right in the land, though the clerk's certificate of acknowledgment only recites that she relinquished her dower.—Razor v. Dowan, (Ky.) 18 S. W. 914.

HOMICIDE.

Murder, right to bail, see *Bail*, 1-3.

Murder.

1. On trial for murder, malice is correctly charged to be the "intentional doing of a wrongful act towards another, without legal excuse or justification."—Powell v. State, (Tex.) 18 S. W. 599.

2. On the trial of defendant for murdering his wife, a witness testified that he was standing in the door of defendant's house when the latter returned from work; that defendant asked deceased why she had not come out to where he was working, as she had promised, and, upon her making excuses, said, "You did not want to come;" that, after talking a while, deceased stooped to pick up a smoothing iron to give to a woman who at that moment came for it; that witness, having turned his back, heard a blow, and looking around saw that defendant had cut deceased in the back; that defendant then threw her down, knelt on her breast, and raised the knife again, but was stopped by the witness; that he then dragged her out of doors, and cut her in the arms, neck, leg, and stomach, though the witness did not see the blows struck; and that she died the same day. The woman who had come after the iron corroborated the witness as to the cutting. *Held*, that defendant was guilty of murder in the first degree.—Murnhy v. State, (Tex.) 18 S. W. 141.

3. Two men living, with their wives, in the same house, were accused of a murder, evidently committed in the course of a burglary. After their arrest, during an altercation in which each accused the other of the shooting, defendant betrayed a guilty knowledge of the location of objects in deceased's house at the time of the murder. By his direction, too, a partially burned pistol was found in his co-defendant's stove, into which a ball extracted from deceased's body was found to fit. His co-defendant, having turned state's evidence, testified that they went together to deceased's house, that defendant went inside while witness remained at the gate, and that while standing there he heard a shot within. His wife testified that she heard them talking together after they came back, when defendant said it was the first time he had taken his shoes off, and that he stepped on a carpet newly put down, which made a noise, and wakened deceased. Defendant had expressed ill will towards deceased, and said he

ought to be shot. *Held* sufficient evidence to justify a conviction of murder in the first degree.—*State v. Miller*, (Mo.) 18 S. W. 832.

4. If defendant was present, aiding and abetting another, who deliberately and with malice aforethought killed the deceased, he was guilty of murder in the first degree.—*State v. Miller*, (Mo.) 18 S. W. 832.

5. It was proper to charge that if defendant shot and killed the deceased in the perpetration of, or the attempt to perpetrate, a burglary, he was guilty of murder in the first degree.—*State v. Miller*, (Mo.) 18 S. W. 832.

6. The evidence showed that, preparatory to keeping house, the wife of deceased was staying at her mother's house, and that, as deceased came to get her, defendant, her brother, who was living with his mother, forbade deceased to enter the house, and on his repeating the warning, when deceased came out with his wife's trunk, the latter replied that it would take a better man than defendant to keep him out, whereupon defendant shot him twice in rapid succession, and immediately thereafter, in reply to a question, said he had shot deceased because the latter had previously threatened to kill him. The wife's testimony that deceased entertained ill feelings towards defendant, and had threatened to kill him, was corroborated by other witnesses, two of whom testified that deceased put his right hand to his hip pocket just before defendant shot, and that after his death an open pocket-knife was found in that pocket. *Held*, that a verdict of murder in the second degree was warranted.—*Powell v. State*, (Tex.) 18 S. W. 599.

7. Defendant had a slight quarrel with her supposed husband, after which she got into bed with another woman. Her husband told her to get up and make his bed, and, upon her refusal, tried to pull her out, whereupon she stabbed him, from the effects of which he died. *Held* sufficient evidence to support a conviction of murder in the second degree.—*Fisher v. State*, (Tex.) 18 S. W. 778.

8. It is the duty of the court to submit the question of murder in the second degree in all cases where there is any evidence tending to present that issue. Evidence of defendant that, after the quarrel ensued, the deceased, who was a bar-keeper, seized what defendant supposed to be a knife or pistol, and rushed towards one end of the counter, and, just as he was about to turn the counter, defendant fired, is sufficient to justify such charge.—*Nalley v. State*, (Tex.) 18 S. W. 670.

Manslaughter.

9. On an indictment for murder, the evidence showed that defendant walked up to deceased with pistol drawn, while deceased was standing near another person, and shot him dead, without provocation, and notwithstanding such other person's remonstrance; that defendant was in no danger whatever; and there was evidence tending to show that deceased, when drunk, was a dangerous man. *Held*, that a verdict of manslaughter would not be disturbed.—*Hall v. Commonwealth*, (Ky.) 18 S. W. 1082.

10. There was no ground for reversal in the fact that the court, in its charge on manslaughter, used the word "riot," instead of "heat and passion," in defining manslaughter: "If the accused, in sudden riot and passion," committed the offense, he is guilty of manslaughter.—*Clem v. Commonwealth*, (Ky.) 18 S. W. 102.

11. In a murder case, in which there was no evidence that deceased, in striking defendant, caused pain or bloodshed, the court instructed that "adequate cause" sufficient to reduce the homicide to manslaughter is such as would commonly produce a degree of rage or terror in the mind of a person of ordinary temper sufficient to render the mind incapable of cool reflection, and that mere insulting words or gestures or an assault and battery so slight as to show no intention to inflict pain or injury, are insufficient; but that, if pain or bloodshed is caused by an assault and battery, it is such adequate cause. *Held* error, as the jury should have been left to determine the question of "adequate

cause" from all the facts, and not restricted to a single cause not shown by the evidence.—*Cochran v. State*, (Tex.) 18 S. W. 651.

12. The true test as to murder in the second degree and manslaughter is that if the homicide was committed under the immediate influence of sudden passion, for which there was adequate cause, the homicide, if not justifiable, would be manslaughter, but if such cause did not exist, and the homicide was not justifiable, then it would be murder in the second degree. Any circumstance capable of and actually creating sudden passion, such as anger or terror, rendering the mind incapable of reflection, whether or not accompanied by bodily pain, is "adequate cause;" and if defendant killed deceased at a time when the latter's actions and words, in connection with his physical strength, produced such "adequate cause," and defendant, under its influence, and while not acting in self-defense, killed deceased, he would be guilty of manslaughter.—*Cochran v. State*, (Tex.) 18 S. W. 651.

Justifiable homicide.

13. Defendant requested the court to charge the jury that if they "believed that, at the time of the alleged assault, defendant did not use any degree of violence with intent to injure, but was merely making some preparation to defend himself against any real or apparent danger, they should acquit." *Held*, there being some evidence which presented the issue covered by the request, it was error to refuse it.—*Hunt v. State*, (Tex.) 18 S. W. 853.

14. In judging of the danger the circumstances must be viewed as they appeared to defendant, and if, when he shot deceased, the latter was violently attacking him under circumstances which reasonably indicated an intention to murder, maim, or inflict serious bodily injury, and the weapon and the manner of its use were reasonably calculated to produce either of such results, then the law presumes that deceased intended to murder, maim, or inflict such injury on defendant, (Pen. Code Tex. art. 571,) and the homicide would be justifiable; and though the danger was not real, but merely apparent, the homicide would be justifiable, if at the time the conduct of deceased was such, under the circumstances, as to reasonably induce defendant to believe that deceased was about to kill or inflict serious bodily injury on him.—*Cochran v. State*, (Tex.) 18 S. W. 651.

15. On the question of a reasonable appearance of danger to justify homicide, the court properly charged that "It is the right of the defendant to have the facts considered by the jury as they reasonably appeared to him at the time they transpired, and if, as the facts reasonably appeared to the defendant, he would be justified under the law as given in this charge, he should be acquitted. It would make no difference that the facts were mistaken by the defendant, and that he was in no real danger if it be so."—*Nalley v. State*, (Tex.) 18 S. W. 670.

16. There was evidence that defendant sought deceased with intent to do him bodily injury, but that before the conflict took place he abandoned that intent, and was in good faith endeavoring to avoid a difficulty. The court charged the jury that if defendant "brought about a meeting" with deceased for the purpose of killing or chastising him, then he could not be acquitted on the ground of self-defense, though he was in imminent danger or great bodily harm. *Held*, that the instruction was erroneous, as his right of self-defense would revive upon the abandonment of his intent to injure deceased.—*Crane v. Commonwealth*, (Ky.) 18 S. W. 1079.

17. The expression "brought about a meeting," in such instruction, is misleading, where the evidence shows that the killing occurred at a public meeting where defendant had a right to be.—*Crane v. Commonwealth*, (Ky.) 18 S. W. 1079.

18. On first meeting the deceased, defendant was the aggressor, striking him over the head with his pistol. But, having disarmed the deceased, and pursued him a short distance, he abandoned the pursuit, saying that he could not

shoot a man in the back. Deceased then withdrew to another building, and defendant turned to the examination of a wound which he had received. After the lapse of two or three minutes, deceased returned at a rapid gait, in an angry, threatening manner, to where defendant was standing. The latter called to deceased to stop; that he did not want to shoot him. Deceased nevertheless kept on, grappled with defendant, and was shot. *Held* that instructions, treating the affair as a single, continuous combat, and repeating again and again that defendant could not justify the homicide if he brought on or produced the conflict, constituted reversible error.—*Brazzil v. State*, (Tex.) 13 S. W. 1006.

Assault with intent to kill.

19. An angry dispute arose at a school meeting between one whose vote was challenged and the challenger, and the latter and his brother were rushing towards the voter, and in the direction of defendant, who was chairman, when defendant drew and raised his revolver, and a third brother, sitting near, came up behind and threw his arms around him, pressing his arms down. Defendant partially freed himself, and, throwing his hand over his shoulder, and looking back, fired. He testified that he feared an attack from one of the brothers, who was drawing off his coat, when he received a blow in the back of the head, and was grasped from behind. *Held*, that whether he had reasonable cause to believe he was in immediate danger was properly left to the jury.—*State v. McNamara*, (Mo.) 18 S. W. 933.

20. Where defendant testifies that he called the prosecuting witness to account for improper language to his mother, and that the prosecuting witness shot at him before the assault was committed, it is error to instruct that, if defendant brought on the conflict, he cannot avail himself of the law of self-defense, though in the conflict his life or person was endangered. If defendant provoked the contest without any intention to kill or inflict serious bodily injury, he would still have an imperfect right of self-defense, which, though not sufficient to justify, might reduce the grade of the offense.—*Carter v. State*, (Tex.) 13 S. W. 147.

21. On a trial for assault with intent to murder, where there is evidence from which the jury may infer that the assault was committed with intent to inflict great bodily injury, it is error to instruct that, to reduce the offense to aggravated assault, the evidence must fail to show, not only that defendant had a specific intent to kill, but also that the act would have been murder, had death resulted. One who commits an assault with intent to do great bodily injury is not guilty of an assault with intent to murder, since the specific intent to kill is the essential element of the offense.—*Carter v. State*, (Tex.) 13 S. W. 147.

22. Evidence that the accused became engaged in an altercation with the proprietor of a saloon, which terminated in his being ejected therefrom; that he thereupon procured a Winchester rifle, returned, and shot at the proprietor,—is sufficient to sustain a conviction for assault, with a deadly weapon, with intent to kill.—*State v. Elvins*, (Mo.) 18 S. W. 937.

23. It is not error to refuse to charge as to assault with intent to kill, where the evidence shows that death resulted directly from the wound, and not from any improper treatment or neglect of it.—*Fulcher v. State*, (Tex.) 13 S. W. 750.

Resisting arrest.

24. Defendant committed the assault in resisting arrest after he was informed by the officer assaulted that he had a warrant for him. *Held*, that a defect in the warrant, in that it only gave his surname, and did not state that his name was unknown, and give a description of him, being at the time unknown to defendant, was no defense.—*Graham v. State*, (Tex.) 13 S. W. 1013.

Accidental killing.

25. On an indictment for murder, defendant testified that he was shooting at one J., who had tried to kill him, and he accidentally shot the deceased. The evidence showed that when the shot

was fired J. was running away. *Held*, that it was not error to refuse to charge the jury on the subject of self-defense in reference to J., as tending to excuse the accidental killing of deceased.—*Sims v. Commonwealth*, (Ky.) 13 S. W. 1079.

Conviction of lesser offense.

26. Under section 1855, Rev. St. Mo. 1879, a conviction for a common assault may be had under an indictment for assault with intent to kill.—*State v. Brent*, (Mo.) 13 S. W. 874.

Indictment.

27. An assault with intent to kill, which is punishable, under 1 Rev. St. Mo. 1879, § 1262, by imprisonment in the penitentiary for a term not exceeding 10 years, is a felony, within the definition of that term by section 1876, as an offense for which the offender "is liable" to be imprisoned in the penitentiary; and an indictment which fails to allege that such assault was committed with a felonious intent is bad.—*State v. Clayton*, (Mo.) 13 S. W. 819.

28. An indictment for an assault need only charge the assault in general terms, without specifying the manner in which it was committed. *Overruling State v. Jordan*, 19 Mo. 212, and *State v. Greenhalgh*, 24 Mo. 373, and following *State v. Chandler*, 1d. 371, and *State v. Chumley*, 67 Mo. 41.—*State v. Clayton*, (Mo.) 13 S. W. 819.

29. An indictment which avers that defendant "feloniously, willfully, and with malice aforethought, did kill and murder F. with a knife," is not defective because it fails to allege the manner in which the knife was used.—*Noble v. Commonwealth*, (Ky.) 13 S. W. 429.

30. An indictment charging defendant with shooting deceased with a pistol is not insufficient because it fails to allege that the pistol was loaded with powder and a leaden ball or other hard substance.—*Sims v. Commonwealth*, (Ky.) 13 S. W. 1079.

31. An indictment charging that the accused feloniously, and with malice aforethought, assaulted and shot at a person named therein, with a Winchester rifle loaded with powder and leaden bullets, with intent to kill and murder, sufficiently charges an assault, with a deadly weapon, with intent to kill, under Rev. St. Mo. § 1262.—*State v. Elvins*, (Mo.) 13 S. W. 937.

Evidence.

32. A pending indictment against defendant for murdering the child of deceased by poison was properly read in evidence as showing a motive for the crime; and, as it tended to establish the main issue, it was not necessary for the court, in its charge, to restrict the purposes for which the evidence could be considered.—*Hudson v. State*, (Tex.) 13 S. W. 383.

33. The defense, on the cross-examination of a state's witness, proved defendant's attempts to prosecute deceased before the witness, who was a justice of the peace. The state, in response, proved by the witness, over defendant's objection, that deceased had previously instituted prosecutions before him against the defendant. *Held* that, whether or not the evidence was improper, defendant, having caused its introduction, could not complain.—*Hudson v. State*, (Tex.) 13 S. W. 383.

34. On a trial for assault with intent to kill, evidence is inadmissible as to the killing of a third person by the prosecuting witness a few minutes before defendant made his assault, at which encounter defendant was not present, and with which he was not shown to have been connected; and where, on the admission of such evidence, the court promises to withdraw it if defendant's connection is not shown, it is error to permit such evidence to go to the jury with the court's approval impressed on it.—*State v. Clayton*, (Mo.) 13 S. W. 819.

35. Where there is nothing to show that the prosecuting witness was acting as a peace-officer at the time of the assault, it is error to admit evidence that he then held the office of town marshal.—*State v. Clayton*, (Mo.) 13 S. W. 819.

36. Where the defense is justifiable homicide, the testimony of a person who was, at the time,

standing to the left of defendant, that he passed behind defendant from his left to his right side because he expected deceased would strike at defendant with a billiard cue, and that he feared being hit, is admissible as bearing on the effect likely to be produced on defendant's mind by the conduct of deceased.—*Cochran v. State*, (Tex.) 13 S. W. 651.

87. In a murder case it appeared that defendant refused to pay a hack-driver, and that deceased was killed while interfering. *Held*, that the driver's testimony that he insisted on being paid because he saw defendant ordered away from an hotel, and that defendant gave him a wrong name, was immaterial, and prejudicial to defendant.—*Childers v. State*, (Tex.) 13 S. W. 650.

88. On the trial of certain negroes for the murder of certain whites killed in a fight between whites and negroes at the trial of one L., before a negro justice of the peace, the theory of the state was that the negroes started the difficulty in pursuance of a previously formed conspiracy, and there was testimony tending to sustain this theory, as well as that of defendants, that the whites started the trouble pursuant to a previous plan to interfere with the court. *Held*, that, for the purpose of showing that the whites went there with innocent motives, which would tend to show that they were not the assailants, it was a proper question for the state to ask one of them, why he went there armed, and that his answer, "we went there to see that no harm came to L.," was competent.—*Wicks v. State*, (Tex.) 13 S. W. 748.

89. On trial for murder, B. testified for the state that, during the summer before the killing, deceased asked witness to carry a letter to defendant, and to tell him that, if he did not bring deceased's things back, they would be taken by law. Another witness for the state testified that, when B. delivered the letter to defendant's wife, defendant not being present, he told her that, if the property was not returned, deceased would have them arrested for theft. *Held*, that the admission of this testimony was, at most, harmless error, as other evidence showed that defendant knew all about the letter, that it was read in his presence, and that the whole subject about the return of the property was discussed between witness and defendant and defendant's wife.—*Fulcher v. State*, (Tex.) 13 S. W. 750.

40. On a trial for murder, it appeared that one C., on the day of the killing, or shortly before, had stated to some one that deceased "had a pretty pistol, and he intended to have it, if he had to kill him to get it." This statement was admitted, as against the accused, upon the idea that the accused, C., and others, had conspired to kill the deceased. *Held*, that, the jury having before them the real tragedy, detailed by eye-witnesses for and against the defendant, could not have been misled or influenced by such testimony, even if incompetent.—*Clem v. Commonwealth*, (Ky.) 13 S. W. 102.

41. In a prosecution for murder, testimony that certain bruises found upon the person of deceased were made with a "rough, hard substance," is not objectionable as opinion evidence.—*Graham v. State*, (Tex.) 13 S. W. 1010.

Evidence—Character of defendant.

42. Where a witness in a murder case has been questioned as to the general reputation of accused, without any objection that the question did not fix the time as that of the murder, his answer will not be excluded from the jury on that ground.—*State v. Hope*, (Mo.) 13 S. W. 490.

Character of deceased.

43. While deceased was sitting at the table eating his supper, defendant stepped up behind him, and inflicted the fatal blows. *Held*, that defendant's evidence that deceased was a violent and dangerous man was properly excluded, it being admissible under Willson, Crim. St. Tex. § 1054, only where, at the time of the homicide, deceased did some act indicating his purpose then to take defendant's life, or do him serious bodily harm.—*Walker v. State*, (Tex.) 13 S. W. 860.

Evidence—Declarations and admissions.

44. On a trial for homicide, in which the evidence tends to show a killing in self-defense, a statement made by defendant about an hour after the killing, and while under arrest, that he would kill any man "for a dollar," is irrelevant.—*Holt v. Commonwealth*, (Ky.) 13 S. W. 71.

45. Under the rule in *Nolen v. State*, 14 Tex. App. 474, that "where the confessions of a defendant under arrest are inadmissible against him, because made while he was uncautioned, his acts, if tantamount to such a confession, and done under similar circumstances, are likewise inadmissible," it was error to allow state's witness to testify that when the parties who had arrested defendant, and who had him in custody, said to him, "We have arrested you for killing B. [deceased] last night," he seemed agitated, and turned pale.—*Fulcher v. State*, (Tex.) 13 S. W. 750.

46. Deceased was shot in the neck, and his articulation was affected by blood collecting in his throat. About 15 minutes after he was shot brandy and camphor were administered, and about 15 minutes afterwards, when able to talk, he made certain statements as to the circumstances of the shooting, and who shot him. *Held*, that the declarations were admissible as part of the *res gestae*.—*Fulcher v. State*, (Tex.) 13 S. W. 750.

Dying declarations.

47. Several days after deceased was shot he made a statement, which was reduced to writing by witness, and sworn to before him as a notary by deceased. At the time deceased made the statement he felt conscious of approaching death, and believed there was no hope of recovery; and, although he lived a month and a half thereafter, there was nothing to show that his mind ever changed as to his condition. *Held* sufficient to warrant the admission of the statement as a dying declaration.—*Fulcher v. State*, (Tex.) 13 S. W. 750.

48. Where a dying declaration is made and reduced to writing and sworn to by the declarant, but the accused procures the rejection of the writing, he cannot object to oral testimony detailing what the deceased then said, provided it be shown that the statements were made under conditions rendering them admissible as a dying declaration.—*Hines v. Commonwealth*, (Ky.) 13 S. W. 445.*

49. Where an injured person makes statements at different times all may be proved, if made under a sense of impending death.—*Hines v. Commonwealth*, (Ky.) 13 S. W. 445.*

Instructions.

50. The definition of "malice aforethought" is essential to the charge in a murder case, and its omission is not cured by the presence of definitions of express malice and implied malice.—*Childers v. State*, (Tex.) 13 S. W. 650.

51. Error cannot be predicated of the court's charge that, "unless you believe from the evidence that the defendant struck the deceased with the intent to kill him, or to inflict such serious bodily injury upon him as would probably end in his death, you will acquit him," as it was more favorable to defendant than he was entitled to.—*Walker v. State*, (Tex.) 13 S. W. 860.

52. The assault having been committed voluntarily, with deliberate design, and with an instrument calculated to inflict serious bodily injury which might, and in fact did, result in death, the crime was murder, and the court properly refused to instruct on the law of aggravated assault and battery.—*Walker v. State*, (Tex.) 13 S. W. 860.

53. On an indictment for murder, where the only issue is whether the killing was done in self-defense, an instruction that defendant was guilty of manslaughter if he intentionally fired off his pistol, and accidentally and carelessly, and not in self-defense, killed deceased, is misleading and erroneous.—*Crane v. Commonwealth*, (Ky.) 13 S. W. 1079.

54. On a trial for assault with intent to murder, it appeared that, while the person assaulted had his back turned, and was walking away, the defendant drew a knife and advanced towards him, but was stopped by a third person. The court

charged in the language of Pen. Code Tex. art. 489, subd. 3, that the use of any dangerous weapon, or the semblance thereof, in an angry or threatening manner, with intent to alarm another, and under circumstances calculated to effect that object, comes within the meaning of an "assault." *Held*, the charge not being justified by the evidence, it was error.—*Hunt v. State*, (Tex.) 13 S. W. 858.

55. Defendant having testified that he was shot at by deceased; that he retreated and fired as he retreated; and that, if he killed deceased, he killed him under these circumstances,—he cannot object that the court failed to instruct that he had the right to act on apparent danger; that the danger need not be real; and that he was not bound to retreat in order to justify the killing; as, according to his testimony, the danger was real, and he did actually retreat.—*Hudson v. State*, (Tex.) 13 S. W. 388.

56. Where defendant admits that he killed deceased, an instruction on circumstantial evidence is not required.—*Self v. State*, (Tex.) 13 S. W. 602.

57. Where the evidence shows that the homicide was either murder or justifiable, a charge on manslaughter should not be given.—*Self v. State*, (Tex.) 13 S. W. 602.

58. On trial for murder in the first degree, the failure of the court to charge the jury as to murder in the second degree, when the evidence tending to establish that grade of the crime is light and trivial, and of such a character that it is not at all probable that the jury would have considered it in arriving at their verdict, is not reversible error in the absence of objection made and exception taken to the charge at the time, as required by Code Crim. Proc. Tex. art. 685.—*Davis v. State*, (Tex.) 13 S. W. 994.

59. Where, in a trial for murder, the evidence clearly raised the issue of self-defense, it was error to omit to instruct the jury upon the law of self-defense, and to refuse a proper charge thereon requested by defendant.—*Reagan v. State*, (Tex.) 13 S. W. 1009.

60. Where two persons, quarreling in a theater, went outside for the purpose of fighting it out, and the evidence raised the question whether defendant, who had a deadly weapon on his person or in his hand, went with an intent to use it, the issue of murder in the first degree was clearly raised, and it was proper to instruct in regard thereto.—*Habel v. State*, (Tex.) 13 S. W. 1001.

— Reasonable doubt.

61. Under the rule that in a prosecution for homicide the charge of the court should apply the doctrine of reasonable doubt, as between the different degrees involved in the case, an instruction that, in order to warrant a verdict of murder in the second degree, the jury must believe from the evidence, beyond a reasonable doubt, that defendant committed the homicide with implied malice, etc., sufficiently applies the doctrine as between murder in the second degree and manslaughter, in the absence of a request for a special instruction.—*Powell v. State*, (Tex.) 13 S. W. 599.

62. Where the court charges the doctrine of reasonable doubt generally, making it applicable to the whole case, an objection that it was not applied in the instructions on threats and self-defense is untenable.—*Powell v. State*, (Tex.) 13 S. W. 599.

Continuance.

63. Where there is a conflict of testimony as to whether deceased was armed, and as to his object in approaching defendant at the time of the killing, evidence that deceased was a violent and dangerous man is material to defendant, and will justify a continuance to procure the attendance of absent witnesses to prove that fact.—*Holt v. Commonwealth*, (Ky.) 13 S. W. 71.

64. In a prosecution for murder, defendant, whose trial was set for the term of court at which he was indicted, made affidavit that H., the principal witness for the state, and the only third party who saw the killing, told an absent witness that not until deceased had told defendant that he must fight, and had struck defendant with a barrel-head, cutting him severely, did the latter draw a pistol and shoot deceased. Affiant said that H.

had refused to talk with his attorney, and that he could procure the attendance of the absent witness at the next term of court. *Held* that, the affidavit showing that defendant had used proper diligence, a continuance should have been granted to enable the defendant to secure such witness.—*Wells v. Commonwealth*, (Ky.) 13 S. W. 915.

New trial.

65. Code Crim. Proc. Tex. art. 777, subd. 7, which provides for a new trial in case "the jury, after having retired to deliberate on a case, have received other testimony," does not authorize the granting of a new trial in a murder case because the jury inspected the clothing worn by deceased at the time of the homicide, after they had retired, where the clothing was inadvertently left in the jury-room, and other undisputed evidence, besides the clothing, showed that deceased was shot in the back, and all the jurors testify that its inspection did not influence their verdict.—*Hendricks v. State*, (Tex.) 13 S. W. 673.

66. When, on indictment for murder, defendant's motion for a continuance, on the ground of absent witnesses, is overruled, and a verdict of guilty of murder in the first degree rendered, and it appears that there is some probability of the truth of defendant's theory that he killed deceased because he slandered his sister, and that the slander may be proved on a new trial by such absent witnesses, the new trial should be granted; as under Pen. Code Tex. art. 597, a homicide committed because of insulting words concerning a female relative is reduced from murder to manslaughter.—*Hammond v. State*, (Tex.) 13 S. W. 605.

67. Where defendant claims that he killed deceased in self-defense, and the prosecution contends that deceased was friendly to defendant, and a continuance was refused, which defendant asked because of the absence of a witness by whom he expected to prove that deceased made threats against his life, and that such absent witness told defendant of them, and it appears that such testimony is probably true, a judgment of conviction will be set aside and a new trial granted.—*Self v. State*, (Tex.) 13 S. W. 602.

Appeal—Review.

68. A bill of exceptions to a refusal of the trial court to allow defendant to prove his cowardly nature will not be considered where it fails to show the object and purpose of the proposed testimony.—*Walker v. State*, (Tex.) 13 S. W. 860.

69. Under Code Crim. Proc. Tex. art. 685, a conviction must be set aside for any error, however immaterial, which was promptly excepted to, and properly presented by a bill of exceptions; and the fact that one tried for murder was convicted of manslaughter does not relieve the reviewing court from considering a charge as to murder in the first degree, which was objected to on the ground that the evidence was not sufficient to raise the question of murder.—*Habel v. State*, (Tex.) 13 S. W. 1001.

HORSE AND STREET RAILROADS.

Liability for negligence.

In an action for personal injuries received by plaintiff, a youth nine years old, in alighting from defendant's cable cars, the court properly instructed that, if the jury found plaintiff was a passenger on defendant's car, and that defendant's agents and servants in charge of the car knew at what point he wished to alight, and that, when they reached said point, they did not stop long enough to permit plaintiff, acting with reasonable care and diligence for one of his years, to alight in safety, and that by reason thereof plaintiff, in attempting to alight, was thrown from said car, and injured, then he is entitled to recover.—*Ridenhour v. Kansas City Cable Ry Co.*, (Mo.) 13 S. W. 839.

HUSBAND AND WIFE.

See, also, *Curtesy; Divorce; Dower; Homestead; Marriage.*

Acknowledgment of deed by wife, see *Deed*, 8, 9.
Competency as witnesses, see *Witness*, 5.
Conveyances between, see *Fraudulent Conveyances*, 9, 10.
Improvements on wife's land, lien, see *Liens*.

Husband's liability for wife's debts.

1. Defendant testified that his wife carried on business against his will; that he had notified those with whom she dealt that he would not be responsible for her debts, but had not notified plaintiffs, because he did not know they were dealing with her; that he had put no means in the business, and derived no benefit from it; and that it was not necessary for the support of his family. It appeared that he had given his wife a house and lot, and joined her in a mortgage thereon to enable her to buy the establishment. The wife had carried on the business for nearly two years, during which time the family lived above the store. A disinterested witness testified that the husband had promised to pay plaintiff's claim. *Held*, that the evidence was sufficient to justify the finding that the husband had so assented to his wife's carrying on the business as to make him responsible for her debts in relation to it. —*Jones v. Worcher*, (Ky.) 18 S. W. 911.

Rights and liabilities of wife.

2. When an insolvent debtor conducts his business in his wife's name, but the management of the business is left entirely in the control of the husband, the avowed purpose being to place the property beyond the reach of the creditors of the husband, the property accumulated in such business will be subjected to the husband's debts. —*Nickle v. Emerson Mercantile & Manufacturing Co.*, (Ark.) 18 S. W. 78.

3. In Kentucky, a personal judgment against a married woman, on a claim which does not authorize a personal judgment against her, is void, and she is not estopped from resisting its enforcement afterwards on that ground, though it is attempted to be enforced in another court. —*Spencer v. Parsons*, (Ky.) 18 S. W. 72.

4. An averment that a married woman and her husband, in a former action, in which the judgment sought to be enforced was rendered, availed themselves of all defenses, both legal and equitable, is a sort of legal conclusion of the pleader, and is insufficient as a plea that in the former action the *feme covert* set up her coverture, and that the court decided the question of her legal status. —*Spencer v. Parsons*, (Ky.) 18 S. W. 72.

Conveyances in fraud of marital rights.

5. A conveyance on the eve of marriage, to be regarded in equity as a fraud on the marital rights of the intended wife, must be made without her consent or knowledge. —*Murray v. Murray*, (Ky.) 18 S. W. 244.

6. When a gift or voluntary conveyance of all or the greater portion of his property is made, by one about to marry, to his children by a former marriage, without the knowledge of the intended wife, or it be advanced to them after marriage without the wife's knowledge, a *prima facie* case of fraud arises, and it rests on the beneficiaries to rebut the presumption. —*Murray v. Murray*, (Ky.) 18 S. W. 244.

Wife's separate estate.

7. Defendant, who had, with his wife's knowledge, mortgaged his cotton crop to secure supplies from plaintiffs, bought a wagon from them, which he paid for with cotton covered by the mortgage. He afterwards mortgaged the wagon to plaintiffs, who sought to replevy it on his default in payment. *Held*, that, in the absence of proof that plaintiffs were influenced by defendant's wife to take the mortgage on the wagon, or to extend defendant's credit on the faith of it, she was not estopped to claim it on the ground that the cotton with which it was paid for was her own. —*Locke v. Adamson*, (Ark.) 18 S. W. 702.

8. A parol antenuptial contract in consideration of marriage, by which it is agreed that the intended wife shall hold as her separate estate the property then owned or thereafter acquired by her, free from the use and control of her intended hus-

band, but vesting in the wife no power of disposition thereof, takes from the husband the use and control thereof during her life, but on her death bank-stock owned by her before marriage or afterwards acquired goes to the husband. —*Brown's Adm'r v. Brown's Ex'rs*, (Ky.) 18 S. W. 105.

9. Though a deed executed by a married woman, without joining her husband, in consideration that the grantee will support her, cannot divest her of the legal title, yet, where the grantee has gone into possession under such deed, he is entitled, in an action by the grantor's heirs to recover the land, to be recompensed for the support of the grantor and her husband, the taxes paid by him, and the value of his improvements, and to have the same declared a charge on the land. Such expenses are for necessities, within the meaning of Gen. St. Ky. c. 53, art. 2, § 2, which provides that the wife's real estate shall be liable for debts contracted by her after marriage, for necessities for herself or any member of her family, when such contract is in writing, signed by her. —*Gray v. Marshall*, (Ky.) 18 S. W. 918.

10. In an action by a married woman to recover a piano, on the ground that it was her separate property and had been sold by her husband to defendant without her knowledge or consent, the jury were instructed to find for plaintiff if the piano was owned by her before her marriage, unless they should find for defendant under other instructions to be given. They were then told that plaintiff could not recover if, with knowledge of the facts, she accepted any of the money paid on the piano, without returning, or offering to return, the money so received to defendant. They were then told that receiving the money merely would not estop plaintiff, unless she knew of the sale at the time. *Held*, that error could not be predicated of the charge on the ground that it did not set forth in clear and distinct terms, and in such a manner as not to confuse or mislead the jury, the conditions on which plaintiff would be entitled to recover. —*Woodward v. McNeill*, (Tex.) 18 S. W. 222.

11. Where a married woman, through her husband as agent, purchases goods for the benefit of her separate property, she is liable therefor, under Mansf. Dig. Ark. §§ 4625, 4626, 4630, which authorize a married woman to carry on any business on her separate account, and provide that judgments against her may be enforced against her separate property the same as against a *feme sole*. Following *Hickey v. Thompson*, 12 S. W. 475. —*Wolf v. Duvall*, (Ark.) 18 S. W. 728.

12. The granting clause of a deed began: "I, L. H., for and in consideration of * * *, have granted * * *, and by these presents do grant, * * * unto said B., * * * the lands and tenements following, to-wit," describing them. The deed concluded: "Now, I, M. H., wife of the said L. H., for the consideration above set forth, do hereby assign, release, relinquish, and quitclaim all my right, title, interest, and ownership to the said B. * * * Therefore we, L. H. and M. H., as man and wife, have this * * * day * * * set our hands and seals." The certificate of acknowledgment was to the effect that both parties grantor acknowledged that they had signed the same for the uses, purposes, and consideration therein set forth. Dower was not mentioned in the deed or acknowledgment. *Held*, that the words used by M. H. referred to the lands described in the deed, and were sufficient to and did convey her separate estate therein. —*Malin v. Raife*, (Ark.) 18 S. W. 595.

Contracts of wife—Avoidance.

13. A statutory bond executed by a married woman, on purchasing land at an execution sale, under Mansf. Dig. §§ 3085, 3087, providing for the execution of such bonds, and giving them the effect of a judgment, on which execution may issue, is voidable on the ground of the obligor's coverture, at her election only. —*Smith v. Hudson*, (Ark.) 13 S. W. 597.

Conveyance by wife.

14. In order to convey the wife's right of dower and homestead, her name must appear in the body of the conveyance as one of the grantors; and the

mere signing and acknowledging of the instrument by her will not operate to convey her interest in the property.—*Measels v. Martin*, (Ky.) 18 S. W. 859.

Conveyances and gifts between.

15. A conveyance of land by a married woman to her husband, without consideration, it not appearing that her disabilities of coverture were in any way removed, or that she ratified the conveyance afterwards, will be canceled.—*Graham v. Struwe*, (Tex.) 13 S. W. 381.

Actions—By wife.

16. Where a firm gives its note for money loaned by a married woman, payable to her husband as trustee, her husband being a member of the firm, on the firm's becoming insolvent, the wife may sue on the note in her own name.—*Martin Brown Co. v. Parrill*, (Tex.) 13 S. W. 975.

Community property.

17. Profits on investments of a wife's separate estate are community property and liable for the husband's debts; and if the profits be mixed with the wife's separate estate, in a contest between the wife and the husband's creditor, the burden is on the wife to show how much of it retained the character of separate estate, or, if any part of it has undergone mutations, to trace and identify it.—*Claffin v. Pfeiffer*, (Tex.) 13 S. W. 483.

18. Where an insolvent member of a firm engaged in the manufacture of show-cases conveys his interest in the partnership to his wife, which includes the cases on hand and material used for their manufacture, her interest will be presumed to be community property, although the conveyance is in good faith and for consideration, and in a contest with her husband's creditor the burden is on her to show that it is her separate estate, and to trace and identify that portion of it which has undergone mutations.—*Claffin v. Pfeiffer*, (Tex.) 13 S. W. 483.

19. In Texas, a deed of trust executed by a man after the death of his wife, on land which was the property of their marriage, and occupied by them, in which deed the children of such marriage do not join, conveys only an undivided one half interest in the land.—*Meyer v. Opperman*, (Tex.) 13 S. W. 174.

20. Under Rev. St. Tex. art. 1653, providing that, on death of husband or wife, leaving children, the surviving spouse shall take one-half of the community property, and the children the other half, a surviving child inherits all of a deceased parent's half of the community estate, to the exclusion of grandchildren.—*Pegues v. Haden*, (Tex.) 13 S. W. 171.

Separation agreement.

21. A separation agreement between husband and wife, made while they are living apart, and in consideration of that fact, and of their agreement to continue to live apart, whereby they make a fair division of their community property, is valid.—*Rains v. Wheeler*, (Tex.) 13 S. W. 324.

Impeachment.

Of witness, see *Witness*, 14-21.

Implied Trusts.

See *Trusts*, 1.

Imputed Negligence.

See *Negligence*, 7.

INCEST.

Indictment.

1. In an indictment for incest committed by defendant with his daughter, it was immaterial by what name the daughter was or is now called, if her identity is established as the daughter of defendant.—*Mathis v. Commonwealth*, (Ky.) 13 S. W. 860.

Evidence.

2. Proof of one commission of the offense is sufficient for conviction, but it is not error to permit the proof of the various times and circumstances of the repetition of the offense.—*Mathis v. Commonwealth*, (Ky.) 13 S. W. 860.

3. Testimony for the purpose of showing that the daughter had had sexual intercourse with another person prior to her marriage was properly rejected.—*Mathis v. Commonwealth*, (Ky.) 13 S. W. 860.

INDECENT EXPOSURE.

Indictment—Variance.

An indictment charging that defendant "did unlawfully and designedly, in public, make an obscene and indecent exhibition of the persons of others," in violation of Pen. Code Tex. § 343, is not sustained by proof that he placed an obscene and indecent writing upon the clothes worn by others.—*Tucker v. State*, (Tex.) 13 S. W. 1004.

Independent Contractor.

Negligence of, see *Master and Servant*, 5, 6.

INDIANS.

Ejection of trader from reservation.

Rev. St. U. S. §§ 2126, 2129, (Treaty 1865, Choctaws and Chickasaws, art. 43,) provide that no white person has a right to go into the Indian country, except officers, agents, and employees of the government, and of any internal improvement company, or persons traveling or temporarily sojourning in said nations; also persons temporarily employed as teachers, mechanics, or as being skilled in agriculture. Section 2147 provides that all persons improperly in the Indian country shall be removed. Section 2058 provides that the United States Indian agents shall manage the affairs of the agency, including the intercourse of the whites with the Indians, and perform such regulations as may be prescribed. There is a regulation that the agency shall not be used for the concealment of persons or property against creditors. *Held*, that a licensed trader, who had sold out his business and abandoned his post, and was avoiding his creditors, was properly ousted from the agency, with his property.—*Echols v. Tate*, (Ark.) 13 S. W. 253.

INDICTMENT AND INFORMATION.

Particular crimes, see *Burglary*, 3, 4; *Disorderly House*, 2; *False Pretenses*, 1-3; *Homicide*, 31-31; *Incest*, 1; *Indecent Exposure*; *Intoxicating Liquors*, 10, 11; *Larceny*, 4-7; *Perjury*, 1, 2; *Rape*, 1; *Robbery*, 1; *Wrecking Trains*, 1.

Following language of statute, see *Abduction*, 1.

Signature—By foreman of grand jury.

1. Where the signature of the foreman of the grand jury to an indictment is placed just before the conclusion, "against the peace and dignity of the state," such signature is mere surplusage, and a motion in arrest of judgment, based thereon, was properly overruled.—*Adams v. State*, (Tex.) 13 S. W. 1009.

—By prosecuting attorney.

2. Under the requirement of the Criminal Code of Kentucky, that the foreman of the grand jury shall sign an indictment, it is not necessary that either the commonwealth's or the county attorney should sign it, and it is immaterial that either does it.—*Sims v. Commonwealth*, (Ky.) 13 S. W. 1079.

Indorsement of witnesses' names.

3. An indictment presented without the names of witnesses indorsed may properly, by order of court, be returned to the grand jury to supply the omission, and entered on the following day.—*State v. McNamara*, (Mo.) 13 S. W. 938.

Information — Allegation of pre-entment.

4. Code Crim. Proc. Tex. art. 490, subd. 2, requires that an information "shall appear to have been presented in a court having competent jurisdiction of the offense set forth." *Held* an exception to an information, which did not show by affirmative allegation that it was presented in any court, should have been sustained. — *Bowen v. State*, (Tex.) 13 S. W. 787.

5. Such defect is one of form, and the judgment should therefore be reversed, with leave to amend the information. — *Bowen v. State*, (Tex.) 13 S. W. 787.

Description of person.

6. Code Crim. Proc. Tex. arts. 314, 315, require an examining magistrate to certify the proceedings had before him, including defendant's bail-bond, to the proper court, and require the clerk of such court to deliver such proceedings to the foreman of the next grand jury. An indictment for theft of money charged that it was the property of one D., whose Christian name was to the grand jury unknown. *Held*, that the docket of the examining magistrate, which recited that the complaint was made by S. W. D., and the bail-bond, which recited that defendant had been committed on a complaint charging him with the theft of money from said S. W. D., were admissible to show that the grand jury, by reasonable diligence, might have known D.'s Christian name. — *Kimbrough v. State*, (Tex.) 13 S. W. 213.

7. Where an indictment for theft alleges the name of the owner of the stolen property to be "Fraude," while the name as actually and properly spelled is "Freude," the question of variance should be submitted to the jury; and it is error to rule that the names are *idem sonans*. — *Weitzel v. State*, (Tex.) 13 S. W. 864.

Description of place.

8. Where, in a prosecution for the fraudulent disposition of mortgaged property, the indictment describes the mortgaged property as being grown on the "McLame Farm," evidence that the farm was known both as the "McLame Farm" and the "McNamee Farm" does not constitute a fatal variance. — *Martin v. State*, (Tex.) 13 S. W. 151.

Complaint and information—Variance.

9. The fact that a complaint describes the prosecuting witness only as "J. Withers," while the information describes him both as "J. Wither" and "J. Withers," constitutes an immaterial variance. — *Hardy v. State*, (Tex.) 13 S. W. 1008.

Election of counts.

10. The state cannot be compelled to elect on which count it will rely where there is proof tending to support both counts. — *Armstrong v. State*, (Tex.) 13 S. W. 864.

INFANCY.

See, also, *Guardian and Ward; Parent and Child*.

Sale of liquor to minors, see *Intoxicating Liquors*, 8.

Contracts.

1. Under Code Mo. § 3295, which provides that a conveyance by a husband, during coverture, of any interest in his wife's real estate, shall be invalid unless jointly executed by husband and wife, and by her duly acknowledged, when the wife was an infant at the time of the conveyance, it is void as to the husband as well as to her. — *Craig v. Van Bebber*, (Mo.) 13 S. W. 906.

— Ratification and avoidance.

2. When a minor conveys land, and, after attaining majority, brings an action of ejectment to recover it, it is not necessary to set out in the petition a disaffirmance of the conveyance. — *Craig v. Van Bebber*, (Mo.) 13 S. W. 906.

3. In such an action, when it appears that the minor has no other property, he may recover the land without returning so much of the purchase

money as has been paid. — *Craig v. Van Bebber*, (Mo.) 13 S. W. 906.

4. An offer, after attaining majority, to execute a confirmatory deed on the payment of the balance of the purchase money, is not a ratification. — *Craig v. Van Bebber*, (Mo.) 13 S. W. 906.

5. A judgment against the administrator of a deceased guardian decreed that it be satisfied by the foreclosure of a mortgage executed by the guardian to his bondsmen to indemnify them in case of loss; but afterwards a private settlement was made between the mother of the infants and the administrator, by which a part of the land was conveyed to the mother, and she gave her receipt in full satisfaction of the judgment, styling herself the guardian of the minors. Afterwards the minors brought an action of forcible detainer against one in possession of the land, alleging that they were landlords, but not alleging that they claimed by virtue of the settlement. *Held*, that the action of forcible detainer did not amount to a ratification of the illegal settlement. — *Wygall v. Myers*, (Tex.) 13 S. W. 567.

Actions — Appointment of guardian ad litem.

6. Where the record of a cause shows that a guardian ad litem was appointed for minor defendants, and that he accepted the appointment and filed their answer, the recital in the decree that the cause was heard upon their answer is conclusive as to the service of legal notice on the minors. — *Beddinger v. Smith*, (Ark.) 13 S. W. 734.

7. The consent of minors is not necessary to the appointment of a guardian ad litem for them. — *Beddinger v. Smith*, (Ark.) 13 S. W. 734.

— Judgment.

8. Where a minor sues by his next friend, a judgment for the minor, and not for the next friend, is proper, when the latter has not qualified as the guardian of the minor's estate. — *Galveston Oil Co. v. Thompson*, (Tex.) 13 S. W. 60.

9. A decree entered against minors upon the pleadings, without proof of every material allegation prejudicial to their rights, is erroneous. — *Luck v. Atkins*, (Ark.) 13 S. W. 1097.

10. A judgment for plaintiff in an action brought by one styling herself the mother and next friend of her minor children against the administrator of their guardian, belongs to the minors, and the mother, having no interest in it, is not a necessary party to an action to enforce it. — *Wygall v. Myers*, (Tex.) 13 S. W. 567.

11. The complaint, in an action to enforce a judgment against the administrators of the guardian of certain minors, alleged that the minors recovered the judgment against the estate of their guardian, but the judgment was in the name of their mother as their mother and next friend. *Held*, that the rule that the allegations and proof must correspond was not violated by admitting the judgment in evidence, as the minors had the exclusive interest in it. — *Wygall v. Myers*, (Tex.) 13 S. W. 567.

12. Where a judgment is recovered in the district court in favor of minors represented by their next friend, the failure to appoint a guardian ad litem, as required by the statute, is a mere irregularity which does not invalidate the judgment. — *Wygall v. Myers*, (Tex.) 13 S. W. 567.

INJUNCTION.

Of collection of taxes, see *Taxation*, 13, 14. erroneous taxation, see *Taxation*, 24, 25. nuisance, see *Nuisance*, 2.

warrant, see *Municipal Corporations*, 35. Pleading, see *Ferry*, 2.

When granted.

1. A petition for injunction alleged that the plaintiff was a corporation duly organized to manufacture and vend gas; that defendant gas company claimed that its franchise was exclusive, and publicly asserted that plaintiff had no franchise to erect works or sell gas, and threatened to invoke all means possible to prevent it from doing so; that

by reason thereof the plaintiff's credit, business, and franchise were irreparably injured. *Held*, that the facts did not present a ground for equitable relief.—*Consumers' Gas Co. of Kansas City v. Kansas City Gas-Light & Coke Co.*, (Mo.) 18 S. W. 874.

2. Where property which has been attached is claimed by one not a party to the writ, and a trial is had of the right to the property, it is provided by Rev. St. Tex. art. 4841, that, in case the value of the property is greater than the amount claimed in the writ by virtue of which it was levied on, the damages shall be assessed "on the amount claimed under said writ." Article 4843 provides that, when the claimant of the property shall fail to establish his right thereto, judgment shall be rendered against him for the value of the property, with interest. This is amended by Laws of 1887, by adding that such judgment shall be rendered in favor of the plaintiff in the writ, and shall fix the amount of the plaintiff's claim, and, in case the judgment shall not be satisfied by a return of the property, then execution shall issue thereon in the name of the plaintiff for the amount of his claim, provided the amount of such judgment exceed such claim; and in such case the excess of the judgment shall inure to the benefit of any person who shall show superior right to the property claimed as against the claimant. *Held*, that where the plaintiff in the writ issues execution for the full amount of his judgment against the claimant, instead of the amount of his claim with interest and damages, the latter was entitled to relief, and that, the illegal proceedings being subsequent to judgment, injunction was the proper remedy.—*Wills Point Bank v. Bates*, (Tex.) 18 S. W. 809.

Procedure.

3. In injunction to restrain execution on judgments on the ground that the judgment creditors had released one of the judgment debtors, the answer must be sworn to on the issue of release by the defendants in person before it can be considered on motion to dissolve.—*Wills Point Bank v. Bates*, (Tex.) 18 S. W. 809.

Violation of injunction—Contempt.

4. Where the enforcement of an order of sale on foreclosure of a trust-deed has been enjoined, its sale under execution, issued on the judgment of foreclosure, while the injunction is still in force, is a contempt of court, and passes no title.—*Ward v. Billups*, (Tex.) 13 S. W. 308.

INNKEEPERS.

Licenses.

Mansf. Dig. Ark. § 758, conferring upon municipal corporations power "to regulate hotels and other houses of public entertainment," does not render sections 6416, 1859, requiring tavern-keepers to procure licenses from the county court, and making the omission to do so a misdemeanor, punishable by a fine, inoperative in such cities, and ordinances in conflict therewith are void to the extent of their inconsistency.—*State v. Sumpter*, (Ark.) 13 S. W. 933.

INSOLVENCY.

See, also, *Assignment for Benefit of Creditors*. Preferences, see *Conflict of Laws*, 3.

Preferences.

A transfer, by an insolvent, of corporate stock, to a third person, for the purpose of drawing the value of the same, and paying it over to a creditor of the transferer, which transfer is made a few hours before executing an assignment for the benefit of creditors, is not within Rev. St. Ohio 1886, § 6343, providing that "all assignments in trust to a trustee or trustees, made in contemplation of insolvency, with the intent to prefer one or more creditors, shall inure to the equal benefit of all creditors, in proportion to the amount of their respective claims."—*Matthews v. Lloyd*, (Ky.) 13 S. W. 106.

INSPECTION.

Construction of statute—Exemption from inspection.

Act Tex. April 5, 1889, (Gen. Laws, 123,) entitled "An act to provide for the inspection of refined oils which are the product of petroleum, and which may be used for illuminating purposes within this state, and to regulate the sale and use thereof, and to provide penalties for violations of the same," in section 8 contains a proviso: "Provided, it shall not be necessary to inspect one which has been inspected under a law of another state." *Held* that, notwithstanding the use of the word "one" instead of "oil," the intention of the legislature to exempt from inspection in the state oils that had been inspected under the laws of another state was manifest.—*In re Robinson*, (Tex.) 13 S. W. 786.

Instructions.

See *Criminal Law*, 46-60; *Trial*, 11-21.

INSURANCE.

Amount of insurance.

1. An insurance policy contained the clause, "this policy, being for \$1,000, covers *pro rata* on each of the following amounts," followed by a list of the articles insured, with the sum for which each was insured, aggregating \$3,510. There was no other insurance on the property. *Held*, that the policy insured each article separately for 1000-8510 of the sum named for it in the list.—*Citizens' Ins. Co. v. Ayers*, (Tenn.) 13 S. W. 1090.

Assignment of policy.

2. A creditor to whom his debtor transfers a life insurance policy by bill of sale absolute on its face, acquires no greater interest in the policy than such sum as will pay his debt and interest, and premiums paid by him and interest.—*Cawthorn v. Perry*, (Tex.) 13 S. W. 268.

3. An absolute assignment of a life insurance policy to a creditor only gives him title to enough of the proceeds to satisfy his debt and disbursements, with interest.—*Lewy v. Gillard*, (Tex.) 13 S. W. 804.

Application.

4. Though an application for insurance recites that the solicitor acted as agent of the insured in writing out answers to questions in the application, and the policy contains a warranty that the diagram of the insured premises in the application is correct, the policy is not vitiated by the incorrectness of the diagram, if it was made by the solicitor.—*Spratt v. New Orleans Ins. Ass'n*, (Ark.) 13 S. W. 799.

Conditions of policy.

5. The last inventory having been kept and exhibited to the adjuster of the company 10 days after the fire, and afterwards lost, there is a performance of the condition of the "iron-safe clause" in a fire policy requiring assured to keep and to produce the last inventory taken of his business, and avoiding the policy in the event of a failure to produce it.—*Pelican Ins. Co. v. Wilkerson*, (Ark.) 13 S. W. 1108.

6. If the books kept by the assured do not furnish the data necessary to enable the insurers to test the accuracy of the accounts delivered to them, nor afford any satisfactory idea of the amount of goods on hand and destroyed by the fire, he cannot recover on a policy containing an "iron-safe clause," avoiding it for failure to keep the last inventory and a set of books showing a record of all business transacted, including purchases and sales for cash and on credit.—*Pelican Ins. Co. v. Wilkerson*, (Ark.) 13 S. W. 1108.

7. A failure to comply with a warranty that insured would keep his books at night in a fire-proof safe, or in some place not exposed to a fire, which would destroy the building insured, does not vitiate the policy when insured informed the solicitor, in preparing the application, that he had

no safe, and would keep the books in his dwelling, and to the question in the application, "Do you agree to keep your books in an iron safe at night?" he answered, "Keep them in dwelling at night."—*Spratt v. New Orleans Ins. Ass'n, (Ark.) 18 S. W. 799.*

8. A policy of insurance for \$1,000 was issued upon property already insured for \$3,000, and provided that if other insurance were obtained without consent of the company the contract should be void. Additional insurance for \$1,000 was obtained. Upon the policy in question, detached from other parts of it, were the words: "Total concurrent insurance, \$4,000." *Held*, the words included the amount of the policy on which they were written, and therefore implied no consent to the additional \$1,000.—*East Texas Fire Ins. Co. v. Blum, (Tex.) 18 S. W. 572.*

9. A clause in the policy providing for forfeiture in case of any change in the title, use, occupancy, or possession of the property cannot be construed to include a change resulting unavoidably from the death of the assured, but only such change as might be caused by the act of the assured while living.—*Richardson's Adm'r v. German Insurance Co., (Ky.) 18 S. W. 1.*

10. Where the agent of the company was on the ground at the time the policy was written, and knew that a portion of the building was used as a store, in consequence of which an increased rate of premium was charged, the fact that gunpowder was kept in the store, in such quantities as is usually kept by country merchants, does not avoid the policy.—*Kenton Ins. Co. v. Downs, (Ky.) 18 S. W. 882.*

11. Where a policy provides that the company will make good to the assured, his executors, administrators, and assigns, all loss or damage to his dwelling-house, not exceeding the interest of the assured in the property, caused by fire or lightning between certain dates, the company cannot avoid payment of the loss on the ground that the assured died before the loss occurred, in the absence of a provision for forfeiture for such cause.—*Richardson's Adm'r v. German Insurance Co., (Ky.) 18 S. W. 1; German Ins. Co. v. Read's Ex'r, Id. 1080.*

Proof of loss.

12. An insurance policy requiring proofs of loss to be furnished "as soon as possible" is not forfeited by a failure to furnish them until 60 days thereafter, in the absence of a provision therein that unnecessary delay shall work a forfeiture.—*Sun Mut. Ins. Co. v. Mattingly, (Tex.) 18 S. W. 1016.*

13. A policy of fire insurance contained stipulations enumerating various causes which should work a forfeiture, and release the company from all liability. It then specified that proof of loss should be made within 30 days, and finally stipulated that no action should be maintained until all its conditions had been complied with by the assured, and that any action should be barred unless brought in six months after loss. *Held*, failure to make proof of loss within 30 days did not forfeit the policy, but only postponed the right of action till furnished.—*Kenton Ins. Co. v. Downs, (Ky.) 18 S. W. 882.*

Waiver.

14. A letter written by an insurance company informing the policy-holder that the proofs of loss furnished were unsatisfactory, and notifying him that payment of the claim would be resisted because of misrepresentations regarding title and property, operates a waiver of further proofs.—*Sun Mut. Ins. Co. v. Mattingly, (Tex.) 18 S. W. 1016.*

Payment of loss.

15. In an insurance policy payable to the wife of the assured, and, in the event that she died before him, then to their children, the words "their children" mean the children common to the assured and his wife.—*Evans v. Opperman, (Tex.) 18 S. W. 312.*

Agents.

16. The term "agent," in an application and policy of insurance providing that agents are not authorized to vary the terms of the policy, or to re-

ceive dues, does not apply to a general agent.—*Hartford Life & Annuity Ins. Co. v. Hayden's Adm'r, (Ky.) 18 S. W. 585.*

17. Where the home office of an insurance company is remote from that in which the insurance is effected, the insured has a right to believe that one intrusted with the general management of the company's business in the latter state has the full powers of a general agent.—*Hartford Life & Annuity Ins. Co. v. Hayden's Adm'r, (Ky.) 18 S. W. 585.*

18. A person who is applied to for insurance in a given amount, and who obtains a policy therefor from the agents of the company to which he is a stranger, and forwards it to the applicant, is agent for the latter; but his agency terminates when he delivers the policy, and notice to him of its cancellation is not notice to the policy-holder.—*East Texas Fire Ins. Co. v. Blum, (Tex.) 18 S. W. 572.*

19. One who is agent for an insurance company only for the purpose of collecting and forwarding the premium, cannot, in its behalf, consent to additional insurance.—*East Texas Fire Ins. Co. v. Blum, (Tex.) 18 S. W. 572.*

20. An insurance company cannot be held to have consented to additional insurance because its agent, long before the policy was issued, promised that consent would be given.—*East Texas Fire Ins. Co. v. Blum, (Tex.) 18 S. W. 572.*

Power to waive conditions.

21. In an action on a policy of life insurance it appeared that the application provided that agents could collect "admission fees" only; that all other payments should be made at the home office; and that, in case any of them were not paid, the policy should be void. The policy contained similar provisions, and further provided that agents were not authorized to vary its terms. The insured died two months after the policy was issued. At the time of receiving the policy the insured paid to the local agent who effected the insurance an amount sufficient to carry the policy four months. This amount was due on the first of the month after the policy was delivered, but it was not tendered to the company by the agent until after deceased's death, and was not accepted by it. The general manager of the company for that section of the country publicly announced that the local agent had authority to receive the dues. *Held*, that this operated as a waiver of the restriction in the application and policy as to the agent's powers, and estopped the company from denying them.—*Hartford Life & Annuity Ins. Co. v. Hayden's Adm'r, (Ky.) 18 S. W. 585.*

Actions on policies.

22. Where suit is brought on a policy of fire insurance which stipulates that the company will not be liable for a greater proportion of any loss than the sum thereby insured bears to the whole amount of insurance, and there is some evidence that the loss was less than the whole amount of insurance, it is reversible error to refuse to instruct the jury as to the *pro rata* liability of the defendant, though such limitation of liability was not pleaded by the defendant.—*Hibernia Ins. Co. v. Starr, (Tex.) 18 S. W. 1017.*

23. In an action on a policy of fire insurance which exempts the company from liability for fire caused by a hurricane, and provides that, if the insured building shall fall except as the result of a fire, the insurance shall cease, where such policy is attached as an exhibit to the petition, the jury should find for the defendant if they believe from the evidence that the fire was caused by a hurricane, though the answer does not expressly allege that the fire was so caused, since that point is put in issue by the general denial.—*Pelican Fire Ins. Co. v. Troy Co-op. Ass'n, (Tex.) 18 S. W. 990.*

Defense of overvaluation.

24. In an action on a policy of fire insurance, before the defense of overvaluation of the property can prevail, it must be shown that the insured falsely, and with intent to deceive the insurer, placed an overvaluation on the property insured.—*German Ins. Co. v. Read's Ex'r, (Ky.) 18 S. W. 1080.*

Actions on policies—Evidence.

25. In an action on a policy of fire insurance which exempts the company from liability for fire caused by a hurricane, and provides that, if the insured building shall fall except as the result of a fire, the insurance shall cease, the jury should be instructed that the burden of proof is on the plaintiff to show by the preponderance of evidence that the fire was not caused by hurricane, or by the fall of the building.—*Pelican Fire Ins. Co. v. Troy Co-op. Ass'n*, (Tex.) 18 S. W. 980.

26. In an action on a life policy, statements of the agent, relative to his insuring the deceased, made subsequent thereto, cannot be proven against the company, as a part of the *res gestæ*.—*Hartford Life & Annuity Ins. Co. v. Hayden's Adm'r*, (Ky.) 18 S. W. 555.

27. The fact that the company objected to the proof of loss when furnished to it, as being incomplete, not in conformity with the policy, and untrue, is no reason for excluding such proof from the evidence, when offered for the purpose of showing a compliance with the terms of the policy, since the final decision as to the sufficiency of the proof rests with the court, and not the company.—*Hibernia Ins. Co. v. Starr*, (Tex.) 13 S. W. 1017.

28. Evidence that insurance in other companies was effected on the life of the assured by or on behalf of the beneficiary is admissible to show that the object was to defraud defendant.—*Whitmore v. Supreme Lodge Knights & Ladies of Honor*, (Mo.) 13 S. W. 495.

Mutual benefit insurance.

29. Where a certificate of membership in a mutual benefit company, by which a certain amount is to be paid on the holder's death, provides that suit must be brought within a certain time thereafter, the limitation is arrested by, and begins to run anew from the date of, a part payment of the amount.—*Kentucky Mutual Security Fund Co. v. Turner*, (Ky.) 18 S. W. 104.

30. Where a benefit certificate was payable to the "heirs" of deceased, who left a widow, but no children, the word "heirs" will be construed to mean those designated by the statute of distribution to take personal property, (Mansf. Dig. Ark. § 2522;) and, since the widow is thereunder entitled only after all the husband's kindred, she has no claim to the fund as against his brothers and sisters.—*Johnson v. Supreme Lodge of Knights of Honor*, (Ark.) 18 S. W. 794.

31. Under section 2592, which provides that, "if a husband die leaving a widow and no children, such widow shall be endowed of one-half the real estate of which such husband died seised, and one-half of the personal estate, absolutely and in her own right," she takes by way of dower, and not as a distributee; and this section does not bring said widow under the description, "heirs," in the certificate.—*Johnson v. Supreme Lodge of Knights of Honor*, (Ark.) 18 S. W. 794.

32. A provision of the society's constitution limiting the beneficiaries to the members of assured's family, or those dependent upon him, is for the society's benefit only; and where it paid the money into court the limitation cannot aid the widow's claim.—*Johnson v. Supreme Lodge of Knights of Honor*, (Ark.) 18 S. W. 794.

33. Where neither the beneficiary of mutual benefit insurance certificates nor the trustee for the beneficiary and her husband (the beneficiary's parents) could insure the life of the assured for the beneficiary's benefit, under defendant's charter, if the trustee's husband induced the assured to insure her life for the benefit of the beneficiary, and paid therefor, the certificates were void; but if they were issued to the assured on her own application, and paid for with her money, and if she died a natural death, the beneficiary can recover, unless the insurance was fraudulently procured.—*Whitmore v. Supreme Lodge Knights & Ladies of Honor*, (Mo.) 13 S. W. 495.

34. The court instructed that the certificates were fraudulently procured, and plaintiffs could not recover, if the assured, when she became a member of defendant, misrepresented her age, physical condition, or family history, and the

facts misrepresented actually contributed to her death; and that "misrepresentation" meant any statement of fact not then known by the assured to be true. *Held* not objectionable, especially as substantially the same instructions were requested by plaintiffs, and as the benefits of Rev. St. Mo. 1879, §§ 5976, 5977, which declare that in certain instances misrepresentations shall not be a defense, do not apply to this class of insurance.—*Whitmore v. Supreme Lodge Knights & Ladies of Honor*, (Mo.) 13 S. W. 495.

INTEREST.

See, also, *Usury*.

On damages in condemnation proceedings, see *Eminent Domain*, 18.

When allowed.

1. Where a note bears interest payable semi-annually, each semi-annual installment of interest, at its maturity, becomes a debt due, and bears interest from its maturity, the same as any other interest-bearing debt, until paid.—*Hall v. Scott's Adm'r*, (Ky.) 13 S. W. 249.

2. In an action on the bond of a county treasurer for misappropriation of the school fund, the sureties were properly charged with interest from the date when the treasurer's successor qualified, rather than from the 1st day of the next succeeding January.—*Burk v. Galveston County*, (Tex.) 13 S. W. 455.

3. Where the price for certain work is definitely fixed by contract, and payable on its completion, the debtor is liable for interest from the time of its completion, though the amount of material furnished under the contract was uncertain, and though the contractor's claim was contested in good faith.—*City of Louisville v. Henderson's Trustees*, (Ky.) 18 S. W. 111.

4. In a suit to recover land, and for damages thereto, where it is admitted that the damages amounted to a certain sum, and the plaintiff recovers the land, it is proper to allow the plaintiff interest on the agreed amount of damages.—*Yellow Pine Lumber Co. v. Carroll*, (Tex.) 13 S. W. 261.

5. A debtor who has paid part of his debt in satisfaction of a judgment rendered against him as garnishee is liable for interest on the residue from the date of the judgment in garnishment.—*Berry v. Davis*, (Tex.) 18 S. W. 978.

6. Payment into court of the amount of a verdict, with interest and costs, will not prevent the recovery of interest on the full amount of a larger verdict recovered on appeal.—*Alloway v. City of Nashville*, (Tenn.) 18 S. W. 123.

7. Where a former judgment is sued on, interest accrued on it is properly added to the principal, and judgment rendered on the amount to bear interest from the date of the last judgment.—*Heidenheimer v. Johnston*, (Tex.) 18 S. W. 46.

Intervention.

In attachment, see *Attachment*, 11-14.

partition, see *Partition*, 3.

sequestration proceedings, see *Sequestration*.
Of parties, see *Parties*, 10-12.

Inter Vivos.

See *Gifts*, 1.

Intimidation.

Of voters, see *Elections and Voters*, 1.

INTOXICATING LIQUORS**Constitutionality of acts.**

1. A law forbidding the giving of intoxicating liquor by one person to another is within the police power of the state.—*Powers v. Commonwealth*, (Ky.) 13 S. W. 450.

Local option.

2. Sayles, Civil St. Tex. art. 3229, requires that the commissioners' court shall order elections on

local option on days not less than 15 nor more than 30 days from the date of such order. Article 3233 provides that, after an election resulting in favor of prohibition, such court shall make an order forbidding the sale of intoxicating liquors, which shall be "*prima facie* evidence that all the provisions of the law have been complied with in giving notice of and holding such election." *Held*, that such order is not *prima facie* evidence of the validity of an election ordered and held more than 30 days from the date of ordering it, and such election is void.—Curry v. State, (Tex.) 13 S. W. 752.

3. Article 3239a, which gives to any voter of the local option district a right to contest the validity of such election within 30 days, does not prevent one accused of violating the order of prohibition from showing at a later time that it is void.—Curry v. State, (Tex.) 13 S. W. 752.

4. Under Sayles' Civil St. Tex. art. 3233, providing that the failure to carry prohibition in a county shall not prevent an election for the same from being immediately thereafter held in a justice's precinct, town, or city of said county; nor shall the failure to carry prohibition in a town or city prevent an election from being immediately thereafter held for the entire justice's precinct or county in which said town or city is situated; nor shall an election in a justice's precinct in any way prevent an election immediately thereafter for the entire county in which such precinct is situated; but, when prohibition has been carried at an election for the entire county, no election on the question of prohibition shall be ordered in any justice's precinct, town, or city of said county until after prohibition has been defeated at a subsequent election held for the entire county; nor in any case where prohibition has been carried in any justice's precinct shall an election on the question of prohibition be ordered thereafter in any town or city in such precinct until after prohibition has been defeated at a subsequent election held for such entire precinct,—if prohibition already existed in a precinct, under an election held for the precinct at the time of an election for the entire county, it would still remain in force in the precinct, though it was defeated as to the entire county.—*Ex parte Cox*, (Tex.) 13 S. W. 862.

5. Under Rev St. Tex. art. 3236, (Willson, Crim. St. 120,) relative to local option, providing that no election under the preceding articles shall be held within the same prescribed limits in less than two years after an election under this title has been held therein; but at the expiration of that time the commissioners' court, whenever they deem it expedient, may order another election,—where prohibition has been adopted in a precinct, its subsequent adoption in the same precinct, at an election held more than two years thereafter, but under an order made by the commissioners' court within the two years, will leave prohibition in force, even if the second election is void.—*Ex parte Cox*, (Tex.) 13 S. W. 862.

Recovery of fees paid.

6. The sum paid for a liquor license for one year cannot be recovered from the state because an order prohibiting the sale of liquor in the territory covered by the license is made immediately after it was granted, on the application of a majority of the inhabitants, under Mansf. Dig. Ark. § 4524, providing that the sale of any liquor within three miles of a church may be prohibited on such application.—*Peyton v. Hot Spring Co.*, (Ark.) 13 S. W. 764.

Illegal sales—Refusal to give license.

7. Pen. Code Tex. art. 110, provides that "any person who shall pursue or follow any occupation, calling, or profession, or do any act taxed by law, without first obtaining a license therefor, shall be fined," etc. *Held* that, in a district where local option had been declared, but was void for defect in the proceedings, one who tendered the amount of the tax due for selling liquors and demanded a license, which was refused, was punishable for selling liquors without a license.—*Curry v. State*, (Tex.) 13 S. W. 773.

Sales to minors.

8. On a trial for selling intoxicating liquors to minors, a witness was properly allowed to state that, from their appearance at the time, he would have taken them to be 17 or 18 years old.—*Garner v. State*, (Tex.) 13 S. W. 1004.

Giving away liquors.

9. Defendant invited an acquaintance into his house three or four times, and there gave him a drink of liquor. On a few occasions he invited another acquaintance, who was working for him, when in his house, to take a drink, and occasionally the party suggested it himself. All the drinking was done in the family room, and when the parties were there by defendant's request. *Held*, that this was within the exception to Act Ky. March 14, 1888, making it unlawful for any person to sell or give liquors within the county of R., which provides that the act shall not apply to those who give or furnish liquors to their invited guest at their own household.—*Powers v. Commonwealth*, (Ky.) 13 S. W. 450.

Criminal prosecution.

10. A statute which forbids any person to sell or give away intoxicating liquors within a certain county is a public statute, though of local application, and need not be specially pleaded in an indictment.—*Powers v. Commonwealth*, (Ky.) 13 S. W. 450.

11. An information which alleges that defendant sold intoxicating liquors in quantities less than a quart, "said occupation being taxable by law, without first obtaining a license therefor, and the taxes then and there due by him to the said state upon said occupation amounted to \$300, and the taxes then and there due by him to said county amounted to \$150," these taxes having been duly levied, is sufficient, and charges but one offense.—*Allen v. State*, (Tex.) 13 S. W. 993.

12. On a trial for selling intoxicating liquors in quantities less than a quart without having paid either state or county taxes, a conviction for the non-payment of the county tax is unwarranted where there is no evidence that it had ever been levied; and a verdict imposing a fine in an amount equaling both state and county taxes will be set aside for uncertainty where there is nothing in the record to show that the jury did not in fact include the county tax as a part of the penalty assessed against defendant.—*Allen v. State*, (Tex.) 13 S. W. 993.

Joinder.

Of parties, see *Parties*, 5-8.

Judge.

See *Justices of the Peace*.

JUDGMENT.

Actions by and against infants, see *Infancy*, 8-12. Appealable, see *Appeal*, 2.

Decree in equity, see *Equity*, 22-24.

— in partition, see *Partition*, 4, 5.

— of foreclosure, see *Mortgages*, 26.

Estoppel by, see *Estoppel*, 3, 4.

In ejectment, see *Ejectment*, 7.

Rendition on appeal, see *Appeal*, 66, 67.

Subject to garnishment, see *Garnishment*, 2, 3.

Validity.

1. A judgment in favor of "the descendants" of a person deceased, without naming them individually, is not void for uncertainty, as it is to be presumed that the papers in the case disclose their individual names.—*Stevenson v. Flournoy*, (Ky.) 13 S. W. 210.

2. An entry of judgment for plaintiffs in their firm name without giving their full names is faulty, and will be reformed.—*Wright v. McCampbell*, (Tex.) 13 S. W. 293.

Right to judgment.

3. Under Civil Code Ky. § 135, providing that if a plaintiff, having a lien on property for a debt due

and a debt not due, state both claims in his petition, he may, upon a suggestion of record that one of them has become due *pendente lite*, have judgment for a sale of the property therefor, a plaintiff, in an action for installments of the purchase price of certain personally, cannot have judgment for installments becoming due pending the action on a mere suggestion of record, where there is no lien on property to secure such installments.—*Dant v. Head*, (Ky.) 18 S. W. 1073.

By confession.

4. Where a judgment is confessed by defendant, who was served with process, and answered, and upon confession was granted a stay of execution, the judgment will not be set aside on the ground that no affidavit of the justness of the debt was filed, as required by Rev. St. Tex. art. 1347, providing that where judgment is rendered by confession the justness of the debt must be sworn to by the person in whose favor the judgment is confessed.—*Chestnutt v. Pollard*, (Tex.) 18 S. W. 852.

By default.

5. A return showing that a citation against a city was served on S., "mayor of the city of H.," will support a judgment by default against the city.—*City of Houston v. Emery*, (Tex.) 18 S. W. 284; *Id.* 284.

Res adjudicata.

6. When notes for the purchase price of land are delivered to a vendor, who agrees to hold them for 90 days, within which time the title is to be cleared, in an action on the notes by a *bona fide* indorsee after the title has been cleared by a decree obtained in the name of the vendee, and never repudiated by him, the latter cannot set up in defense that the decree was obtained without his authority.—*Heffron v. Cunningham*, (Tex.) 18 S. W. 259.

7. A judgment which subjects the property devised to a married woman to sale for the debts of the testator is conclusive against her, in an action to enforce the judgment, when it appears that the issue in the original suit was whether the property devised to her was liable for the testator's debts.—*Stevenson v. Flournoy*, (Ky.) 18 S. W. 210.

8. The omission of claimant of attached property to demand damages for being deprived of the use of it will not bar his subsequent action therefor. The direction to the court (Mansf. Dig. § 858) "to make such order as may be necessary to protect his rights," when the judgment is in his favor, refers only to his right to the property, and not to an award of damages.—*Jefferson v. Dunavant*, (Ark.) 18 S. W. 701.

9. Plaintiffs sued on a note for \$991.25, and an account of \$34. Defendant pleaded *res adjudicata*, and showed that, 13 months before, plaintiffs had in another county recovered judgment against him for \$725.25, and testified that this action was for the same indebtedness. Plaintiffs did not show that it was not for the same indebtedness, nor offer to prove the judgment dormant, because execution had not issued thereon within a year. *Held*, that the plea of *res adjudicata* was established.—*Humason v. Loba*, (Tex.) 18 S. W. 532.

10. In an action for the wrongful conversion of certain bales of cotton, an answer was filed to the effect that theretofore defendant had sued plaintiff on an open account, in which the full value of a certain number of bales of cotton, including the cotton alleged to have been converted, was credited to plaintiff, and that it had been adjudged in such action that a balance was due defendant after the allowance of all credits. No special damage was alleged in the complaint. *Held*, that the answer stated a defense.—*McWhorter v. Andrews*, (Ark.) 18 S. W. 1099.

11. On an administrator's sale of land the widow of decedent became the purchaser; but, his debts not having been paid, the estate was subsequently ordered into the hands of the public administrator. On the representations of a creditor that he would make the land pay \$1,000 of decedent's debts, the probate court ordered a resale, and the creditor bid it in for only \$100. He subsequently instituted

proceedings to have the widow's dower assigned, wherein he was adjudged the owner of the land, subject to her dower right. *Held* that, these proceedings having been pending for four years, and having been defended by the widow, she could not afterwards sue to have the judgment therein set aside on the ground of collusion and fraud between the public administrator and the creditor at the resale of the land, as that was a matter of defense to be interposed in the dower proceedings.—*Murphy v. De France*, (Mo.) 18 S. W. 756.

12. The widow's answer having set up the collusion and fraud between the public administrator and the creditor, and the validity of the two administrators' deeds having been passed on in the dower proceedings, the judgment in the creditor's favor is conclusive on these questions, as between the parties and their privies, though these proceedings may not have been the proper method of testing the validity of the deeds.—*Murphy v. De France*, (Mo.) 18 S. W. 756.

13. In an action by a partner against his co-partner for injury to partnership property, it appeared that plaintiff formerly sued in equity to restrain defendant from unlawfully interfering with such property, in which suit defendant filed a cross-complaint, asking for dissolution and settlement of the partnership, to which plaintiff set up a counter-claim for the damages alleged in the present action. *Held*, that a plea of *res adjudicata* was good, as the injury to the property was cognizable in equity in a suit for final settlement, and, if not, the difference between suits in equity and actions at law, in Arkansas, being in the mode of trial by the same court, the judgment rendered without objection was not void.—*Harris v. Townsend*, (Ark.) 18 S. W. 283.

Reversed judgment.

14. An action by the trustees, on behalf of the members of a voluntary religious association, to establish a will making it a devise, is not barred by the reversal of a judgment establishing the same will at the suit of the church as a corporation organized after the rejection of the will by the probate court, the reversal having been because the corporation was held not to be a proper proponent.—*Lilly v. Tobbein*, (Mo.) 18 S. W. 1060.

In ejectment.

15. A judgment in ejectment is not a bar to another action of the same sort between the same parties litigant, for the same land, where no equitable defense was interposed in the former action, and defendants may attack an agreed statement in the former action as being equally inconclusive as the judgment based thereon.—*Sutton v. Dameron*, (Mo.) 18 S. W. 497.

16. In an action to recover possession of land, plaintiff introduced the record of a suit brought against the person under whom he claimed by the person under whom defendant claimed. In that suit the defendant therein answered the original complaint, denying that the plaintiff was the owner, and entitled to possession, of the land therein described. The complaint did not embrace the land in question; but, after the answer was filed, plaintiff filed, by leave of court, an amended complaint embracing the land. Defendant filed no other answer, and judgment was rendered for defendant. The judgment did not describe the land. *Held*, that the answer was responsive to the amended as well as the original complaint, and the judgment covered the land described in the former.—*Smith v. Halliday*, (Ark.) 18 S. W. 1093.

Persons affected by.

17. An action to set aside the probate of a will is a proceeding *in rem*, and a judgment therein, annulling the will, is binding upon all the world.—*Miller v. Foster*, (Tex.) 18 S. W. 539.

18. A testator devised land to his wife for 21 years, then to any children he might have, or, in case of the death of his children, to his wife for life, and in case no child of his survived her, then on her death to the children of M. After the probating of will, testator's widow brought suit to have it set aside. The executor and a guardian *ad litem* for testator's child filed answers. *Held*,

that the children of M., who had under the will a contingent remainder, were represented in the suit by the parties thereto, and were bound by the decree annulling the probate of the will.—*Miller v. Foster*, (Tex.) 18 S. W. 529.

19. A judgment against the personal representative of a testator, in an action against him and the devisees for a settlement in which the personal representative appeared, is *prima facie* evidence against the heirs in a proceeding against them to subject to testator's debts land devised to them.—*Stevenson v. Flournoy*, (Ky.) 18 S. W. 310.

20. One to whom land has been conveyed, and the deed delivered, though the deed is not recorded, is not affected by a judgment in a partition suit afterwards instituted by a third party against his grantor, to which suit he is not a party.—*Masterson v. Little*, (Tex.) 18 S. W. 154.

21. A judgment in an action brought against a husband to settle a boundary line of land owned by his wife, in which action the wife did not appear, and to which she was not made a party, will not divest her title to any part of the land, though the judgment purports to be rendered against both herself and husband; nor will such judgment bar another action, involving the same question, brought by the wife against the plaintiffs in the former action.—*Durst v. Amyx*, (Ky.) 18 S. W. 1067.

Lien.

22. A judgment, in order to operate as a lien on land situated in an unorganized county attached to another county "for judicial purposes only," must be recorded in the county to which such unorganized county is attached, since the recording of a judgment is for judicial purposes.—*Folta v. Ferguson*, (Tex.) 18 S. W. 1087.

Collateral attack.

23. Plaintiff in ejectment cannot question a judgment regularly entered in a suit for a division of lands, wherein plaintiff's interest in the lands in dispute was allotted to defendant, as plaintiff's vendee.—*Prince v. Antia*, (Ky.) 18 S. W. 486.

24. A judgment of a justice of the peace which recites that the plaintiff against whom it was rendered appeared, is good as against collateral attack though such plaintiff did not in fact appear, or submit to the jurisdiction.—*Williams v. Hays*, (Tex.) 18 S. W. 1029.

25. Where a judgment of a justice's court recites that citation was "returned duly executed on Bowman & Martin and Sam Kline, of Freeberg, Kline & Co.," and that "the parties appeared in person and by attorney," and it was adjudged that plaintiff recover of "defendants, J. A. Martin and R. M. Bowman, lately composing the firm of Bowman & Martin," it appears that the judgment was against each defendant individually, and in a collateral proceeding to recover the land of one defendant, sold on execution issued thereunder, it cannot be impeached by evidence that such defendant was not served with process, and did not appear.—*Heck v. Martin*, (Tex.) 18 S. W. 51.

Foreign judgments.

26. The judgment of a court of another state that plaintiff's action on a note was barred by the laws of this state is a bar to an action on the note in this state.—*Wernse v. McPike*, (Mo.) 18 S. W. 809.

27. A decree of another state finding that an exchange of land owned by complainant in that state for land of defendant in Texas was obtained by fraud, and directing reconveyances, does not operate, of itself, to divert the title to the land in Texas from complainant to defendant.—*Fryer v. Meyers*, (Tex.) 18 S. W. 1025.

Scire facias.

28. In *scire facias* to revive a judgment, where the prayer for relief is that the "judgment be revived by *scire facias*, if necessary, and that plaintiff have all the relief necessary to make valid said judgment," and there is no general prayer for relief, it is error to enter judgment as in an action of debt upon the former judgment, though the petition states facts entitling plaintiff to such a judg-

ment.—*City of Houston v. Emery*, (Tex.) 12 S. W. 264.

29. Under Rev. St. Tex. art. 3210, which provides that judgments may be revived by *scire facias*, a proceeding to revive a judgment against a city may be joined with an application for a *mandamus* to enforce its collection.—*City of Houston v. Emery*, (Tex.) 18 S. W. 264.

Amendment.

30. Where judgment is rendered directing a sale of defendant's undivided interest in land on the ground that it cannot be divided without impairing its value, the court may at the same term amend the judgment by withholding the order of sale, and ordering the land to be divided, where it is of opinion that it can be done.—*Brown v. United States Home & Dower Ass'n*, (Ky.) 18 S. W. 1065.

By supreme court.

31. The supreme court can on appeal amend a judgment by striking out the names of parties erroneously joined in the suit, and affirm it as to the remaining parties. Rev. St. Mo. 1839, § 2101, provides that, after final judgment, the court may amend, in affirmance of such judgment, any record or other proceedings in the cause by striking out the name of a party.—*Orr v. Rode*, (Mo.) 18 S. W. 1066.

Opening and vacating.

32. Where the files show affirmatively that there was no service of process, judgment may be impeached thereby; and in case of their loss, proof of their contents may be made.—*McClanahan v. West*, (Mo.) 18 S. W. 674.

33. A domestic judgment rendered by a court of general jurisdiction cannot be impeached by a party thereto, merely because the record is silent as to the service of process on such party.—*McClanahan v. West*, (Mo.) 18 S. W. 674.

34. In an action of trespass to try title, the plaintiff, being unable to find a certain deed which constituted a link in his chain of title, relied upon a certified copy of its record, which was excluded by the court, and judgment rendered for defendant. Afterwards the deed was found, and the plaintiff brought suit to set aside the judgment. *Held*, that he was not entitled to such relief, since he might have averred the judgment by taking a nonsuit.—*Brownson v. Reynolds*, (Tex.) 18 S. W. 986.

35. Since a judgment becomes final at the end of the term at which it is rendered, the court cannot set it aside at a subsequent term, notwithstanding it has taken under advisement a motion for a new trial and in arrest of judgment, and has entered an order suspending execution until his decision is rendered.—*City of Siloam Springs v. McPhitridge*, (Ark.) 18 S. W. 137.

Equitable relief.

36. A petition in equity to set aside a judgment by default, and for a new trial, which avers a good defense to the action, and alleges that the default resulted from a failure of plaintiff's attorney to appear and defend, but which shows no reason for such failure and no excuse for neglect to move for a new trial within two days after judgment, and in term-time, as required by Sayles' Civil St. Tex. art. 1371, is fatally defective, and will entitle the petitioner to no relief.—*Alexander v. San Antonio Lumber Co.*, (Tex.) 18 S. W. 1025.

Assignment.

37. One to whom a judgment has been assigned for the benefit of himself and another may sue thereon in his own name.—*Benne v. Schnoeck*, (Mo.) 18 S. W. 83.

Action on judgment.

38. In an action to enforce a judgment, an allegation that defendants were made parties to the original proceeding is not sufficiently denied by an averment that defendants were not parties to any action wherein plaintiffs were parties plaintiff, and in which any cause of action against defendants was alleged as a foundation for the judgment, when it appears that plaintiffs were defendants in the former proceeding, and obtained the

judgment on their cross-petition.—*Stevenson v. Flournoy*, (Ky.) 13 S. W. 210.

Judicial Notice.

See *Evidence*, 1.

Judicial Powers.

See *Constitutional Law*, 2, 3.

JUDICIAL SALES.

Foreclosure sales, see *Mortgages*, 27-33.

In partition, see *Partition*, 6-8.

Of decedent's lands, see *Executors and Administrators*, 24-27.

heir's interest, rights of purchaser, see *Descent and Distribution*, 3.

Sale of ward's realty, see *Guardian and Ward*, 7-11.

Under execution, see *Execution*, 4-9.

In general.

1. The holder of a junior lien, for whose account a sale of the incumbered property is made, has the right, for his own protection, to give notice, at the time of the sale, of other liens on the property which will be bought.—*Meyer v. Opperman*, (Tex.) 13 S. W. 174.

Pleading.

2. Under Civil Code Ky. § 694, which provides that, before ordering a sale of land for the payment of debts, the court shall be satisfied from the pleadings, or agreement of the parties, or affidavits, or commissioner's report, that it can be divided without materially impairing its value, the court is warranted in ordering a sale of land where it appears from the description in the petition that it is divisible, though there is no special allegation to that effect.—*Lucy v. Hopkins*, (Ky.) 13 S. W. 518.

Time of sale.

3. Under an order of sale, requiring it to be made on four days' notice, the sheriff may, by consent, adjourn it to a time less than four days distant.—*Hilliard v. Wilson*, (Tex.) 13 S. W. 25.

Estate conveyed.

4. Where one has purchased a dower interest in land, and already owns an undivided interest in the remainder dependent thereon, a sale under a decree of "his undivided interest in the dower" passes his remainder.—*Gill v. Buckner*, (Ky.) 13 S. W. 908.

Confirmation—Modification.

5. Where a court orders a receiver's sale to be confirmed on condition that the bid is increased a certain amount, the order becomes final on the acceptance of the terms by the purchaser, and the court has no power, at a subsequent term, to modify it.—*State Nat. Bank v. Neel*, (Ark.) 13 S. W. 700.

Setting aside inadequate consideration.

6. Where land sold under a decree is appraised and sold for two-thirds of its value, and a report of the sale filed and confirmed, the sale will not be set aside upon a showing by affidavits that the land was sold for less than its actual value, where no advanced bid, or offer to pay the debt, has been made.—*Byrne v. Henderson*, (Ky.) 13 S. W. 909.

— Conditions of.

7. Where land sold under a decree of court is situated in another county from that in which the action is brought, and the decree is procured at the instance of the owners who receive the benefit of it, they will not be allowed to vacate the decree, and recover the land, without any offer to restore the purchase money.—*Best's Ex'r v. Vanhook's Adm'r*, (Ky.) 13 S. W. 119.

Jurisdiction.

See *Courts*, 4-13; *Partition*, 1.

Appellate, see *Appeal*, 1, 2.

Of equity, see *Equity*, 1-4.

Justices, see *Justices of the Peace*, 1.

Waiver of objection to, see *Appearance*, 5.

JURY.

See, also, *Grand Jury*.

Custody, see *Criminal Law*, 61-63.

Separation, see *New Trial*, 3, 4.

Trial without jury, see *Trial*, 26-30.

Competency of jurors.

1. After a mistrial on indictment for murder, a special venire man is not incompetent on the second trial, simply because he was challenged peremptorily by defendant on the first trial.—*Nalley v. State*, (Tex.) 13 S. W. 670.

Summoning and impaneling.

2. Where, upon request, attachments were issued for absent venire men, it was not error to issue a venire for talesmen before such venire men were brought in, and to refuse a postponement for that purpose.—*Habel v. State*, (Tex.) 13 S. W. 1001.

3. Under M. & V. Code Tenn. § 4805, providing that on motion of either party, in any civil action, a special jury may be ordered and summoned, if in the opinion of the court it is proper, it is not within the power of the circuit court to summon such special jury on its own motion.—*McDaniel v. Nashville, C. & St. L. R. Co.*, (Tenn.) 13 S. W. 76.

4. Code Crim. Proc. Tex. art. 605, provides for special venires in "capital" cases only. Pen. Code Tex. art. 55, defines "a capital felony" as "an offense for which the highest penalty is death." Article 35 provides that "a person, for an offense committed before he arrived at the age of 17 years, shall in no case be punished with death." Defendant was indicted for murder in the first degree, but the prosecuting attorney admitted in open court that he was under 17 years old. Held, that it was not a capital case, and defendant was not entitled to a special venire.—*Walker v. State*, (Tex.) 13 S. W. 860.

5. Refusal to stand aside a special venire man for misnomer in the copy of the special venire served on defendant is error; but the error is immaterial where he was peremptorily challenged by the defense, and no objectionable juror was impaneled.—*Hudson v. State*, (Tex.) 13 S. W. 883.

6. Defendant cannot complain that the court refused, after the special venire was exhausted, to postpone the case till some of the regular panel should be through deliberating on another case, so that they could be passed on in their order, where such jurors were actually called and passed on before talesmen were ordered.—*Hudson v. State*, (Tex.) 13 S. W. 883.

7. Rev. St. Tex. art. 3053, provides that the jurors shall be selected from the names included in the list drawn by the jury commissioners for the week; and article 3055 provides that the court may adjourn the whole number of jurors for the week, or any part thereof, to any subsequent day of the term. At the court's direction the jury for the week ending November 2, 1899, reported November 4th, and defendant, after exhausting his challenges, was compelled, against his objection, to take one of these, who had already served six days. Held, that section 3055 must be construed as an exception to the general provision of section 3053, so as to give effect to both, and there was no error in overruling defendant's objection.—*Howard Oil Co. v. Davis*, (Tex.) 13 S. W. 665.

Attachment.

8. Code Crim. Proc. Tex. art. 613, authorizes attachment, at the instance of either party, for jurors who do not appear. Article 640 provides that "no cause shall be unreasonably delayed" for such absent jurors. Defendant demanded attachment; and, after 18 or 20 hours, the officer not having had time to execute the process, the jury was completed. Though defendant exhausted his per-

emptory challenges, he did not show that any juror sat on the trial against whom such cause for challenge existed as would affect his competency or impartiality. *Held*, that an abuse of discretion in refusing to await the execution of the writ of attachment was not shown.—*Hudson v. State*, (Tex.) 18 S. W. 888.

Oath of sheriff.

9. Rev. St. Tex. art. 3056, provides that, "when ever it may be necessary to summon jurors who have not been selected by jury commissioners under the provision of this title, the court shall administer to the sheriff and each of his deputies the following oath," etc. *Held* that, where it was shown that the oath had been administered already at the term, it was not error to refuse to again administer it, at defendant's request, upon the issuing of a special venire.—*Habel v. State*, (Tex.) 18 S. W. 1001.

Failure to demand jury trial.

10. Though both parties fail to demand a jury on appearance day, it is not error to grant a jury trial at a subsequent term.—*Noel v. Denman*, (Tex.) 18 S. W. 818.

JUSTICES OF THE PEACE.

Jurisdiction.

1. A justice of the peace has no jurisdiction to try a suit for trespass on real estate.—*Halpern v. Burgess*, (Ark.) 18 S. W. 763.

Prosecution for non-feasance.

2. Mansf. Dig. Ark. § 5923, provides that the county court shall appoint a justice of the peace, who shall apportion the persons in the township liable to work the roads; and section 5925, that any justice who shall refuse to accept and discharge the duties of such appointment shall be fined in the county court. *Held*, that an indictment at common law for non-feasance in office, in failing to make the apportionment, charging that the accused was the apportioning justice, having been appointed and duly notified, is fatally defective unless it also show an acceptance of the appointment.—*State v. Lewis*, (Ark.) 18 S. W. 925.

3. Under section 5925, the justice has a choice between paying the penalty, and accepting the appointment, and no absolute duty to accept is imposed.—*State v. Lewis*, (Ark.) 18 S. W. 925.

Justifiable Homicide.

See *Homicide*, 13-18.

Kidnapping.

See *Abduction*.

Killing Stock.

See *Railroad Companies*, 80-82.

LANDLORD AND TENANT.

See, also, *Forcible Entry and Detainer*.

Disputing title of lessor.

1. Lessees who, while holding under the lease, obtained a tax-deed of the demised premises, cannot question the title of their lessors.—*Morris v. Apperson*, (Ky.) 13 S. W. 441.

Liability for negligence — Dangerous premises.

2. A landlord, who does not covenant to repair, is not liable to a servant of the lessee injured by the falling of a cistern caused by decayed and insufficient supports, though he knew of the defect, and had promised to repair, as such promise was without consideration.—*Perez v. Raybaud*, (Tex.) 18 S. W. 177.

LARCENY.

What constitutes.

1. Where it is proven that defendant stole the horse in question, and took it to the house of F.,

who borrowed it and rode into another county, defendant accompanying him, such act of F. is the act of defendant, whether the former knew the horse was stolen or not.—*Wampler v. State*, (Tex.) 18 S. W. 144.

2. On indictment for theft of a horse, the defense being that defendant, believing the horse to belong to one T., received it from him, and at his request took it into another state, and the evidence tending to support such defense, it is error to refuse to charge that, if T. delivered the horse to defendant, who did not participate in the theft of the same as principal, the latter should not be convicted of the theft of the horse, though T. had in fact stolen it, and defendant knew the fact when he received it.—*Moore v. State*, (Tex.) 18 S. W. 152.

3. On the trial for the theft of a yearling it appeared that defendant, for a valuable consideration, executed a writing to one M., reciting that defendant sold to M. 10 head of yearling cattle, marked with defendant's brand, which he was to keep during the winter, and deliver in the spring. There was no other description. It appeared that defendant had other cattle, and there was no evidence but that some of them were of the same age and brand, nor did it appear that the one named in the indictment was one of the 10 mentioned in the writing. Said 10 head of cattle were never separated from defendant's other cattle, were never designated and set apart as M.'s cattle, and were never delivered to M. *Held*, that this evidence did not warrant a conviction for theft of one of said cattle, as the sale was executory, and the title and possession never changed.—*Johnson v. State*, (Tex.) 18 S. W. 651.

Indictment.

4. An indictment for the theft of "one five-dollar bill in money, of the value of five dollars," sufficiently describes the stolen property, under Code Crim. Proc. Tex. art. 427, providing that, whenever it becomes necessary to describe property of any kind in an indictment, a general description of the same by name, kind, quantity, number, and ownership, if known, shall be sufficient.—*Green v. State*, (Tex.) 18 S. W. 784.

5. An indictment for theft, where defendant and the owner of the stolen property were of the same name, alleged that "M. B., on or about * * * did * * * take from the possession of M. B. five head of cattle, the same being the property of the said M. B., without the consent of the said M. B., and with the intent to deprive the said M. B. of the value of the same, and to appropriate them to the use and benefit of him, the said M. B.," etc. *Held*, that the words "him, the said M. B.," in the appropriation clause, refer to defendant, and not to the alleged owner of the cattle.—*Brown v. State*, (Tex.) 18 S. W. 150.

6. Pen. Code Tex. art. 742a, provides that "any person having possession of personal property of another by virtue of a contract of hiring or borrowing, or other bailment, who shall, without the consent of the owner, fraudulently convert such property to his own use, with intent to deprive the owner of the value of the same, shall be guilty of theft." *Held*, it is unnecessary to charge in the indictment an intent to appropriate the property.—*Purcell v. State*, (Tex.) 18 S. W. 993.

7. Failure to set out in an indictment for larceny the Christian name of one of two persons therein alleged to have been joint owners of the stolen property is not ground for quashing the indictment, since Rev. St. Mo. 1879, § 1813, provides that it shall only be necessary to allege in such indictment the property to belong to one of such joint owners, and section 1820 provides that, on trial of a felony, a variance between the statement in the indictment and the proof, in the Christian name or surname of a person, shall not be grounds for an acquittal unless the court shall find that the variance is material to the merits of the case, and prejudicial to the defense.—*State v. Riley*, (Mo.) 18 S. W. 1063.

Variance.

8. Where an indictment for theft alleges defendant's name correctly in the first instance, but, in charging the intent, incorrectly alleges either

his Christian name or surname, the variance does not render the indictment invalid.—Wampler v. State, (Tex.) 18 S. W. 144.

9. An averment of the theft of "United States paper currency money of a certain value" is sustained by proof that the stolen property was either United States treasury notes, or national bank notes, or United States gold or silver certificates.—Kimbrough v. State, (Tex.) 18 S. W. 218.

10. The indictment for the theft of a bale of cotton laid the possession in the owner. The proof showed that the owner took the cotton to a gin to be ginned and baled, and that after this was done it was put in the gin-yard with other cotton; that the owner took it from there, and removed it some 50 yards from the gin-house. *Held*, that there was no variance between the allegation and the proof.—Doss v. State, (Tex.) 18 S. W. 788.

11. A variance between the indictment and the proof, on trial for larceny from a dwelling-house, in that the former alleges the house to belong to one person, while the proof shows that it is owned by another jointly with him, is not fatal, since Rev. St. Mo. 1879, § 1812, provides that, where any offense shall be committed upon or in relation to any property belonging to several owners, the indictment shall be deemed sufficient if it alleges such property to belong to any one or more of them.—State v. Riley, (Mo.) 18 S. W. 1068.

Evidence.

12. On trial for larceny, evidence that defendant, while under arrest, on being charged with the theft, and with having changed a \$20 bill in a saloon the preceding evening, at first denied it, but a few minutes later admitted that he got the bill changed, but said that it belonged to another, is inadmissible.—Wren v. State, (Tex.) 18 S. W. 865.

13. Defendant, while riding on horseback with his employer, B., on the latter's horse, encountered C., to whom he gave up the horse at B.'s request. B. and C. then rode off, stole and butchered a cow, and brought defendant some of the meat. *Held*, that it was not error to admit testimony that accused knew the principals were in the habit of stealing cattle together.—Tippie v. State, (Tex.) 18 S. W. 777.

14. Defendant, who was on trial for theft of certain cotton, testified that he got it from one S., and proposed to give a conversation with S. at that time to the effect that S. said the cotton was his, but that he owed people in W., and was afraid, if he took the cotton to the cotton yard himself, it would be attached, and that he hired defendant to take it for him. *Held*, that it should have been admitted as *res gestæ*,—a part of the transaction by which he claimed to have obtained innocent possession.—Doss v. State, (Tex.) 18 S. W. 788.

15. In a prosecution for the larceny of a horse, it was error to refuse to permit defendant to prove by the sheriff that, immediately upon being informed of the cause of his arrest, he told the sheriff, in explanation of his possession of the alleged stolen horse, that he traded another horse for it with his companion, and that the latter was present, and assented to the statement.—Lopez v. State, (Tex.) 18 S. W. 219.

16. In a prosecution for the theft of a horse, it is not error to admit testimony as to the contemporaneous theft of a saddle and other articles, in the same neighborhood, where the court charges the jury that such evidence cannot be considered as tending to show the theft of the horse, but only as tending to show the intent of defendant in whatever action they may find from the evidence was done by him.—Moore v. State, (Tex.) 18 S. W. 152.

17. On indictment for theft of a cow, the evidence showed that the cow was killed by one R.; that defendant roped the cow at his request, and was present, as was also one P., when the cow was killed; that the brand had disappeared when the hide was found; that defendant stated that he cut the brand out to take it home, but threw it away, and also stated that the cow belonged to R., and asked why people did not come to himself and R. to inquire about it. *Held*, that evidence that a

friend and two relatives of defendant, a week after the theft, defendant not being present, came to P., and asked him if he had been to town, and made complaint, and, receiving a reply that he had, remarked that there was then no use of "carrying him down yonder," was hearsay, and reversible error.—Mixon v. State, (Tex.) 18 S. W. 142.

— Sufficiency.

18. On a trial for the theft of a horse, testimony for the state showed that one C. hired the horse to go to W.; that, while C. was getting it at the stable, defendant came and called for C., but went away on C.'s motioning for him to do so; that defendant went with C. to W., and that the horse was there sold as C.'s property, defendant vouching for C., and his ownership of the horse. Defendant's brother testified that C. tried to hire him to drive on the trip, but that he could not go, and told C. where he could find defendant. Defendant testified that C. hired him to drive, and when they reached W. told him that the horse belonged to him, and he was going to sell it; that he believed the horse belonged to C., and told the auctioneer who sold it that he knew C., and that C. was all right. *Held*, that the evidence did not warrant a conviction, as none of the facts were inconsistent with his innocence.—Gilmore v. State, (Tex.) 18 S. W. 646.

19. On indictment for theft, the evidence showed that a horse was stolen from its range, and that at about the same time defendant and others were seen there; that, soon after, defendant and his companions were seen in a town with several horses, defendant riding the horse described in the indictment, and one of his companions riding another stolen horse; that the companion offered to sell the horse that defendant was riding; and that defendant immediately exclaimed, "If you sell this horse, I want my horse back." The companion had been convicted of theft of the horse in question. *Held*, that defendant could not be convicted of driving a horse from its range with intent to defraud the owner, under Pen. Code Tex. art. 749, as the evidence showed that, if guilty at all, he was either the guilty agent who took the horse, or was guilty as a principal by acting with his companion in the taking, and could not be convicted of a different crime.—Lopez v. State, (Tex.) 18 S. W. 219.

20. A conviction for theft of a hog will be set aside where the proof merely shows that the meat of a hog about the size and shape of the missing one was found at defendant's house, and where defendant and two other witnesses testified that it was the meat of defendant's own hog.—Littlejohn v. State, (Tex.) 18 S. W. 889.

21. Where the evidence shows that defendant sold cattle of the same mark and brand as the cow which he was accused of stealing; that the cattle were gathered from the range by the purchaser, the cow being among those gathered; and that defendant, on hearing that the real owner claimed her, returned her to him,—a conviction for larceny should be reversed.—Bennett v. State, (Tex.) 18 S. W. 142.

22. That defendant had fresh veal in his possession, that a calf belonging to a neighbor had disappeared, and that the calf's mother was seen near defendant's house lowing over a spot where an animal had been recently butchered, is not sufficient to sustain a conviction of theft where defendant and his wife both testify that a party of hunters who camped near their house killed a calf which they had with them, and gave defendant part of the meat.—Adams v. State, (Tex.) 18 S. W. 1009.

23. Defendant, while riding on horseback in company with his employer, B., on the latter's horse, encountered C., and, at his employer's request, gave up to him the horse. B. and C. then rode off, stole and butchered a cow, and brought defendant some of the meat. B. testified that defendant was told before he gave up the horse of the intention to steal a beef, that he expressed approval, and knew he and C. were in the habit of stealing cattle together. *Held*, not sufficient to sustain a conviction as an accomplice.—Tippie v. State, (Tex.) 18 S. W. 777.

24. In a prosecution for the larceny of certain sheep, there was evidence that the owner subsequently recovered the sheep stolen from one P., and that defendant had traded certain sheep to P., but there was no evidence to identify the sheep so sold to P. with the sheep stolen. *Held*, that the evidence of an accomplice that defendant had stolen the sheep was not sufficiently corroborated to sustain a conviction.—*Lockhart v. State*, (Tex.) 18 S. W. 993.

25. Where, in a prosecution for larceny, there is evidence that, on the night of the theft, defendant was in the town where the theft was committed; that he could not be found the next morning; and that, a few days afterwards, he was seen at a point 500 miles distant, in possession of the stolen property,—the question as to whether the testimony of an accomplice against defendant is sufficiently corroborated to warrant a conviction is properly left to the jury.—*Cooper v. State*, (Tex.) 18 S. W. 1011.

26. Evidence that the owner of stolen money felt some one touch his pocket containing his purse, and that on looking around quickly he saw defendant's hand holding the purse pass from his to defendant's pocket, is sufficient to prove theft from the person, under Pen. Code Tex. art. 745, which provides that "the theft must be committed without the knowledge of the person from whom the property is taken, or so suddenly as not to allow time to make resistance before the property is carried away."—*Green v. State*, (Tex.) 18 S. W. 784.

27. Testimony of the house-owner that defendant, who had previously boarded there, returned and spent the night, going in the morning to the room where he had slept, and leaving by the back door, and that in the evening the man with whom he had slept said he missed some clothes, and went after defendant, and brought back the clothes and defendant, who, when asked why he took them said he did not know, coupled with that of the man who went with the owner after his clothes, that defendant when found had them on, and, when asked why he took them, said he did not want to go to his father's with his old, dirty clothes on, sustains a verdict of larceny from the house.—*State v. Guest*, (Mo.) 18 S. W. 957.

Instructions.

28. On indictment for larceny, it appeared that defendant, who was 24 years old, had for several years used intoxicating liquors to excess; that he would go off several times a month, and stay on a spree for several days; that he had several times had *delirium tremens*, the last time being a few months before the larceny. But the evidence did not show that he was insane, or that his mind was affected so that he could not tell right from wrong. He was drunk a few days before the larceny, but three witnesses, to whom he sold the stolen article on the day of the larceny, testified that he was then sober. *Held*, that an instruction to find defendant not guilty if, by reason of his intemperance, he did not have mind enough at the time of the larceny to know right from wrong, was properly refused.—*State v. Riley*, (Mo.) 18 S. W. 1063.

29. The court charged: "If any person other than the defendant took the cotton originally without the aid or encouragement of the defendant, and if afterwards the cotton came into the possession of the defendant, even with the knowledge then that it had been stolen, this would not constitute theft on the part of defendant; and in such case the jury must acquit."—and refused to charge: "In order to convict the defendant in this case, you must believe from the evidence, beyond a reasonable doubt, that the defendant took the bale of cotton in question from the possession of K. [prosecutor.] If any person other than the defendant took the cotton, and the said bale of cotton came into the possession of the defendant after the original taking, then you should acquit defendant, regardless of whether defendant acted in good faith or not, and regardless of whether he knew or not as to whether said bale of cotton had been stolen by another; and, if you have a reasonable doubt upon this point, you will acquit." *Held*, that the charge given was in some essentials inaccurate,

and calculated to mislead, and that the charge refused should have been given.—*Doss v. State*, (Tex.) 18 S. W. 788.

30. In a prosecution for the larceny of a horse, the court instructed as follows: "Evidence of the theft and possession of another animal by the defendant at the same time and place as that where it is testified the animal in question was lost or missing has been admitted, and you are instructed that the object of this testimony * * * is to explain the intent with which the animal in question was taken if taken, and not as proof of the taking of the animal charged." *Held* obnoxious to the objection that it assumes as a fact that the evidence established the contemporaneous theft of another horse.—*Lopez v. State*, (Tex.) 18 S. W. 219.

31. On trial for theft, where evidence that other property was stolen in the same manner, if not at the same time, as that charged, is admitted, the jury should be instructed as to the only purposes for which such evidence can be considered, which are either (1) to establish identity in developing the *res gestæ*, (2) to prove defendant's guilt by circumstances, or (3) to show his intent with respect to the property for the theft of which he is accused.—*Hanley v. State*, (Tex.) 18 S. W. 142.

32. Where the first count of the indictment alleges ownership in P., and the second in some person unknown to the grand jury, to warrant conviction under the first count, the state must prove ownership in P., and, under the second count, that ownership was unknown to the grand jury, and that they used reasonable diligence to ascertain the fact of ownership; and a charge that the jury need not believe that the property stolen belonged to P., but must believe that the property was taken, as alleged, as the property of some person unknown to the grand jurors, is erroneous, as failing to state separately the law as applicable to the two counts.—*Mixon v. State*, (Tex.) 18 S. W. 143.

33. Where the indictment charged the fraudulent conversion of a borrowed horse with intent to deprive the owner of its value, and the testimony also showed that defendant took without leave a pistol and saddle, the omission to charge that such evidence must be considered only in its bearing upon the intent as to the horse was not material error; and, in the absence of an exception, or request for an instruction, the verdict will not be disturbed.—*Purcelley v. State*, (Tex.) 18 S. W. 998.

34. In a prosecution for larceny, an instruction that "when the state relies upon the possession of recently stolen property as a presumption of guilt," etc., is erroneous as telling the jury that guilt will be presumed from such possession.—*Lockhart v. State*, (Tex.) 18 S. W. 1012.

35. Where the prosecution could not identify the bale of cotton which defendant had as prosecutor's property, it was error to refuse to charge that, in order to convict, the jury must believe beyond a reasonable doubt that it was the identical bale taken from prosecutor.—*Doss v. State*, (Tex.) 18 S. W. 788.

36. On indictment for theft from the person the court need not instruct the jury on the question of value, since under Pen. Code Tex. art. 744, providing that one convicted of such crime shall be punished "by confinement in the penitentiary not less than two, nor more than seven, years," such offense is *per se* a felony, and it is not necessary to allege or prove the value of the stolen property.—*Green v. State*, (Tex.) 18 S. W. 784.

37. Pen. Code Tex. art. 738, provides that if property, taken under such circumstances as to constitute theft, be voluntarily returned within a reasonable time, and before prosecution is commenced, the punishment shall be by fine not exceeding \$1,000. *Held* that, if the evidence shows such a return of the stolen property to the owner, the failure of the court to give the provisions of said article in charge to the jury is reversible error.—*Bennett v. State*, (Tex.) 18 S. W. 142.

38. On indictment for larceny from a dwelling-house, though the proof shows that the value of the article stolen was less than \$30, an instruction to find defendant guilty of petit larceny only is properly refused, since, under Rev. St. Mo. 1879, §

1809, larceny from a dwelling-house is grand larceny, irrespective of value.—*State v. Riley*, (Mo.) 18 S. W. 1068.

Lease.

See *Landlord and Tenant*.

Levy.

Of attachment, see *Attachment*, 9.
taxes, see *Taxation*, 8-11.

LIBEL AND SLANDER.

What actionable.

1. It is libelous to charge a person with having uttered "foul lies," in reference to another, and possessing a "vile, slanderous tongue."—*Allen v. Wortham*, (Ky.) 18 S. W. 78.

Publication.

2. Sending a letter containing libelous matter through the mail to a person, who, because of illiteracy, is obliged to have it read by others, is a publication of the libel.—*Allen v. Wortham*, (Ky.) 18 S. W. 78.

Privileged communication.

3. Where an affidavit, on a motion to require plaintiff to give security for costs, alleges that affiant believes plaintiff to be insolvent, and plaintiff's attorney files a counter-affidavit, denying the insolvency, and alleging the affidavit in support of the motion was "a corrupt, voluntary, and willful case of false swearing," such averment in the counter-affidavit is not sufficiently relevant to the issue to be privileged.—*Hyde v. McCabe*, (Mo.) 18 S. W. 875.

Action—Pleading.

4. Though a letter from defendant to plaintiff, stating that defendant had been informed that plaintiff had charged him (defendant) with being a "thief," in response to which information defendant used libelous words, was made part of a petition for libel, the petition is not demurrable as showing a privileged communication, but defendant must plead and prove that he received the information stated in his letter.—*Allen v. Wortham*, (Ky.) 18 S. W. 78.

License.

By city, of houses of prostitution, see *Disorderly House*, 1.

License tax, see *Corporations*, 2, 3.

Of hawkers, etc., see *Hawkers and Peddlers*.
innkeepers, see *Innkeepers*.

To sell liquor, see *Intoxicating Liquors*, 6, 7.

LIENS.

See, also, *Mechanics' Liens*.

Of attachment, see *Attachment*, 10.

factor, see *Factors and Brokers*, 1.

judgment, see *Judgment*, 23.

mortgage, see *Chattel Mortgages*, 1, 2; *Mortgages*, 13-15.

Vendor's lien, see *Vendor and Vendee*, 12-25.

For improvements.

1. Where a person makes improvements on land of a married woman, which forms no part of the homestead, by reason of her having induced him to think that he had bought it from her, equity will give him a lien thereon for the value of the improvements, though she is not bound by her contracts.—*Dailey v. Cain*, (Ky.) 18 S. W. 424.

2. In such case it is in the discretion of the chancellor to order that a certain amount of the land be sold, and that, if this be not sufficient, more be then sold.—*Dailey v. Cain*, (Ky.) 18 S. W. 424.

Life Insurance.

See *Insurance*.

Life Tenants.

See *Estates*, 1.

LIMITATION OF ACTIONS.

When statute applicable.

1. In Missouri, 10 years' possession of the property, adverse to the mortgagee, is necessary to bar a suit to foreclose the mortgage.—*Orr v. Rode*, (Mo.) 18 S. W. 1066.

2. Complainant, as executor of a will which created a trust, made certain advances to the trustee for the purchase of property for the *cestui que trust*, to the amount of his supposed interest under the will. But, to protect himself in case he had advanced too much, complainant took back a bond from the trustee, conditioned to refund to him any sum in excess of the true share of the *cestui que trust*. The advance being too large, complainant took judgment against the trustee and his sureties for the excess, but they were insolvent. After this judgment was barred by limitation, complainant sued to subject the trust-estate to the payment of the excessive advance. Held, that his equitable remedy was barred, as well as his legal remedy.—*Hughes v. Brown*, (Tenn.) 18 S. W. 286.

3. Gen. St. Ky. c. 71, § 6, art. 8, limits the time for bringing an action for relief for fraud to 10 years from its perpetration, but section 21, art. 4, provides that where the doing of an act necessary to save a right is suspended by some lawful restraint the time covered by the restraint shall not be estimated in the application of any statute of limitations. Held, that, where a judgment debtor pending appeal superseded the judgment, the judgment creditor had 10 years from the disposal of the appeal in which to bring an action to set aside a fraudulent conveyance by the debtor.—*Cavanaugh v. Britt*, (Ky.) 18 S. W. 441.

Running of the statute.

4. Where a widow renounces a life-estate granted under a will, and takes possession in her own right, the remainder vests at once, and a suit by the remainder-men to try title, brought 16 years thereafter, is barred.—*Miller v. Foster*, (Tex.) 18 S. W. 529.

5. Under Sayles' Tex. Civil St. art. 65f, which provides that the creditors of an insolvent may bring suit on the assignee's bond, against him and his sureties, for any breach thereof, the statute of limitations begins to run in favor of the sureties from the time the assignee breaks the condition of his bond, and not from the time that judgment is recovered against him therefor.—*Kaufman v. Wolf*, (Tex.) 18 S. W. 987.

6. In a suit by a voluntary religious association to establish a will, an amendment substituting the trustees as plaintiffs, made after five years from the rejection of the will, in an action brought within that time, relates back to the commencement of the action, and avoids the bar contained in Rev. St. Mo. 1879, § 3980, limiting actions to establish or contest a will to five years after the probate or rejection thereof.—*Lilly v. Tobbein*, (Mo.) 18 S. W. 1060.

7. Where an assignee for the benefit of creditors has unlawfully paid a dividend on an unsworn claim against the insolvent, who had secretly agreed with the claimants to pay them an additional sum, the statute of limitations begins to run against the assignee's right to sue the claimants for the sum so paid at the time he paid the dividend, and is not interrupted by the fact that he notified the claimants to defend an action brought by the other creditors against himself for the dividend so unlawfully paid.—*Wynne v. Willis*, (Tex.) 18 S. W. 548.

8. Where defendant, in trespass to try title, who claims by adverse possession, took from a person who had no title to the land a deed to one B., who afterwards conveyed to defendant, the statute of limitations does not begin to run in defendant's favor until the deed to him from B. is recorded.—*Van Sickle v. Catlett*, (Tex.) 18 S. W. 81.

9. Code Tenn. § 2755, provides that when a suit is commenced in time, and a decree is rendered

against the complainant on any ground not concluding his right of action, a new suit may be brought within one year. Complainant sued to subject a trust-estate to the payment of a claim. The trust was for B. for life, remainder to her children. B. and her husband, and D., as trustee, were made defendants; but it appeared that D. had been discharged from his trusteeship, and the suit was dismissed because the remainder-men were not made defendants. *Held*, that this suit could not be connected with a suit commenced within a year thereafter, against the proper defendants, so as to save the bar of the statute of limitations.—*Hughes v. Brown*, (Tenn.) 18 S. W. 266.

10. An assignment for the benefit of creditors does not suspend the running of the statute of limitations against a matured debt mentioned in the assignment during the time the estate remains in the hands of the assignee, since the assignment does not interrupt the creditor's right of action; but the statute will run against such debt from the date of the assignment.—*Meusebach v. Half*, (Tex.) 18 S. W. 979.

Disabilities and exceptions.

11. The statutes of limitation were suspended by the war of the rebellion.—*Hodges v. Taylor*, (Ark.) 18 S. W. 129.

12. Where a defendant dies while the action is pending, and the petition is amended by substituting his legatee and her son as defendants, the statute of limitations ceases to run as against the substituted defendants when the amended petition is filed, though the petition is afterwards again amended, setting up substantially the same facts, and though both amendments are bad on general demurrer as to one of the substituted defendants.—*Kaufman v. Wooters*, (Tex.) 18 S. W. 549.

13. In partition proceedings, it appeared that defendant's grantor went into the exclusive and adverse possession of the land in 1862, claiming under a foreclosure of a trust-deed; that this possession continued until 1873, when ejectment was brought by three of the four devisees of a one-sixth interest in the land, who had not united in the trust-deed; and that the right of action in all the devisees accrued in 1865. *Held*, that the ejectment proceedings did not operate to prevent the running of the statute as against the fourth devisee, who had not joined therein.—*Sutton v. Dameren*, (Mo.) 18 S. W. 497.

14. Under Gen. St. Ky. c. 71, art. 3, § 6, providing that an action for relief against fraud or mistake must be commenced within 5 years after the discovery thereof, and shall be barred in any event after 10 years from the time of making the fraudulent contract, an action to set aside a conveyance as fraudulent, and to subject the property to the payment of a judgment against the grantor, will be barred after 5 years from the time when, by the exercise of reasonable diligence, he should have discovered the fraud.—*Cavanaugh v. Britt*, (Ky.) 18 S. W. 922.

15. Under Gen. St. Ky. c. 71, art. 4, § 21, providing that, where an act necessary to save a right is suspended by lawful restraint, the duration thereof shall not be estimated in the application of any statute of limitations, the superseding of a judgment on appeal suspends the running of the statute of limitations against an action to set aside a fraudulent deed and enforce the judgment against the property conveyed thereby.—*Cavanaugh v. Britt*, (Ky.) 18 S. W. 922.

Acknowledgment.

16. A declaration made by the secretary of a city, in his annual statement to the council, that there is a certain amount of interest due on certain city bonds, is not an acknowledgment of the debt, within the meaning of the statute, when it does not appear that the secretary had authority to bind the city by his statement, or that such statement was approved by the council.—*City of Houston v. Jankowski*, (Tex.) 18 S. W. 269.

17. The fact that a city levied and collected taxes to pay interest on its debts is not an acknowledgment of any particular debt.—*City of Houston v. Jankowski*, (Tex.) 18 S. W. 269.

Acknowledgment—Part payment.

18. An instruction that a note is taken out of the statute of limitations if a certain payment was made on a given date, is sufficient without requiring the jury first to find that a memorandum of the payment indorsed on the note was made at or about the time of the alleged payment.—*Henry v. Diviney*, (Mo.) 18 S. W. 1057.

19. The indorsement of a partial payment upon a note given for purchase money of lands does not suspend the operation of the statute of limitations as to the whole contract, so as to keep alive the vendor's lien upon the land, when in the hands of a subsequent purchaser not a party to the transaction.—*Kendall v. Clark*, (Ky.) 18 S. W. 583.

20. Where an indorsement of a partial payment upon a note is relied upon to suspend the operation of the statute, and the fact of payment is denied by the answer of the payor, the burden of proof rests upon the plaintiff.—*Kendall v. Clark*, (Ky.) 18 S. W. 583.

21. Where a partial payment on a note was relied on to suspend the operation of the statute, the testimony of the plaintiff and another witness, both parties to the transaction alleged to result in the payment, is not sufficient to establish the fact, against the positive denial of the payor, and of a disinterested third person, through whom, if at all, the payment was made, when their testimony is supported by circumstances, and by other evidence.—*Kendall v. Clark*, (Ky.) 18 S. W. 583.

Pleading and proof.

22. The bar of the statute of limitations is not available, unless it is specially pleaded.—*Orr v. Rode*, (Mo.) 18 S. W. 1066.

23. Where plaintiff, in reply to plea of the statute of limitations, alleges that suit had been theretofore brought and dismissed, the burden is upon him to show the truth of his allegation.—*Memphis & L. R. Ry. Co. v. Shoecraft*, (Ark.) 18 S. W. 493.

Limited Partnership.

See *Partnership*, 14.

Liquors.

See *Intoxicating Liquors*.

Local Actions.

See *Venue in Civil Cases*, 1-4.

Local and Special Laws.

See *Constitutional Law*, 7.

Local Option.

See *Intoxicating Liquors*, 2-5.

Lost Instruments.

Proof of lost mortgage, see *Mortgages*, 12.

Malice.

See *Malicious Prosecution*, 2, 3.

MALICIOUS MISCHIEF.

Willful killing or wounding of cattle, see *Animals*, 3-7.

Evidence.

Testimony of the owner describing his cow, and that he found her shot behind defendant's fence, with that of others that defendant shot at a cow of that description which was in his inclosure, but jumped out after the shot and died, sustains a verdict for maliciously killing the cow, under Rev. St. Mo. 1879, § 1874.—*State v. Grimes*, (Mo.) 13 S. W. 956.

MALICIOUS PROSECUTION.**When action lies.**

1. A petition, in malicious prosecution, showing that the prosecution was for cutting and carrying away trees on a highway laid out over defendant's land under permit from the overseer of roads, is not demurrable, since, though the fee remained in defendant, plaintiff, acting under authority of the overseer, was not guilty of knowingly cutting timber on the land of another, without the owner's consent, under Pen. Code Tex. art. 697.—*Cooper v. Langway*, (Tex.) 18 S. W. 179.

Malice.

2. It is not error to charge that "malice" means wickedness of purpose, or a spiteful or malevolent design against another, or a purpose to injure another, or a design of doing mischief, or any evil design or an inclination to do a bad thing, or a reckless disregard of the rights of others, or an intent to do an injury to another, or absence of legal excuse, or any other motive than that of bringing a party to justice.—*Shannon v. Jones*, (Tex.) 18 S. W. 477.

3. In an action for malicious prosecution, where the court has charged that "legal malice is made out by showing that the proceeding was instituted from any improper or wrongful motive," and that the term "malice" is not to be considered "in the sense of spite or hatred against the individual, but as denoting that the party is actuated by improper and wrongful motives," plaintiff is not prejudiced by a refusal of the court to charge that "malice," in its legal sense, is any wrong act, done intentionally, without legal justification or excuse. It is not what is called "malice" in its common acceptation, as ill will against a person.—*Hearn v. Coy*, (Ark.) 18 S. W. 596.

Probable cause.

4. It is not error to charge that "probable cause means a reasonable ground of suspicion, supported by facts and circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged."—*Shannon v. Jones*, (Tex.) 18 S. W. 477.

Advice of counsel.

5. Where a statement of the facts shows want of probable cause, the fact that defendant consulted an attorney before acting is not sufficient to relieve him from liability.—*Shannon v. Jones*, (Tex.) 18 S. W. 477.

Evidence.

6. In an action for malicious prosecution for unlawfully opening a letter addressed to defendant, evidence that defendant authorized plaintiff to open the letter is admissible in order to show malice and want of probable cause, though such authorization is not specially pleaded.—*Sutor v. Wood*, (Tex.) 18 S. W. 321.

7. The certified copy of defendant's affidavit, charging plaintiff with having unlawfully opened his letters, is admissible in evidence, though the court had no jurisdiction of the prosecution, as the defendant is not thereby relieved from liability. Following 8 S. W. 51.—*Sutor v. Wood*, (Tex.) 18 S. W. 321.

8. Evidence that plaintiff read the letter is immaterial, where his defense to the prosecution was that he opened the letter with defendant's consent.—*Sutor v. Wood*, (Tex.) 18 S. W. 321.

9. Evidence to show that, at the time the alleged authority was given, defendant was not anxious to have the matter referred to in the letter immediately attended to, is immaterial.—*Sutor v. Wood*, (Tex.) 18 S. W. 321.

10. The verdict in the criminal prosecution is admissible to show that the prosecution had ended.—*Sutor v. Wood*, (Tex.) 18 S. W. 321.

11. In an action for malicious prosecution, where injury to plaintiff's good name and reputation in his business is alleged as an element of damage, there is no error in allowing proof that at the time of the prosecution plaintiff was not of good credit.

—*Finley v. St. Louis Refrigerator Co.*, (Mo.) 18 S. W. 87.

12. Under a petition alleging that defendant made affidavit charging plaintiff with cutting and carrying away trees from his land, and caused it to be filed in the county court, and a capias to be issued, on which plaintiff was arrested and imprisoned until he gave bond, the capias and bond are admissible, though stating the charge to be theft.—*Cooper v. Langway*, (Tex.) 18 S. W. 179.

Sufficiency.

13. In an action for malicious prosecution, it is sufficient to show that defendant either commenced or continued the prosecution, maliciously.—*Finley v. St. Louis Refrigerator Co.*, (Mo.) 18 S. W. 87.

14. In an action for malicious prosecution, defendant testified that he had had certain singularly marked turkeys in his yard; that his servant informed him that they had flown into plaintiff's yard; that on going to demand their return he was told that she was sick in bed, and that she said that the turkeys in her yard had been sent her by express; that he found on inquiry at the express offices that no turkeys had been delivered to plaintiff; that he had sworn out a warrant against plaintiff after consulting his attorney; that he could not identify the turkeys in plaintiff's yard as his own; and that he had no malice against plaintiff. Plaintiff testified that she was confined to her bed at the time of defendant's visit, and that she had purchased the turkeys from a peddler. The peddler testified that he had sold turkeys to plaintiff. Held, that there was sufficient evidence to support a verdict for plaintiff.—*Shannon v. Jones*, (Tex.) 18 S. W. 477.

Instructions.

15. It is proper to refuse to charge, in an action for malicious prosecution for unlawfully opening a letter addressed to defendant, that "no verbal authority to take defendant's letters from the post-office would authorize plaintiff to take any registered letter," since, if the letter was taken with the defendant's consent, the fact that it was registered would not justify the prosecution.—*Sutor v. Wood*, (Tex.) 18 S. W. 321.

16. Under a petition alleging injury in the sum of five thousand dollars, and praying judgment "for the sum of two thousand as actual, and three thousand as exemplary, damages," a charge stating that plaintiff sues for two thousand dollars actual damages, and three thousand dollars exemplary damages, is not misleading from the use of the word "dollars."—*Cooper v. Langway*, (Tex.) 18 S. W. 179.

Damages.

17. When the petition alleges that great distress of mind and sickness was caused by the prosecution, and there was no objection to the admission of evidence tending to prove them, it is not error to charge the jury that they can consider the sickness and distress in estimating the damages.—*Shannon v. Jones*, (Tex.) 18 S. W. 477.

Mandamus.

To corporation, see *Benevolent Societies*, 2.

Manslaughter.

See *Homicide*, 9-12.

MARRIAGE.**What constitutes.**

Const. Tex. 1869, art. 12, § 27, legitimizing the children of slaves, who prior to emancipation lived together as husband and wife, and continued so to do until the death of one of them, and validating the marriages of such persons as were living together at the time of its adoption, and legitimizing their children, whether born before or after that time, did not make persons husband and wife who were at the time cohabiting, and who had previously cohabited while slaves, when the relation of husband and wife was not recognized between them while they were slaves, and

when the man at that time was cohabiting with another woman, formerly a slave, who was recognized as his wife, both before and after emancipation.—*Livingston v. Williams*, (Tex.) 18 S. W. 173.

Married Women.

See *Divorce; Dower; Homestead; Husband and Wife.*

MASTER AND SERVANT.

Contract of hiring—Discharge.

1. A clerk in a store employed by the month, who is unjustly discharged before the end of the month, is not obliged, in order to recover for the breach of the contract, to immediately seek for employment of a different character, but has a right to seek, for a reasonable time, the same character of employment that he had when discharged.—*Simon v. Allen*, (Tex.) 18 S. W. 296.

Master's liability to third persons.

2. In an action against a railroad company for personal injuries received by plaintiff while riding on a hand-car which was furnished by the company for the exclusive purpose of carrying its employees to and from their work, and on which such employees, without the knowledge of the company's officers or agents, were carrying the plaintiff on an errand in no way connected with the business of the company, it is reversible error to instruct the jury that it must appear from the evidence that plaintiff had notice of the company's rules against carrying passengers on such hand-car, and that the company could be bound by the acts of its servants done within the scope of their apparent authority, and that the jury might take into consideration the habitual disregard of the company's rules, by consent of its officers and agents, in determining whether such rules had been abandoned.—*Gulf, C. & S. F. Ry. Co. v. Dawkins*, (Tex.) 18 S. W. 982.

3. In such action it is error to refuse to instruct the jury that the burden of proof is on the plaintiff to show that such employees were acting within the scope of their authority, and that if they were at the time of the accident using the hand-car for private business of their own, in which the company had no interest, then they were not acting within the scope of their authority.—*Gulf, C. & S. F. Ry. Co. v. Dawkins*, (Tex.) 18 S. W. 982.

4. The fact that railroad employees, while using a hand-car for their private business contrary to the rules of the company, allow a young child to ride on the car, whereby he is injured, does not make the company liable.—*Dawkins v. Gulf, C. & S. F. Ry. Co.*, (Tex.) 18 S. W. 984.

Negligence of independent contractor.

5. A person employed by a railroad company to clear off and burn the rubbish from its right of way at so much per mile, who hires, pays, and controls his own help, is not a servant of the company, but an independent contractor.—*St. Louis, L. M. & S. Ry. Co. v. Yonley*, (Ark.) 18 S. W. 333.

6. A construction company engaged in building a railroad made a subcontract for the construction of the road from a given point as far as the company's chief engineer might determine, the company to furnish a locomotive and train, with engineer, fireman, and brakeman, for the use of the subcontractors in such work. *Held* that, while engaged in such work, the subcontractors were independent contractors, for whose negligence in the management of the train the company was not liable.—*Powell v. Virginia Const. Co.*, (Tenn.) 18 S. W. 691.

Negligence of master.

7. In an action against a railroad company for the negligent killing of an employee, where the evidence does not show that defendant was negligent, and that the deceased exercised due care, a verdict should be directed for defendant.—*Texas & N. O. Ry. Co. v. Crowder*, (Tex.) 18 S. W. 831.

8. A railroad company is liable to an inexperienced brakeman for injuries received while coup-

ling foreign cars, the injury being caused by the unusual construction of the couplings, materially differing from those of its own cars, unless it has cautioned him against the danger.—*Missouri Pac. Ry. Co. v. White*, (Tex.) 18 S. W. 65.

9. Though it is customary with other roads to send out water trains with a conductor, negligence of the company in not putting a conductor in charge will not authorize a verdict for the killing of the fireman in a collision occasioned by failure of the engineer to obey orders to await a passenger train at a certain station.—*Gulf, C. & S. F. Ry. Co. v. Compton*, (Tex.) 18 S. W. 667.

10. The water train on which deceased was killed not having been in charge of a conductor, it is not admissible to show that such trains were afterwards put in charge of a conductor.—*Gulf, C. & S. F. Ry. Co. v. Compton*, (Tex.) 18 S. W. 667.

11. In an action against a railroad company for the death of a brakeman it was shown that deceased was engaged at night in switching cars on a track where there was a rail so worn as to be an inch and a half lower than the next one at the joint, so that a car passing over the joint would be jarred, and that deceased fell from the car on which he was riding, striking the ground at a point consistent with the theory that he was thrown off by the jar in passing over the joint, and that he was dragged some distance, and killed, though nobody saw the accident. *Held*, that the evidence was sufficient to take the case to the jury.—*Soeder v. St. Louis, L. M. & S. Ry. Co.*, (Mo.) 18 S. W. 714.

12. An instruction, in an action for the death of a switchman caused while he was making a coupling of two cars, that, if the proximate cause of the accident was the darkness of the night, or the stormy weather, plaintiff cannot recover, is properly refused, where there is no evidence that such were the proximate causes of the accident, and as such causes, if they increased decedent's peril, would be additional grounds for recovery.—*Missouri Pac. Ry. Co. v. Lamothe*, (Tex.) 18 S. W. 194.

13. In an action by defendant's employee for injuries sustained in its oil-mill, the court instructed that plaintiff should recover if defendant's superintendent ordered him to perform a service not within the purview of his employment, which was dangerous, if the superintendent did not use due care therein, provided that plaintiff was injured while attempting, in the exercise of due care, to obey the command. *Held* not objectionable, on the ground that the jury were thereby prevented from considering plaintiff's recklessness in undertaking to obey the order, in the absence of a request by defendant for fuller instructions.—*Galveston Oil Co. v. Thompson*, (Tex.) 18 S. W. 60.

14. In an action by defendant's employee for injuries sustained in its mill, where the two witnesses who testified as to whether plaintiff was acting under the superintendent's order when he was injured directly contradict each other, and the evidence that the superintendent was not at the mill when the order was alleged to have been given is uncertain and unreliable, a finding that such order was given will not be disturbed on appeal.—*Galveston Oil Co. v. Thompson*, (Tex.) 18 S. W. 60.

15. In an action against a railroad company for injuries received while employed as a brakeman, where it appears that plaintiff was 16 years of age at the time of the accident, was of average intelligence, and was employed without the consent of his parent, defendant must show that plaintiff possessed the capacity and experience to do the work in safety, though there is no evidence of negligence on the part of plaintiff or of his fellow-servants.—*Gulf, C. & S. F. Ry. Co. v. Jones*, (Tex.) 18 S. W. 874.

Defective appliances.

16. Where, in a suit for damages for personal injuries caused by the bursting of an engine, plaintiff avers that the injury was caused by a crack, unknown to him, but known to the defendant, in the piston-head of the engine, which piston-head broke and knocked out the end of the cylinder, the testimony of a witness that he knew

nothing about the piston being cracked, but had several times called the attention of the chief engineer to the clicking of it, and told him something was wrong in the cylinder, was directly in support of the issue, and not irrelevant.—Howard Oil Co. v. Davis, (Tex.) 13 S. W. 665.

17. Where the testimony of four witnesses strongly tends to show that the accident was caused by the negligence of plaintiff, but there is positive evidence to the effect that it was due to a defect in the machinery, a verdict for the plaintiff will not be set aside on the ground that it was not supported by the evidence.—Howard Oil Co. v. Davis, (Tex.) 13 S. W. 665.

18. In an action by a brakeman against a railroad company for personal injuries, caused by defective appliances on defendant's cars, evidence that a sufficient force of car inspectors was not employed by defendant, where it is also shown that this particular car was inspected, and that one of the car inspectors got drunk sometimes when not on duty, is not sufficient to show that defendant failed to use reasonable care in seeing that its cars were in a safe condition.—St. Louis, L. M. & S. Ry. Co. v. Gaines, (Ark.) 13 S. W. 740.

19. Where plaintiff was injured by the derailing of his locomotive at a switch which was defective, in that the spring was not strong enough to throw the point of the switch against the rail, and keep it there, when the position of the lever indicated that this was the position of the switch, and that it was safe to pass it, an instruction that the injury was due to the negligence of fellow-servants, in not placing the rails in a proper position by the unusual means of a maul or axe, is properly refused.—Texas & P. Ry. Co. v. Johnson, (Tex.) 13 S. W. 463.

20. In an action against a railroad company for personal injuries received by a brakeman while coupling a box-car to a locomotive, it appeared that the locomotive was intended for use on passenger trains, and that it had a coupling apparatus known as a "goose-neck," which is useless on freight trains, and, according to plaintiff's evidence, very dangerous. Plaintiff, who had been in defendant's employ some months, testified that he had always worked with the usual freight train locomotives; that he did not know of the use on freight trains of locomotives having this appliance; that this particular locomotive was sent out of the round-house without warning; and that he undertook to couple it to the box-car in the usual way, when he received the injuries complained of. *Held* that, though defendant's evidence showed that plaintiff had been notified of the goose-neck before he attempted to make the coupling, a finding by the jury that defendant was negligent in using the engine without warning plaintiff of the increased hazard arising from the goose-neck attachment would not be set aside.—Galveston, H. & S. A. Ry. Co. v. Garrett, (Tex.) 13 S. W. 62.

21. In an action for injuries caused by the derailing of plaintiff's locomotive at a defective switch, it is proper to refuse to charge that plaintiff could not recover on account of any defect in the brakes, where there is evidence that, had such brakes been in good order, the train might have been stopped before plaintiff was injured notwithstanding the defective switch.—Texas & P. Ry. Co. v. Johnson, (Tex.) 13 S. W. 463.

— Evidence.

22. A water train, in charge of an engineer, fireman, and one brakeman, having collided with a passenger train between A. and H., killing the fireman, testimony of a witness that, when the water train was at a certain station, he saw a man get off the engine, and heard the operator tell him he ought to meet the passenger train at A., to which he replied: "I am hungry. Can't we make H.?" and was answered, "No," and got on the engine and went off,—is admissible, as part of the *res gestæ*, though the witness did not identify the man as the engineer.—Gulf, C. & S. F. Ry. Co. v. Comp-ton, (Tex.) 13 S. W. 667.

23. Where, in an action for the death of a switchman caused while he was making a coupling of two cars, it appears that the train which de-

cedent was attempting to couple was not moved by a switch-engine, but by a powerful road freight-engine, evidence that the former is more suitable for such work, and more easily handled, than the latter, is pertinent to the issues, and admissible.—Missouri Pac. Ry. Co. v. Lamothe, (Tex.) 13 S. W. 194.

24. Where, in an action for the death of a switchman caused while he was making a coupling of two cars, the petition fails to allege that the accident was due to the failure or inability of the engineer to see the signals, the admission of evidence that engineers are controlled entirely by signals when switching, though improper, does not affect the result of the action, as it does not suggest that the injury was caused by the omission to give them.—Missouri Pac. Ry. Co. v. Lamothe, (Tex.) 13 S. W. 194.

25. Evidence, in an action for the death of a switchman caused while he was making a coupling of two cars, that decedent was killed by the Miller draw-head passing the central draw-head, and crushing him, there not being more than four or five inches of space between the cars after the passing of the draw-heads where he was standing, is not objectionable as suppositional and hearsay.—Missouri Pac. Ry. Co. v. Lamothe, (Tex.) 13 S. W. 194.

Negligence of vice-principal.

26. Plaintiff was injured in a collision between a special freight train and a working train. The freight train had orders to look out for the working train, but the latter, although it was all the previous night at a telegraph station, had no such orders in regard to the former. *Held*, that the neglect of the defendant's superintendent to give such orders was the negligence of the defendant, imposing a liability on the latter if the injury resulted therefrom.—Galveston, H. & S. A. Ry. Co. v. Smith, (Tex.) 13 S. W. 562.

Negligence of fellow-servants.

27. A railroad yard switchman and a locomotive engineer are not fellow-servants.—Louisville & N. R. Co. v. Sheets, (Ky.) 13 S. W. 248.

28. A road-master in charge of a working train and a working party, with power to employ and discharge the men, is a fellow-servant of a section hand riding thereon under his direction, but not employed under the immediate eye of the road-master, and the latter cannot recover for an injury received in a collision caused by the road-master's negligence.—Galveston, H. & S. A. Ry. Co. v. Smith, (Tex.) 13 S. W. 562.

Risks of employment.

29. In an action against a railroad company for the death of a brakeman, caused by having his foot caught between the rails while uncoupling cars, it is error to charge that decedent's knowledge of the fact that the space between the main and guard rails was unblocked was knowledge of the attendant danger, as that is a question for the jury.—Davis v. St. Louis, I. M. & S. Ry. Co., (Ark.) 13 S. W. 801.

30. A street-car driver who continues in the service after becoming aware of a defect in the platform on which he stands cannot recover for an injury sustained by a fall caused by the defect, but will be held to have assumed the increased risk.—Rogers v. Galveston City R. Co., (Tex.) 13 S. W. 540.

Contributory negligence.

31. Plaintiff, having stepped between moving cars for the purpose of uncoupling them, was injured through his clothes catching on a "sliver" in the rail as he was leaving the track. The evidence showed that the space between the ties inside the rails was filled with earth, though that outside the rails was not entirely filled in, and there was no claim that plaintiff was injured because the filling between the ties was incomplete. *Held*, that it was proper to refuse an instruction that plaintiff could not recover if he knew of the defect in the filling, and if it contributed to his injury, especially when the court had already fully charged in relation to the doctrine of contributory

negligence.—*Texas & P. Ry. Co. v. Overheiser*, (Tex.) 18 S. W. 468.

83. Plaintiff, in attempting to uncouple cars, found the coupling-pin fastened, when he signaled to the engineer to stop the train, which was done. Being still unable to remove the pin, he asked the engineer to give him the slack. The train kept moving slightly, and, after moving along with it for 10 or 12 feet, plaintiff succeeded in pulling out the pin, and, as he stepped out, the leg of his pants was caught by a "silver" in the rail, causing a car-wheel to run over his foot. *Held*, that a verdict for plaintiff would not be set aside because of his negligence in stepping between moving cars.—*Texas & P. Ry. Co. v. Overheiser*, (Tex.) 18 S. W. 468.

83. The conductor of a freight train, having stopped his train on one end of a bridge, climbed to the top of a box-car as the train moved on, being prevented by obstructions along the track from going back to the caboose, and was knocked off and killed by a scaffold suspended over the bridge. The scaffold could have been raised three or four feet higher; and the attention of the boss had been called to that fact, but he said it was high enough. It was customary and sometimes the duty of freight-car conductors to stand on the top of box-cars when assisting in braking and signaling. A rule of the company had been furnished deceased which prohibited all persons from standing on the top of box-cars while passing through bridges of that class, and from boarding trains while in motion. *Held*, that the deceased was guilty of contributory negligence.—*San Antonio & A. P. Ry. Co. v. Wallace*, (Tex.) 18 S. W. 565.

84. In an action for damages for the death of plaintiff's son, caused by defendant's defective elevator, it appeared that the elevator was managed by an operator in the engine-room; that deceased got on to descend from the top story of the building, and, as it approached the first floor, leaned forward to step off, when the operator suddenly reversed the motion, sending the elevator up again, thus crushing deceased between the elevator and the second floor. It further appeared that from his position in the engine-room the operator could not see the elevator; that the duties of deceased were in the factory yard, and did not require him to go upon the elevator; that at the time of the accident he had left his work, and gone up to the top story of the factory, to get a drink of ice water; that he had done this several times before, and knew of the peculiar construction and management of the elevator; that there were stairways for the use of employees, and the elevators were used only for freight. *Held*, that an instruction directing a verdict for the defendant was not erroneous.—*O'Brien v. Western Steel Co.*, (Mo.) 18 S. W. 402.

Measure of Damages.

See *Damages*.

MECHANICS' LIENS.

Priority—Vendor's lien.

Act Ky., approved March 2, 1869, provides that any person who shall furnish to a previous building any machinery or fixtures, alterations, additions, or repairs, which are capable of being removed from such building without material injury thereto, shall have a lien thereon superior to all others, even though the employer had no right to bind the land on which the building is located for a sufficient estate to satisfy the liens. *Held*, that plaintiffs, who furnished machinery to the lessee of a flour-mill, to enable him to convert it into a roller mill, were entitled, as against one holding a vendor's lien on the land, to remove all such machinery capable of removal without serious injury to the mill, although they did not put the former machinery back in the condition it was before being detached.—*Slocum v. Caldwell*, (Ky.) 18 S. W. 1069.

Merger.

See *Mortgages*, 20.

MINES AND MINING.

Mining partnership.

1. Where the managing member of a mining partnership, in disregard of positive instructions from his copartners, borrows money for partnership purposes, but solely on his own credit, and without their knowledge, it is error, in an action against the partnership for the money, to instruct that the copartners are liable if the act was "necessary for carrying on the business of the partnership." The implied power of a member of a mining partnership to borrow money so as to bind the firm depends on the question whether such an act is usual in the ordinary conduct of the business.—*Randall v. Meredith*, (Tex.) 18 S. W. 576.

2. Where there is no evidence that the managing partner had ever before borrowed money for the partnership within the knowledge of his copartners, or that it was usual for one member of a mining firm to borrow money to carry on the firm business, it is error to charge that the copartners are liable if the act was "done in the usual course of the business."—*Randall v. Meredith*, (Tex.) 18 S. W. 576.

Minor.

See *Guardian and Ward; Infancy; Parent and Child*.

Misjoinder.

See *Parties*, 5-8.

Monopolies and Privileges.

See *Constitutional Law*, 9, 10.

Mortality Tables.

Evidence, expectation of life, see *Death by Wrongful Act*, 8, 9.

MORTGAGES.

On homestead, see *Homestead*, 28-31.

Railroad mortgages, see *Railroad Companies*, 26-28.

What constitutes—Absolute deed.

1. The land of one B. was about to be sold under a judgment. His brother-in-law paid the debt, taking a deed from B., and by a conveyance gave B.'s wife the use of the land for life. At the same time, he executed to B. an agreement to reconvey on payment to him during his life-time of the amount of the judgment and interest. The brother-in-law died, leaving the land by will to C. The wife of B. died three years later. B. had made several payments on the debt. *Held*, that the conveyance to the brother-in-law was a mortgage, and C. was not entitled to a judgment for possession, but to a decree for the balance due on the judgment.—*Sherrer v. Harris*, (Ark.) 18 S. W. 780.

2. An assignor for the benefit of creditors who joins his assignee in a *prima facie* absolute deed of land, the legal title to which is in the assignee at the time, occupies the position of vendor, and cannot, under the statute of frauds, (Gen. St. Ky. c. 22, § 1,) change the operation of such deed into a mortgage by evidence of a parol agreement, in the absence of fraud and mistake.—*Crutcher v. Muir's Ex'r*, (Ky.) 18 S. W. 435.

Validity—Signing and acknowledgment.

3. A mortgage, in which the character "&" and a word or name following the name of the mortgagor were erased, recited that "the first-named parties" had made a loan to the mortgagor. Below the signatures of the grantor and officer, and above that of the witnesses, there was an erasure of what appeared to be two names, apparently of witnesses. *Held*, that the mortgage was valid, as against the heirs of the mortgagor suing for the land.—*Rodriguez v. Hayes*, (Tex.) 18 S. W. 296.

4. Under Gen. St. Ky. c. 81, § 17, providing that, except in an action against an officer or his sureties, no certificate of the officer shall be called

in question in the absence of a charge of fraud or mistake, allegations of a married woman, in a suit to foreclose a mortgage, denying the matters set up in the certificate of acknowledgment by the county clerk, cannot be considered. — *Razor v. Dowan*, (Ky.) 18 S. W. 914.

— Description.

5. Defendants agreed to secure their indebtedness to plaintiffs and H. "on about 908 acres of land of the H. headright, in M. county," plaintiffs to be secured on 500 acres of said land, beginning at the west boundary, and extending east sufficiently far to embrace 500 acres. *Held*, in a suit to establish the agreement as a mortgage, and to foreclose the same, that this description was sufficient. — *Westmoreland v. Carson*, (Tex.) 18 S. W. 559.

6. Although the description was sufficient, there was no error in admitting, in a suit to enforce the equitable lien, a deed of 908 acres of said headright to defendants. — *Westmoreland v. Carson*, (Tex.) 18 S. W. 559.

7. As the description in the agreement was sufficient, and the deed properly admitted, it was not prejudicial to defendants to admit parol evidence of the identity of the land described in the two instruments. — *Westmoreland v. Carson*, (Tex.) 18 S. W. 559.

8. A mortgage, after stating the county and state in which the land was situated, described it as "beginning on a Spanish oak," and then gave the courses and distances, as well as monuments, stating that the described area contained 242½ acres. It then excepted all of the described land lying west of a certain stream, and 7½ acres on the east, which excepted parts "were sold off by Henry Yount, Sr.," leaving 142½ acres remaining in the tract, all on the east side of the stream. *Held*, in ejectment between the original parties to the mortgage, that the mortgagees could introduce parol evidence that certain land in the county had long been known by the description contained in the mortgage; that the land had been conveyed, by persons in privity with the mortgagor, by the same description; and that the tract was also popularly known as "Henry Yount's Land," as well as deeds of the excepted parts executed by Henry Yount, Sr. — *County of Bollinger v. McDowell*, (Mo.) 18 S. W. 100.

9. Where the documents of title are referred to as accompanying the mortgage, and describe the land, the mortgage need not describe it. — *Rodriguez v. Hayes*, (Tex.) 18 S. W. 296.

— Delivery.

10. On a contest as to the ownership of certain mortgages, it appeared that defendant was engaged in getting staves to be delivered to merchants in New Orleans at a fixed price; that he contracted with the mortgagor to build boats for that purpose, but, the latter being impecunious, it became necessary to advance money beyond the agreed price thereof, and for this one mortgage was given, while another was executed to a third person for supplies furnished, and was bought from him by defendant; that all the money so used was furnished to defendant by the agent of said merchants; and that before it was furnished they had already exacted from defendant all the securities he could give for moneys previously advanced. Plaintiff's testimony was that defendant delivered the mortgages to said merchants as collateral security for the additional advances, but he claimed that they were abstracted from his safe by the merchant's agent, and by him delivered. *Held*, that the evidence was sufficient to establish plaintiff's claim. — *Caldwell v. Meshew*, (Ark.) 18 S. W. 761.

— Consideration.

11. A mortgage for a specific sum given in good faith as security for future advances is a valid security, as against the general creditors of the mortgagor, for advances not exceeding the sum specified in the mortgage. — *Louisville Banking Co. v. Leonard*, (Ky.) 18 S. W. 521.

Proof of lost mortgage.

12. In an action to establish a trust-deed alleged to have been lost or destroyed, plaintiff

testified that before the execution of the deed defendant was indebted to him in a certain sum, part of which was secured by notes deposited by defendant as collateral; that subsequently defendant executed his note for the indebtedness, and also a trust-deed on a quarter section of land, to secure the note; that, after satisfying himself that the deed had been properly executed, plaintiff handed it to his book-keeper; that the collaterals were surrendered to defendant, who returned them to plaintiff for safe-keeping; and that the deed of trust had not been recorded, and had subsequently been lost. Plaintiff's book-keeper testified substantially to the same effect. Defendant's note, containing a memorandum that it was secured by a deed of trust, was also introduced in evidence. Both plaintiff and his book-keeper testified that plaintiff made the memorandum on the delivery of the note and deed. Plaintiff's books also showed that defendant's old indebtedness had been canceled, and that a note had been executed therefor, secured by a deed of trust. *Held*, that the evidence warranted a finding that the deed of trust had been executed and subsequently lost, though defendant testified that he never executed a deed of trust to plaintiff or any one else; that the collaterals were never returned to him, but collected by plaintiff, and credited on the note; and that his wife owned the land covered by the alleged trust-deed. — *Bohart v. Chamberlain*, (Mo.) 18 S. W. 85.

Lien.

13. An agreement that a mortgage shall be a continuing security for any future advances, whether made before or after its maturity, will extend the lien of the mortgage in favor of advances made after its maturity. — *Louisville Banking Co. v. Leonard*, (Ky.) 18 S. W. 521.

— Recording.

14. Under Act Ark. March 12, 1833, dividing Carroll county into two districts, each district stands as a separate county; and a mortgage recorded in one district, on property situated in another, is not a lien as against a subsequent mortgage, recorded in the district in which the property is located. — *Beaver v. Frick Co.*, (Ark.) 18 S. W. 134.

— Actual notice.

15. Where a lot intended to be conveyed is by mistake omitted from a mortgage, but public notice of the mistake and of the mortgagee's claim is given, the mortgagee's claim on the omitted lot is superior to that of a subsequent purchaser under execution against the mortgagor. — *Ilse v. Seinsheimer*, (Tex.) 18 S. W. 329.

Rights of mortgagee.

16. Though alienation, within six years, of land acquired under the colonization law of Texas of March 26, 1825, was prohibited, the heirs of a mortgagor cannot recover land so mortgaged without payment of the debt, where the mortgagee or those claiming under him are in possession. — *Rodriguez v. Hayes*, (Tex.) 18 S. W. 296.

17. Where possession is taken and retained under a mortgage in accordance with its terms, the heirs of the mortgagor cannot recover the land without payment of the debt, though barred by the statute of limitations. — *Rodriguez v. Hayes*, (Tex.) 18 S. W. 296.

18. The mortgagee, and those claiming under him, being in possession, as authorized by the mortgage, it is not necessary to show that notice of their claim was had by the mortgagor's heirs. — *Rodriguez v. Hayes*, (Tex.) 18 S. W. 296.

Conveyance by mortgagee in possession.

19. Conveyance by a mortgagee in possession passes his interest in the mortgage without an assignment. — *Rodriguez v. Hayes*, (Tex.) 18 S. W. 296.

Merger.

20. Where one who has purchased swamp land from a county goes into possession, and executes a mortgage thereon to secure school money borrowed from the county in order to pay the purchase price, a deed subsequently given him by a commissioner

appointed by the county to convey swamp lands to those who have paid the purchase money does not operate as a merger or satisfaction of the mortgage.—*Williams v. Brownlee*, (Mo.) 18 S. W. 1049.

Foreclosure.

21. Upon the death of a mortgagor it is not necessary to probate the claims against him in order to enable the mortgagee to foreclose the mortgage.—*Hodges v. Taylor*, (Ark.) 18 S. W. 129.

22. A mortgagee having no notice that the land was held under a parol trust may foreclose without joining the beneficiaries, and the purchaser will obtain good title, though having notice of such fact.—*Cooper v. Loughlin*, (Tex.) 13 S. W. 37.

23. Beneficiaries under a parol trust, being interested in and parties to the administration of the estate of the trustee instituted by the mortgagee for the purpose of obtaining payment of the mortgage debt, are sufficiently made parties to the foreclosure proceedings.—*Cooper v. Loughlin*, (Tex.) 13 S. W. 37.

24. In an action by a county to foreclose a mortgage given by a purchaser of swamp land from the county to secure school money borrowed from the county to pay the purchase price, failure to bring in as defendant a creditor whose debt is secured by a subsequent deed of trust on the land can have no other effect than to allow those claiming through a sale under that deed to redeem from the foreclosure.—*Williams v. Brownlee*, (Mo.) 18 S. W. 1049.

25. Where, on bill to foreclose a mortgage, plaintiff shows *prima facie* the execution thereof, and there is no contrary evidence, it is not error to direct a verdict for plaintiff on defendant's plea of *non est factum*.—*McIlhenny v. Binz*, (Tex.) 13 S. W. 655.

Decree.

26. In a suit to redeem from the foreclosure of a mortgage, a decree allowing redemption by paying a specified sum by a given date, and providing that on failure to make payment within the given time the mortgage shall stand foreclosed, is not erroneous, in that it does not direct a sale on failure to redeem, where plaintiffs in their petition did not ask such sale, and did not, by motion or otherwise, ask the court to modify the decree in that respect.—*Martin v. Ratcliff*, (Mo.) 18 S. W. 1051.

Sale.

27. The heirs and administrator of a deceased mortgagee may purchase the mortgaged premises at the foreclosure sale under a decree of the circuit court.—*Briant v. Jackson*, (Mo.) 18 S. W. 91.

28. Mortgaged premises were worth \$8,000, but the amount bid at the foreclosure sale was only \$900. Before the sale the heirs of the deceased mortgagee had agreed among themselves to buy the land, if it did not go too high; but there was nothing to show that they in any way tried to deter others from bidding, or in any way intimated that it was being bought for the estate. On the other hand, there were many present at the sale, and the mortgagor, who was in possession, gave notice at that time that any one who bought the premises would simply be buying two lawsuits. Moreover, at that time there was a great depression in the real-estate market. *Held*, that these facts did not show fraud as against a creditor of the estate, especially where at that time a judgment stood unreversed in favor of the estate, and against such creditor.—*Briant v. Jackson*, (Mo.) 18 S. W. 91.

29. At the sale of mortgaged premises under judicial process, the heirs of the deceased mortgagee were the purchasers, and the sheriff's deed to them acknowledged the receipt of the purchase price. *Held*, that mere uncertainty in the evidence, years afterwards, as to when this was paid to the administrator, would not be conclusive that it was paid with money in the hands of the administrator, or that the transaction was in fraud of decedent's creditors.—*Briant v. Jackson*, (Mo.) 18 S. W. 91.

30. In a sale of lands on foreclosure the property was bid in by the wife of the mortgagor, who was notified by the commissioner that she must give bond or he would resell the property. She

having failed to give the bond, the land was again offered the same day, and sold. *Held*, that it was within the power of the commissioner to offer the property a second time without readvertising the sale.—*Wilson v. Thorn*, (Ky.) 18 S. W. 365.

31. Where there is evidence that the paper in which the sale under a deed of trust was advertised had only a limited circulation, not as large as other papers published in the same city,—and that the general public did not take and read it, but that it was the official organ of the city, and that legal notices were generally published in it, whether or not such paper was a newspaper is a question for the jury.—*Meyer v. Opperman*, (Tex.) 13 S. W. 174.

32. In an action to enforce a mortgage lien, an order of sale was made, and the report of sale was filed on the second day of the term of court next thereafter. Time was given, from day to day, for the defendant to file his objections to the sale, but he did not do so until the last day of the term. The cause was therefore continued until the next term, when defendant again asked for a continuance, on the ground that he was informed that the attorney who had been representing him was sick. He was, however, then represented in court by two attorneys. *Held*, that the continuance was properly refused.—*Wilson v. Thorn*, (Ky.) 18 S. W. 365.

33. Where a note secured by deed of trust has been partially paid, and a part of the land has been released from the lien of the deed, one claiming under the *cestui que trust*, who purchased the land at a foreclosure sale, takes no title to the land so released, though without notice of the payment and release.—*Huntington v. Crafton*, (Tex.) 13 S. W. 542.

Redemption.

34. Act Ark. March 17, 1879, § 1, provides that at all mortgage sales the "property shall not sell for less than two-thirds of the appraised value thereof: provided that this act shall not apply to sales of property for the purchase money thereof," etc. It also provides that, in cases of sales of real estate, it shall bring two-thirds of its appraised value; and, if not sold for that amount, then at the end of twelve months it may be sold without reference to its appraisal, and that real property may be redeemed by the mortgagor at any time within 12 months. *Held*, that the mortgagor, in case of sale of real property, had the right to redeem in one year, whether the debt be for the purchase money or not.—*Wood v. Holland*, (Ark.) 13 S. W. 739.

35. But the mortgagor must offer to pay the whole purchase money due, and not merely the amount for which the land sold, with interest and costs.—*Wood v. Holland*, (Ark.) 13 S. W. 739.

Power of sale.

36. A mortgage contained a power in the mortgagee or her assigns, on default, to sell the premises at public or private sale, and convey the same to the purchaser in fee-simple absolute. On default the mortgagee's assignee executed an absolute deed of the land, unambiguous in its terms, to defendant. The deed did not refer to the mortgage or the power of sale, and the note secured by the mortgage was not assigned to defendant. *Held*, that the conveyance was an execution of the power, and not an assignment of the mortgage.—*Lanigan v. Sweany*, (Ark.) 13 S. W. 740.

Motion.

To strike out, see *Pleading*, 7.

MUNICIPAL CORPORATIONS.

See, also, *Counties*; *Highways*; *Schools and School-Districts*; *Towns*.

Aid to railroads, see *Railroad Companies*, 10-12. Contract with city, liability for fire, see *Water Companies*.

License of house of prostitution, see *Disorderly House*, 1.

Notice of adverse claim, see *Adverse Possession*, 4.

Incorporation—Dissolution.

1. Rev. St. Tex. art. 340, authorizing cities of a certain population to accept the provisions of that act in lieu of any existing charter, by a two-thirds vote of the council, and on compliance with certain requirements, being the only law relating to the dissolution of municipal corporations by its own action, an attempted dissolution by vote of the mayor and aldermen, and a subsequent incorporation under laws relating to unincorporated towns and cities, are void.—*Largen v. State*, (Tex.) 13 S. W. 161.

2. An attempted dissolution of a municipal corporation being void, dissolution cannot be presumed from acquiescence and lapse of time.—*Largen v. State*, (Tex.) 13 S. W. 161.

Ordinances—Enactment.

3. The St. Louis city charter, art. 3, § 23, (Rev. St. Mo. 1879, p. 1534,) which prescribes that, "before the presiding officer shall affix his signature to any bill he shall suspend all other business, declare that the bill will now be read, and that, if no objection be made, he will sign the same," is merely directory; and where the journal shows that the signature of the officer was affixed in open session, and that no objection was made, the ordinance will not be declared invalid because the journal fails to show that the other formalities were observed.—*Barber Asphalt Paving Co. v. Hunt*, (Mo.) 13 S. W. 93.

4. Where both houses adjourn on the day a bill is presented to the mayor, and the bill is signed by the mayor, and filed in the city register's office, it becomes a valid ordinance, though it is not returned to the house in which it originated, as required by article 3, § 23, of the charter; as there is no provision in the charter which prescribes that no bill shall become an ordinance which shall not be returned to the house in which it originated.—*Barber Asphalt Paving Co. v. Hunt*, (Mo.) 13 S. W. 93.

Police regulations.

5. A city ordinance, subjecting any officer or agent of a bridge company to a fine if he shall refuse to sell packages of 100 passage tickets for a dollar, in accordance with a contract between the city and the company, is not a police regulation, and is invalid.—*City of Newport v. Newport & C. Bridge Co.*, (Ky.) 13 S. W. 720.

Control of markets.

6. Where a city, by its charter, is given full power to establish and control market places and privileges, one who spends money in fitting up a private market, under a license granted pursuant to an ordinance limiting the duration of the privilege to one year, acquires no vested right to exercise his business therein, and cannot complain of the refusal to renew his license pursuant to a subsequent ordinance prohibiting private markets within a given area.—*Newson v. City of Galveston*, (Tex.) 13 S. W. 368.

7. An ordinance prohibiting private markets within a prescribed area, where the city has erected a market-house for the accommodation of those engaged in vending provisions, etc., is not in restraint of trade.—*Newson v. City of Galveston*, (Tex.) 13 S. W. 368.

Officers—Liabilities.

8. Defendants, who were members of the town council, with others, entered into a bond in a certain sum for the purpose of building a court-house in the town. Afterwards the town council, of which defendants were members, illegally appropriated \$1,000 of the town funds to aid in building the court-house, a portion of which sum was immediately paid over. *Held*, that the defendants were liable for the amount thus paid, in an action brought by the tax-payers for its recovery.—*Russell v. Tate*, (Ark.) 13 S. W. 130.

Compensation.

9. Under Mansf. Dig. Ark. § 926, which provides that a city council shall not increase the salary of a city officer during his term in office, when the council of a city of the second class has fixed the salary of the city attorney, it cannot, after be-

coming a city of the first class, increase his salary during his term in office.—*Barnes v. Williams*, (Ark.) 13 S. W. 845.

Contracts.

10. Article 6, § 27, of the charter of St. Louis, provides that the board of public improvements shall let out work by contract to the lowest responsible bidder, subject to the approval of the council. *Held*, that the council is not prohibited from letting a contract for paving a street because the work prescribed by the ordinance is covered by letters patent, under which the contractor holds the exclusive right.—*Barber Asphalt Paving Co. v. Hunt*, (Mo.) 13 S. W. 93.

Lease of wharf.

11. The city of St. Louis leased to defendant, an elevator company owning an elevator on the river front, a portion of its unpaved wharf, for the purpose of erecting thereon "a shed or warehouse for storage and handling of grain or other merchandise in connection with the elevator," reserving the right to control the use of such buildings and grounds, and to terminate the lease on six months' notice, if it were desired to pave and extend the wharf. *Held*, that the lease is valid under the general power to erect, repair, and regulate wharves, and collect wharfage; and especially so under the charter, which gives power "to set aside and lease portions of the unpaved wharf for special purposes, such as the erection of sheds, elevators, and warehouses, * * * and for any purpose tending to facilitate the trade of the city."—*Belcher's Sugar Refining Co. v. St. Louis Grain Elevator Co.*, (Mo.) 13 S. W. 822.

12. By the charter of an elevator company railroads are to have a connection with its elevators, which are required to be so constructed as to accommodate the river interests, and give all facilities for storing grain in bulk or otherwise. *Held* that, although defendant may make reasonable charges, its property is subject to a public trust and to public regulation, and therefore the lease is not invalid as granting a public franchise for private use.—*Belcher's Sugar Refining Co. v. St. Louis Grain Elevator Co.*, (Mo.) 13 S. W. 822.

13. The charter power to lease portions of the "unpaved" wharf applies to any portion not paved in a manner suitable for receiving and discharging passengers and freight; and a portion not used for that purpose, from which most of the macadam was washed away in 1873, and which has been used ever since as a scavenger dump, is not paved, in the sense of the charter.—*Belcher's Sugar Refining Co. v. St. Louis Grain Elevator Co.*, (Mo.) 13 S. W. 822.

Control of streets.

14. The power granted to the city of St. Louis "to regulate the use of streets" (Charter, art. 3, § 26, subd. 2) extends to public uses only, and does not authorize an ordinance permitting a private corporation to build a railroad track and run trains across streets of the city for the transaction of its business.—*Glaessner v. Anheuser-Busch Brewing Ass'n*, (Mo.) 13 S. W. 707.

Defective sidewalks and bridges.

15. Where a city opens a sidewalk to public travel, it is bound to keep every portion of it in repair.—*Roe v. City of Kansas*, (Mo.) 13 S. W. 404.

16. In an action against a city for a defective bridge, the fact that the street commissioner officially examined the bridge three days before the accident, and noticed no defect, is not conclusive evidence that the defect did not then exist.—*City of Sherman v. Nairey*, (Tex.) 13 S. W. 1023.

17. Where plaintiff had crossed the bridge safely several times on the day of the accident, and he testified that his eye-sight was not good, that it was dark when the accident occurred, and that he had never seen the hole which constituted the defect complained of, it is proper to leave the question of contributory negligence to the jury.—*City of Sherman v. Nairey*, (Tex.) 13 S. W. 1023.

Private sewer.

18. St. Louis city ordinance No. 10,977, § 2, provides that no person shall connect a private sewer

with a public sewer without a permit from the sewer commissioner, and that these permits shall be issued only to such persons as shall give bond as required by the ordinance. Section 8 provides that any person desiring to work under such permits shall give a bond in the sum of \$500, conditioned that he will faithfully comply with the regulations of the sewer commissioner and the requirements of the ordinance, and that he will be responsible for the acts of his employees in such work. Defendants, as principals and sureties, executed a bond conditioned as required by the ordinance. A permit to connect a drain from the premises of one S. with the district sewer was issued to the principals on such bond, and under cover thereof they connected a drain from the premises of certain adjoining owners with the sewer instead of the premises of S., as designated in the permit. *Held*, that this was a breach of the bond, defendants' liability for which was not affected by the fact that the ordinance declares any violation of the bond to be a misdemeanor.—*City of St. Louis v. Thierry*, (Mo.) 18 S. W. 344.

Public improvements.

19. Under Rev. St. Mo. 1879, p. 1607, §§ 6-10, (St. Louis city charter,) providing that, in proceedings to open alleys, the city may dismiss at any time before final action by the circuit court on the report of the commissioners, an appeal by the property owners from an order denying a new trial is premature where final action has not been taken on the report, though at the time of the appeal the court was in a position to take final action.—*City of St. Louis v. Thomas*, (Mo.) 13 S. W. 685.

Assessments.

20. A city charter provided that, "where the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement of such public way shall state the depths on both sides, fronting said improvement, to be assessed for the cost of making the same, according to the number of square feet owned by the parties, respectively, with the depth as set out." A street on which improvements were made was bounded on the north by a lot containing 32 acres, which was 640 feet wide from north to south, and was surrounded by principal streets, but was not intersected by other streets. South of the improved street, the territory was divided by a street (Twenty-Fifth) running 420 feet south to another principal street, so as to form two squares. In front of one of these squares the improvements were much more expensive than in front of the other. The ordinance fixed the depth to be assessed at 210 feet on both sides of the improved street. It was not contended that the territory north of the improved street would ever be subdivided by streets running from east to west. *Held* that, as the ordinance required property in one of the defined squares on the south to pay for improvements bordering on a different square, it was erroneous; that the area to be taxed should be found by treating the territory on the north as intersected by Twenty-Fifth street, and thus formed into squares; and that these squares should be taxed to one-half their depth for the improvements in front of each, though such squares and those on the south would be unequal.—*Cooper v. Nevin*, (Ky.) 13 S. W. 841.

21. The charter of the city of Louisville, (section 12,) as amended by the act of 1873, provides that improvements of public streets shall be made at the expense of the owners of lots in each fourth of a square; each subdivision of territory bounded on all sides by a principal street being deemed a square. The property west of a street improved was in form a triangle, that east in form a quadrangle, cut by three short streets, extending from the street improved, making four squares within the area described bounded by principal streets. *Held*, that the lots on both sides of the improvement were liable to assessment, and those upon the east side could be included in one assignment and apportionment.—*Stengel v. Preston*, (Ky.) 13 S. W. 839.

22. The charter of the city of Louisville, of March 24, 1832, § 2, provides that, where an im-

provement is the original construction of any street, alley, or avenue, it shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned according to the number of square feet owned by them. Section 8 provides that the costs of making sidewalks, including curbing, whether by original construction or reconstruction, shall be apportioned to the front foot as owned by the respective parties fronting such improvement. *Held*, that the cost of curbing an alley adjoining defendant's property should be apportioned on the front feet bordering thereon.—*Joyes v. Shadburn*, (Ky.) 13 S. W. 861.

23. Under an amendment to a city charter, providing that "no error in the proceedings" shall exempt from payment after the work has been done as required by either the ordinance or contract, "where a contract for improvements has been complied with, one whose property has been erroneously assessed may, on reversal of the assessment, be required to pay the proper amount."—*Cooper v. Nevin*, (Ky.) 13 S. W. 841.

24. The city council is the sole judge whether the work was done according to contract, and not the person for whose benefit the improvement was made.—*Joyes v. Shadburn*, (Ky.) 13 S. W. 861.

Action to enforce assessment.

25. The charter of Galveston authorizes the city to pave and improve streets whenever, by a vote of two thirds of the aldermen, they may deem it necessary, provided the city pays one-third, and the abutting owners two-thirds, of the cost. *Held*, that a petition by the city to collect of an abutting owner his share of the cost is insufficient to support a judgment by default, if it fails to allege that the two-thirds vote of the aldermen was passed.—*Wood v. City of Galveston*, (Tex.) 13 S. W. 227.

26. As the law requires that the city engineer shall take a receipt from the contractor for street improvements before delivering special tax-bills to him, it will be presumed, in an action on such bills, in the absence of evidence to the contrary, that the law was complied with.—*Keith v. Bingham*, (Mo.) 13 S. W. 683.

27. Special tax-bills being *prima facie* evidence of the liability of the property to the charge stated in them, under *Sess. Acts Mo. 1875*, p. 252, art. 8, § 4, the burden is on defendant to prove that receipts were not given by the contractor to the city engineer before delivering the tax-bills to him, as required by law.—*Keith v. Bingham*, (Mo.) 13 S. W. 683.

28. As the judgment on special tax-bills for street improvements can be levied only on the land against which the special tax is a charge, it is no defense to the action that defendant does not own the land, or that an action of ejectment for the land is pending.—*Keith v. Bingham*, (Mo.) 13 S. W. 683.

29. It is not necessary that special tax-bills shall show that every prerequisite step necessary to their validity has been taken, under *Laws Mo. 1875*, pp. 251, 252, art. 8, §§ 3, 4.—*Keith v. Bingham*, (Mo.) 13 S. W. 683.

30. In an action to tax defendants' property for improvements on an adjoining alley, an answer alleging that the city council, in ordering the improvement, did not fix the grade nor specify the improvements to be made, presents a good defense.—*Joyes v. Shadburn*, (Ky.) 13 S. W. 861.

Damages.

31. The claim for damages to property by reason of changes in the street is a personal claim of the owner of the property at the time of the injury, and does not run with the land.—*Keith v. Bingham*, (Mo.) 13 S. W. 683.

Appropriation of money for court-house.

32. Under *Const. Ark. 1874*, art. 12, § 5, providing that no county, city, or town, or other municipal corporation, shall appropriate money or loan its credit to any corporation, institution, or individual, the common council of a town has no power to appropriate money to aid the building of a court-house in such town.—*Russell v. Tate*, (Ark.) 13 S. W. 130.

Bonds.

33. Act Ky. April 5, 1888, § 7, authorizes the town of Parkland to issue bonds for the construction of certain streets running through the entire corporate limits, including several hundred acres of agricultural land not subject to municipal taxation. *Held* that, as the act, in so far as it subjects agricultural lands to taxation, is clearly unconstitutional, and as the court will not presume that the legislature intended the entire burden of taxation to fall on the town proper, the board of trustees will be enjoined from issuing bonds for the construction of these streets through part of the corporate limits only, but still extending partially over agricultural lands. *Town of Parkland v. Gaina*, 11 S. W. 649, followed.—*Tate v. Town of Parkland*, (Ky.) 18 S. W. 448.

Actions against.

34. In *scire facias* to revive a judgment against a city, and for *mandamus* to enforce its collection, where the petition names the "mayor, aldermen, and inhabitants of the city of H." as the defendant, and alleges that the business of the city is managed by a mayor and board of aldermen, naming them, the fact that the citation commands the mayor and aldermen to be summoned, as well as the corporation, does not vitiate the citation.—*City of Houston v. Emery*, (Tex.) 18 S. W. 264; *Id.* 266.

35. Under Mansf. Dig. Ark. § 929, which provides that any person owning property and paying taxes may enjoin the payment of any warrant issued by a city or town without authority of law, any tax-payer of the town may maintain injunction to restrain the payment of a warrant issued in accordance with an illegal appropriation to aid the building of a court-house.—*Russell v. Tate*, (Ark.) 18 S. W. 180.

Murder.

See *Homicide*, 1-8.

Mutual Benefit Insurance.

See *Insurance*, 29-34.

NAVIGABLE WATERS.

Boundaries on, see *Riparian Rights*, 1.

Bridges.

1. A bridge company built a draw-bridge over the Missouri river, under authority of Act Cong. May 11, 1872, which provided that such bridge should not interfere with the free navigation of the river; that, if built as a draw-bridge, it should be a pivot draw-bridge, with the draw over the main channel of the river at an accessible and navigable point, with spans of certain length on each side of the pivot pier, and that the piers should be parallel to the current. The bridge company built their bridge with two draw-rests, one above and the other below the pivot pier, and 140 feet distant from it. Afterwards the bridge company leased the structure to the defendant. Three years after, plaintiff's boat, while attempting to go through the draw during a high stage of water, was driven against one of the piers by the current, and sunk. The plaintiff charged that the piers were not parallel to the current, and that the draw-rests above the bridge caused a cross-current, which drove the boat against the pier. *Held* that, if the bridge was so built that the piers were parallel to the usual and ordinary course of the current, it was a sufficient compliance with the act, and this question was properly one for the jury.—*Silver v. Missouri Pac. Ry. Co.*, (Mo.) 18 S. W. 410.

2. Defendant's lessor built a draw-bridge across the Missouri river, under authority of Act Cong. May 11, 1872, which provided that the piers should be parallel to the current. Plaintiff's boat was injured while attempting to go through the draw, by being driven against one of the piers by the current. *Held*, that plaintiff, in order to recover, must show that defendant had notice or knowledge of the fact that the piers of the bridge were not parallel to the current of the river; but such notice or knowledge may be shown by facts

and circumstances, and not necessarily by direct evidence.—*Silver v. Missouri Pac. Ry. Co.*, (Mo.) 18 S. W. 410.

3. Defendant's lessor built a draw-bridge across the Missouri river, under Act Cong. May 11, 1872, which provided that the bridge should not interfere with the free navigation of the river, beyond what was necessary in order to carry into effect the rights and privileges granted. *Held*, in an action to recover for injuries sustained by plaintiff's boat while attempting to go through the draw, that the burden of proof was on the plaintiff to show that draw-rests were not necessary or lawful parts of the bridge, and that, there being no evidence that such draw-rests were unauthorized or dangerous, the question as to their characters should not have been submitted to the jury.—*Silver v. Missouri Pac. Ry. Co.*, (Mo.) 18 S. W. 410.

Necessary Parties.

See *Parties*, 1, 2.

NEGLIGENCE.

Action for, venue, see *Venue in Civil Cases*, 5, 6. Contributory see, also, *Master and Servant*, 31-34. Dangerous premises, see, *Landlord and Tenant*, 2. Defective sidewalks and bridges, see *Municipal Corporations*, 15-17.

—toll-bridge, see *Turnpikes and Toll-Roads*, 4-8.

In delivery of message, see *Telegraph Companies*.

Injuries to passengers, see *Carriers*, 7-10.

Of master, see *Master and Servant*, 7-28.

railroad companies, see *Railroad Companies*, 37-38.

warehouseman, see *Warehousemen*.

Willful neglect, see *Death by Wrongful Act*, 7.

What constitutes.

1. In an action for the destruction of plaintiff's house owing to defendant's alleged negligent construction of an embankment four feet high, it appeared that plaintiff's house fronted on a body of water, and that the embankment was about a mile west thereof. During a violent storm from the east, the water from the pass was blown over the house, and plaintiff alleged that the embankment prevented the water from flowing over the level country west of it; that the height of the flood was thereby increased, and the house thereby destroyed. *Held* that, as it was clear that the injury had been occasioned by the combined action of the wind and water, and as it was questionable whether the increased depth of the water, if any, caused by the embankment, contributed in any manner to the destruction of the house, a finding that the house would have been destroyed even though the embankment had not been there would not be disturbed.—*Smith v. Sabine & E. T. Ry. Co.*, (Tex.) 18 S. W. 165.

2. Contractors employed in constructing a railroad fired a blast which injured another workman on the same road. *Held*, that the fact that plaintiff's employers failed to notify him that the blast was about to be set off did not excuse defendants from giving such notice.—*Cameron v. Vandegriff*, (Ark.) 18 S. W. 1092.

3. An instruction, "by the term 'negligence,' as used in the instructions, is meant the want of that degree of care that an ordinarily prudent person would have exercised under the same circumstances," is not erroneous.—*Wilkins v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 18 S. W. 893.

Who liable.

4. Contractors employed in constructing a railroad cannot claim the right of way as their own premises, and thus avoid liability to another working on the same road, injured by their negligence.—*Cameron v. Vandegriff*, (Ark.) 18 S. W. 1092.

Contributory negligence—Children.

5. Negligence cannot be imputed to one who has not sufficient capacity or discretion to understand danger, and use proper means to guard against it; and the mere fact that plaintiff, a child nine years old, who was injured in alighting from

defendant's cable car, was on the steps, when there was room inside, does not absolve defendant from liability; and whether the steps were a more dangerous place than inside the car, and, if so, whether plaintiff had at the time sufficient capacity and discretion to understand that it was the more dangerous, are questions for the jury, under the facts and circumstances.—*Ridenhour v. Kansas City Cable Ry. Co.*, (Mo.) 18 S. W. 889.

Contributory negligence — Burden of proof.

6. Where contributory negligence is pleaded as a defense, it is proper to instruct the jury that, if plaintiff proves to their satisfaction that the death was caused by defendant's negligence, then the burden of proof is on defendant to establish the existence of contributory negligence.—*San Antonio & A. P. Ry. Co. v. Bennett*, (Tex.) 13 S. W. 319.

Imputed negligence.

7. Contributory negligence of a stage-coach driver will not be imputed to his passengers, and thus defeat a recovery for injuries sustained by the latter in a collision with a train of cars.—*Becke v. Missouri Pac. Ry. Co.*, (Mo.) 13 S. W. 1063.

Evidence.

8. Where a boy 11 years old climbs upon a freight car standing on a side track at a depot, without the knowledge of the company's employees, and is thrown from the car by the concussion caused by attaching a train thereto, evidence that there was no railing between the depot and the side track; that persons were in the habit of crossing such track; and that no signal was given before backing the train up,—is incompetent.—*Louisville & N. R. Co. v. Hurt*, (Ky.) 13 S. W. 875.

9. The negligence of defendants in sending off a blast without notice, and thereby injuring plaintiff, need only be proved by a preponderance of evidence.—*Cameron v. Vandegriff*, (Ark.) 18 S. W. 1092.

NEGOTIABLE INSTRUMENTS.

Alteration, see *Alteration of Instruments*, 2.

Negotiability.

1. In an action on a note delivered to plaintiff by one of the joint makers, without the indorsement of the payee named, the complaint alleged that the note was executed for discount, and on the payee's refusal to discount it plaintiff discounted it. The answer of one of the joint makers was that the note was not executed for discount, but for the purpose and with the distinct agreement that it should be delivered to the payee named in the note in renewal of a note executed by the same makers to the same payee; that he was in fact a surety for the other maker on both notes; that he would not have signed the note for discount, but only to extend the other note; and that he received no part of the proceeds of it. *Held*, a good defense, under Rev. St. Ky. c. 23, §§ 6, 21, providing that a promissory note shall not be negotiable unless negotiated in and by a chartered bank, and Civil Code Ky. § 19, providing that the assignee of any other promissory note shall hold it subject to all proper defense.—*Rogge v. Cassidy*, (Ky.) 13 S. W. 716.

Indorsement and transfer.

2. Under Code Tenn. 1834, § 2444, 5708, making it a misdemeanor for the holder of a negotiable instrument, knowing it to be founded on a gaming or wagering consideration, to negotiate the same, such a note is void even in the hands of an innocent holder.—*Snoddy v. American Nat. Bank*, (Tenn.) 18 S. W. 127.

3. In an action on a note by an assignee for value, the maker cannot avoid liability by setting up that the original holder, a corporation, had no authority to loan money, which was the consideration for the note.—*Brown v. United States Home & Dower Ass'n*, (Ky.) 13 S. W. 1068.

4. The fact that the payee of a negotiable note, at the time he negotiated it with plaintiff bank, de-

posited collaterals to secure it, does not import notice to plaintiff of failure of consideration where plaintiff's president and cashier testify that they knew nothing of the consideration, except that it was given for some kind of property, and that the payee told them that the note was good, and that he preferred to have it discounted so that he would not be appealed to by the maker for an extension of time.—*Harmon v. Hagerty*, (Tenn.) 18 S. W. 690.

Payment.

5. Plaintiffs, bankers, held defendants' joint note, and one of defendants, a tax collector, deposited with plaintiffs tax funds collected by him, part of which plaintiffs applied in payment of the note. The collector objected, but afterwards accepted from plaintiffs a new loan for the amount of the note, for which he gave a new note. *Held*, that the first note was thereby discharged. Following *Boyd v. Bell*, 7 S. W. 657.—*Bell v. Boyd*, (Tex.) 13 S. W. 232.

Extension of time of payment.

6. The maker, after stating the amount due to date on his overdue note, promised to pay an increased rate of interest if the holder would "extend time for payment of this balance for one year." *Held*, that the extension was for one year from the date of the agreement.—*Dalton v. Rainey*, (Tex.) 13 S. W. 34.

Actions on notes—Pleading.

7. An allegation in a petition that "the defendant, by his promissory note filed herewith, agreed and promised to pay," etc., is sufficient averment of the execution and delivery of the note.—*Bell v. Mansfield's Assignee*, (Ky.) 13 S. W. 888.

Evidence.

8. The defense to a suit on a note was that it was in lieu of others given in consideration of a promise to refrain from prosecuting the maker for theft. Plaintiffs replied that the original notes had been surrendered to defendants, who were indorsers, at their request, and that they had attached the maker's property, and realized a large sum therefrom. *Held*, evidence of the attachment was properly admitted, and that as to the amount realized, properly excluded.—*Biering v. Wegner*, (Tex.) 13 S. W. 537.

9. Evidence of one of the indorsers that plaintiff understood that it was given under an agreement not to prosecute the maker for theft is incompetent as a mere opinion.—*Biering v. Wegner*, (Tex.) 13 S. W. 537.

Newly-Discovered Evidence.

As ground for new trial, see *New Trial*, 7, 8.

NEW TRIAL.

In criminal cases, see *Criminal Law*, 74, 75; *Homicide*, 65-67.

Time of application.

1. Under Civil Code Ky. § 342, providing that motions for new trial shall be made within three days after the verdict or decision is rendered, the making of a motion for judgment *non obstante verdicto*, when the verdict is general, does not give the party making it a right to move for new trial within three days after such motion is decided against him, and more than three days after the rendition of the verdict, as, under section 386, which authorizes a judgment against the verdict only when the pleadings entitle the other party to it, such judgment may be rendered by the court of its own motion.—*Ruhrwein v. Gebhardt*, (Ky.) 13 S. W. 447.

Excessive damages.

2. A judge may set aside a verdict as excessive even in a case where exemplary damages are recoverable.—*Tynberg v. Cohen*, (Tex.) 13 S. W. 315.

Separation of jury.

3. Under Rev. St. Tex. arts. 1804-1806, which provide that the court may allow the jury to separate after admonishing them as to their duty, it is

not error to allow them to separate after proper instructions, though one of the parties urges that they be kept together.—*Noel v. Denman*, (Tex.) 13 S. W. 318.

4. Under Rev. St. Tex. art. 1304, which expressly authorizes a judge, in his discretion, to permit the jury in a civil action to separate during the trial, error cannot be predicated on the act of allowing a jury to separate for dinner, when it is not clearly shown that the complaining party was injured thereby.—*San Antonio & A. P. Ry. Co. v. Bennett*, (Tex.) 13 S. W. 319.

Surprise.

5. An application for a new trial, based on surprise at the absence of a material witness, will be denied where it appears that the party making the application took no steps to enforce the attendance of the witness, nor had any reasonable ground to believe that he would attend, and made no objection to going to trial in his absence.—*Love v. Breedlove*, (Tex.) 13 S. W. 223.

6. Plaintiff demanded a jury trial, but failed to pay the jury fee, and the case, though not stricken from the non-jury docket, was placed on the jury docket, which showed that the fee had not been paid. Defendants averred that they attended court until the judge announced that there was no jury for the following week; that they, having been informed by plaintiff and the clerk that the case was on the jury docket, and having found this true by inspection of the record, did not attend during that week, during which time judgment was rendered for plaintiff; and that they were able to produce material testimony. *Held*, that defendants were entitled to a new trial, though the case should not have been placed on the jury docket until the fee had been paid.—*Lanius v. Shuler*, (Tex.) 13 S. W. 614.

Newly-discovered evidence.

7. Refusal to permit defendants to file an affidavit on motion for new trial, after they have announced that they have closed their evidence on that motion and have argued it, is not error, unless there is an abuse of discretion, which is not shown where the affidavit states that affiant went to certain places, and had barely time to find the witnesses, and what they would testify to, before he had to take the train, and it does not appear that he might not have taken some of their affidavits in the week intervening, and also alleges the discovery of a material witness, with whom he had not been able to communicate otherwise than by telegram, it not stating positively that any communication had been had, or what it was.—*Henry v. Diviny*, (Mo.) 13 S. W. 1057.

8. A motion for a new trial, on the ground of newly-discovered testimony, will not be granted, where the petition and answer show that such evidence was necessary on the trial, and the motion fails to show that any effort was made to obtain it.—*Waples v. Overaker*, (Tex.) 13 S. W. 537.

False testimony.

9. A new trial will not be granted on the ground that plaintiff's witnesses did not testify correctly, where the affidavits only show ability to furnish cumulative evidence, and were considered by the trial court, together with the counter-affidavits, when it overruled the motion.—*Galveston Oil Co. v. Thompson*, (Tex.) 13 S. W. 60.

Terms and conditions of granting.

10. Rev. St. Tex. art. 1303, provides that new trials may be granted "on such terms and conditions as the court shall direct." An order granting a new trial directed payment of witness fees "as a condition upon which" the new trial was granted. *Held*, that the payment of the fees was the "terms" on which the order was made, and not a condition on performance of which it should take effect.—*Fenn v. Gulf, C. & S. F. Ry. Co.*, (Tex.) 13 S. W. 273.

NOTICE.

In condemnation proceedings, see *Eminent Domain*, 5.

If adverse claim, see *Adverse Possession*, 4.

Of laying out road, see *Highways*, 1, 2.

mortgage, see *Mortgages*, 15.

revival of action, see *Abatement and Revival*.

Pleading.

A party cannot be held to be affected with notice, though there is evidence from which it may be inferred, when there are no corresponding allegations in the pleadings.—*Cooper v. Loughlin*, (Tex.) 13 S. W. 37.

NUISANCE.

Private nuisance—Powder magazine.

1. Defendant erected a powder magazine between three and four hundred feet from plaintiff's residence, in which thousands of pounds of powder were kept stored, and which was left uninclosed, and surrounded by a growth of weeds and grass. Plaintiff testified that the magazine was a constant source of alarm, and that it had caused a very great depreciation in the value of his property, and other witnesses corroborated him as to such depreciation. *Held*, that the evidence was sufficient to show that the magazine was a nuisance.—*Comminge v. Stevenson*, (Tex.) 13 S. W. 556.

Injunction.

2. On a bill to enjoin the building of a railroad track across a street, the evidence showed that plaintiff owns improved property on one of the streets, where he lives and does business as a retail merchant; that the street on both sides of the crossing is populous, filled with stores, shops, boarding-houses, and residences; that the proposed railroad track will divert travel from it, decrease the value of plaintiff's property, and take away some of the trade which he now enjoys. *Held*, a sufficient showing of special injury to enable plaintiff to enjoin the crossing as a public nuisance.—*Glaessner v. Anheuser-Busch Brewing Ass'n*, (Mo.) 13 S. W. 707.

Action for damages.

3. The fact that plaintiff purchased and located on his land, after the city had established its dump ground, will not preclude his recovering damages for the negligent manner in which it uses the place for that purpose, whereby it becomes a nuisance.—*City of Sherman v. Langham*, (Tex.) 13 S. W. 1042.

4. All persons who aid or assist in creating and maintaining a nuisance are liable for the damages.—*Comminge v. Stevenson*, (Tex.) 13 S. W. 556.

5. An instruction that "a nuisance is anything that works hurt, inconvenience, or damage to another, either in his person or property," is not erroneous as ignoring the legal ingredient of a "violation of a right," as the jury would doubtless understand that to authorize a verdict for damages they must believe that the injury was inflicted in violation of plaintiff's right.—*Comminge v. Stevenson*, (Tex.) 13 S. W. 556.

6. Where action is brought to abate a nuisance and recover damages, and the verdict is for plaintiff, the damages may be assessed down to the date of the trial.—*Comminge v. Stevenson*, (Tex.) 13 S. W. 556.

—Pleading and proof.

7. The complaint alleged that because of a powder magazine plaintiff's property had been rendered unsalable at any price, but did not say that he had opportunity to sell it at a price greater than he would be able to sell it for after the nuisance was abated, and there was no evidence to support such an allegation. *Held*, that an instruction "that if the magazine, as a nuisance, prevented plaintiff from selling his property, or any part of it, at a price greater than he will be able to get for it if said magazine is abated as a nuisance, and that but for said magazine plaintiff would have made such sale, then the loss in value, if any, so sustained by plaintiff, would also be a proper element of damages to be considered by the jury," is error. Such damage, not being a necessary consequence of the nuisance, must be specially alleged and proved.—*Comminge v. Stevenson*, (Tex.) 13 S. W. 556.

OFFICE AND OFFICER.

See, also, *Clerk of Court; Counties*, 8-17; *Justices of the Peace; Municipal Corporations*, 8, 9; *Sheriffs and Constables*.

Disqualification, see *Duelling*.

Of schools, see *Schools and School-Districts*, 2, 3.

Appointment of deputies.

The tax collector appointed under Act Ky. Jan. 30, 1873, authorizing Carter county to compromise and settle with the holders of its bonds, and to levy and collect a tax for that purpose, has the power to appoint deputies to assist him, under section 4 of the act, which provides that he shall have the same power to collect the taxes as sheriffs have to collect the state revenue; sheriffs, though not expressly empowered by law to appoint deputies, having an implied authority to do so.—*Frater v. Strother*, (Ky.) 18 S. W. 232.

OIL.

Inspection of, see *Inspection*.

Opinion Evidence.

See *Evidence*, 15-18.

Ordinance.

See *Municipal Corporations*, 3-5.

PARENT AND CHILD.

See, also, *Guardian and Ward; Infancy*.

Support of children.

When a mother is unable to support and educate her son, and the income of his estate is insufficient to do so, the amount expended by her for his support and education, though without a special order of a probate court, is a charge on the *corpus* of his estate.—*Freybe v. Tiernan*, (Tex.) 18 S. W. 870.

Parol Evidence.

See *Evidence*, 28-34.

PARTIES.

See, also, *Death by Wrongful Act*, 1-6; *Effectment*, 4, 5.

In condemnation proceedings, see *Eminent Domain*, 6.

Necessary parties.

1. In trespass to try title, where the original defendant has died, and his heirs have been made parties, and filed their answer, and plaintiff afterwards files an amended petition, alleging that he has purchased the interest of some of the heirs, which allegation is not controverted, such heirs are no longer necessary parties, and the suit may be prosecuted without them.—*Meyer v. Opperman*, (Tex.) 18 S. W. 174.

2. In a contest between one to whom property was transferred by an insolvent shortly before an assignment for the benefit of creditors, and the trustee in the assignment, to settle the right of the former to the property transferred, the insolvent is not a necessary party.—*Matthews v. Lloyd*, (Ky.) 18 S. W. 106.

Real party in interest.

3. Where an executor, under misapprehension as to the scope of a power of attorney given to him by the devisees, sells and conveys land which is afterwards adjudged to be liable in the hands of the purchaser to decedent's debts, the purchaser, in the absence of bad faith, cannot object that certain claims would not have been allowed on the settlement, if exceptions had been filed by the devisees.—*Casey v. Casey's Ex'rs*, (Ky.) 18 S. W. 718.

4. A complaint, in an action on a note delivered to plaintiff by one of the makers without any indorsement of the payee named therein, alleging

that the note was executed for discount, and that, on the refusal of the payee to discount it, plaintiff discounted it, is not demurrable for failure to make the nominal payee a party, under Civil Code Ky. § 18, providing that every action shall be brought in the name of the real party in interest. The rule that the payee who transfers a note without indorsement retains the legal title does not apply in such case, as the nominal payee never had the legal title.—*Rogge v. Cassidy*, (Ky.) 18 S. W. 716.

Joinder and misjoinder.

5. In a suit by some members of a voluntary association for and in behalf of all, it is not material that some of the named plaintiffs have died, or ceased to be members, or are minors or married women; and they may be disregarded as unnecessary parties.—*Lilly v. Tobbein*, (Mo.) 18 S. W. 1060.

6. In an action for injury to plaintiff's land by defendant's taking sand from its adjoining land, a supplemental petition alleged that a third person had bought defendant's land, and had continued taking sand therefrom, thereby adding to the injury to plaintiff's land; that at the time of filing the supplemental petition both defendant and the third person were engaged in taking away such sand; and that the third person had ratified the wrongs of defendant, and was, in fact, the nominal successor of defendant in controlling the excavation of sand; and prayed that such third person be made a defendant. *Held* demurrable for misjoinder of defendants.—*Mexican Nat. Construction Co. v. Middlege*, (Tex.) 18 S. W. 257.

7. The plaintiff in attachment, and the sureties on the attachment bond, may be joined as defendants in an action for wrongful attachment.—*Tynberg v. Cohen*, (Tex.) 18 S. W. 815.

8. Defendants obtained separate judgments against C., and attached property thereon. In actions by defendants against plaintiff, to whom the property had been transferred by C., to try title to the property, all the actions were made to depend on the result of one, and judgments were entered against plaintiff for the value of the property attached, which was, in each instance, in excess of the judgment against C. *Held*, that defendants were properly joined in one action to restrain the executions on the ground of this excess.—*Wills Point Bank v. Bates*, (Tex.) 18 S. W. 809.

Defect of parties.

9. It is plaintiff's duty to bring the proper parties into court, and where he fails to do so he cannot complain of his own neglect.—*Hurt v. Marshall*, (Tex.) 18 S. W. 33.

Substitution and intervention.

10. In a suit to establish a will making a devise to a voluntary religious association, afterwards incorporated, brought by the church as a corporation, the trustees, for and in behalf of the members, may be substituted as plaintiffs by amendment, under Rev. St. Mo. 1879, § 8567, authorizing the adding or striking out the name of any party, or the correction of a mistake in the name of a party.—*Lilly v. Tobbein*, (Mo.) 18 S. W. 1060.

11. Though it may be irregular, on the suggestion of a sole defendant that others are liable with him, to cite in such others as defendants before plaintiffs amend their pleadings, yet the irregularity is cured by the answer of the additional defendants, and a postponement of the trial until a subsequent term.—*Randall v. Meredith*, (Tex.) 18 S. W. 576.

12. In an action concerning land between the devisees of a testator and parties deriving title from the executor, it is proper to refuse to compel the executor to intervene.—*Bennett v. Kiber*, (Tex.) 18 S. W. 220.

PARTITION.

Appealable judgment, see *Appeal*, 2.

Jurisdiction.

1. Civil Code Ky. § 499, subsec. 1, 10, provides for the filing of petitions for partition in either the county or circuit courts, and that actions for

division of land shall be tried as ordinary actions, but without a jury. Plaintiff in partition alleged that there was a verbal agreement between himself and a deceased co-tenant, under whom defendants claimed, that the land should be divided in a particular manner. He alleged his willingness to abide by the agreement, to which defendant acceded, and the division was thus made. *Held*, that the court of common pleas of Knox county was not deprived of jurisdiction because of its lack of equity powers, as there was no equitable issue involved.—*Chamberlain v. Ballinger*, (Ky.) 18 S. W. 429.

By devisees—Appraisement.

2. Where a sale was sought by devisees simply for the purpose of division, no appraisement was necessary.—*Southwick v. Grenzenbach*, (Ky.) 18 S. W. 918.

Intervention—Dismissal of petition.

3. Where an intervenor in partition, against whom no affirmative relief is asked, fails to appear, the intervention should be dismissed without prejudice, and a decree that he take "nothing by his intervention" is erroneous.—*Noble v. Meyers*, (Tex.) 18 S. W. 929.

Decree.

4. Where, in partition, the judgment determining the rights of the parties, and decreeing that the land be so divided "as to give to each party the land upon which his improvements are situated," appears to have been rendered on a trial on the merits, the court cannot, at a subsequent term, inquire into an agreement of the parties relative to the division, but must have the division made according to the decree.—*Petrucio v. Seardon*, (Tex.) 18 S. W. 560.

5. Under Gen. St. Ky. c. 63, art. 5, § 6, providing that, when land held jointly or in common cannot be divided without materially impairing its value, the court may, on petition of one of the parties in interest, order a sale and a division of the proceeds, the court cannot order a partition by which one of the joint owners would be obliged to take less than his share of the land, with compensation from the other in money. If there cannot be a proper partition, the land must be sold, and the proceeds distributed.—*Wrenn v. Gibson*, (Ky.) 18 S. W. 766.

Sale.

6. Gen. St. Ky. c. 63, art. 5, § 6, and Civil Code Ky. § 490, provide for the sale of real estate held jointly or in common, in an action by either of the owners, if it cannot be divided without materially impairing its value. *Held* that, where there were but 35 acres in the tract, and six parties to divide it between, the court was justified in ordering it sold.—*Smith v. Upton*, (Ky.) 18 S. W. 791.

—Rights of purchaser.

7. In an action by some of the devisees of a certain lot against the other devisees to have the lot sold on the ground of its indivisibility, the owners of an undivided interest, which had been mortgaged by the devisee, were properly made defendants. Afterwards an amended petition was filed, making the mortgagee a defendant, and he answered, consenting to the sale. *Held* that, the sale having been ordered on the ground set up, the purchaser could not have the sale set aside because the answer of the mortgagee was not made a cross-petition against the owners of the mortgaged interest, and they were not brought before the court upon it.—*Southwick v. Grenzenbach*, (Ky.) 18 S. W. 918.

8. A purchaser at partition sale could not object that the inchoate right of dower of a wife, who joined in a deed of the land more than 50 years before, did not pass because the deed was not recorded in the proper time, and that therefore the title was defective; it appearing that the deed was eventually recorded, and that the laws in force at the time of the execution of the deed provided that deeds recorded at any time should thenceforth be as effectual as if recorded in the proper time.—*Southwick v. Grenzenbach*, (Ky.) 18 S. W. 918.

PARTNERSHIP.

Attachment of individual property, *see Attachment*, 5.

Contrary to public policy, *see Contracts*, 1.

In mining, *see Mines and Mining*.

Pledge by, *see Pledge*.

Property conveyed by assignment, *see Assignment for Benefit of Creditors*, 13.

Power of partner to bind firm.

1. In an action by a purchaser for value, before maturity, on a note purporting to have been executed by M. & Son, where the partnership between defendants is denied, and M. testifies that the note was executed without his knowledge, though it is shown that, at the time of its execution, he was holding himself out to the public as the partner of his son in business, plaintiff cannot recover without showing that he knew of such ostensible partnership.—*Hahlo v. Mayer*, (Mo.) 18 S. W. 804.

Loan by partner.

2. N. and W. were partners, and as such leased to defendants, also a partnership. Soon afterwards W. became a special partner in defendants' firm. N. loaned money to the defendant partnership, giving the check of N. & W., and the loans were entered in defendants' books as from N. & W. It appeared, however, that N. & W. had the right to check out partnership money for individual use, and that the loans were in fact made by N. individually, though by the firm checks. *Held*, that this evidence was sufficient to sustain a finding that the loans were made by N. individually, and not by N. & W. as partners.—*Hall v. Glessner*, (Mo.) 18 S. W. 349.

Firm and private creditors.

3. Partnership property, having been bought by one member of the firm, and afterwards assigned in trust for creditors by a valid assignment, cannot be attached by firm creditors.—*Hart v. Blum*, (Tex.) 18 S. W. 181.

4. A transfer of all of the firm property by one of the partners to his father, in payment of a loan made by the father to aid him in buying his interest in the business, which transfer was made without the consent, express or implied, of his copartner, is void, as against the partnership creditors, though no wrong was actually intended, and though a part of the money loaned by the father was used in paying firm debts.—*Feucht v. Evans*, (Ark.) 18 S. W. 217.

5. Creditors of a firm, whose claims did not exist when a note was given for money loaned by a wife of one of the partners to the firm, cannot complain of a judgment in favor of the wife, for interest on the money loaned the firm, on the ground that such interest belonged to the community estate, and was subject to the husband's debts.—*Martin Brown Co. v. Perrill*, (Tex.) 18 S. W. 975.

Dissolution and accounting.

6. A settlement of partnership accounts made by arbitrators, without concealment or fraud, will not be disturbed.—*Abell's Adm'r v. Phillips*, (Ky.) 18 S. W. 109.

7. Plaintiff and defendants, as partners, leased a certain store-building for future possession. Prior to the commencement of the term, a dissolution of partnership being contemplated, defendants, without plaintiff's knowledge, secured a cancellation of the lease, and leased again, in their own name. Afterwards the partnership was dissolved; plaintiff buying out the interest of defendants in the partnership property and business. *Held*, that defendants held their lease of the building in trust for plaintiff.—*Sneed v. Deal*, (Ark.) 18 S. W. 708.

8. Where, from lapse of time, specific relief cannot be given to plaintiff, he can recover of defendants for any repairs he had made in the building in contemplation of occupancy.—*Sneed v. Deal*, (Ark.) 18 S. W. 708.

Surviving partners.

9. Where a petition alleges that plaintiffs sue as "successors and assigns," instead of as surviv-

ing partners, of the law firm by which the services sued for were rendered, that fact sufficiently appears from the allegation that, at the time of the death of the member for whose services the firm was employed, they were his only partners; and its defect in failing to allege that the partner is dead, is cured where that fact distinctly appears in the answer.—*Wright v. McCampbell*, (Tex.) 18 S. W. 298.

10. The question of plaintiffs' right to recover under the allegation that they held the claim for such services as assignees is immaterial, as they are entitled to sue by reason of their relation of surviving partners.—*Wright v. McCampbell*, (Tex.) 18 S. W. 298.

11. Nor is the evidence material that they were purchasers for value of the interest of their deceased partner's heir in the claim.—*Wright v. McCampbell*, (Tex.) 18 S. W. 298.

12. Where all the members of a partnership agree to change it into a corporation, and articles are drawn up transferring to it all the firm property, the fact that the articles are not recorded until after the death of one of the partners, and that the others thereafter, in good faith, conduct the business of the corporation, using the partnership assets, does not render them guilty of a conversion of the partnership property.—*McCarthy's Adm'r v. Wood*, (Ky.) 18 S. W. 792.

13. A statement furnished by surviving partners to the administrator of a deceased partner, showing the amount of capital each had paid into the firm, does not render them liable as on an account stated, where they have done nothing which prevents the ascertainment of the true condition of the assets of the firm at the time of the partner's death.—*McCarthy's Adm'r v. Wood*, (Ky.) 18 S. W. 792.

Limited partnership.

14. The fact that W., a special partner, paid his contribution to the firm with a check of N. & W., a firm of which he was also a partner, did not constitute N. a special partner as well as W.; and an attachment by N. of the property of defendant partnership could not fall within the provisions of Rev. St. Mo. 1879, § 3410, declaring that "no sale, transfer, or change of the property or effects" of a limited partnership, "made for the purpose of giving a preference or priority to one over others of his or its creditors, shall be valid against its creditors, if made where he or the firm is insolvent, or in contemplation of insolvency."—*Hall v. Glessner*, (Mo.) 18 S. W. 849.

Passengers.

Injuries to, see *Carriers*, 7-10.

PAYMENT.

See, also, *Accord and Satisfaction*; *Release and Discharge*.

Of loss, see *Insurance*, 15.

note, see *Negotiable Instruments*, 5.
Partial, see *Limitation of Actions*, 18-21.

What constitutes.

1. In the absence of an express agreement that the grantor of land under a verbal sale would accept as payment a claim which the grantee had against her husband for money loaned, the mere agreement that the husband would and should so pay it is not a payment of the purchase money.—*Snowden v. Estelle*, (Tex.) 18 S. W. 970.

Presumption of payment.

2. No presumption of payment of a judgment will arise from lapse of time short of 20 years; but it is not necessary, to make out a plea of payment, that payment should be positively shown; it may be presumed from lapse of time short of 20 years, with other circumstances tending to show payment.—*West v. Brison*, (Mo.) 18 S. W. 95.

3. Plaintiff's title consisted of a recorded deed of trust, with power of sale to secure a debt due plaintiff, and a deed in fee, executed by the same grantor 30 years afterwards, which recited the

making of the deed of trust, and that the trustee had died without executing the trust; that a certain sum was still due plaintiff, and plaintiff having demanded payment, and being "willing to accept a deed of the land described in said deed of trust in payment thereof, now, therefore, in consideration of said sum," etc., and conveyed the land to plaintiff. Defendants' title consisted of a deed from the same grantor dated after the last deed to plaintiff, but recorded before it. *Held*, that plaintiff's deed had no legal connection with the deed of trust, and that defendants, having had their deed recorded first, acquired the title, since they were authorized by the lapse of time to presume that the debt secured by the deed of trust had been paid.—*Foot v. Silliman*, (Tex.) 18 S. W. 1082.

Acceptance of draft.

4. Where the drawers of an order had funds in the hands of the drawee on its presentation, a waiver by the payee of a cash payment, and an acceptance of a bill of exchange instead, extinguishes the debt, though the exchange proves worthless.—*Loth v. Mothner*, (Ark.) 18 S. W. 594.*

Voluntary payment.

5. Where a person pays an illegal license tax which he believes to be unjust, and the legality of which he is not averse to testing, when no process has issued for its collection, the payment is voluntary, and he cannot recover the amount paid.—*City of Houston v. Feizer*, (Tex.) 18 S. W. 266.

PENSION.

Exemptions.

Rev. St. U. S. § 4747, providing that no money shall be liable to seizure by any legal process while "in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner," does not exempt the money after it reaches the pensioner; and where lands conveyed to a wife are paid for by a third person with proceeds of a check made payable to the husband for pension money, and indorsed by him, the transaction is a voluntary conveyance, and the land is liable for the husband's debts.—*Johnson v. Elkins*, (Ky.) 18 S. W. 448.

Performance.

Of contracts, see *Contracts*, 8.

PERJURY.

Indictment.

1. On indictment for perjury, it is sufficient to allege that the false statement on which perjury is assigned was material without alleging the facts which show materiality.—*Sisk v. State*, (Tex.) 13 S. W. 647.

2. Defendant, on a trial at which C. was convicted of robbery at a certain time and place, testified that at that time and place he was at another place, D., and there saw C. The indictment for perjury alleged that defendant swore to the above facts on said trial, averred that they were material, and assigned perjury, in that defendant was not at D., but at another place, and therefore could not have seen C. at D. at the time he swore he was there. The indictment further alleged that on the trial of C., his defense being an *alibi*, it was a material issue whether he was at the place of the robbery or at D. *Held* that, the indictment having failed to allege that C. was not at D. at the time sworn to by defendant, there was no assignment of perjury on a material fact; the allegation that defendant was at another place being only a statement of evidence.—*Maddox v. State*, (Tex.) 18 S. W. 861.

Evidence.

3. Code Crim. Proc. Tex. art. 746, provides that no person shall be convicted of perjury "except upon the testimony of two credible witnesses, or of one credible witness corroborated strongly by other evidence as to the falsity of the defendant's statements under oath." Only one witness testi-

led directly to the falsity of defendant's statement. *Held*, that a charge that defendant could be convicted on circumstantial evidence alone was error.—*Kemp v. State*, (Tex.) 18 S. W. 869.

4. The indictment for perjury alleged that, G. H. having been convicted of assault with intent to murder S. H., defendant, in support of G. H.'s motion for a new trial, made a false affidavit that, a few minutes after the assault, S. H. told him that she was not hurt much, and that on the next day she said that the most that hurt her was her thumb, and that she then proposed to accompany him to a party that night. *Held* that, as bearing on intent of G. H. in making the assault, the statements in the affidavit were material to the issue on the motion for a new trial.—*Kemp v. State*, (Tex.) 18 S. W. 869.

5. It is not competent for defendant to prove what a member of the grand jury said in regard to defendant's intoxicated condition while testifying before the grand jury, since such testimony is mere hearsay, and does not come within the rule of *res gestæ*.—*Sisk v. State*, (Tex.) 18 S. W. 647.

Instructions.

6. Where several statements are assigned as perjury, it is not error for the judge, in charging the jury, to designate the statement which is material, and submit it alone.—*Sisk v. State*, (Tex.) 18 S. W. 647.

7. Where, on indictment for perjury, the intoxication of defendant at the time he made the false statement is relied on as a defense, a charge giving the provisions of Pen. Code Tex. art. 189, providing that "a false statement made through inadvertence or under agitation or by mistake is not perjury," is sufficient without calling special attention to defendant's intoxicated condition.—*Sisk v. State*, (Tex.) 18 S. W. 647.

Platting.

See *Dedication*, 1.

PLEADING.

And proof, see *Assumpsit*, 2.

Estoppel, see *Estoppel*, 17.

In action for breach of marriage promise, see *Breach of Marriage Promise*, 1.

— for divorce, see *Divorce*, 1, 2.

— for libel, see *Libel and Slander*, 4.

— for nuisance, see *Nuisance*, 7.

— on bond, see *Bonds*, 8-5.

— on notes, see *Negotiable Instruments*, 7.

condemnation proceedings, see *Eminent Domain*, 7, 8.

equity, see *Equity*, 16, 17.

sequestration proceedings, see *Sequestration*.

Statute of limitations, see *Limitation of Actions*, 22, 23.

Declaration or petition.

1. Where a suit is based on two causes of action, one a contract to manufacture certain articles, the other a running account, the insertion in the count on the latter of certain items which might have been included in the count on the contract is not ground for reversal, even if properly objected to, as it cannot prejudice defendant.—*Crescent Manuf'g Co. v. N. O. Nelson Manuf'g Co.*, (Mo.) 18 S. W. 508.

Plea in abatement.

2. A plea to the jurisdiction, in a suit before a justice in A. county, that defendant "is now a *bona fide* citizen of precinct No. 2, C. county, Texas, and was so residing in said precinct No. 2, C. county, at and long before the institution of this suit," is defective in not alleging that defendant was not a resident of A. county.—*Noel v. Denman*, (Tex.) 18 S. W. 318.

Demurrer.

3. Where a petition states a good cause of action, an objection that part of the damages claimed are too remote to be recoverable cannot be raised by general demurrer.—*Fort Worth & R. G. Ry. Co. v. Jennings*, (Tex.) 18 S. W. 270.

Answer.

4. Under Rev. St. Tex. art. 1202, providing that the defendant, in his answer, may plead as many several matters, whether of law or fact, as he shall think necessary to his defense, each separate plea is to be tested by its own averments; and it is immaterial that it may be inconsistent with, or contradicted by, the averments of other pleas.—*St. Louis, A. & T. Ry. Co. v. Whitley*, (Tex.) 18 S. W. 853.

5. An allegation that plaintiffs are the same parties who obtained the judgment which they are seeking to enforce is not sufficiently denied by an averment that defendants have neither knowledge nor information sufficient to form a belief as to whether plaintiffs sustain the relation alleged by them to plaintiffs' ancestor, or any of his brothers and sisters, and they therefore deny the allegation thereof.—*Stevenson v. Flournoy*, (Ky.) 13 S. W. 210.

6. Rev. St. Tex. art. 1223, providing that, in order to compel defendant to plead at the return term "the citation must have been served at least five days before the first day of such return-term, exclusive of the days of service and return," does not require that the five days be secular days.—*Wood v. City of Galveston*, (Tex.) 18 S. W. 227.

Motion to strike out.

7. Where a demurrer to an answer is sustained it is proper to strike out a paragraph of the amended answer on the ground that it sets up the same defense as the original answer.—*McWhorter v. Andrews*, (Ark.) 13 S. W. 1099.

Dismissal without prejudice.

8. Where, in a petition for the appointment of a receiver of a railroad company, plaintiffs claim as heirs and legatees of their father, who, they allege, owned all the stock of the company, it is not error to dismiss without prejudice a subsequent pleading, filed by them shortly before trial, which recites that it is filed in lieu of their original petition, and in which they allege that their father fraudulently converted community property, one-half of which belonged to their mother, to the building of the railroad, and claim as heirs of their mother.—*Mollhenny v. Binz*, (Tex.) 18 S. W. 655.

Amendment.

9. It is not an abuse of discretion for the lower court to reject a pleading tendering a new issue after the pleadings have been made up, where it appears that the fact pleaded was known to appellee before the action was commenced.—*Cavanaugh v. Britt*, (Ky.) 13 S. W. 922.

10. On a contest as to the ownership of certain mortgages, it appeared that defendant was engaged in getting staves to be delivered to merchants in New Orleans at a fixed price; that he contracted with the mortgagor to build boats for that purpose, but, the latter being impecunious, it became necessary to advance money beyond the agreed price thereof, and for this one mortgage was given, while another was executed to a third person for supplies furnished, and was bought from him by defendant; that all the money so used was furnished to defendant by the agent of said merchants; and that before it was furnished they had already exacted from defendant all the securities he could give for moneys previously advanced. Plaintiff's testimony was that defendant delivered the mortgages to said merchants as collateral security for the additional advances, but he claimed that they were abstracted from his safe by the merchant's agent, and by him delivered. Plaintiff, having averred that the mortgages were executed to defendant as agent for said merchants, asked leave, a year after the cause was submitted, to strike out the allegation of ownership, and amend to correspond with the proof recited. *Held*, that the ground of his claim would not thereby have been substantially changed, and the amendment should have been allowed.—*Caldwell v. Meshew*, (Ark.) 13 S. W. 761.

11. Objection that action was begun before maturity of the debt is cured by an amended original petition filed by leave of court after its maturity.—*Dalton v. Rainey*, (Tex.) 13 S. W. 34.

Pleading and proof—Variance.

13. There is no variance between the allegations of the petition that defendant stopped its cars to allow plaintiff to alight, and negligently put them in motion while plaintiff was leaving the car, and proof that the car slackened up only, and then started up with a sudden jerk, etc.—*Ridenhour v. Kansas City Cable Ry. Co.*, (Mo.) 18 S. W. 889.

18. In an action for death by wrongful act, defendant cannot object that the petition does not authorize the submission to the jury of the question whether the engine which ran over deceased was so far distant when he stepped on the track that those in charge ought to have seen him, where it asked an instruction involving the same question, and both parties introduced evidence on that issue.—*Hills v. Missouri Pac. Ry. Co.*, (Mo.) 18 S. W. 946.

14. Plaintiff, a stockholder in a building and loan association, sued to recover from it the amount which he had paid in on his stock, pleading a by-law of the association permitting stockholders to withdraw after due notice filed, and to receive the amount actually paid in, etc. But there was a proviso in the by-law, which he did not set out, that at no time should more than one-third of the funds in the treasury be applied to the demands of withdrawing stockholders without the consent of the directors. *Held*, that the by-law was not admissible in evidence.—*Texas Homestead Building & Loan Ass'n v. Kerr*, (Tex.) 18 S. W. 1020.

Waiver of defects.

15. Objection to the action of the court in sustaining a demurrer to an answer is not waived by filing an amended answer.—*McWhorter v. Andrews*, (Ark.) 18 S. W. 1099.

PLEDGE.**Pledge by firm.**

A negotiable note deposited with a bank by a partnership to secure a firm debt, under an agreement that "any excess of collaterals upon this note shall be applicable to any other note or claim held by said bank against us, J. R. & S. J. Blocker," and signed, "J. R. & S. J. Blocker," such being the firm name, cannot be held by the bank as security for a note executed by one of the partners as principal, and the other partner and others as sureties.—*San Antonio Nat. Bank v. Blocker*, (Tex.) 18 S. W. 961.

Possession.

See *Adverse Possession*.

Powder Magazine.

See *Nuisance*, 1.

POWERS.

Of sale in mortgage, see *Mortgages*, 86.

Execution.

1. A grantor conveyed land to his daughter for life, remainder to her children, or, in case she should die without leaving children or their descendants, to the grantor's heirs on the death of the daughter and her husband: provided, that if she and her husband should ever sell the land the purchase money should be invested in other land, the title to which should be secured to the daughter in the same manner as was the title to the land originally conveyed. *Held*, that the power of sale conferred was exhausted with the sale of the land originally granted, and did not extend to land purchased with the proceeds.—*Fritsch v. Klausung*, (Ky.) 18 S. W. 241.

Testamentary powers.

2. Testator devised his estate to his wife and children, and gave his executor and executrix "full and discretionary power to sell any or all of my estate, and reinvest the same, when they may deem it most conducive to the interest of my wife

and children, and for that purpose, vest title to all and every part of the same in them," and in the survivor, if either should die. The wife of testator was made executrix, and one H. executor, who died, leaving the wife of testator sole personal representative. *Held*, that the wife held the property as trustee, and had power to sell the same, and reinvest, when the interest of the estate demanded, and mere lapse of time would not divest her of this right.—*Jones v. Breed's Ex'x*, (Ky.) 18 S. W. 866.

PRACTICE IN CIVIL CASES.

See, also, *Appeal; Appearance; Certiorari; Costs; Exceptions, Bill of; Judgment; Jury; New Trial; Parties; Pleading; Prohibition; Writ of; Removal of Causes; Trial; Venue in Civil Cases; Writs*.

In equity, see *Equity*, 18-24.

Failure to prosecute action.

1. Where, after an order permitting one of several plaintiffs, who have voluntarily joined in an action to try title, to sever, the cause is several times tried without regard to the land claimed by him, and without his participating in the proceedings, and he fails for more than 25 years to have his branch of the action separately docketed, or in any manner to continue its prosecution, and his evidence that this was the result of an agreement with defendants is denied, his suit is properly held to have been abandoned.—*Punchard v. Delk*, (Tex.) 18 S. W. 615.

Transfer of cause to equity.

2. In an action by the heirs of a married woman to recover land conveyed by her, where the answer seeks to make certain expenses a charge on the land, it presents an equitable defense, making it proper to transfer the cause to equity.—*Gray v. Marshall*, (Ky.) 18 S. W. 913.

Stipulations.

3. Where an agreement is executed, to be used in evidence at a trial, to which is attached a certified copy of a duly-recorded will, the detachment therefrom and loss of such copy does not render the agreement inadmissible in evidence, where another certified copy of the will, with proof of probate, is introduced in evidence, and its correctness is not questioned.—*Hall v. Haywood*, (Tex.) 18 S. W. 612.

Preferences.

See *Assignment for Benefit of Creditors*, 6-12; *Insolvency*.

Prescription.

See *Adverse Possession*.

Presumption.

Of correctness of record, see *Records*, 1.
payment, see *Payment*, 2, 3.
On appeal, see *Appeal*, 36.

Price.

Action for, see *Sale*, 18.

Principal and Accessory.

See *Criminal Law*, 1, 2.

PRINCIPAL AND AGENT.

See, also, *Attorney and Client; Factors and Brokers*.

Insurance agents, see *Insurance*, 16-31.

Authority of agent.

1. A physician employed by the conductor of a train, after communicating with the general manager, to attend a person injured on the road, cannot recover compensation for his services from the railway company, in the absence of proof that the conductor was authorized to employ him.—*St.*

Louis, A. & T. Ry. Co. v. Hoover, (Ark.) 18 S. W. 1092.

2. Nor has the attorney for the company any authority to employ a physician on its behalf.—*St. Louis, A. & T. Ry. Co. v. Hoover*, (Ark.) 18 S. W. 1092.

3. An agent, with power to sell and receive payment, cannot bind his principal by accepting, in lieu of payment for goods sold, a cancellation of his own debt to the purchaser, where the latter knows, or by the exercise of reasonable diligence could know, of the agency.—*Smith v. James*, (Ark.) 18 S. W. 701.

4. In an action against a railroad company for board furnished to its employes, under contract with its road-master, though it appears that the road-master "had made contracts to board section-men all along the line," and that "it was the custom of railroads in that section of country for road-masters to hire boarding bosses," the company is not liable, in the absence of proof of authority to the road-master to make such a contract, or of its ratification of similar contracts.—*St. Louis, L. M. & S. Ry. Co. v. Bennet*, (Ark.) 18 S. W. 742.

Ratification—Acquiescence.

5. The owner of land executed a power of attorney authorizing the attorney to convey his land to a certain vendee on payment of a named price. The attorney purchased from the vendee a half interest in his contract, and then executed a deed to him. Ten years after the vendor's death, and 13 years after the attorney's purchase had been recorded, the vendor's heirs conveyed the land to a third person. *Held*, that such person acquired no title; the right to repudiate the attorney's act being lost by the lapse of time.—*Yellow Pine Lumber Co. v. Carroll*, (Tex.) 18 S. W. 261.

PRINCIPAL AND SURETY.

Discharge of surety on administrator's bond, see *Executors and Administrators*, 5.

—guardians' bonds, see *Guardian and Ward*, 2-4.

Liabilities of sureties on bail-bonds, see *Bail*, 9, 10. Subrogation of surety on guardians' bonds, see *Subrogation*, 1, 2.

Who may be surety on appeal-bond, see *Appeal*, 3.

When relation exists.

1. Judgment for a balance due, and a decree of foreclosure, were rendered against the joint makers of a promissory note secured by mortgages of their lands. On the sale of the land of one of them, the amount computed as due by the commissioner in charge of the sale was realized, but was subsequently found to be insufficient. On motion for order of sale against the land of appellant, the other co-maker, for the deficiency, he urged that, by an arrangement with his co-maker, they had divided the borrowed money equally; that he had paid half of the debt and interest; that he was liable for the balance only in the relation of surety for his co-maker; and that the acquiescence of the payee in the mistake of the commissioner, thereby causing him to take no step to secure himself against loss, operated a release of that liability. *Held*, that appellant was liable to payee as principal, and that an order of sale was properly granted.—*Jump v. Johnson*, (Ky.) 18 S. W. 843.

Consideration for surety's signature.

2. A party who signs as surety a note renewing one wherein he is a joint maker is so benefited by the new note as to render his estate liable in equity, upon his decease, for the payment of the new note. Following *Boyd v. Bell*, 7 S. W. 657.—*Bell v. Boyd*, (Tex.) 18 S. W. 232.

Scope of contract.

3. Where a tax collector carries a balance due from him to the state over to the succeeding year, when he enters on a second term, with new sureties, and there is a deficit for such year, it will be considered a deficit for the preceding year to the extent of such balance; but where the accounts are balanced for such succeeding year, and the collector's private funds are used to the amount of the balance brought forward, the sureties on his

bond for the first term are not liable for any deficit that may thereafter occur.—*Newcomer v. State*, (Tex.) 18 S. W. 1040; *Polk v. Same*, *Id.* 1041.

4. A guardian invested a portion of her ward's property in the stock of a solvent bank, and deposited the balance to her individual credit. After the sureties on the bond then in force were released, and a second bond executed, she sold the stock, withdrew the deposit, and wasted the proceeds. *Held*, in a controversy between the sureties as to which bond was liable, that, although the unauthorized investment and deposit to her individual credit amounted to a conversion, the sureties on the first bond were not liable therefor, because the fund in her hands was still susceptible of being traced and identified, but that the second bond was liable for the guardian's subsequent appropriation of the fund.—*Cassidy v. Cochran's Guardian*, (Ky.) 18 S. W. 844.

Release and discharge of surety.

5. Where a guardian loaned his ward's money to a firm composed of himself and defendant, a surety on his bond, the latter, as between himself and a co-surety, became a principal debtor, and the release of defendant likewise released the co-surety.—*Roberson v. Tonn*, (Tex.) 18 S. W. 385.

—Erasure of name of surety.

6. An acceptance of the bond of a tax collector by the county court, knowing that the name of a responsible surety has been erased therefrom, and that of another substituted, without the knowledge or consent of the other sureties, will discharge them from their obligation.—*State v. McGonigle*, (Mo.) 18 S. W. 758; *McGonigle v. State*, *Id.* 761.

7. The fact that the sureties left the bond with the principal to procure other sureties, and to present it to the county court for approval and acceptance, does not give him the implied power to discharge one who thereafter becomes a party to the instrument; nor does knowledge by the sureties of its approval give rise to an inference that they authorized the alteration.—*State v. McGonigle*, (Mo.) 18 S. W. 758; *McGonigle v. State*, *Id.* 761.

8. The substituted surety having signed the bond without knowledge of its alteration, and under the supposition that the other signers were his co-sureties, the bond is also void as to him, as he never undertook to become the sole surety.—*State v. McGonigle*, (Mo.) 18 S. W. 758; *McGonigle v. State*, *Id.* 761.

9. Though the erasure may have been at the instance of the county court, a stranger to the bond, the doctrine that an alteration of a written instrument by a stranger will not affect the liability of any of the parties can have no application, as the erasure was made before the acceptance of the bond, and as the surety whose name was erased consequently never became liable thereon.—*State v. McGonigle*, (Mo.) 18 S. W. 758; *McGonigle v. State*, *Id.* 761.

10. The fact that the sureties on the bond as finally approved knew of the approval, and made no objection to the principal's performing the duties of his office for two years thereafter, does not estop them from setting up the alteration, of which they had no knowledge, as a defense in an action on the bond.—*State v. McGonigle*, (Mo.) 18 S. W. 758; *McGonigle v. State*, *Id.* 761.

Remedies of surety against principal.

11. Plaintiff attached property of defendant in an action to recover money paid by him as surety. Defendant testified that plaintiff had agreed to give him indulgence in the payment of the amount due, but plaintiff denied this, and it was shown that he had made repeated efforts to collect his claim, and that defendant made no attempt to enforce the alleged agreement. *Held*, that the evidence was sufficient to warrant a judgment for plaintiff.—*Doll v. Reed*, (Ky.) 18 S. W. 1081.

12. In equity, payment of a debt by a surety does not extinguish it, but operates as an assignment to the surety, with all the creditor's rights.—*Benne v. Schnecko*, (Mo.) 18 S. W. 82.

Contribution between sureties.

13. Where a note signed by a principal and several sureties is discharged by a new note signed

by the principal and one of the sureties, such surety, on being compelled to pay the second note, cannot exact contribution from his co-sureties on the first note, since he did not pay such first note, but merely changed the form of the contract.—*Bell v. Boyd*, (Tex.) 18 S. W. 232.

14. A surety's liability on an administrator's bond conditioned to faithfully administer the estate, does not terminate with his death; and for subsequent defaults of the principal the surviving surety may enforce contribution by judgment against an heir who has inherited from the deceased surety property exceeding in value the amount to be contributed.—*Hecht v. Scraggs*, (Ark.) 18 S. W. 930.

Private Nuisance.

See *Nuisance*, 1.

Privileged Communication.

See *Libel and Slander*, 3.

Probable Cause.

See *Malicious Prosecution*, 4.

Probate.

Of wills, see *Wills*, 11-20.

Process.

See *Writs*.

Failure of sheriff to execute, see *Sheriffs and Constables*, 4-6.

PROHIBITION, WRIT OF.

When lies.

A writ of prohibition will not lie to prevent the circuit court of the city of St. Louis from entertaining proceedings for the condemnation of property on the ground that it had no jurisdiction over the special class of property involved in the proceedings.—*State v. Valliant*, (Mo.) 18 S. W. 898.

Promissory Notes.

See *Negotiable Instruments*.

Proof of Handwriting.

See *Evidence*, 85.

Proof of Loss.

See *Insurance*, 12-14.

PROSTITUTION.

Houses of, see *Disorderly House*.

Evidence.

1. Where the information, in general terms, charges defendant with being a vagrant, to-wit, a common prostitute, the offense must be proven by evidence of the particular facts showing it, and it is error to admit evidence of defendant's general reputation.—*Arnold v. State*, (Tex.) 18 S. W. 774.

2. Evidence of the bad character of the women who lived near defendant's residence, and with whom she sometimes associated, is incompetent.—*Arnold v. State*, (Tex.) 18 S. W. 774.

Publication.

Of libel, see *Libel and Slander*, 2.

Public Improvements.

See *Municipal Corporations*, 19-31.

PUBLIC LANDS.

Pre-emptions—Abandonment.

1. M. occupied and improved certain land in 1846. There was no proof that he occupied it with the intention of pre-empting it. He abandoned it within a year; and there was no proof that he ever gave any one the right to be his successor, or that any one entered under him. *Held*, that it would be presumed that, when it was surveyed by another person, in 1853, M. had abandoned any intention of pre-empting the land that he might have had, and that the land was vacant.—*King v. Hunt*, (Ky.) 18 S. W. 214.

Swamp lands.

2. Where a mortgage given by a purchaser of swamp lands from a county to secure school money borrowed from the county to pay the purchase price is foreclosed by the county, a recital in a deed from the county for such land after the foreclosure, stating that the grantee therein had become the purchaser and paid the price in full, with interest, does not tend to show that the land was sold to him privately, but is consistent with a public sale, as required by Rev. St. Mo. 1879, § 7115.—*Williams v. Brownlee*, (Mo.) 18 S. W. 1049.

School lands.

3. Under Const. Tex. art. 7, § 6, providing that actual settlers on county school lands "shall be protected in the prior right of purchasing the same to the extent of their settlement, not to exceed 160 acres," a purchaser of such lands from a county, on which an actual settler is residing, who has not been afforded an opportunity to buy, takes it subject to the privilege of pre-emption by the settler, who, on tendering him, with reasonable promptness, the value of the land on which he has settled, estimated on the basis of the price paid the county for the whole tract, may demand a conveyance of 160 acres, or less, at his election.—*Perego v. White*, (Tex.) 18 S. W. 974.

4. Const. Tex. art. 7, § 6, in regard to school lands, provides that "actual settlers residing on said lands shall be protected in the prior right of purchasing the same," etc. *Held*, that one who does not reside upon the land claimed is not an "actual settler," although he has fenced the entire tract, and cultivated several acres of it.—*Baker v. Millman*, (Tex.) 18 S. W. 618.

5. Rev. St. Tex. art. 4818, allows compensation for improvements to land to those who "have had adverse possession, in good faith, of the premises in controversy for at least one year before the commencement of this suit." *Held*, that one who has fenced and cultivated school lands for more than one year, but has not actually resided thereon, is not entitled to compensation for improvements from a purchaser of such lands.—*Baker v. Millman*, (Tex.) 18 S. W. 618.

6. The right of pre-emption given to actual settlers on county school lands by Const. Tex. art. 7, § 6, which provides that they "shall be protected in the prior right of purchasing the same to the extent of their settlement, not to exceed one hundred and sixty acres," extends to future settlers as well as to those residing on the land at the time the constitution was adopted, and is not affected by a sale of the land by the county to another before the settler offered to buy it.—*Baker v. Dunning*, (Tex.) 18 S. W. 617.

Titles derived from states.

7. The acquisition of public lands under Gen. Laws Tex. 1883, p. 85, providing for its classification and sale by the land board, and requiring the applicant for the purchase of such land to be an actual settler in good faith, and to have settled on the land with a view to purchasing it, is distinct from the acquisition of land by pre-emption; and, in a suit by the purchaser of such lands to recover possession, evidence on behalf of defendant that he is the head of a family, and that he located on the land for the purpose of acquiring a homestead therein before plaintiff purchased it, is incompetent.—*Luckie v. Watt*, (Tex.) 18 S. W. 1035.

8. Under Gen. Laws Tex. 1883, p. 85, providing for the classification and sale of public lands by the

land board, the decision of the land board, awarding land to one of two claimants, cannot be reviewed in an action between such claimants, or those claiming under them, to recover the land.—*Luckie v. Watt*, (Tex.) 18 S. W. 1035.

9. Hart. Dig. Tex. art. 2144, authorizing the commissioner of the general land-office to issue a patent to an assignee, to whom the unconditional certificates had been issued, without an exhibition of the transfer, the issue of the patent to the assignor does not deprive the assignee of the land, but inures to his benefit.—*Capps v. Terry*, (Tex.) 18 S. W. 52.

San Jacinto donation lands.

10. Pasch. Dig. Tex. art. 4063, provides for the granting of 640 acres of land to all soldiers of the republic of Texas who participated in the battle of San Jacinto, and declares that the lands shall "not be subject to sale or alienation, mortgage or execution," during the life-time of the grantee. *Held*, that an instrument executed by a grantee after he received his certificate, but before he obtained his patent, purporting to authorize another to locate the certificate and receive the patent, and to hold the land for 99 years free of rent is void.—*Williams v. Wilson*, (Tex.) 18 S. W. 69.

11. Where defendants claim under a void conveyance by the original donee of San Jacinto donation lands which recites a consideration, those claiming under the donee cannot recover the lands without refunding the purchase money.—*Williams v. Wilson*, (Tex.) 18 S. W. 69.

12. Where plaintiffs in trespass to try title for the recovery of San Jacinto donation lands, which had been conveyed by the donee to defendants, do not offer to refund the purchase money, and defendants plead only a term of years, a general judgment for defendants is not erroneous, as the judgment does not affect plaintiffs' right to the reversion after the expiration of defendants' term.—*Williams v. Wilson*, (Tex.) 18 S. W. 69.

Surveys.

13. Rev. St. Tex. art. 3895, provides that an application for a survey of public lands shall be in writing signed by the applicant, shall particularly describe the lands applied for, and shall, together with the land certificate, be filed in the office of the surveyor. *Held*, that where a surveyor received certain certificates, together with a blank paper signed by one whose connection with the owner of the certificates was not shown, with directions to locate them upon the head of the Sabinal, and the surveyor himself afterwards filled out the application with the proper description, this was a sufficient compliance with the statute; and, the owner of the certificates having ratified the location, the lands were appropriated according to law, and the surveyor rightly refused to locate other certificates thereon.—*Beatty v. Masterson*, (Tex.) 18 S. W. 1014.

14. Under Const. Tex. art. 14, § 2, providing that all land certificates shall be located "only upon vacant and unappropriated public domain, and not upon any land titled," land held under a patent cannot be located upon, where the beginning is well known, and the first two calls for distances are found to be correct, though the lines are unmarked on a prairie, the third is excessive if carried to the point called for, and if followed will give 2,719 acres, instead of 800, as called for in the patent; it not being shown that the other distances and lines are not correct, and it being necessary to disregard calls for distance in order to make the survey include only 800 acres.—*Mad-dox v. Fenner*, (Tex.) 18 S. W. 158.

15. Gen. St. Ky. c. 109, provides that any person obtaining an order from the county court for that purpose may by entry in the surveyor's book, appropriate the land his entry calls for; that the surveyor shall survey the entries in the succession in point of time in which they are made; that such survey must be made within six months from the date of entry, and a plat and certificate thereof recorded; and that "every entry, survey, or patent made or issued under this chapter shall be void so far as it embraces lands previously entered, surveyed, or patented." *Held*, that the provision for

surveys in the succession in point of time in which entries are made does not invalidate a survey made before entry, or give one, by virtue of entry merely, a right to appropriate land which appears by the records to have been surveyed for another previously.—*Goosling v. Smith*, (Ky.) 18 S. W. 487.

16. As the statute also provides that the register of the land-office may receive plats and certificates after the expiration of six months from the date of the survey, a valid patent may be issued after that time, and entries and surveys made by another within that time are void.—*Goosling v. Smith*, (Ky.) 18 S. W. 487.

Public Policy.

See *Contracts*, 1.

QUIETING TITLE.

When action lies.

Deed for land was given, in 1861, reserving a vendor's lien until payment of purchase-money notes. The grantee soon afterwards left the state, and was never heard from again. The notes were given to an attorney for collection, but he failed to find the maker, and in 1878 returned them to the owners' agent, who afterwards moved away, and the notes were not produced at trial. *Held*, that plaintiffs, claiming under the original grantor, having taken possession, were entitled to a decree quieting title in them.—*Ruff v. Lind*, (Tex.) 18 S. W. 68.

RAILROAD COMPANIES.

See, also, *Carriers; Horse and Street Railroads*. Receivers, judgment for negligence, discharge, see *Receivers*, 6-9.

Use of land owned by company.

1. Rev. St. Tex. art. 4216, which forbids railroad companies to use or occupy any part of the right of way over which their respective roads pass for any other purpose than the construction and keeping in repair of their roads, and which is part of an act conferring on railroad companies the power to take and hold the fee in lands, (articles 4211, 4212,) and providing (article 4206) that the "right of way" acquired by condemnation "shall not be so construed as to include the fee," does not apply to land owned by a railroad company in fee, though its road is built thereon.—*Calcasieu Lumber Co. v. Harris*, (Tex.) 18 S. W. 458.

Mixed trains.

2. If the business of a railroad does not warrant the running of separate trains for freight and passengers, it will not be required to do so; but if the business is sufficiently large and profitable to warrant it, and the safety of passengers is endangered by having passenger-coaches mixed in the same train with freight-cars, it is the duty of the company to run separate trains.—*Arkansas M. R. Co. v. Canman*, (Ark.) 18 S. W. 280.

3. Mansf. Dig. Ark. § 5477, provides that, in the formation of mixed trains, the baggage and freight cars shall be placed in front of the passenger-coaches. *Held* that, where it was permissible for a road to use mixed trains, the law would not require bell-pulls and air-brakes to be used on such trains, unless it was practicable to do so, and they were necessary to the security of the passengers.—*Arkansas M. R. Co. v. Canman*, (Ark.) 18 S. W. 280.

Use of public street.

4. Authority granted to a railroad company to lay its tracks and switches in a public street does not carry the right to use such street as a place for making up trains, nor as a depot for cars, nor for receiving or discharging freight.—*Owensborough & N. R. Co. v. Sutton*, (Ky.) 18 S. W. 1086.

Intersecting railroads—Report of commissioners.

5. The report of commissioners appointed by the circuit court in a proceeding under Rev. St.

Mo. 1879, § 765, providing that any railroad company shall have power to cross, unite, etc., its railroad with any other, and that if the two corporations cannot agree as to the amount of compensation, or the points of connection, the same shall be determined by commissioners as in the condemnation of lands for railroad purposes, will not be set aside on appeal because it fails to recite that the commissioners went upon the premises, and viewed the points of crossings and connections, as, in the absence of evidence to the contrary, it will be presumed they performed their statutory duty.—*St. Louis T. Ry. Co. v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 13 S. W. 710.

6. Nor will such report be set aside on appeal because it does not award damages to defendant corporation, when no evidence on that point is preserved in the record.—*St. Louis T. Ry. Co. v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 13 S. W. 710.

7. A report allowing plaintiff a latitude of 10 feet in which to make the connections, with an explanation that it is for the purpose of a proper alignment of the frogs and lead-bars, is sufficiently definite under the statute.—*St. Louis T. Ry. Co. v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 13 S. W. 710.

8. Where the general direction of both roads is north and south across a street running east and west, and plaintiff's tracks approach those of defendant diagonally, it is not a ground of objection to the report that it permits plaintiff to make the connection on the north or south side of the street, in the absence of any showing in the record that defendant is prejudiced thereby.—*St. Louis T. Ry. Co. v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 13 S. W. 710.

9. But a provision in the report permitting plaintiff to occupy a certain incomplete switch of defendant for the space of 250 feet, without compensation, is virtually a condemnation of defendant's property, and is unauthorized by the order appointing the commissioners to determine the points and manner of crossings and connections, and to ascertain the damages therefor, and an exception to the report on that ground should be sustained.—*St. Louis T. Ry. Co. v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 13 S. W. 710.

Municipal aid.

10. Though Act Mo. March 23, 1863, known as the "Township Aid Act," has by this court been held to be unconstitutional, yet, as the federal courts uphold the act, bonds issued under it are proper subjects of compromise, and a tax levied to pay such compromise bonds issued under 2 Rev. St. Mo. 1879, p. 848, is valid.—*State v. Hannibal & St. J. R. Co.*, (Mo.) 13 S. W. 505.

11. Under Act Ky. March 17, 1870, declaring that if more than one question of taxation is voted on at any one election such tax shall be void, an election upon county subscriptions to the capital stock of two different railroad companies, at the same time, is void.—*Christian County Court v. Smith*, (Ky.) 13 S. W. 276.

12. An election on the subscription by a county to the stock of two railroad companies, held in violation of Act Ky. March 17, 1870, declaring that if more than one question of taxation is voted on at any one time such tax shall be void, is not validated as to one of the subscriptions by the fact that it is void as to the other.—*Christian County Court v. Smith*, (Ky.) 13 S. W. 276.

Consolidation.

13. Plaintiff and other creditors of an insolvent railroad company authorized their agents to purchase the road, and afterwards to transfer it to a new corporation, to complete the road, and operate it, for the purpose of securing their debts. Subsequently this corporation was consolidated with another, and plaintiff sued to recover the value of its interest in the property, as having been converted without its consent. *Held*, that plaintiff was only entitled to recover its proportionate share of the stock of the corporation to which the road, with plaintiff's consent, was transferred after its purchase.—*Deposit Bank v. Barrett*, (Ky.) 13 S. W. 337.

Taxation.

14. A bridge built by a corporation organized for that purpose is not the property of a railway company, and assessable for taxes as such by the state board of railway commissioners, under Mansf. Dig. Ark. § 5647, though the stockholders of both companies are the same, and all of the bridge company stock is pledged to the railway company, which by contract has the permanent use of the bridge. *Distinguishing State v. Depot Co.*, 43 N. W. 840.—*St. Louis & S. F. Ry. Co. v. Williams*, (Ark.) 13 S. W. 796.

15. Acts Mo. 1847, p. 157, gives to defendant company all the privileges and immunities which were granted to the Louisiana & Columbia Railroad Company by Acts 1836-37, p. 252, which provide, *inter alia*, that "the stock of said company shall be exempt from all state and county taxes." Act Sept. 20, 1852, granting lands to defendant, and accepted by it, provides that it shall "pay into the treasury of the state a sum of money equal to the amount of state tax on other real and personal property of like value for that year, upon the actual value of the road-bed * * * and other property of said company," etc. *Held*, that this act in no way affects defendant's charter exemption from taxation for county purposes.—*State v. Hannibal & St. J. R. Co.*, (Mo.) 13 S. W. 505.

16. A local tax levied only on property within the limits of a particular township to pay township funding bonds is not a "county tax," within the meaning of defendant's charter, (Acts Mo. 1847, p. 157,) which exempts it "from state and county taxes."—*State v. Hannibal & St. J. R. Co.*, (Mo.) 13 S. W. 505.

17. A tax levied to pay the bonds of the county, given by it for stock in a railroad company, is a county tax; and this, though the bonds can only be paid out of the tax levied for that special purpose.—*State v. Hannibal & St. J. R. Co.*, (Mo.) 13 S. W. 505.

18. Under Rev. St. Mo. 1879, §§ 6371, 6373, which make it the duty of the state board of equalization, after assessing a railroad in its entire length, to apportion the aggregate value to each county according to the ratio which the number of miles in each county bears to the whole number of miles in the state, an assessment of a railroad by a county court for state, county, township, and school taxes need not describe the property other than as so many miles of road of a given value; and a petition, in a suit to recover these delinquent taxes, which sets forth the number of miles of road owned by defendant in a designated county, is sufficient, as it need not be more specific than the assessment, though the form for a petition prescribed by section 6389 contemplates a description of the road.—*State v. Hannibal & St. J. R. Co.*, (Mo.) 13 S. W. 505.

19. Neither need the petition state the number of miles of road owned by defendant in a designated township, where it states the amount of the railroad tax levied against defendant in that township; nor, so far as the validity of the township tax is concerned, is it a matter of any importance whether or not the county had adopted township organization.—*State v. Hannibal & St. J. R. Co.*, (Mo.) 13 S. W. 505.

20. An order of the county court levying township taxes for prior years, which recites that special taxes to pay the bonds of a designated township had been omitted for those years, and which then orders the clerk of the county court to extend the taxes on defendant's property in said township at a certain rate, "said rate being the same as extended upon other property in said township for said years," is a sufficient levy of the tax, as well as *prima facie* evidence both that the taxes for the designated years had been omitted, and that the rate for those years was the same as that levied on defendant's property.—*State v. Hannibal & St. J. R. Co.*, (Mo.) 13 S. W. 505.

21. Where the county court opens a regular term, and adjourns from day to day, or for a number of days, the adjournments are a part of the regular term, within the meaning of Rev. St. Mo. 1879, § 6373, which provides that taxes against

railroad property are to be levied "at a regular term of said court, if in session at the time."—*State v. Hannibal & St. J. R. Co.*, (Mo.) 13 S. W. 505.

22. Act Mo. 1871, pp. 56-59, creating a state board of equalization to adjust and equalize the valuation of railroad property, and authorizing them, on "the evidence produced before them," to increase or reduce the aggregate valuation of any railroad property as "they may deem just and right," does not require them to base their valuation on any other evidence than the report of the company's officer; nor does it require them to preserve the evidence in the record of their proceedings.—*State v. Hannibal & St. J. R. Co.*, (Mo.) 13 S. W. 406.

23. Section 8 of this act, providing for taxation for past years, on the valuation to be adjusted and equalized by such board, of property which "shall have been subjected to taxation" prior to the passage of the act, but shall not have been assessed, refers only to such property as before the passage of the act was subject and liable to taxation, but has escaped it through inattention of the owner or inadvertence of the county officers.—*State v. Hannibal & St. J. R. Co.*, (Mo.) 13 S. W. 406.

24. The fact that the board fixes the same valuation for past years as for the year in which the assessment is made does not raise such a suspicion that it has acted arbitrarily and without evidence as will overcome the legal presumption that it has honestly discharged its duties.—*State v. Hannibal & St. J. R. Co.*, (Mo.) 13 S. W. 406.

25. Act Mo. 1868, p. 151, repealing former acts relating to taxes for maintenance of public roads, provides in section 7 that county courts may borrow money on the credit of the county for the purpose of opening and repairing public roads, and levy a tax to meet the interest thereon. Section 27 provides that, for the purpose of opening, repairing, and improving roads, and in order to raise the necessary funds, the county courts shall levy a special tax, which shall be known as the "road tax," said levy to be made as the county revenue is levied; and that all property subject to pay a county tax shall be made subject to pay a road tax. Subsequent acts classify all taxes into state, county, township, school, and municipal taxes. *Held*, that the road tax is a county tax, within the meaning of the special charter of defendant company, (Act Mo. 1847, p. 157, § 4,) exempting said company from payment of county taxes.—*State v. Hannibal & St. J. R. Co.*, (Mo.) 13 S. W. 406.

Mortgages.

26. Where a mortgage given by a railroad company in pursuance of a resolution of the directors, to render effectual what was attempted to be done by a former one, whose validity is doubted, contains no reference to the former mortgage, and neither the resolution nor the second mortgage expresses an intention that the latter shall cover the same property as the first, the description in the second cannot be aided by that in the first.—*McIlhenny v. Binz*, (Tex.) 13 S. W. 655.

27. A railroad company alleged its insolvency, and prayed for a sale of its property, and distribution of the proceeds among its creditors. A receiver was appointed. A mortgage creditor filed a cross-bill asking foreclosure of two mortgages, on both of which default in the interest had been made, but the debt secured by the second only was due. *Held*, that both mortgages were properly foreclosed, though by its terms the first was not subject to foreclosure until default in payment of the principal at maturity.—*McIlhenny v. Binz*, (Tex.) 13 S. W. 655.

28. Even if it had been error to foreclose the first mortgage, the railroad company was not injured thereby, where it was hopelessly insolvent.—*McIlhenny v. Binz*, (Tex.) 13 S. W. 655.

Insolvency and receivers.

29. It was not error to direct that the property of an insolvent company, when offered for sale to the highest bidder, should not be sold for less than a certain sum.—*McIlhenny v. Binz*, (Tex.) 13 S. W. 655.

Insolvency and receivers—Priorities between creditors.

30. Debts incurred by a railroad company for construction of new road within six months before the company's insolvency and the appointment of a receiver, are entitled to priority in payment out of the net earnings of the road while in the hands of the receiver, over mortgages executed when the road was unfinished, and which show that it was contemplated that the road should be completed, and which attach to new road as fast as finished.—*McIlhenny v. Binz*, (Tex.) 13 S. W. 655.

31. Where net earnings have been applied to the payment of interest on the bonded debt of the company, and to improvements on the property subject to the mortgages, whereby its value is enhanced to the amount expended on it, the debts incurred for construction before the appointment of the receiver are entitled to be paid from the corpus of the property in preference to the mortgage debts, though the mortgage creditors were not parties to the suit at the time of the application of the net earnings to the purposes mentioned.—*McIlhenny v. Binz*, (Tex.) 13 S. W. 655.

32. The mere lapse of more than six months between the time within which claims for operating and construction expenses accrued, and the appointment of a receiver, does not deprive them of priority over the mortgages where they arose within twelve months before, and were, by *Sayles*, Ann. St. Tex. art. 3179a, given a lien for that time, though the court fixed six months before the appointment of the receiver as the limit for such claims, which it ordered paid, and though the statutory lien was inferior to that of the mortgages.—*McIlhenny v. Binz*, (Tex.) 13 S. W. 655.

33. Notes given for money borrowed to pay interest on the railroad bonds, each of which stipulates that a certain amount of the gross earnings of the road from date "is pledged in liquidation of this note," are not thereby given priority over the bonded debt, as the stipulation is ineffectual.—*McIlhenny v. Binz*, (Tex.) 13 S. W. 655.

34. Claims by boarding-house keepers for board furnished to railroad laborers and operatives, and by grocers for supplies furnished to the boarding-house keepers, under an arrangement whereby the company retained from the wages of the laborers the amounts due for their board, and credited the boarding-house keepers and grocers therewith, are properly treated as claims for wages assigned to the holders, and allowed priority as such.—*McIlhenny v. Binz*, (Tex.) 13 S. W. 655.

35. The taking from the railroad company of notes indorsed by a stockholder for claims is not a waiver of any lien which such claims may have, in the absence of any intention to waive it.—*McIlhenny v. Binz*, (Tex.) 13 S. W. 655.

36. Two claims for coal furnished to the railroad company for the purpose of operating the road, one of which arose a little more, and the other a little less, than six months before the appointment of the receiver, are both entitled to priority over the mortgages.—*McIlhenny v. Binz*, (Tex.) 13 S. W. 655.

Negligence.

37. Under Code Tenn. § 1167, which declares that in every case of non-observance by a railroad company of certain precautions to prevent accidents the company shall be liable for the damages caused thereby, the fact that the injured person was guilty of contributory negligence, though admissible in mitigation of damages, is no bar to the action.—*Chesapeake, O. & S. W. R. Co. v. Foster*, (Tenn.) 13 S. W. 694.

38. When city ordinances prescribe certain precautions to be observed by railway companies at public crossings, they do not relieve the companies from the observance of ordinary care in particulars not mentioned in the ordinances.—*Wilkins v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 13 S. W. 898.

39. The use of the expression, "such care as an ordinary man," or "an ordinary business man," would use, in an instruction defining the degree of diligence and care required of a railroad company to avoid liability on a charge of negligence, and in

determining the question of contributory negligence, is improper.—*Houston & T. C. Ry. Co. v. Smith*, (Tex.) 18 S. W. 972.

40. In an action for injuries sustained by collision with defendant's cars, the petition alleged that, while plaintiff was driving along the street, defendant's cars came around a curve in front of him, and that defendant's servants, seeing his dangerous position, "refused to slow up or stop the engine, but went right on puffing and blowing its smoke and steam, and so frightened plaintiff's horse," etc. *Held*, that the allegation of negligence related to and included the emission of smoke and steam.—*Gulf, C. & S. F. Ry. Co. v. Hodges*, (Tex.) 18 S. W. 64.

41. A requested instruction that the company had the right to use the track; that an engineer was not required to stop his engine merely because he saw a person driving up the street parallel with the track; and that if the managers of the train kept a proper lookout, and saw plaintiff driving up the street parallel to the track, and his horse appeared to be gentle, and there was nothing to indicate that it would get frightened, and collide with the cars, and the engineer managed the train with such care and prudence as a reasonably prudent man would have observed under the circumstances, plaintiff cannot recover, while not unexceptionable, correctly suggests the required degree of care.—*Gulf, C. & S. F. Ry. Co. v. Hodges*, (Tex.) 18 S. W. 64.

42. In an action against a railroad company for personal injuries, an instruction that defendant was required "to use such care and prudence as the most skillful and careful and prudent engineers would use under similar circumstances," and that, in the absence thereof, the company would be guilty of negligence, and liable for a resulting injury, tends to induce the belief that a greater degree of care is required than the law exacts.—*Gulf, C. & S. F. Ry. Co. v. Hodges*, (Tex.) 18 S. W. 64.

43. A boy 11 years old, who climbs upon freight-cars standing on a side track at a railroad depot, is a trespasser; and the company, not knowing of his presence, is not liable for injuries sustained by him in being thrown from the car by the concussion caused by attaching a train thereto.—*Louisville & N. R. Co. v. Hurt*, (Ky.) 18 S. W. 275.

Accidents to trains.

44. In an action against a railroad company for personal injuries caused by the derailment of a car, it is error to instruct that "if the jury find from the evidence that there was a spread or bent rail at the time and place of derailment, the jury may infer negligence from that fact, and the burden of disproving it is on the defendant," as it assumes that any spread or bend in a rail is negligence, without regard to its sufficiency to cause the derailment, or in some manner impair the safety of the train.—*Arkansas M. R. Co. v. Canman*, (Ark.) 13 S. W. 280.

Accidents at crossings.

45. Deceased, going along a street crossing several railroad tracks, passed in front of one train, and stopped on the next track, watching a train on the track beyond, but did not look towards the engine which struck him. He was seen by several witnesses, who estimated his distance from the engine at from 25 to 150 feet. The engineer, fireman, and road-master were on the engine, and said it was backing 5 or 6 miles an hour; that they were looking in the direction they were moving, but did not see deceased, and thought he must have got on the track within 25 or 30 feet, when the view would have been obstructed by the tender and back-board. A postal clerk on one of the trains said deceased was 100 to 150 feet away, with nothing to prevent his being seen, and that he did not see the engineer or fireman until after the collision, and then only saw the engineer sitting on his seat as the engine passed, which was going 10 miles an hour. The crossing was usually much used at this hour. *Held* sufficient to sustain a verdict for plaintiff notwithstanding his contributory negligence.—*Hils v. Missouri Pac. Ry. Co.*, (Mo.) 18 S. W. 946.

46. In an action for injury at a railroad crossing, it was not error to instruct the jury that if they believed that the night was dark, and that the engine was running 25 miles an hour through a thickly-settled portion of the country, without the head-light being lighted, in consequence of which the collision occasioning the injury occurred, they should find for plaintiff.—*Becke v. Missouri Pac. Ry. Co.*, (Mo.) 13 S. W. 1053.

47. In an action for injuries sustained at a crossing, an instruction in such case that it was defendant's duty to use such care and skill in handling its engine as the "most" prudent are accustomed to exercise in like business is erroneous, since all that is required is the exercise of such prudence as is shown by the "mass" of prudent persons in like business.—*Houston & T. C. Ry. Co. v. Brin*, (Tex.) 18 S. W. 886.

48. A charge that, in passing on the question of negligence of defendant's servants in charge of the train, the jury might consider the place at which the injury occurred, its surroundings, the rate of speed at which the train was being run, and whether or not the required signals were given, is erroneous, as giving too much emphasis to the circumstances referred to.—*Galveston, H. & S. A. Ry. Co. v. Kutac*, (Tex.) 18 S. W. 327.

49. Such charge is also objectionable as recognizing the fact that no signals were given, where all of the witnesses who saw the collision, except two, testify that the signals were given, and those two merely state that they did not hear them.—*Galveston, H. & S. A. Ry. Co. v. Kutac*, (Tex.) 18 S. W. 327.

50. In an action under Rev. St. Tex. art. 2899, subd. 1, authorizing an action for death caused by the negligence of the proprietor of a railroad, or by the gross negligence of his servants, charges authorizing a recovery on the ground of ordinary negligence of defendant's servants, and a refusal to charge that gross negligence must be shown, are erroneous. Following *Railway Co. v. Hanks*, 11 S. W. 877.—*Galveston, H. & S. A. Ry. Co. v. Kutac*, (Tex.) 18 S. W. 327.

51. An instruction that defendant is entitled to recover if it is not established by a preponderance of evidence that the flagman gave plaintiff permission to cross, is erroneous, in that it takes the question of negligence away from the jury.—*International & G. N. R. Co. v. Dyer*, (Tex.) 13 S. W. 577.

52. Where the evidence conflicts as to the condition of a mule which plaintiff was driving at the time of an accident at a railroad crossing, and there is no evidence that he failed or refused to draw the load across the track, or that his condition contributed to the accident, it is proper to refuse to instruct that if the mule was crippled and unfit for hauling the load placed behind him, and such inability contributed proximately to the accident, it will be imputed to plaintiff.—*International & G. N. R. Co. v. Dyer*, (Tex.) 13 S. W. 577.

53. A charge that plaintiffs cannot recover if deceased's husband, with whom she was riding, could, by the use of ordinary care, have prevented the collision, and if his failure to use such care contributed proximately to the death of deceased, is properly refused.—*Galveston, H. & S. A. Ry. Co. v. Kutac*, (Tex.) 18 S. W. 327.

— Signals.

54. Rev. St. Tex. art. 4232, as amended by Act March 31, 1883, provides that "the whistle shall be blown or the bell rung at the distance of at least 80 rods from the place where the railroad shall cross any public road or street, and such bell shall be kept ringing until it shall have crossed such public road or stopped." The court charged that it was the duty of the railroad company to "keep ringing or blowing" until the street was crossed. *Held*, that the charge was not prejudicial to defendant.—*Gulf, C. & S. F. Ry. Co. v. Anderson*, (Tex.) 13 S. W. 196.

55. Though, as matter of law, where witnesses are of equal credit, positive evidence that the bell on defendant's engine was ringing as it approached the crossing is entitled to more weight than that

of witnesses who say they did not hear it, yet the position and situation of the witnesses, the attention they were giving, and their credibility, are questions for the jury, and hence it is proper to submit to them the ultimate fact as to whether or not the bell was ringing.—*Murray v. Missouri Pac. Ry. Co.*, (Mo.) 18 S. W. 817.

56. In an action against a railroad company for personal injuries sustained at a place where two railroads crossed each other, an instruction that it was the duty of defendant to ring the bell and blow the whistle of its engine, on starting at such crossing, is error, since Rev. St. Tex. art. 4232, relating to railroad crossings, does not require such signals.—*Houston & T. C. Ry. Co. v. Brin*, (Tex.) 18 S. W. 886.

— Watchmen.

57. Where there is evidence that the bell on defendant's engine was not rung, and that a brakeman was not stationed on the rear car, as required by an ordinance, an instruction that, if defendant's failure to keep a watchman at the crossing "directly contributed" to the accident, plaintiff could recover, provided he exercised care in attempting to drive across, is not open to the criticism that it authorizes a recovery if the negligence of defendant "contributed" with that of the plaintiff in producing the injury. It simply means that plaintiff can recover if defendant's failure to keep a watchman "directly contributed" to the injury with its other negligence.—*Murray v. Missouri Pac. Ry. Co.*, (Mo.) 18 S. W. 817.

58. When a city ordinance requires the presence at a railway crossing of a watchman, "who shall display at the cars, in the day-time, a red flag," it is not sufficient if a watchman is present with a flag at the crossing; but he must also warn passers of the danger from approaching trains.—*Wilkins v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 18 S. W. 893.

59. Failure of defendant to have a flagman stationed at a public crossing in a city, as required by its ordinance, is negligence *per se*.—*Murray v. Missouri Pac. Ry. Co.*, (Mo.) 18 S. W. 817.

— Contributory negligence.

60. When a person is attempting to pass at a public crossing between two cars, knowledge on his part that one of the cars is being moved by an engine does not render him guilty of negligence, unless he also knew that the effect of the motion was to shove the cars together.—*Wilkins v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 18 S. W. 893.

61. In an action for injuries received at a railroad crossing, it is a question for the jury whether plaintiff's failure to look for approaching trains was negligence.—*Gulf, C. & S. F. Ry. Co. v. Anderson*, (Tex.) 18 S. W. 196.

62. It is not error to refuse to instruct that a recovery will be precluded by a failure to look and listen before attempting to cross a railroad track on a much-used thoroughfare in a populous city. Following *Railway Co. v. Anderson*, 18 S. W. 196.—*International & G. N. R. Co. v. Dyer*, (Tex.) 18 S. W. 877.

63. Where the evidence conflicts as to whether or not the flagman signaled plaintiff to cross the track, and the court has defined "contributory negligence" to the jury, and instructed that plaintiff could not recover if his negligence contributed to the injury, it is not necessary to instruct that if the flagman warned plaintiff not to cross, or told him that he did so at his peril, plaintiff could not recover if his crossing contributed to the injury.—*International & G. N. R. Co. v. Dyer*, (Tex.) 18 S. W. 877.

64. An instruction that plaintiff would be guilty of negligence if he failed to use such care and prudence in crossing the track as would be exercised under like circumstances by persons of ordinary care and prudence, and that if plaintiff contributed to the injury by his own negligence he could not recover, is sufficient on the question of plaintiff's negligence.—*International & G. N. R. Co. v. Dyer*, (Tex.) 18 S. W. 877.

65. In an action against a railroad company for personal injuries received by one in a collision

with defendant's train while attempting to drive over a public crossing in a city, an instruction that the burden of proving contributory negligence as alleged in the answer is on defendant does not deprive it of the benefit of plaintiff's evidence showing contributory negligence, as the instruction does not require defendant to prove that fact by its own witnesses.—*Murray v. Missouri Pac. Ry. Co.*, (Mo.) 18 S. W. 817.

— Variance.

66. Where the gist of the complaint is that the injury was caused by the negligence of defendant in propelling unguarded cars against other detached cars, forcing them over the crossing, it is immaterial that the injury was not caused by a "flying switch," as alleged, especially where the description following such allegation shows that a "flying switch" was not meant.—*International & G. N. R. Co. v. Dyer*, (Tex.) 18 S. W. 877.

67. Though the petition alleges that the accident occurred on a street crossing, proof that it occurred on a trestle, some distance from the crossing, will not defeat plaintiff's recovery, where the answer alleges that it occurred at the latter place.—*Gulf, C. & S. F. Ry. Co. v. Anderson*, (Tex.) 18 S. W. 196.

— Evidence.

68. Though the petition, in an action for injuries received at a railroad crossing, does not allege that plaintiff's view was obstructed by smoke and steam, evidence that it was so obstructed is admissible in response to a plea of contributory negligence.—*Gulf, C. & S. F. Ry. Co. v. Anderson*, (Tex.) 18 S. W. 196.

69. In an action for the killing of plaintiff's mother by a collision between defendant's train and a wagon in which deceased was riding, evidence of the rate of speed at which the same train was run on the same day, by the same servants, at different places along the road, is admissible on the question of the servants' gross negligence.—*Galveston, H. & S. A. Ry. Co. v. Kutac*, (Tex.) 18 S. W. 827.

Injuries to persons on track.

70. A railroad company cannot be held liable for injuries to persons on its track, simply because the engineer in charge of its train could not have seen such person in time to prevent the injury.—*Houston & T. C. Ry. Co. v. Smith*, (Tex.) 18 S. W. 972.

71. In an action against a railroad company for the wrongful death of a boy 16 years old, the only testimony as to the accident was that of the engineer in charge of the train, who testified that he was running at the usual speed when he first saw deceased lying on his face on the track, about 15 or 20 yards ahead; that he immediately called for brakes, and reversed his engine, but, the rails being wet, the engine slid, and ran over deceased. The accident occurred in a cut where there was no crossing. There was evidence that a body lying on the track at that place could have been seen at a distance of from 150 to 300 yards, but the engineer testified that just before seeing the boy, he was looking at the train, which a rule of the company required him to watch. *Held*, that defendant was not negligent.—*Houston & T. C. Ry. Co. v. Smith*, (Tex.) 18 S. W. 972.

72. Deafness of one about to cross a railroad track imposes on him increased vigilance in the use of his eye-sight; and those operating a train may, in the absence of knowledge, and of any fact that would arouse their suspicions, assume, on seeing him, that he is in the possession of all his senses, and using them for his own safety.—*International & G. N. Ry. Co. v. Garcia*, (Tex.) 18 S. W. 223.

73. It was error to refuse to charge that, if the company's servants used ordinary care to prevent the accident as soon as they became aware, or had reason to believe, that plaintiff would not probably leave the track in time, and that, when they became aware that plaintiff would not move off the track, they used all their efforts, but were unable to stop the train in time to prevent the injury, they were not guilty of negligence.—*International & G. N. Ry. Co. v. Garcia*, (Tex.) 18 S. W. 223.

74. An instruction that the proximate cause of the injury was not the trespass or negligence of plaintiff in going upon or remaining on the track, but the failure of the company's servants to stop or slacken the train when plaintiff's danger was discovered, if in time to prevent the accident or lessen the injury, is misleading, in view of the fact that, though plaintiff was discovered in time to have stopped the train before it reached him, his deafness, and the consequent exposure to danger, were not known till after the accident.—*International & G. N. Ry. Co. v. Garcia*, (Tex.) 13 S. W. 928.

75. Plaintiff's husband was run over by some cars which were detached from the engine, and were being switched to a side track about 1,100 yards long, and nearly straight. On one side of the side track was a saw-mill, and on the other side, about eight feet from the track, was a file-room, in which deceased worked. His business required him to cross the track frequently, going from the file-room to the mill. A brakeman on the cars, which were running faster than usual, after looking ahead, and seeing no one on the track, turned his back. The station engine's whistle had been blown on the arrival of the train, but it was not blown during the time the switch was being made, and the noise from the mill would drown that of the cars. The view of the switch track was somewhat obscured from the door of the file-room, but not so to a person advanced a few feet from the door towards the side track. Deceased came out of the file-room, and could have seen the cars, if he had looked up the track, but he was looking towards the mill; and just as he stepped on the track he was run over. *Held*, that the evidence disclosed a case of contributory negligence.—*Sabine & E. T. Ry. Co. v. Dean*, (Tex.) 13 S. W. 45.

76. Where a person, killed by a railroad train while on the track, was negligent in being there, and the employes in charge of the train could not by the use of ordinary care, after his peril was discovered, have prevented the accident, the railroad company is not liable.—*Houston & T. C. Ry. Co. v. Smith*, (Tex.) 13 S. W. 972.

77. Where plaintiff's injury is caused by his negligence in going on defendant's railroad track in a public street, and by defendant's negligence in running its train faster than allowed by law, plaintiff cannot recover, unless defendant discovered plaintiff's peril, or might, by the use of ordinary care, have discovered it, and then neglected to use the means at his command to prevent the injury; and in such case recovery is granted, not on the ground that defendant's second act of negligence was the sole cause of the injury, but on the ground that defendant is estopped by its recklessness from asserting plaintiff's contributory negligence.—*Kelley v. Missouri Pac. Ry. Co.*, (Mo.) 13 S. W. 806.

78. Plaintiff, while driving along a public street, came to a point where it was blocked with teams for the distance of 50 feet, except in the middle of the street, which was occupied by defendant's railroad track. He drove through this opening, and just as he was turning off at the further end the hind wheel of his wagon was struck by defendant's engine, coming in the same direction he had been driving, and running at the rate of 15 miles an hour. The city ordinance provided that trains should not run faster than 6 miles an hour. *Held* error to charge that plaintiff was guilty of contributory negligence for not looking back to see if a train was coming.—*Kelley v. Missouri Pac. Ry. Co.*, (Mo.) 13 S. W. 806.

79. Deceased, in lying on a track at a place where there was no crossing, and where he knew trains were accustomed to pass about that time, was guilty of contributory negligence.—*Houston & T. C. Ry. Co. v. Smith*, (Tex.) 13 S. W. 972.

Stock-killing cases.

80. In an action against a railroad company for killing stock, the uncontradicted testimony of defendant's witnesses that the killing was unavoidable is sufficient to rebut the statutory presumption of negligence.—*Memphis & L. R. Ry. Co. v. Shoecraft*, (Ark.) 13 S. W. 42.

81. Mansf. Dig. Ark. § 5478, requiring engineers of locomotive engines to ring the bell or blow the whistle before reaching public crossings, and making the railroad company "liable for all damages which shall be sustained by any person by reason of such neglect," includes injuries to cattle.—*St. Louis, I. M. & S. Ry. Co. v. Hendricks*, (Ark.) 13 S. W. 699.

82. Where an engineer fails to ring the bell or blow the whistle, as required by Mansf. Dig. § 5478, the fact that the killing could not have been avoided after the cattle were discovered is not sufficient to remove the presumption of negligence raised by section 5544, which provides that the killing of stock on any railroad shall be *prima facie* evidence of negligence.—*St. Louis, I. M. & S. Ry. Co. v. Hendricks*, (Ark.) 13 S. W. 699.

Fires.

83. Mansf. Dig. Ark. §§ 1953, 1959, providing that if any "hiring" shall willfully set fire to any woods, etc., so as to occasion damage to any other person, with the consent or by the command of his employer, such employer shall be liable, refers to the servants of a railroad company, but not to independent contractors.—*St. Louis, I. M. & S. Ry. Co. v. Yonley*, (Ark.) 13 S. W. 838.

Range.

Driving cattle from, see *Animals*, 1, 2.

RAPE.

Indictment.

1. An indictment for assault to rape, which alleges that the offense was committed "on or about the 8th day of December, one thousand eight hundred and nine," is substantially defective, under Code Crim. Proc. Tex. art. 420, subd. 6, providing that the date alleged must not be so remote that the prosecution of the offense is barred by limitation.—*Reed v. State*, (Tex.) 13 S. W. 865.

Instructions.

2. Where, in the trial on indictment for rape, it appeared that the prosecutrix, at the time the offense was alleged to have been committed, made no outcry, and did not complain for more than a year, it is error to refuse to charge that these circumstances should be taken into consideration with all the other evidence in determining the guilt or innocence of the defendant.—*State v. Witten*, (Mo.) 13 S. W. 871.

3. On a trial for burglary with intent to commit rape, where the court fails to instruct as to the character and degree of force necessary to constitute rape, a finding of intent to commit rape cannot be sustained.—*Williams v. State*, (Tex.) 13 S. W. 609.

4. The jury may convict of rape on the evidence of the prosecutrix alone; and, where there are circumstances tending to support or discredit her, it is not error in the court to refuse to single out certain circumstances, and instruct the jury as to their effect.—*Lynn v. Commonwealth*, (Ky.) 13 S. W. 74.

Ratification.

Of contracts, see *Infancy*, 2-5; *Principal and Agent*, 5.

RECEIVERS.

Appointment.

1. A court of chancery has no authority, on petition of the preferred creditors, with consent of the debtor and the assignee, to put an estate which has been assigned for the benefit of creditors into the hands of a receiver to be sold, on mere allegations that a large part of the assigned goods is perishable, and that the assignee, in administering the trust, will be trammelled by the statute.—*Penzel Grocer Co. v. Williams*, (Ark.) 13 S. W. 786.

Rights of receivers.

2. A receiver cannot, before sale of the goods of the receivership, take an interest therein with

one who intends to purchase them.—*Penzel Grocer Co. v. Williams*. (Ark.) 18 S. W. 736.

Actions.

3. Where a receiver is fully discharged from the receivership, by the court that appointed him, after an action has been commenced against him in his representative capacity, and not for any personal liability, to which the owner of the property has not been made a party, and, under the order of the court, the property in the receiver's hands is restored to its owner free from any further control of the receiver, the owner must be made a party defendant before the trial can proceed, as no judgment can be rendered against the receiver after the termination of his official existence which would bind the owner or the property.—*Brown v. Gay*, (Tex.) 18 S. W. 472; *Same v. Melton*, *Id.* 473.

4. An action against a receiver does not abate because the receiver is discharged and the property restored to its owner, but the owner may be substituted as a party, and the action prosecuted against him.—*Brown v. Gay*, (Tex.) 18 S. W. 472.

5. Where a railroad company, in consideration of a right of way, contracts with the grantor for the erection of a tank on his land for its use, to be supplied with water from his spring, and agrees to pay him therefor, a lien to secure such payment exists on the earnings of the road in the hands of a receiver subsequently appointed, and an action for the breach of such contract will lie, and judgment may be rendered against the receiver, under Gen. Laws Tex. 1887, p. 121, which provides that all causes of action, when determined, existing against a corporation at the time of the appointment of a receiver, shall be paid out of the earnings of the corporation while in his hands, and the same shall be a lien on such earnings.—*Howe v. Harding*, (Tex.) 18 S. W. 41.

Discharge.

6. Where a judgment is recovered against the receiver of a railroad company for injuries sustained through the negligence of his servants, the company is liable on such judgment after the discharge of the receiver, where it has received, in improvements, earnings, out of which the injured person was entitled to have his judgment paid, though he failed to establish his claim by intervening in the suit in which the receiver was appointed, as the decree ordering that the property shall be relieved from liability on claims not established by intervention in such suit does not affect him. *Following Railway Co. v. Johnson*, 18 S. W. 463.—*Texas & P. Ry. Co. v. Griffin*, (Tex.) 18 S. W. 471.

7. Where, in an action against a railroad company for personal injuries, the complaint alleges that plaintiff was in the employ of the receiver of the road, and the answer sets up the discharge of the receiver and redelivery of the property to defendant, and it is admitted that during the receivership all earnings, after paying operating expenses, were applied to improvements on the road, to an amount greater than that sought to be recovered by plaintiff, the pleadings and proof properly present the question whether defendant is liable if the accident occurred under such circumstances as would entitle plaintiff to payment out of the earnings of the road had he recovered judgment pending the receivership.—*Texas & P. Ry. Co. v. Johnson*, (Tex.) 18 S. W. 463.

8. Where the receiver has been discharged by the court appointing him, and the property returned to defendant, the jurisdiction of the court is ended; and an order, in such decree, that the property shall be relieved from any liability on claims not established by intervention in the suit in which receiver was appointed, does not affect defendant's liability for injuries to plaintiff arising from the receiver's negligence, where it has received in improvements earnings out of which plaintiff was entitled to have such damages paid, though his claim is not established by such intervention.—*Texas & P. Ry. Co. v. Johnson*, (Tex.) 18 S. W. 463.

9. The court has no power to require in such decree that claims must be established by inter-

vention within a given time, where that period is not long enough to constitute an equitable bar, since such order is an infringement of the power to fix the limitation of actions, which is vested solely in the legislative branch of the government.—*Texas & P. Ry. Co. v. Johnson*, (Tex.) 18 S. W. 463.

RECEIVING STOLEN GOODS.

Evidence.

1. In a prosecution for receiving personality, knowing it to have been stolen, for the purpose of showing that the property was stolen before defendant was found in possession of it, an indictment charging one H. with the theft of the property, and a judgment of conviction of said person for such theft, are admissible.—*Cooper v. State*, (Tex.) 18 S. W. 1011.

2. That such testimony was introduced after defendant had rested, and was not in rebuttal, did not constitute error; the court having expressly charged the jury that they should consider the testimony for no other purpose than that indicated.—*Cooper v. State*, (Tex.) 18 S. W. 1011.

3. Evidence that, when such indictment was served on H., he said that the only connection which defendant had with the property alleged to have been stolen was as a purchaser in good faith, was properly excluded as hearsay.—*Cooper v. State*, (Tex.) 18 S. W. 1011.

Instructions.

4. On trial of two defendants for grand larceny in stealing ginseng exceeding \$10 in value, which was in two sacks, the only evidence that defendants stole or received the ginseng knowing it to have been stolen was the testimony of a witness that he had purchased ginseng from each of them on different occasions, paying each less than \$10 therefor, though the aggregate exceeded that amount. Gen. St. Ky. c. 29, art. 11, § 8, provides that persons knowingly receiving stolen goods, "the stealing whereof is punished as a felony or misdemeanor," shall be liable to the same punishment as the person stealing the same. *Held*, that the degree of the offense of receiving stolen goods is determined by the value of what is received; and, as the jury may have inferred either that defendants stole the ginseng, or received it knowing it to have been stolen, defendants were entitled to an instruction applicable to such a state of the case as would reduce the offense charged to a misdemeanor.—*Chenault v. Commonwealth*, (Ky.) 18 S. W. 442.

— Possession of stolen goods.

5. An instruction that the possession of property stolen is not positive evidence of guilt, but is a circumstance sufficient to warrant the presumption of guilt of defendant, if the evidence shows that such possession was recent, was personal and exclusive, etc., is objectionable as being on the weight of evidence.—*Cooper v. State*, (Tex.) 18 S. W. 1011.

Recognizance.

See *Bail*.

Reconviction.

See *Set-Off and Counter-Claim*.

Recording.

See *Mortgages*, 14.

Of foreign will, see *Wills*, 21.

RECORDS.

Estoppel by, see *Estoppel*, 3-5.

On appeal, see *Appeal*, 12-23.

Presumptions.

1. Where the record shows the service of a summons and an entry of appearance, in the absence of an averment of fraud, the record must be taken as importing absolute verity.—*Stevenson v. Flournoy*, (Ky.) 18 S. W. 210.

Amendment.

2. The district court has authority, on proper proof, to correct its minutes in any action, even after such action has been removed to the superior court by appeal or writ of error.—*Chestnutt v. Pollard*, (Tex.) 18 S. W. 852.

Redemption.

From foreclosure, see *Mortgages*, 84, 85.

Reformation.

Of contracts, see *Equity*, 5-7.

Regulation of Commerce.

See *Constitutional Law*, 18, 14.

Rehearing.

On appeal, see *Appeal*, 24.

RELEASE AND DISCHARGE.

See, also, *Accord and Satisfaction*; *Payment*.

Of guaranty, see *Guaranty*, 2.

What constitutes.

Where the owner of land through which a railroad company wishes to construct its road takes a position with the company under a parol agreement to "drop the question of damages," such agreement is a bar to a subsequent suit for the damages to his land, though the agreement may have been terminated by the company contrary to its terms.—*Corey v. Chicago, B. & K. C. Ry. Co.*, (Mo.) 18 S. W. 846.

RELIGIOUS SOCIETIES.**Right to hold land.**

1. Mill & V. Code Tenn. § 2008, which provides for the conveyance by the proper church officers of land held for the purpose of public worship, does not enlarge the capacity of an unincorporated local religious association to take personal property under a will probated before the section was enacted.—*Rhodes v. Rhodes*, (Tenn.) 18 S. W. 590.

Actions by trustees.

2. The trustees of a voluntary religious association may, for and in behalf of all the members, sue to establish a will making it a devise.—*Lilly v. Tobbein*, (Mo.) 18 S. W. 1060.

REMOVAL OF CAUSES.**Citizenship.**

1. A petition for the removal of a cause from a state to a federal court, under Removal Act Cong. 1887, alleged that the controversy was wholly between petitioner and plaintiff, who were citizens of different states; that co-defendant was joined solely to defeat the right of removal, and to defraud petitioner of its rights; that plaintiff formerly sued petitioner and co-defendant on the same cause of action, which action he dismissed as to co-defendant, thereby admitting that he had no cause of action against co-defendant, whereupon petitioner procured from the federal court an order of removal; and that plaintiff then dismissed that action, and brought the present one. Plaintiff denied all fraud, and any admission that petitioner alone was liable, and insisted that both defendants were jointly and severally liable. No evidence was offered to support the petition. *Held*, that no cause of removal was shown.—*Chesapeake, O. & S. W. R. Co. v. Hendricks*, (Tenn.) 18 S. W. 696.

Separable controversy.

3. Where a county sued a citizen of Texas and a citizen of Missouri for the cancellation of an alleged fraudulent deed, and the former disclaimed title, and made no further appearance, the controversy was wholly between plaintiff and the citi-

zen of Missouri, and the latter was entitled to a removal to the federal court, under Removal Act Cong. Aug. 18, 1888.—*Reed v. Hardeman County*, (Tex.) 18 S. W. 1024.

Jurisdictional amount.

8. The petition for removal was filed eight days after the passage of the act of March 3, 1887, by which the amount necessary to give the circuit courts jurisdiction was raised from \$500 to \$3,000; and, in evident ignorance of such enactment, petitioner averred that the amount in dispute exceeded \$500 in value. *Held* that, where the record showed that the lands were actually valued at \$25,000, the removal should have been granted, and a judgment rendered after refusal thereof will be reversed.—*Reed v. Hardeman County*, (Tex.) 18 S. W. 1024.

Repeal.

Of statutes, see *Statutes*, 4, 5.

Res Adjudicata.

See *Judgment*, 6-21.

Rescission.

Of contracts, see *Contracts*, 4-6; *Equity*, 8-15. sale, see *Sale*, 9, 10.

Reservation.

See *Indians*.

Respondent Superior.

See *Water Companies*.

Resulting Trusts.

See *Trusts*, 2.

Return.

See *Writs*, 5, 6.

Reversion.

On abandonment of cemeteries, see *Cemeteries*.

RIPARIAN RIGHTS.**Boundaries on navigable waters.**

1. The owner of land on the margin of a navigable stream, holding under a grant from the United States, does not take to the middle of the stream, but to high-water mark, which is determined by the change in the vegetation and the character of the soil, and the beds of all navigable streams, though the tide does not ebb and flow in them, belong to the state.—*St. Louis, I. M. & S. Ry. Co. v. Ramsey*, (Ark.) 18 S. W. 961.

Accretion.

2. Plaintiffs had a patent to land on the bank of a navigable stream. In front of the land lay a gravel bar. The proof showed that 25 years ago the river ran close to the bank, and over the place where the bar now is; that below the bank there is a second bottom; that beyond and six feet below is the gravel bar, and then the water; that the bar had formed slowly for years; that it is not above ordinary high water; that it is 6 or 8 feet below low water, but that 10 to 15 feet is an ordinary high-water rise; that any year the water, at some time, rises 15 to 23 feet; that at ordinary high water steam-boats can pass over the bar; that there are no trees or soil on the bar; that water often rises over it in a single night. *Held*, that the bar was not an accretion to plaintiff's land, but part of the bed of the river.—*St. Louis, I. M. & S. Ry. Co. v. Ramsey*, (Ark.) 18 S. W. 961.

Risk of Employment.

See *Master and Servant*, 29, 30.

Roads.

See *Highways*.

ROBBERY.**Indictment.**

1. An indictment for assault with intent to rob need not describe the property which defendant intended to take, nor aver that defendant intended to deprive the owner of the property of the value of it.—*Crumes v. State*, (Tex.) 18 S. W. 868.

Evidence.

2. It was proper to permit witnesses to state their opinion as to the correspondence of tracks found at and near the place of the attempted robbery with the shoes worn by defendant, and a party who was seen with him the night of the offense; also to state their opinion that the hair found on a fence to which the tracks lead was from a horse which defendant was riding that night.—*Crumes v. State*, (Tex.) 18 S. W. 868.

3. The state having proved by an officer that he secured the pistol in evidence from the house of defendant's father a week after the alleged offense, the defense proposed to prove on cross-examination that the father told the officer at that time that defendant did not have the pistol on the night of the offense. *Held*, properly rejected as being hearsay, and no part of the *res gestæ*.—*Crumes v. State*, (Tex.) 18 S. W. 868.

4. Whether the father delivered the pistol to the officer voluntarily or not was irrelevant.—*Crumes v. State*, (Tex.) 18 S. W. 868.

SALE.

See, also, *Judicial Sales; Vendor and Vendee*.
By mortgage, see *Chattel Mortgages*, 8.
On bailment, see *Bailment*.

What constitutes.

1. The fact that, after an attachment was levied on the property of an assignor for benefit of creditors, the assignee agreed not to sue the creditor therefor upon the latter giving a bond of indemnity, and agreeing to buy up the other claims of the insolvent, does not amount to a sale of the attached goods to the creditor.—*Perry v. Stephens*, (Tex.) 18 S. W. 964.

2. Where a person buys goods under false representations as to his credit, a suit for the price and attachment levied on the goods by the seller, with knowledge of such false representations, is a confirmation of the sale.—*Mansfield v. Wilson*, (Ark.) 18 S. W. 598.

When title passes.

3. Where, under a contract for the sale of logs, the logs are to be of certain kinds of timber, of specified dimensions, free from defects described, and to be rafted in a certain manner, and delivered at a fixed place, and none of these things are done or ascertained previous to the death of the seller, the title does not vest in the purchaser, but in the seller's personal representative.—*Herman v. Whitecover's Adm'r*, (Ky.) 18 S. W. 103.

Delivery.

4. Defendant in attachment, under a contract with the H. L. Co. that it would take lumber of specified dimensions "free on board" the cars at P., and would allow defendant one dollar on each car for loading, loaded three cars, which he consigned to the H. L. Co. Defendant was authorized to draw on the H. L. Co. for what money he might need, and at the time of the consignment was indebted to it for money advanced. The laborers who loaded the lumber, under agreement with defendant, retained the bills of lading to secure their wages. The lumber had been received at the consignee's lumber yard, and was partly unloaded, when the attachment was levied. *Held*, that the loading of the lumber on the cars at P. was a delivery to the H. L. Co. as purchaser.—*Hope Lumber Co. v. Foster & Logan Hardware Co.*, (Ark.) 18 S. W. 731.

Warranty.

5. A contract for printing and binding books implies a warranty that they will be merchantable when delivered.—*Weed v. Dyer*, (Ark.) 18 S. W. 592.

6. Under a contract for printing and binding books, an acceptance of the books with knowledge of their inferior quality is not a waiver of the right to recoup for the defect in an action for the contract price, but it is a circumstance to be weighed by the jury in determining whether there was in fact a breach of warranty.—*Weed v. Dyer*, (Ark.) 18 S. W. 592.

Action for breach.

7. In an action for a breach of warranty, where it is shown that plaintiff agreed to buy of defendant a bull, for a certain price, if, after the application of an agreed test, he should prove to be a breeder, and that defendant represented that the test had been successfully applied, whereas, in fact, the bull was not a breeder, an instruction that the jury need not necessarily believe the defendant guilty of false representations before they could find for plaintiff is proper.—*Bedford v. Megibben*, (Ky.) 18 S. W. 1062.

8. Where plaintiff alleged a special warranty to be based on a given test, and defendant denied that the test to be applied was that alleged by plaintiff, and set up a different test, and there is evidence tending to support the contention of each, an instruction that if the jury found that there was a general warranty, and a breach thereof, they should find for plaintiff, is erroneous.—*Bedford v. Megibben*, (Ky.) 18 S. W. 1062.

Rescission.

9. A false statement as to its financial condition, given by an insolvent firm to a mercantile agency, with a view to obtaining credit from third persons, is a statement of material facts, and not a mere expression of opinion; and a subscriber to such agency, who sells the firm goods on the faith of such statement, may cancel the sale, and recover the goods.—*Gainesville Nat. Bank v. Bamberger*, (Tex.) 18 S. W. 959.

10. Where one has been induced to sell goods on credit to a firm, on the faith of a false statement as to its assets and liabilities, made by a partner having full opportunity to know that it was false, the seller may avoid the sale, and recover the goods from any one not a *bona fide* purchaser; and if the goods have been disposed of the seller can recover their value.—*Morrison v. Adoue*, (Tex.) 18 S. W. 166.

Refusal to accept goods—Resale.

11. Where the seller elects to resell the goods which the buyer has refused to accept, the buyer's knowledge of the legal right to resell, resulting from his refusal to comply with the contract, is a sufficient notice to him of the intention to resell to entitle the seller to recover the damages sustained by a resale.—*Waples v. Overaker*, (Tex.) 18 S. W. 537.

12. The seller's right to resell goods which the buyer refuses to accept is not restricted to the place where the buyer ought to receive the goods, but he may sell in a distant market, provided he exercises good faith, and tries to realize the best price he can on a resale.—*Waples v. Overaker*, (Tex.) 18 S. W. 537.

Action for price—Defense.

13. In an action on a note given for the price of a chattel bought for a particular purpose, whether on an express or implied warranty, with or without fraud, it is not necessary that the purchaser should return the article, or offer to return it, or rescind the contract, or that such article should be wholly worthless, in order that he may avail himself of his plea of a failure of consideration; but if he retains the article, and does not offer to return it, and such article is not wholly worthless, such plea can avail him only to the extent of the difference between the value of the article, had it been what it was represented to be, and its value such as it is shown to be.—*Brown v. Weldon*, (Mo.) 18 S. W. 342.

Bona fide purchasers.

14. Where a sale of goods is induced by the fraudulent representations of the vendee, one who takes the goods from the latter solely in payment of pre-existing debts is not a *bona fide* purchaser,

though he may have been ignorant of such representations.—*Morrison v. Adoue*, (Tex.) 18 S. W. 166.

SCHOOLS AND SCHOOL-DISTRICTS.

School lands, see *Public Lands*, 8-6.

Incorporation.

1. Under Sayles' Ann. St. Tex. art. 541d, which authorizes "towns and villages" to incorporate for school purposes only, a tract of land containing 28 square miles, not more than two of which are covered by a town, cannot be incorporated as a town for school purposes only.—*State v. Eidson*, (Tex.) 18 S. W. 268.

Officers.

2. The provision of Mansf. Dig. Ark. § 6206 as amended by Act Ark. April 4, 1887, requiring school directors, in order to qualify, to subscribe the oath of office, and file it with the clerk, is mandatory. A verbal oath is not sufficient.—*School-Dist. No. 42 v. Bennett*, (Ark.) 18 S. W. 182.

3. Mansf. Dig. Ark. § 6206, relating to the election of directors of school-districts, as amended by Act Ark. April 4, 1887, provides that any person so elected shall within 10 days file his acceptance of the office with his predecessor, subscribe the oath of office, and file it with the county clerk, and enter at once upon the duties of the office. *Held*, that the requirement of the statute that the officers holding the election should make a return of the result to the county clerk 10 days before the meeting of the county court for the purpose of levying taxes, does not imply that the county court shall canvass the return, and certify to the result, and that the term of office of the director so elected begins as soon as he has qualified as required by the terms of the act.—*School-Dist. No. 42 v. Bennett*, (Ark.) 18 S. W. 182.

Contracts.

4. A contract made by two of three directors of a school-district at a meeting held at a time different from the time fixed for regular meetings, and of which the third director had no notice, is not binding on the district.—*School-Dist. No. 42 v. Bennett*, (Ark.) 18 S. W. 182.

Non-resident pupils.

5. Act Ky. March 2, 1888, establishing public graded schools in Carlisle, (section 16,) authorizes the trustees to admit children residing outside of the district, "upon such terms and conditions, and upon payment of such charges, as the said board may deem right." *Held* that no objection can be made to the admission by the trustees of non-resident children upon payment of tuition.—*Rogers v. Trustees Graded School*, (Ky.) 18 S. W. 587.

Taxation.

6. Act Ky. March 2, 1888, to establish public graded schools in Carlisle, appointed trustees, with authority to issue bonds of the district, not exceeding \$12,000, for the purchase of grounds and buildings, and to levy a property tax not exceeding 50 cents on the \$100, and a poll-tax not exceeding \$2, to pay teachers and maintain schools, said measures to be approved by a majority of the voters at an election ordered for that purpose. *Held*, an issue of bonds for a lesser amount, and the levy of a tax at a lesser rate, when so approved, are valid.—*Rogers v. Trustees Graded School*, (Ky.) 18 S. W. 587.

Scire Facias.

See *Judgment*, 28, 29.

Seal.

When required, see *Assignment for Benefit of Creditors*, 5.

SEDUCTION.

Criminal prosecution—Evidence.

1. The fact that prosecutrix testified that defendant always forced her does not render the evi-

dence demurrable as showing another crime, where the circumstances testified to by her tend to show that force was not used.—*State v. Stratman*, (Mo.) 18 S. W. 814.

—Instructions.

2. Error cannot be predicated of the court's charge that, before the jury could acquit because a higher degree of crime had been shown, they would have to believe from the evidence that, if defendant were on trial for such higher degree of crime, then it would be their duty from such evidence to convict defendant of such higher degree of crime, if they believed such evidence to be true; especially where any possible ambiguity there might be in the words "higher degree of crime" is explained by another charge that they should acquit if they found that defendant accomplished his object by force, and the prosecutrix only yielded to his superior strength.—*State v. Stratman*, (Mo.) 18 S. W. 814.

—Seduction of ward.

3. Under Rev. St. Mo. 1879, § 1260, providing that, "if any guardian of any female under the age of 18 years, or any other person to whose care or protection any such female shall have been committed, shall defile her by carnally knowing her while she remains in his care, custody, or employment," he shall be punished, a conviction may be had of one in whose family such female was employed to look after his children; there being evidence that he promised her father to give her clothing and board, and send her to school, and treat her like one of his children.—*State v. Stratman*, (Mo.) 18 S. W. 814.

4. It is no defense to a prosecution under the statute that the female was unchaste.—*State v. Stratman*, (Mo.) 18 S. W. 814.

Sentence.

See *Criminal Law*, 69-78.

Separable Controversy.

See *Removal of Causes*, 2.

Separation.

Of husband and wife, see *Husband and Wife*, 21.

SEQUESTRATION.

Pleading—Intervention.

1. A plea that the intervenor, in sequestration proceedings, shows no cause why he should be permitted to intervene, and that the petition is insufficient in law, amounts only to a general demurrer, and is not sufficient to raise the objection that no oath and bond were filed.—*Irvin v. Ellis*, (Tex.) 18 S. W. 22.

2. A petition for intervention in sequestration proceedings, alleging that the intervenor was the owner and in possession of the property when seized under the writ of sequestration, and taken from his possession, and given to plaintiff, is sufficient on general demurrer.—*Irvin v. Ellis*, (Tex.) 18 S. W. 22.

3. A declaration by the intervenor to the sheriff, after the sequestration, that the property did not belong to him, will not estop him from intervening to claim the property.—*Irvin v. Ellis*, (Tex.) 18 S. W. 22.

Service of Process.

See *Writs*, 1, 2.

SET-OFF AND COUNTER-CLAIM.

When allowable.

1. In an action by the vendor of land on the purchase-money notes, the vendee may set off damages accruing to him from the wrongful act of the grantor in tearing down a fence inclosing part of the land, and temporarily ejecting him

therefrom.—*Apperson's Adm'r v. Triplett*, (Ky.) 18 S. W. 791.

Against insolvent—Debt not due.

2. A bank has the equitable right to set off, against deposits made with it by an insolvent before making an assignment for the benefit of creditors, a debt due it from the insolvent which at the time of the assignment was not yet due.—*Kentucky Flour Co.'s Assignee v. Merchants' Nat. Bank*, (Ky.) 18 S. W. 910.

Settlement.

See, also, *Accord and Satisfaction; Payment; Release and Discharge.*

Of executors, etc., see *Executors and Administrators*, 15-20.

SHERIFFS AND CONSTABLES.

Action for wrongful levy, see *Venue in Civil Cases*, 1, 2.

Powers—Retirement from office.

1. A special execution, under an order of condemnation, for the sale of attached property in the possession of a sheriff whose term has expired, should run to his successor. *Mansf. Dig. Ark. § 8081*, providing that where an officer has levied on goods under an execution, and his term shall expire before a sale thereof, he shall have power to do all things in relation to such execution and sale as if his term had not expired, applies only where such officer's duties under a writ are incomplete when his term expires.—*State v. Atkinson*, (Ark.) 18 S. W. 415.

Duties and liabilities.

2. *Mansf. Dig. Ark. §§ 5882-5844*, makes it the duty of the sheriff to settle for the taxes collected by him at each regular term of the county court, and to render his account for the same. On failure to account and settle, the county court is empowered to adjust the account according to the best information obtainable, and ascertain the balance due the county. *Held* that, a sheriff having failed and neglected to render an account of taxes collected, or make any settlement, a cause of action against the sheriff for taxes collected did not accrue until the adjusting of the account by the county court, within the meaning of *Mansf. Dig. Ark. § 4481*, requiring actions against sheriffs upon any liability incurred by them in the discharge of an official duty, or the omission of such duty, to be brought within two years after the cause of action accrued.—*Fride v. State*, (Ark.) 18 S. W. 135.

Unlawful seizure.

3. In an action against a sheriff for the seizure of goods conveyed to plaintiff, under an averment in the answer that the debt in consideration of which the goods were conveyed to plaintiff was fictitious, evidence of a counter-claim of the debtor against plaintiff is admissible.—*Freybe v. Tiernan*, (Tex.) 18 S. W. 870.

Failure to execute process.

4. A sheriff cannot be held guilty of a breach of his bond in failing to sell attached property in his possession under an order of condemnation directing such sale, unless a legal demand has been made on him for an execution of the order.—*State v. Atkinson*, (Ark.) 18 S. W. 415.

5. Where a special execution is improperly issued to a sheriff after his term has expired, his failure to execute it is no breach of his bond.—*State v. Atkinson*, (Ark.) 18 S. W. 415.

6. A debtor, being in failing circumstances, undertook, by confessions of judgment, to prefer certain creditors. He employed F. as attorney to prepare the necessary statements, and enter the confessions of judgment, and levy executions for such creditors, among whom was relator. F. entered the confessions in favor of seven creditors, and directed the sheriff to levy the executions, five of them simultaneously, and for the relator last. The creditors were notified, and a few days after relator applied to F. for an order on the

sheriff, directing him to levy his execution on certain other property belonging to the debtor. Afterwards, learning that his execution had been levied subject to the other creditors as to the property first levied on, he employed other attorneys, and through them demanded that the sheriff should so amend the return as to show that relator's execution was levied simultaneously with the others. This the sheriff refused to do, and made the sale in accordance with the levies as first made. *Held* that, by recognizing the authority of F. to enter confession of judgment in his favor, the relator ratified all the acts done in such connection, and was bound by the levies made under F.'s directions.—*State v. Harrington*, (Mo.) 18 S. W. 898.

Failure to pay over collections.

7. In an action against a sheriff by those claiming under defendants in execution, for failure to pay over the proceeds of property sold under execution in excess of the debt, it is not error to exclude evidence that defendant actually received more cash than appears by his return, when the amount for which the property sold is admitted; that being the sum for which he was bound to account, whether he received the money or not.—*State v. Finn*, (Mo.) 18 S. W. 712.

Actions on bonds.

8. In an action on a sheriff's bond, to recover damages for the loss of plaintiffs' judgment by the sheriff's failure to safely keep the property attached to satisfy it, the complaint alleging such neglect, and setting forth the amount of the judgment and the value of the attached property, which exceeds the judgment, is sufficient, though it does not state that plaintiffs lost their debt by such neglect.—*State v. Atkinson*, (Ark.) 18 S. W. 415.

SHIPPING.

Injuries to passengers.

1. In an action against a company owning a tug-boat, where the petition alleges that defendant was a common carrier of passengers, and that the child of plaintiffs was killed while a passenger on the boat, an answer averring that the boat was not a passenger boat, and that the employees of the company were forbidden to carry any one as a passenger, is sufficient.—*Cook v. Houston Direct Nav. Co.*, (Tex.) 18 S. W. 475.

2. When the petition also alleges that the company was guilty of negligence in receiving the child on board of the boat without the consent of plaintiffs, it is error to charge that plaintiffs cannot recover unless the child was a passenger on defendant's boat.—*Cook v. Houston Direct Nav. Co.*, (Tex.) 18 S. W. 475.

3. If the child was on board with the consent of plaintiffs they cannot recover.—*Cook v. Houston Direct Nav. Co.*, (Tex.) 18 S. W. 475.

4. If the crew permitted the child to come on board without the consent of plaintiffs, the fact that it was against the orders of defendant, and without the knowledge of the officer in charge of the boat, is not sufficient to relieve defendant from liability.—*Cook v. Houston Direct Nav. Co.*, (Tex.) 18 S. W. 475.

5. Whether a child who was injured on board defendant's tug-boat, and who was between 13 and 14 years of age, had the intelligence of an ordinary adult to perceive and avoid the dangers of the situation, is a question for the jury.—*Cook v. Houston Direct Nav. Co.*, (Tex.) 18 S. W. 475.

6. Though the child had not the intelligence of an adult, yet, if she did not act with the ordinary prudence of a person of her intelligence, she is guilty of contributory negligence.—*Cook v. Houston Direct Nav. Co.*, (Tex.) 18 S. W. 475.

Signature.

Of indictment, see *Indictment and Information*, 1, 2.

Slander.

See *Libel and Slander*. Digitized by Google

Slavery.

Legitimizing children of slaves, *see Marriage.*

Societies.

See Building and Loan Associations; Religious Societies.

SPECIFIC PERFORMANCE.**Requisites of contract.**

1. In an action for specific performance, and for the recovery of land, it appeared that D. conveyed the land to defendant in trust for plaintiff, subject to the payment of a debt; that plaintiff paid the debt, and D. executed a deed to plaintiff authorizing defendant to convey to plaintiff. Defendant, claiming that plaintiff owed him certain sums for attorney's fees expended by him in perfecting title to certain lands, refused to convey. It did not appear, however, that the transaction set up by defendant had any connection with the land in controversy. *Held*, that plaintiff was entitled to a decree vesting title to the land in him. —Cook v. Cook, (Tex.) 13 S. W. 847.

2. A father and son purchased land on credit, and the son afterwards paid the purchase price under a verbal agreement that he should have the land. He soon after exchanged that tract for another, on which he made permanent improvements, and occupied it as his own for 15 or 16 years; the father always recognizing his right to it, and expressing his willingness to make a deed to him. *Held*, that the verbal agreement, coupled with the making of permanent improvements and long occupation, vested title in the son to the land received in exchange. —Anderson v. Horn, (Tex.) 13 S. W. 24.

Spirituuous Liquors.

See Intoxicating Liquors.

STATES AND STATE OFFICERS.

License to operate ferry, *see Ferry, 1.*

State treasurer—Bonds.

The failure of the auditor and secretary of state to make proper monthly and biennial settlements with the state treasurer, as required by law, whereby the latter was able to appropriate money of the commonwealth to his own use, and to conceal the fact, does not release sureties on the treasurer's bond, it being conditioned that the treasurer should "faithfully and diligently discharge all the duties appertaining to his office." —Commonwealth v. Tate, (Ky.) 13 S. W. 113.

STATUTES.

Titles of laws, *see Constitutional Law, 4-6.*

Enactment.

1. After an act has been passed by the legislature, signed by the proper officers of each house and by the governor, and filed in the office of the secretary of state, and published as a law, the presumption is conclusive that the act is the same as was enacted by the legislature, and neither the legislative journals, nor any other evidence, can be received to show the contrary. —In re Tipton, (Tex.) 13 S. W. 610.

Amendment.

2. By the act of 1887, portions of the special act (Act Mo. Feb. 13, 1883) creating the school board of St. Louis are repealed or modified, but the sections repealed are not mentioned, nor are the sections modified set out in their modified form. *Held* not a violation of Const. Mo. art. 4, § 34, declaring that no act shall be amended by providing that designated words be stricken out or certain words inserted, but "the act or section amended shall be set forth in full as amended," because the city nge

is not by inserting or striking out designated words, but is, in effect, a repeal by implication. —State v. Miller, (Mo.) 13 S. W. 677; Same v. Macklin, Id. 680.

3. The constitution of Texas does not limit the power of the legislature, in enacting laws, to enactments by amendment of the Code, under Const. Tex. art. 3, § 36, which provides that "no law shall be revived or amended by reference to its title, but in such case the act revived or the section or sections amended shall be re-enacted and published at length." —Washington v. State, (Tex.) 13 S. W. 606.

Repeal.

4. Act Ky. March 17, 1870, relating to the submission of "questions of taxation to the popular vote," and declaring that if more than one question of taxation is voted on at any one election such tax shall be void, is not repealed, as to companies previously in existence, by Gen. St. Ky. art. 17, c. 23, § 2, (under the title of "Courts,") containing a direction to the county judge as to the manner in which a proposition to take stock in a railroad company is to be submitted, as such statute is not, by its terms, retrospective. —Christian County Court v. Smith, (Ky.) 13 S. W. 276.

5. Mansf. Dig. Ark. § 1755, (part of Act Feb. 11, 1875, "An act prescribing and defining the duties of justices of the peace in certain cases," the prime object of which is to give information to grand juries,) provides that justices shall make a detailed statement of all cases tried by them. Section 5363 (part of the revenue act of 1883) requires a report of such cases only as resulted in the imposition of a fine or forfeiture. This act contains no express repeal of the former law, and at the time the former law was passed, (Gantt's Dig. Ark. § 5291,) a provision of the revenue law identical with section 5363 was in force. *Held*, that section 5363 did not repeal section 1755. —State v. Kirk, (Ark.) 13 S. W. 925.

Stock.

Killed by locomotive, *see Railroad Companies, 80-82.*

Street.

See Municipal Corporations.

SUBROGATION.**Of sureties on guardians' bonds.**

1. Under Const. Ark. art. 9, § 3, providing that the homestead is not exempt from levy for debts due in his fiduciary capacity by the trustee of an express trust, and expressly mentioning a guardian as such a trustee, sureties on the bond of a deceased guardian are entitled to subrogation to the right of the wards to subject the homestead of the guardian to sale for the payment of claims owing by him in his fiduciary capacity. —Luck v. Atkins, (Ark.) 13 S. W. 1097.

2. Sureties on the bond of a deceased guardian are entitled to subrogation to the rights of the wards to subject the guardian's homestead to sale for the payment of claims owing by him in his fiduciary capacity. And where the deceased guardian was the father of the wards, and they were his sole heirs, such right of subrogation may be made available to defeat an action by the wards against the sureties on a claim due from the father as guardian. —Luck v. Atkins, (Ark.) 13 S. W. 1097.

To vendor's lien.

3. Where a person loans money on a homestead, such loan being invalid, but, before paying over the money, he has part of it applied to discharge a vendor's lien on the land, he is entitled to subrogation to all the rights of the vendor. —Texas Land & Loan Co. v. Blalock, (Tex.) 13 S. W. 12.

4. Where the vendee of land gives his note for the purchase price, and afterwards pays the note from the proceeds of property belonging to his minor children, the children, though not entitled to a resulting trust in the land, become subrogated

to the vendor's lien.—*Oury v. Saunders*, (Tex.) 18 S. W. 1080.

Substitution.

Of parties, see *Parties*, 10-12.

Summons.

See *Writs*.

Supersedeas.

On appeal, see *Appeal*, 62.

Surveys and Surveyors.

See *Public Lands*, 18-16.

Surviving Partners.

See *Partnership*, 9-18.

Swamp Lands.

See *Public Lands*, 2.

TAXATION.

See *Constitutional Law*, 15-19; *Schools and School-Districts*, 6.

Collector, deputies, see *Office and Officer*.

Failure of sheriff to account for taxes, see *Sheriffs and Constables*, 2.

Of railroad, see *Railroad Companies*, 14-25.

Limitation of power.

1. Const. Mo. 1875, prescribing a limit to taxation, applies only to taxes for years subsequent to its adoption, and does not affect the validity of levies made after its adoption for years prior thereto.—*State v. Hannibal & St. J. R. Co.*, (Mo.) 18 S. W. 406.

Taxable property.

2. Credits are taxable at the place of residence of the owner, and not at the place of deposit. Following *Ferris v. Kemble*, 12 S. W. 689.—*Connor v. City of Waxahachie*, (Tex.) 18 S. W. 80.

Corporate stock.

3. Where the sole defense made to an information under the "Auditor's Agent Act" Ky. April 29, 1880, to compel defendant to list shares of corporate stock owned by him, for taxation, is that the stock is not liable to taxation, an objection that the information proceeds for an assessment of the shares of stock as such, for taxation, while, if taxable at all, they are by law taxable as surplus wealth only, is waived.—*Whitaker v. Brooks*, (Ky.) 18 S. W. 855.

4. Stockholders in corporations not included in Gen. St. Ky. c. 92, art. 12, which required certain corporations to report and pay taxes on their property, and section 8 of which enacted that the individual stockholders of the companies therein referred to should not be required to list their shares in such companies for taxation, were individually liable for taxes on their shares of stock prior to Act Ky. April 22, 1884, which made all corporations subject to that statute.—*Whitaker v. Brooks*, (Ky.) 18 S. W. 855.

5. The act of April 22, 1884, took effect from its passage, changed the mode of assessment, and repealed all inconsistent laws. Assessors were not then required to return their lists until May 1st in each year. By chapter 92, art. 12, corporations had been required to report their lists by July 10th. Held, that the act of 1884 applied to taxation for that year.—*Whitaker v. Brooks*, (Ky.) 18 S. W. 855.

6. Under the Act of 1884, the stockholders are not liable to taxation on their stock, though the corporation has not reported and paid taxes on its property.—*Whitaker v. Brooks*, (Ky.) 18 S. W. 855.

Exemptions.

7. Const. Tex. art. 11, § 9, exempting from taxation the "property of counties, cities, and towns owned and held only for public purposes," applies

to county school lands; and, where such lands are held under a lease from the county, they cannot be taxed as the property of the lessee. Following *Daugherty v. Thompson*, 9 S. W. 99.—*Davis v. Burnett*, (Tex.) 18 S. W. 618.

Assessment and levy.

8. An assessment is not invalidated by the fact that the property was added by the assessor to the inventory of the tax-payer's estate at the direction of the board of equalization.—*Connor v. City of Waxahachie*, (Tex.) 18 S. W. 80.

9. A levy of a tax by the county court to pay township funding bonds gives rise to a presumption that a preliminary order had been previously obtained from the circuit court directing the county court to levy the tax, as provided by Rev. St. Mo. 1879, § 6799.—*State v. Hannibal & St. J. R. Co.*, (Mo.) 18 S. W. 505.

10. The Hewitt bill (Gen. St. Ky. c. 92, art. 1, § 12) provides that personal property of every kind shall be separately stated and valued, and that "the assessor, after having listed all the property required to be listed above, shall require each person, on oath, to affirm the amount he or she is worth from all other sources, after taking out his or her indebtedness from said amount." Article 6, § 27, provides for the list or tax-book, which enumerates every species of property, and also requires the tax-payer to give "the value of all other property, after deducting debts." The statute further provides that personal estate, for the purpose of taxation, includes intangible, as well as tangible, property. Held, that no deduction can be made from the property enumerated in the list, and, as it embraces all known kinds, the provision relating to the deduction of debts is nugatory.—*Clark v. Belknap*, (Ky.) 18 S. W. 212.

11. Though the valuation of the property may be fixed by the assessor, he has no authority to list it of his own accord, on refusal of the tax-payer to do so, but must report the fact to the supervisors, as required by the statute.—*Clark v. Belknap*, (Ky.) 18 S. W. 212.

Equalization.

12. Acts of two members of a board of equalization are valid, without co-operation of a third.—*Connor v. City of Waxahachie*, (Tex.) 18 S. W. 80.

Collection—Injunction.

13. Gen. St. Ky. (Ed. 1873.) c. 92, art. 8, §§ 3, 8, require the sheriff to give bond each year for collection of the revenue and dues, and the bond stipulates that he shall, during the year, by himself or deputies, collect, account for, and pay into the state treasury, or to the proper person, all taxes and public dues. On his failure to do so by a specified time, he and his sureties shall be liable therefor, and the commonwealth shall have a lien on his land which shall not be discharged until he has obtained a quietus. Held, that a sheriff was entitled to a quietus for taxes with which he had become chargeable during his term, but which he had been enjoined from collecting by order of court.—*Commonwealth v. Masonic Temple Co.*, (Ky.) 18 S. W. 121.

14. Gen. St. Ky. (Ed. 1873.) c. 92, art. 8, §§ 3, 8, require the sheriff to give bond each year for the collection of the revenue and dues, and the bond stipulates that he shall, during the year, collect, account for, and pay into the treasury or to the proper person all taxes and public dues. Held, that, an injunction against the collection of the taxes not having been dissolved by the appellate court until after the expiration of the term of office of the sheriff who was chargeable therewith, his successor has authority, under the statute, to collect the same.—*Commonwealth v. Masonic Temple Co.*, (Ky.) 18 S. W. 121.

Non-payment—Forfeiture.

15. A forfeiture to the state, for non-payment of taxes, of a particular quarter section of land, will not divest title to the land, when the taxes on it have been duly paid under the description, "blocks 73 and 74, town of B," that being sufficient to identify it.—*Kelly v. Salinger*, (Ark.) 13 S. W. 596.

Donation of farm lands.

16. Act Ark. March 14, 1879, which revises the whole subject of donation of farm lands forfeited to the state for non-payment of taxes, and which permits the state to donate such lands to any adult citizen of the United States, "subject to the conditions hereinafter mentioned," but which mentions no condition obliging the donee to pay for improvements on the land, repeals Act Ark. Dec. 28, 1840, § 8, (Mansf. Dig. § 4250,) which provides that the donee of improved land forfeited to the state shall pay the person owning the improvement double its value.—*Thomas v. Joyner*, (Ark.) 13 S. W. 391; *Winter v. Arnold*, Id. 509.

Tax-titles.

17. A tax-deed, executed by the collector of Kansas City, which fails to recite that the tax-sale, when first begun, was "publicly" held, is not executed "substantially" as provided by the Kansas City charter, art. 6, § 64; and one claiming under such a tax-deed is not entitled to be repaid, on recovery of the premises by an adverse claimant, the amount paid at the tax-sale, together with 10 per cent. penalty, and interest at the rate of 24 per cent. per annum from the day of sale, as provided by section 65, since that section requires the tax-deed to be executed "substantially as provided" in section 64.—*Bingham v. Delougherty*, (Mo.) 13 S. W. 208.

18. Mansf. Dig. Ark. §§ 5780, 5781, providing that, if land sold for taxes shall remain unredeemed for two years, the clerk of the county court shall execute a deed to the purchaser, which shall be "*prima facie* evidence" that the county officers have performed all duties required to make a valid title, cannot prevent the owner from showing that the sale was void because not made on a day appointed by law.—*Taylor v. Van Meter*, (Ark.) 13 S. W. 699.

19. A donation deed from the state, executed after the land had been sold for taxes under a decree condemning the land under the overdue-tax law, (Laws Ark. 1881,) conveys no title to the donee, as the state's interest has already been divested by the sale.—*Miller v. Reynolds*, (Ark.) 13 S. W. 597.

20. Where land is sold for taxes, and a decree confirming the sale is made by a court not legally constituted, but afterwards a deed is executed in pursuance of the sale by order of the proper court, and an order for the possession entered, it amounts to a confirmation of the sale, and validates the title.—*Miller v. Reynolds*, (Ark.) 13 S. W. 597.

21. Defendants in a tax-suit received no personal service of the summons, and put in no appearance. An order of publication was made on the false return of the sheriff that defendants could not be found. The judgment which was entered for a sum in excess of that recited in the order of publication was vacated on motion at a subsequent term. *Held*, that the title of purchaser under the execution sale, without notice of the irregularities, was good.—*Schmidt v. Neimeyer*, (Mo.) 13 S. W. 405.

22. Defendant, having obtained a donation certificate for lands forfeited to the state for taxes, made a contract with a tenant already in possession under another person claiming as landlord, by which the tenant agreed to hold under defendant. Within 18 months the tenant cleared and put in cultivation 10 acres of the land, and defendant made proof of that fact, in compliance with Act Ark. March 14, 1879, prescribing the method of acquiring state lands forfeited for taxes. There was no evidence that the former landlord had any title, as it was admitted that the lands had been forfeited. *Held*, that it was not necessary that defendant should have dispossessed the tenant in order to get the benefit of his improvements, since, the former landlord having no claim, the contract between him and the tenant was against public policy, and the rule that a tenant cannot deny his landlord's title has no application to such case.—*State v. Hicks*, (Ark.) 13 S. W. 704.

23. It was not necessary that defendant or the tenant should have resided on the land, since the statute (Act Ark. March 14, 1879) provides that if

the applicant, "instead of residing thereon, has cleared, fenced, and put in readiness for cultivation ten acres," within 18 months from the date of his application, he shall be entitled to a deed.—*State v. Hicks*, (Ark.) 13 S. W. 704.

Erroneous taxation—Injunction.

24. Injunction is the proper remedy to prevent the collection of an illegal tax. Following *Galveston Co. v. Gas Co.*, 10 S. W. 583.—*Davis v. Burnett*, (Tex.) 13 S. W. 613.

25. It is not necessary, before seeking to enjoin the collection of an illegal tax on county school lands, for plaintiff to show that he first applied for relief to the board of equalization, as the jurisdiction of the board extends only to questions of valuation.—*Davis v. Burnett*, (Tex.) 13 S. W. 613.

Tax-Titles.

See *Taxation*, 17-23.

TELEGRAPH COMPANIES.

What constitutes delivery.

1. A telegraph company which has received a message directed to one person in the care of another, and has tendered it to the person in whose care it was to be delivered, is under no obligation, on his refusing to receive the message, to find the addressee, and deliver it to him.—*Western Union Tel. Co. v. Young*, (Tex.) 13 S. W. 985.

Failure to deliver message.

2. A telegraph company which negligently failed to deliver two telegrams announcing the illness, death, and date of the funeral of plaintiff's father is liable to plaintiff in substantial damages for the injury to his feelings, without proof of physical pain or pecuniary loss.—*Chapman v. Western Union Tel. Co.*, (Ky.) 13 S. W. 880.

3. The loss of a note which plaintiff avers his father would have given him, had he been able to see him before his death, is a consequence too remote to sustain a claim for damages.—*Chapman v. Western Union Tel. Co.*, (Ky.) 13 S. W. 880.

4. In an action for failure to deliver a message summoning a physician to attend plaintiff's wife, who died two days later, plaintiff cannot recover for loss of his wife's services where there is no evidence that her life could have been saved had the message been promptly delivered.—*Western Union Tel. Co. v. Kendzora*, (Tex.) 13 S. W. 966.

5. Plaintiff delivered to a telegraph company for transmission a message as follows: "R., [addressed.] Meet me in C. Saturday night. S.;" which was not delivered to R., and plaintiff brought an action against the company, alleging that by its negligence he was put to expense in hiring a conveyance to go from C. to R.'s home, and back again; that by loss of time he failed to meet important engagements; and that, by reason of exposure, his health was greatly impaired. *Held*, that the petition was bad on demurrer, the damages being too remote, conjectural, and not in contemplation of the parties, in case of a breach of the contract.—*Western Union Tel. Co. v. Smith*, (Tex.) 13 S. W. 169.

Presentation of claim.

6. Where the sender of a telegram presents, in accordance with the contract with the telegraph company, a claim for damages for failure to deliver the message, and classifies the damages as "\$50 actual damage, and \$5,000 exemplary damage," such classification does not prejudice him so as to prevent his recovering over \$50 in actual damage, and nothing as exemplary damage.—*Western Union Tel. Co. v. Morris*, (Tex.) 13 S. W. 888.

Delay in delivery.

7. In the absence of other notice than the message itself, a telegraph company is not liable to a husband for the mental suffering of his wife, caused by its delay in delivering a message addressed to the husband, requesting him to come with "Ferdinand" to the latter's father, who was very low, though the agent to whom the message was transmitted knew that the information re-

lated to the wife's father.—*Western Union Tel. Co. v. Kirkpatrick*, (Tex.) 13 S. W. 70.

Mistake in transmission.

8. A stipulation by a telegraph company that it will not be liable for errors in an unrepeatable message is valid, and a verdict and judgment whereby plaintiff recovered \$35,000 for mistake in the transmission of such a message, sent under such stipulation, were erroneously rendered.—*Western Union Tel. Co. v. Hearn*, (Tex.) 13 S. W. 970.

TENANCY IN COMMON AND JOINT TENANCY.

Recovery of land.

Tenants in common cannot recover an entire tract of land in which they claim a certain undivided interest, where defendant shows adverse possession as to part of it against some of them.—*Allen v. Peters*, (Tex.) 13 S. W. 767.

TENDER.

Effect.

1. Where a defendant admits indebtedness in a certain amount, of which he has made no tender before suit, it is error to render judgment for a less amount, and to apportion the costs.—*Berry v. Davis*, (Tex.) 13 S. W. 978.

2. Under *Mansf. Dig. Ark.* § 5179, providing that judgment shall be entered for the party entitled thereto on the face of the pleadings, though a verdict has been found against him, plaintiff is entitled to judgment for the amount admitted to be due and paid into court by defendant, and costs till the time of deposit, though there has been a verdict for defendant.—*Rhodes v. Andrews*, (Ark.) 13 S. W. 423.

Testamentary Capacity.

See *Wills*, 1-7.

Time.

For preparing and filing record on appeal, see *Appeal*, 21-23.

Title.

Color of, see *Adverse Possession*, 10.

Of laws, see *Constitutional Law*, 4-6.

To support ejectment, see *Ejectment*, 1-3.

Torts.

See *Assault and Battery*; *Death by Wrongful Act*; *Deceit*; *False Imprisonment*; *Forcible Entry and Detainer*; *Fraud*; *Libel and Slander*; *Malicious Prosecution*; *Negligence*; *Nuisance*; *Trespass*; *Trover and Conversion*.

TOWNS.

Incorporation for school purposes, see *Schools and School Districts*, 1.

Reorganization.

1. Rev. St. Tex. tit. 17, c. 1, art. 840, provides that "any city * * * containing one thousand inhabitants or over may accept the provisions of this title in lieu of any existing charter," etc. *Held*, that a town incorporated under title 17, c. 11, *Id.*, which provides for the organization of a "town or village" containing 200, and less than 1,000, inhabitants, cannot reorganize under said provisions, even though it has increased to more than 1,000 inhabitants.—*Harness v. State*, (Tex.) 13 S. W. 535.

2. An attempt by a town of over 1,000 inhabitants, incorporated under Rev. St. Tex. tit. 17, c. 11, to reorganize under the provisions of title 17, c. 1, *Id.*, does not result in the surrender of its existing charter, even though all steps were taken as prescribed.—*Harness v. State*, (Tex.) 13 S. W. 535.

3. A town, acting under a supposed incorporation, which is void because of a valid and existing

charter previously obtained, cannot procure a new charter by proceeding as for an original incorporation.—*Harness v. State*, (Tex.) 13 S. W. 535.

Officers under void incorporation.

4. Persons who are acting as town officers under an incorporation which is void because of a pre-existing valid charter will be ousted on proceedings *in quo warranto*, when the boundaries of the districts from which they were elected are not coterminous with those prescribed in the original charter.—*Harness v. State*, (Tex.) 13 S. W. 535.

TRADE-MARKS.

Sale.

A trade-mark affixed to articles manufactured at a particular place may be lawfully sold with the establishment, though it consists simply of the name of the vendor.—*Dant v. Head*, (Ky.) 13 S. W. 1078.

Treasurers.

Of state, see *States and State Officers*.

TRESPASS.

Who may maintain.

1. Where a trespass is committed on land conveyed to trustees to secure bonds pending foreclosure proceedings, and the land does not sell for enough to pay the bonds, and is purchased by the bond-holders, they may sue for the trespass, under Rev. St. Mo. 1879, § 3462, providing that every action shall be prosecuted in the name of the real party in interest, except as provided by section 3463, which declares that the trustee of an express trust may sue in his own name without joining the *cestui que trust*, and that the trustee of an express trust shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another.—*Chouteau v. Boughton*, (Mo.) 13 S. W. 877.

What constitutes.

2. In an action for trespass on plaintiff's land, where the affidavit in attachment alleges that the injuries complained of arose from the commission of some felony or misdemeanor, evidence that defendant, representing himself to be the agent of a third person, from whom he had no authority, sold timber on the land, and collected the proceeds, that the timber was cut and carried away under such sale, and that defendant indorsed the trespass, is admissible under Rev. St. Mo. 1879, § 1359, which makes it a misdemeanor for one to cut down or carry away any trees on land not his own.—*Chouteau v. Boughton*, (Mo.) 13 S. W. 877.

Criminal trespass.

3. A conviction under Pen. Code Tex. art. 684, for "knowingly" causing cattle to go into the inclosed lands of another, without the latter's consent, cannot be had where it appears that defendant had permission from the former owner of the land to turn his cattle on the land, and did not know that it had recently been sold.—*Yarbrough v. State*, (Tex.) 13 S. W. 775.

TRESPASS TO TRY TITLE.

When lies.

1. Where persons in possession of land as tenants disown the relation, and claim adversely, trespass to try title will lie against them.—*Hall v. Haywood*, (Tex.) 13 S. W. 612.

2. Testator devised land to his children, and provided that, as each became of age, his executors should partition and deliver to him or her one-half of his or her ultimate distributive share. Two, only, of the executors joined in the conveyance to plaintiff, a daughter of testator. *Held* that, irrespective of the deed, plaintiff's interest as joint tenant entitled her to bring action for possession against one claiming the same by adverse possession.—*Hall v. Haywood*, (Tex.) 13 S. W. 612.

Defenses.

8. In 1840, H. sold to W. the equitable title to certain land. H. did not obtain legal title until 1873, and in 1887 he conveyed the land to plaintiff for a nominal sum by warranty deed, taking back a contract that he should not be bound by his warranty. Prior to that time he had made no claim to the land. In 1867, W. devised the land to parties under whom defendant claims, and by them the taxes were paid. No one was in actual possession. *Held*, that defendant was not estopped by laches from asserting his equitable title, as his right to equitable relief depended, not on the date of his claim, but on the lapse of time after it was disputed.—*Robertson v. Du Bose*, (Tex.) 13 S. W. 300.

4. W. devised an undivided interest in the land to defendant's grantor, and the will was probated before the conveyance of the interest to defendant. *Held*, that defendant's interest was sufficient to defeat recovery of any part of the land by plaintiff.—*Robertson v. Du Bose*, (Tex.) 13 S. W. 300.

Pleading.

5. Averments that plaintiff is the owner in fee-simple of certain land, and that defendant is setting up a pretended claim thereto, authorize, on general demurrer, the intendment that plaintiff is entitled to the possession of the premises.—*Rains v. Wheeler*, (Tex.) 13 S. W. 324.

6. Rev. St. Tex. art. 4790, provides that defendant in trespass to try title shall be the person in possession if the premises are occupied, or some person claiming title thereto if they are unoccupied. Article 4794 provides that an answer to the merits shall be deemed an admission by defendant that he was in possession or claimed title when the action was begun. *Held*, that an allegation in the petition that defendant claimed title to the premises was sufficient without an allegation that he had dispossessed plaintiff, though article 4786, in prescribing the form of the petition, makes the latter one of the requisite allegations.—*Rains v. Wheeler*, (Tex.) 13 S. W. 324.

7. Where defendant files a plea in reconvention claiming an interest in the property, in reply to which plaintiff files a supplemental petition, fully and specially pleading his title, and praying for specific and general relief, the overruling of a demurrer to the original petition is not prejudicial to defendant.—*Rains v. Wheeler*, (Tex.) 13 S. W. 324.

8. In trespass to try title by the grantee of a purchaser from the county of school lands against one who was a settler thereon at the time of the sale by the county, to recover possession of the land, the settler cannot depend on a plea of not guilty. He must plead specially that he was an actual settler when the lands were sold, that he desired to purchase, and must offer to purchase on the terms of the sale by the county.—*Ferego v. White*, (Tex.) 13 S. W. 974.

Evidence.

9. It is not competent, in trespass to try title, to show that the deed under which plaintiff claims was intended to embrace land not in fact included in the description.—*Watts v. Howard*, (Tex.) 13 S. W. 966.

10. In trespass to try title, where a decree of partition between the heirs of one under whom defendant claims is in evidence, it is competent to prove that a parol partition making the same disposition of the land had been previously made, and that the decree was obtained simply on account of the death of some of the parties.—*Warren v. Fredericks*, (Tex.) 13 S. W. 643.

11. In an action concerning land between the devisees of a testator and parties deriving title from the executor, the executor may testify to the facts with regard to his purchase of the land at a sheriff's sale made under a judgment recovered by the executor.—*Bennett v. Kiber*, (Tex.) 13 S. W. 220.

12. In such suit, permitting the executor to testify that he paid taxes on the land after he bought it is harmless error.—*Bennett v. Kiber*, (Tex.) 13 S. W. 220.

13. Where the answer in trespass to try title alleges that plaintiff fraudulently, and at an inadequate price, bought the land at a sale under a deed of trust given by defendants, in which he was beneficiary, evidence that there were other liens besides his on the land is admissible, and it is not necessary that plaintiff shall have specially replied to defendants' allegation; Rev. St. Tex. art. 1197, providing that "it shall not be necessary for the plaintiff to deny any special matter of defense pleaded by the defendant, but the same shall be regarded as denied, unless expressly admitted."—*Meyer v. Opperman*, (Tex.) 13 S. W. 174.

Declarations and admissions.

14. Evidence of statements made in regard to the land, by one in possession, while negotiating for its purchase, are inadmissible against plaintiff where it does not appear that plaintiff claimed through the occupancy of such person, or that such person sustained any relation to plaintiff which would make the declarations binding on him.—*Warren v. Fredericks*, (Tex.) 13 S. W. 643.

15. Where a person has testified in an action of trespass to try title, in which plaintiff claims, by adverse possession, that he was in possession of the land in controversy as a tenant of plaintiff, evidence as to actions or declarations of such tenant while in possession are incompetent to show want of title in plaintiff.—*Warren v. Fredericks*, (Tex.) 13 S. W. 643.

Documentary.

16. The parties to an action stipulated that a patent to B., issued in 1873, was common source of title. *Held*, that a contract by which H., before obtaining the patent, sold the equitable title to W., in 1840, was admissible to show who owned the land held by the patent.—*Robertson v. Du Bose*, (Tex.) 13 S. W. 300.

17. It was stipulated that either party might use as evidence original deeds and certified copies without being required to account for the loss or destruction of the original, and without the notice of filing required by law. *Held*, that this did not take away the right to object to a deed because not duly registered, or otherwise properly proved.—*Robertson v. Du Bose*, (Tex.) 13 S. W. 300.

18. An unconditional certificate issued by a county board of land commissioners to the assignees of a conditional certificate, and the report of the board to the land department, are admissible in evidence in an action between the heirs of the assignor and the grantees of the assignee, without proof of the facts necessary to give the board jurisdiction to issue the certificate.—*Capps v. Terry*, (Tex.) 13 S. W. 52.

19. Where both defendants claim under the same chain of title, nearly to themselves, a certified copy of an instrument in that chain is admissible in favor of both, though the notice of its filing required by statute, and which was in the name of the defendants, was signed by the attorney of one of the defendants only.—*Capps v. Terry*, (Tex.) 13 S. W. 52.

20. In a suit for possession of land patented to plaintiffs, as heirs of the heir of B., to whom the certificates were issued, title being shown in plaintiffs, and there being no evidence of an actual sale of the certificates, or of title in defendants, an unacknowledged instrument executed by the administratrix of B. after close of the administration, purporting to convey the certificates to the person under whom defendants claim, is not admissible to show the intention in regard to the certificates.—*Utzfield v. Bodman's Heirs*, (Tex.) 13 S. W. 414.

Weight and sufficiency.

21. Evidence that plaintiff's grantor, before conveying to plaintiff, had transferred to a third person an equitable right to a conveyance of the land sued for, is not sufficient to sustain the defense of outstanding title.—*Yellow Pine Lumber Co. v. Carroll*, (Tex.) 13 S. W. 261.

22. The evidence of an unconditional land certificate issued by a county board of land commissioners to the assignee of a conditional certificate, and report as to the person to whom the certificate was issued, cannot be overcome by the entry in the

register required to be kept by the commissioner of claims of all certificates presented to him by the commissioner of the general land-office, which entry showed its issue to the assignor.—*Capps v. Terry*, (Tex.) 13 S. W. 52.

23. From the record of a transfer of a land certificate it appeared that, though it purported to be made and was acknowledged by M. E. T., the owner of the certificate transferred, it was signed by E. M. T. An agent of the transferees testified that when he corrected the field-notes of the survey for them he found the original certificate, and the transfer from M. E. T. to his clients, on file in the general land-office; that he withdrew them to have them recorded in the county, and they were afterwards destroyed by the burning of the court-house. *Held*, that it was proper to submit to the jury the question whether M. E. T. ever executed a transfer of the certificate.—*Capps v. Terry*, (Tex.) 13 S. W. 52.

24. In trespass to try title, plaintiff introduced in evidence a deed from one whom he claimed to be the common source of title, and proved that after the delivery defendant obtained a sheriff's deed to the land on a judgment against plaintiff's grantor and another. *Held* not to make a *prima facie* case, since it did not appear that defendant's title was not derived from the other judgment debtor.—*Howard v. Masterson*, (Tex.) 13 S. W. 635.

25. In a suit for possession of land patented to plaintiffs, as heirs of the heir of B., to whom the certificates were issued, evidence that the widow and administratrix of B. was directed by the probate court to use the land for the support of herself and children, "so long as she might be undisturbed by the course of law and the succession closed;" an unacknowledged instrument, executed by the administratrix and her second husband after the administration was closed, purporting to convey the certificates to one from whom defendants show deeds; and evidence that the land was surveyed and located for some person other than plaintiffs, and that defendants and their vendors have paid the taxes on it,—are not sufficient to show a sale of the certificates, or title in defendants.—*Utzfield v. Bodman's Heirs*, (Tex.) 13 S. W. 474.

26. After execution of a mortgage in 1833, the grantor went to Mexico, and one intimate with him testified that he stated that he owned no land in Texas, and there was also evidence that he executed a deed to the mortgagee's administrator. Afterwards his widow and heirs resided in Texas, but made no claim to the land until shortly before suit. The mortgagee took possession, as authorized by the mortgage, and he, and those claiming under him, paid the taxes, except for about six years, and held possession themselves or by tenants the greater part of the time. The mortgagee's heirs sold in 1870 to one who in 1880 sold to defendants, who took and held possession till time of trial. *Held*, that judgment was properly rendered for defendants.—*Rodriguez v. Hayes*, (Tex.) 13 S. W. 996.

27. In trespass to try title, plaintiff contended that the L. survey, under which he claimed, commenced at the S. W. corner of the S. survey, (which was a fixed point,) and ran south; that the A. survey made at the same time, began at the same corner, and ran north instead of south, so as not to embrace the land in controversy. There were erasures in all the surveys, some showing one and some another direction. Two witnesses testified that they saw the A. survey before it was changed, and it then called for directions as claimed by defendants. The original survey of the L., calling for directions as claimed by plaintiff, had been cancelled, and a new survey, calling for directions as claimed by defendants, was filed, and the patent under which plaintiff claimed was issued thereon. The original survey called for the L. as beginning at the S. W. corner of the S., and the A. called for the same, so that, if the A. ran south as claimed by defendant, it would have conflicted with the L. The corrected survey of the L. called for the S. E. corner of the A. instead of the S. W. corner of the S. If the A. ran north, its S. E. corner and the S. W. corner of the S. would

have been the same, and there would have been no necessity for the change. The change made the survey as claimed by defendants. *Held*, that judgment was properly for defendants.—*Keyser v. Meusebach*, (Tex.) 13 S. W. 967.

Instructions.

28. Where plaintiffs in trespass to try title established their title by written muniments, except their relationship to the ancestor under whom they claimed, which was not disputed, a charge that they had shown a title which entitled them to recover the lands, unless defendants were entitled to hold under the statute of limitations, is proper.—*Van Sickle v. Catlett*, (Tex.) 13 S. W. 81.

29. In trespass to try title it is not error for the court to refuse to charge as to the effect of a decree in partition of the land in controversy between plaintiffs' predecessors in title and third persons, where the decree does not make a partition, but leaves the parties as they were before the suit was brought.—*Van Sickle v. Catlett*, (Tex.) 13 S. W. 81.

Judgment.

30. Where plaintiff recovers on his first ground of action, the ruling of the court on so much of his petition as seeks alternative relief, even though erroneous, is not prejudicial to defendant.—*Rains v. Wheeler*, (Tex.) 13 S. W. 824.

TRIAL.

See, also, *Appeal; Appearance; Certiorari; Costs; Exceptions, Bill of; Judgment; Jury; New Trial; Pleading; Practice in Civil Cases; Witness.*

Conduct of trial.

1. Where, on adjournment of the trial to permit the judge to preside at a term of court in another county, the parties have agreed that the trial should proceed at a special term, which could legally last only two weeks, and the contestant has stated that he would not consume over two days in the examination of his witnesses, it is not an abuse of discretion for the court to compel him to close his case after allowing him half a day beyond the allotted time for the examination of witnesses.—*Jones v. Glidewell*, (Ark.) 13 S. W. 723.

Reception of evidence.

2. If, after evidence is rejected as incompetent, proof is made which shows its competency, it should again be offered.—*Jones v. St. Louis, I. M. & S. Ry. Co.*, (Ark.) 13 S. W. 416.

3. Under Rev. St. Tex. art. 1331, requiring the special verdict to find "the facts as established by the evidence," so that nothing shall remain for the court "but to draw from such facts the conclusions of law," it is proper, in an action for injuries received at a railroad crossing, to refuse to submit as a special issue the question whether plaintiff by looking westward could have seen the train in time to avoid the accident, as, upon an affirmative finding, it would still be a question for the jury whether his failure to look in that direction was negligence.—*Gulf, C. & S. F. Ry. v. Anderson*, (Tex.) 13 S. W. 196.

4. Where both parties in trespass to try title have introduced their testimony and closed, evidence on behalf of plaintiff that trees were marked on a certain line of the survey beyond the point claimed by defendants as a corner, and that the marked line extended to the point claimed by plaintiff as the corner, is not in rebuttal, within Rev. St. Tex. art. 1297, subd. 9, providing that, after the parties have introduced their evidence, they "shall then be confined to rebutting testimony on each side."—*Ayers v. Harris*, (Tex.) 13 S. W. 763.

5. When a part of an ordinance is relevant, and another irrelevant, the admission of the whole ordinance is not error, in the absence of a motion to exclude the irrelevant part.—*Wilkins v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 13 S. W. 893.

Objections to evidence—Demurrer.

6. Defendant does not waive a demurrer to plaintiff's evidence by putting in his own evidence;

but the supreme court, in reviewing the ruling of the lower court, will do so in the light of all the evidence, no matter by whom or when offered; and if there is a case to go to the jury the supreme court will not reverse, though the demurrer to plaintiff's evidence should have been sustained as the case stood when it was interposed.—*Weber v. Kansas City Cable Ry. Co.*, (Mo.) 13 S. W. 587.

Right to open and close.

7. Defendant in attachment cannot controvert the grounds on which the writ has been sued out for the purpose of defeating it, when he admits plaintiff's cause of action, but denies that the property attached is subject to sale, claiming it as part of his homestead, and he is therefore entitled to open and conclude the trial.—*Milburn Wagon Co. v. Kennedy*, (Tex.) 13 S. W. 28.

Arguments of counsel.

8. After the refusal of the court to allow books to be introduced in evidence, counsel for the opposite party cannot, in his argument to the jury, comment on the failure to introduce them.—*Martin Brown Co. v. Perrill*, (Tex.) 13 S. W. 975.

9. In an action against a railroad company for negligently causing the death of an employe, the action of the court in permitting plaintiff's counsel, in the presence of the jury, to read authorities to the court showing a verdict for \$15,000, and another for \$10,000, against railroad companies, does not show such an abuse of judicial discretion as to warrant a reversal.—*Missouri Pac. Ry. Co. v. Lamothe*, (Tex.) 13 S. W. 194.

10. It is not improper for plaintiff's counsel to say, in his closing argument, in an action for malicious prosecution, "I proved that defendant was down at the trial, and that plaintiff was acquitted, upon the ground that he had permission to open the letter," where such statement is a legitimate deduction from the testimony.—*Sutor v. Wood*, (Tex.) 13 S. W. 321.

Instructions.

11. Where no requests to instruct the jury upon particular points have been made, it is not error if the court fails to do so.—*Milburn Wagon Co. v. Kennedy*, (Tex.) 13 S. W. 28.

12. Where requests to charge are made before any charge is given, error cannot be predicated on their refusal, where they are not afterwards repeated.—*Chesapeake, O. & S. W. R. Co. v. Hendricks*, (Tenn.) 13 S. W. 696.

13. Where the court modifies an instruction requested by striking out a sentence, but supplies the sentence in different language in other parts of the charge, an objection that the instruction was not given as requested is untenable.—*Metcalf v. Little Rock St. Ry. Co.*, (Ark.) 13 S. W. 729.

14. The refusal to give special instructions cannot be assigned as error when such instructions are asked for before, instead of after, the general charge has been given, and such general charge is not preserved in the bill of exceptions.—*Chesapeake, O. & S. W. R. Co. v. Foster*, (Tenn.) 13 S. W. 694.

15. An instruction that plaintiff, in suing out an attachment, must have acted so as not to "unjustly or wrongfully" injure the rights of other creditors, is properly refused, since it leaves it for the jury to say what plaintiff might lawfully do.—*Martin Brown Co. v. Perrill*, (Tex.) 13 S. W. 975.

16. Where the court had already instructed the jury that certain evidence had nothing to do with the case, and was to be disregarded, it was not error to refuse to repeat the ruling on a motion to strike out.—*Rollins v. O'Farrell*, (Tex.) 13 S. W. 1021.

17. Where the court, at defendants' request, instructs the jury to allow them all credits admitted by the petition, and the latter admits more than are found by an auditor, an instruction to allow all reported by the auditor, none of the latter being excepted to, is unnecessary.—*Kempner v. Galveston County*, (Tex.) 13 S. W. 460.

Instructions—On weight of evidence.

18. The court is prohibited from charging the jury as to the weight of the evidence by Const. Ark. § 28, art. 7.—*Cameron v. Vandegriff*, (Ark.) 13 S. W. 1093.

19. An instruction to consider as actual damages the physical pain and suffering experienced by plaintiff is not objectionable as a charge on the evidence, where it is undisputed that plaintiff had three ribs and one leg broken.—*Baldridge & Courtney Bridge Co. v. Cartrett*, (Tex.) 13 S. W. 8.

20. The word "satisfy" should not be used in instructions on the evidence in civil cases, as the verdict should be given on preponderance of evidence.—*Arkansas M. R. Co. v. Canman*, (Ark.) 13 S. W. 280.

Direction of verdict.

21. A direction of a verdict for defendants will be set aside on appeal, where there is any evidence in support of plaintiff's side of the issue.—*Commonwealth v. Tate*, (Ky.) 13 S. W. 118.

Verdict.

22. A verdict "for the plaintiff, damages to the amount of \$7,500," is sufficiently definite.—*Missouri Pac. Ry. Co. v. White*, (Tex.) 13 S. W. 65.

23. Though plaintiff is formally joined by her husband as a party, a verdict for "plaintiff" is not defective.—*Shannon v. Jones*, (Tex.) 13 S. W. 477.

24. In attachment by a creditor of a firm to collect a note due her, where intervening creditors have put in no defense, and the court has instructed the jury, after stating the issues between plaintiff and intervenors, that if they found that the note sued on represented a real debt, and that the attachment was sued out for the purpose of collecting it, and not of delaying and defrauding creditors of the firm, they should find for plaintiff a verdict, "We, the jury, render a verdict in favor of plaintiff," is a sufficient finding for plaintiff against intervenors for the whole demand claimed in her petition, and that the attachment was not fraudulently issued.—*Martin Brown Co. v. Perrill*, (Tex.) 13 S. W. 975.

25. *Manaf. Dig. Ark. §§ 5142, 5143*, provide that the court may require the jury, "in any case in which they render a general verdict, to find specially upon particular questions of facts, to be stated in writing;" and that, "when the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly." *Held* that, if the verdict is sustained by any one of two or more interpretations of the evidence, it is not necessary that the jury should concur in a special finding; but if they must necessarily agree on the answer to some particular question before they can find the verdict, and their answer shows that they cannot agree, the general verdict should be disregarded.—*Arkansas M. R. Co. v. Canman*, (Ark.) 13 S. W. 280.

Trial by court.

26. Where issues of fact have been tried by the court, judgment will not be reversed because of the admission of testimony merely immaterial, though of a character that might prejudice a jury.—*Andrews v. Key*, (Tex.) 13 S. W. 640.

27. A statement by a witness that "the undisputed fact is that said land has been and is the property of [defendant] for the past 45 or 46 years" will not cause a reversal, where the case was tried by the court, and the evidence, without this statement, was conclusive as to ownership.—*Rodriguez v. Hayes*, (Tex.) 13 S. W. 296.

Findings.

28. The court having orally stated the findings at the time of rendering judgment, and having filed them during the term, appellant cannot complain that they were not, on his request, filed in time to enable him to base a motion for a new trial thereon.—*Anderson v. Horn*, (Tex.) 13 S. W. 24.

29. It is not necessary that facts found by the court should be set out with the particularity required in special pleading.—*Andrews v. Key*, (Tex.) 13 S. W. 640.

80. It is no ground of reversal that, in a trial before the court, there was a finding of immaterial facts.—*Andrews v. Key*, (Tex.) 18 S. W. 640.

TROVER AND CONVERSION.

Evidence.

1. Where plaintiff alleges that the property converted was in a box, which he delivered to defendant's intestate to be placed in intestate's safe, he cannot testify as to the contents of the box until he has shown by competent testimony that the box was actually delivered to intestate.—*Nunnally v. Becker*, (Ark.) 18 S. W. 79.

Instructions.

2. Where the jury has been charged, in an action for conversion, that plaintiff must prove his ownership, it is not error to refuse to charge that he must prove that the sale under which he claims actually occurred.—*Jacobs v. Totty*, (Tex.) 18 S. W. 872.

Trustee Process.

See *Garnishment*.

TRUSTS.

Implied trust—Fraud.

1. Plaintiff alleged that he was in possession of a lot in Eureka Springs, before the town-site was patented to the mayor under Act Cong. March 2, 1867, providing that land occupied as a town-site might be entered by the mayor for the use of the occupants under such rules as might be established by the state legislature; that, in a suit in the circuit court between defendant and the mayor, a consent decree was entered vesting title to the town in three trustees, one of whom was defendant's president, who were to hold the land for the use of the occupants, and execute deeds to them in pursuance of Act Ark. Feb. 16, 1885, p. 13, which barred all claims of persons who failed to procure deeds or bring suit within one year from the passage of the act; that plaintiff, having complied with the requirements of the act, received a deed from the other two trustees, but that defendant's president, the other trustee, having received the deed for the alleged purpose of making certain entries from it, and under an agreement to sign and return it to plaintiff, fraudulently withheld it until the time for signing it had expired, when he refused to sign it; that under the consent decree all property not deeded within one year vested in defendant. The complaint asked that the land be decreed to be held in trust for plaintiff by defendant. *Held*, that the complaint stated a cause of action, though the limitation had expired, since, if its allegations of fraud on the part of defendant's president were true, defendant would hold the land as trustee for plaintiff.—*Jones v. Eureka Imp. Co.*, (Ark.) 18 S. W. 1094.

Resulting trusts.

2. On a bill to enforce a resulting trust against the estate of the administrator of plaintiffs' ancestor, it appeared that there came to the hands of the administrator 3,000 acres of land, and about \$100,000 in personalty. A small portion of this was distributed to those entitled. Final settlement, 10 years after the grant of letters, showed a balance of \$25,382 due the estate, and was approved by the probate court, but on appeal to the circuit court the balance was adjudged to be \$71,894. The administrator owned a large plantation, but no other property of consequence. During his administration he engaged extensively in business, and suffered heavy losses. He also bought lands to the amount of \$50,000, which constitute a part of the property sought to be affected with the trust. At his death his estate inventoried \$75,000 in notes and accounts, mostly worthless, and a little other property. His debts were \$60,000, consisting in part of notes given in payment for the lands he had purchased, besides the amounts due from him as administrator to plaintiffs. *Held*, the evidence failed to show that the estate sought to be subjected was the product of the trust-estate, or to iden-

tify any part of it as the trust property, and did not establish a resulting trust.—*Phillips v. Overfield*, (Mo.) 18 S. W. 705.

Appointment of trustee.

3. Where a trust-deed gives the power to appoint a substituted trustee in case the original trustee refuses or fails to act, the appointment of a substituted trustee while the original trustee is advertising the property for sale under the deed confers no title on the substituted trustee.—*Chesnutt v. Gann*, (Tex.) 18 S. W. 274.

Powers of trustees.

4. Decedent, being indebted, conveyed land to a trustee in trust to enable the latter "to sell such parts of said property as may be desired to settle and satisfy said debts, * * * and, in order to settle said debts, he may give his individual notes for the same, and execute a mortgage on the before-described lands and lots, or any part thereof, to secure the same, upon such terms * * * as to him may seem proper and advisable." *Held*, that the deed authorized the trustee to borrow money to meet such debts, and to give his individual note therefor, secured by a mortgage on the land.—*Orr v. Rode*, (Mo.) 18 S. W. 1066.

Rights of third persons.

5. Decedent, being indebted, conveyed land to a trustee by deed of trust to pay the debts, and authorized him to borrow money, and to give his notes secured by mortgage on the land. *Held*, in a suit to foreclose a mortgage given by the trustee, that evidence on the part of the heirs of the grantor in the deed of trust, that when the note was executed by the trustee all the debts, to settle which the trust-deed was given, were paid, is inadmissible, since Rev. St. Mo. 1879, § 3937, provides that no person who in good faith pays money to a trustee authorized to receive it shall be responsible for the application of such money, nor shall the right or title derived by him from such trustee, in consideration of such payment, be called in question in consequence of any misapplication by such trustee.—*Orr v. Rode*, (Mo.) 18 S. W. 1066.

TURNPIKES AND TOLL-ROADS.

Incorporation of turnpike company.

1. A charter of a turnpike company which authorizes an organization when "\$200 to any one mile" are subscribed, is substantially complied with by a subscription of \$200, without designating any particular mile of road to which it shall be applied.—*Fitch v. Poplar Flat, L. R. & S. L. Turnpike Co.*, (Ky.) 18 S. W. 791.

Powers of officers.

2. The president and directors of a turnpike company authorized by statute to move any of its gates as they may deem right, and for the interest of the road, cannot, as long as they act in good faith, be restrained from the exercise of the power, and the sale of the abandoned toll-houses, at the suit of the stockholders.—*Bardstown & G. R. Turnpike Co. v. Rodman*, (Ky.) 18 S. W. 917.

3. Under Gen. St. Ky. 1883, c. 110, § 1, providing that a turnpike company may sell land acquired to its use to the abutting owners, but to none other, a sale to others by the directors will not be restrained at the instance of the stockholders.—*Bardstown & G. R. Turnpike Co. v. Rodman*, (Ky.) 18 S. W. 917.

Defective bridge — Action for personal injuries.

4. A petition showing that plaintiff, in crossing a toll-bridge, stopped to pay toll, when his mules, for some unknown reason, became frightened, and, before he could get control of them, backed the wagon against the railing, which was defective, and gave way, is not demurrable as showing an intervening cause of the injury.—*Baldridge & Courtney Bridge Co. v. Cartrett*, (Tex.) 18 S. W. 8.

5. In an action for injuries caused by plaintiff's mules becoming frightened on defendant's bridge, and breaking through the railing of the bridge, it being alleged that plaintiff was guilty of contributory negligence in not jumping from his wagon before it fell, he may testify that while his mules were backing he looked around, and saw the railing to the bridge, and thought that would stop them.—*Baldrige & Courtney Bridge Co. v. Cartrett*, (Tex.) 18 S. W. 8.

6. In an action for injuries caused by plaintiff's team becoming frightened, and breaking through the railing of a bridge, an instruction that plaintiff cannot recover if he could have got out of the wagon after the mules began to back, and by so doing prevented the injury to himself, was properly refused, as plaintiff is entitled to recover for the injury to his team, if not to his person.—*Baldrige & Courtney Bridge Co. v. Cartrett*, (Tex.) 18 S. W. 8.

7. In an action for injuries caused by plaintiff's team becoming frightened, and breaking through the railing of a bridge, an instruction that plaintiff cannot recover if his mules became unmanageable on account of his whipping them, and trying to urge them forward, was properly refused, as it was a question for the jury whether it was prudent to whip the mules.—*Baldrige & Courtney Bridge Co. v. Cartrett*, (Tex.) 18 S. W. 8.

8. An instruction that plaintiff cannot recover if the mules became frightened, after entering upon the bridge, without fault on the part of defendants, and backed the wagon against a portion of the railing which had been passed, knocking it off, and precipitating the wagon to the ground, was properly refused.—*Baldrige & Courtney Bridge Co. v. Cartrett*, (Tex.) 18 S. W. 8.

Undue Influence.

See *Wills*, 8, 9.

Unlawful Seizure.

See *Sheriffs and Constables*, 3.

USURY.

What constitutes.

1. Where a note bearing lawful interest is signed and delivered, and on the same day a check for the amount of the consideration is received, the contract is complete; and the fact that, before the payment of the check, a law takes effect reducing the legal rate of interest below that stipulated in the note, does not taint the contract with usury.—*Jump v. Johnson*, (Ky.) 18 S. W. 848.

Effect.

2. Mansf. Dig. Ark. § 4732, makes a usurious loan absolutely void as to both principal and interest. Defendant executed a deed, absolute in form, to secure a loan. Afterwards he obtained a usurious loan from plaintiff, who at his request paid the original debt, and took a deed from the creditor as security. This deed being void because of the usury, the court below decreed that plaintiff should be subrogated to the rights of the original creditor, and ordered a foreclosure of the original mortgage. *Held*, error, since equity will not aid one who is compelled to prove an illegal contract in order to establish his claim.—*Nichols v. Tribble*, (Ark.) 18 S. W. 796.

3. Under such circumstances, plaintiff is entitled to recover the taxes he paid on the land, with interest.—*Nichols v. Tribble*, (Ark.) 18 S. W. 796.

Recovery back.

4. The maker of a note, which had been running for several years, at the time of the payee's death gave his legatee a new one in its place, which he paid. He sued the legatee to recover usurious interest paid to his testator, the original payee. *Held*, that plaintiff could recover, as the illegal interest had been added to the new note, instead of being deducted from the old, and to that extent de-

fendant had collected more than he was entitled to.—*Eggen v. Huston*, (Ky.) 18 S. W. 919.

Usury as a defense—Pleading.

5. Since, under Rev. St. Tex. art. 2981, the defense of usury must be interposed by special plea under oath, intervening creditors of a firm whose property has been attached to collect a note due by the firm cannot object to the judgment in the attachment suit on the ground that usury was allowed on the note, where they have not specially pleaded usury.—*Martin Brown Co. v. Perrill*, (Tex.) 18 S. W. 975.

Variance.

Between complaint and information, see *Indictment and Information*, 9.

Pleading and proof, see *Pleading*, 12-14.

VENDOR AND VENDEE.

See, also, *Deed; Fraudulent Conveyances; Judicial Sales; Sale; Specific Performance*.

Subrogation to vendor's lien, see *Subrogation*, 3, 4. Validity of contract, see *Frauds, Statute of*, 2-5. Vendor's lien, priority of mechanic's lien, see *Mechanic's Lien*.

The contract.

1. A father and son purchased land on credit, and the son afterwards paid the purchase price under a verbal agreement that he should have the land. Afterwards he exchanged that tract for another, on which he made permanent improvements, and occupied it for 15 or 16 years, the father always recognizing his right to it, and expressing his willingness to make a deed to him. The land which the son received in exchange was in the same survey as the land originally purchased; and, on ascertaining that this survey conflicted with an older one, the certificates were floated, and located elsewhere, by the son and others owning in the survey. This took place in the life-time of both the father and the mother. *Held*, that the heirs could not question the son's title, as the transaction of the father relative to the certificates was sufficient to pass title.—*Anderson v. Horn*, (Tex.) 18 S. W. 24.

2. H., having a headright claim for land under the constitution of the republic of Texas, before securing title to a certificate, sold to W. certain land which he had located, reciting in the contract that it was not patented, but that he would make further title as soon as W. obtained a title in his (H.'s) name. H. was unable to obtain title to this land, but afterwards acquired other land under his right. *Held*, that W. had an equitable title in the land so acquired, as the contract showed an intention to convey whatever land the certificate was applied to.—*Robertson v. Du Bose*, (Tex.) 18 S. W. 800.

3. After a deed, and notes and trust-deed for part of the purchase price, had been delivered, the vendor's agent agreed in writing "to hold the notes and deed of trust for 90 days, within which time title is to be made clear" by suit. *Held*, that such agreement did not make the sale conditional on the title being cleared within 90 days.—*Heffron v. Cunningham*, (Tex.) 18 S. W. 259.

4. There being no evidence of a valid contract to purchase land, evidence of a tender of a deed was properly excluded.—*Westmoreland v. Carson*, (Tex.) 18 S. W. 559.

5. Evidence that a party offered to sell land to which he did not have the title is immaterial to show that he had agreed to purchase it.—*Westmoreland v. Carson*, (Tex.) 18 S. W. 559.

Rights and remedies.

6. The price of two pieces of land, containing 20 and 30 acres respectively, was \$1,000 on March 1, 1886, or on taking possession; the payment of two \$300 notes owing by the vendor to his grantor, which were a lien on the 20-acre tract; and an amount sufficient to make the price \$2,900 one year from the date of sale. On or before March 1, 1886, "a good and sufficient deed" was to be given; but, owing to a prior mortgage sale of the 30 acres, the

vendor was unable to give it, and one was never tendered. Vendee paid one of the \$300 notes, and one of \$426.88, embracing a settlement of the other, which had been retained to hold the lien, and took an assignment of all three. He then sued to enforce the lien of the \$300 notes against the 20 acres, and to reduce the other note to judgment. *Held*, that the purchaser was not required to make the \$1,000 payment, and take the risk of his vendor being unable to procure and convey a good title, and the failure so to do constituted no defense to the actions; and an order setting aside the sale as to the 30-acre tract, and affirming it as to the other, and judgment for a balance due on accounting, being satisfactory to vendee, was proper.—*Johnson v. Miller*, (Ky.), 13 S. W. 879.

7. The purchaser of a tract of land took possession under a bond for deed, leaving the legal title in his vendor as security for the purchase money, to pay which he subsequently obtained a loan at a usurious rate of interest, giving his note therefor, and causing a deed to be executed by his vendor to the payee as security. He afterwards rented the land of the payee, and later, in consideration of an agreement to surrender his note and forgive the rent, promised to release his equitable interest, but never did so. *Held*, in an action brought to declare a trust in the land, discharged of the lien, that he was still the owner thereof, and that the agreement to release his equity was void for want of consideration.—*Brakefield v. Halpern*, (Ark.) 13 S. W. 1102.

Rescission.

8. Where a bond for title recites a consideration as having been paid, the heirs of the grantor cannot enforce their title against those claiming under the bond without refunding the consideration, though the bond may be void as being in contravention of the law.—*Houston v. Killough*, (Tex.) 13 S. W. 959.

Action for purchase money.

9. Where a vendor's legal title by adverse possession becomes perfect during the pendency of a suit for the purchase price, that fact may be set up by amended pleading, and the vendee will be compelled to accept such title.—*Hall v. Scott's Adm'r*, (Ky.) 13 S. W. 249.

Defenses.

10. In an action on notes for unpaid purchase money of land, when the defense is a deficit in the quantity of the land, and one surveyor testifies that there is a deficit, and another testifies to the contrary, and there is no evidence to show which is the more accurate, a judgment for plaintiff will not be disturbed on the ground that it is not supported by the evidence.—*Bird v. Bank of Williamstown*, (Ky.) 13 S. W. 480.

11. When defendant testifies that at the time he verbally purchased the land it was understood that a right of way of a railroad through it was to be surveyed as part of his purchase, the right of way will not be held to be a deficit, though the deed contains a warranty of title, and says nothing about the right of way.—*Bird v. Bank of Williamstown*, (Ky.) 13 S. W. 480.

Vendor's lien.

12. Gen. St. Ky. c. 68, art. 1, § 24, which provides that, "when any real estate shall be conveyed," the vendor shall have no lien on the land, unless it is stated in the deed what part of the consideration remains unpaid, does not deprive a vendor of his lien on the land, as against a remote *bona fide* purchaser, where neither the deed of the vendor nor that of his grantee was recorded, or lodged for record.—*Lucy v. Hopkins*, (Ky.) 13 S. W. 518.

13. E. agreed to sell defendant land for a certain price, and to include an adjoining tract, belonging to plaintiff, if the same did not contain over five acres. E. negotiated with plaintiff's agent for the purchase of the tract, which on measurement was found to contain eighteen acres; and plaintiff made a deed to defendant, which he accepted, and which recited the purchase money as

paid, though, unknown to plaintiff, her agent agreed that it should be paid at a future time. Afterwards, plaintiff brought a suit to have the deed canceled, which defendant resisted. *Held*, that E. was defendant's agent for the purchase of the land, and plaintiff had a vendor's lien thereon for the purchase money.—*Clark v. Collins*, (Tex.) 13 S. W. 44.

14. Under Mansf. Dig. Ark. § 474, providing that a vendor's lien, when the same is expressed upon or appears from the face of the deed, shall inure to the benefit of the assignee of the note or obligation given for the purchase money of the land, such lien will not pass to the assignee where the vendor has conveyed by an absolute deed.—*Crossland v. Powers*, (Ark.) 13 S. W. 732.

15. As an action to enforce as a lien on land in the hands of a third person a note given for its purchase price is not barred until after the lapse of 15 years, plaintiff is not precluded from recovering by his failure to sue until after 18 years from the maturity of the note and the time when it was assigned to him, during which the vendee was solvent and remained in the county, where it appears that plaintiff has not estopped himself by contract from asserting his lien, and that his declaration that he could have collected the note, but delayed too long, was not made to defendant.—*Lucy v. Hopkins*, (Ky.) 13 S. W. 518.

16. Subsequent purchasers of land subject to a vendor's lien are not released from its operation by an extension of the time of payment granted to their vendors without their consent.—*Dalton v. Rainey*, (Tex.) 13 S. W. 34.

17. A deed from J. to D. recited that \$100 of the purchase price was due December 15, 1875. D. conveyed the land to B. by a deed which referred to a \$100 note of B. to J., and recited that it was given in lieu of the payment still owing by D. to J., and that it was payable on or before March 1, 1876. The note recited that it was given for the land described in the deed, and was of the same date, but was payable December 15, 1875. *Held*, that the variance between the deed and note as to the date of maturity was not fatal to a petition to enforce the note as a lien on the land, as the deeds, which were both filed with the petition, sufficiently identified the note.—*Lucy v. Hopkins*, (Ky.) 13 S. W. 518.

18. A judgment foreclosing a vendor's lien on land as described in the petition, but including 50 acres which were excepted from the conveyance to the vendee, is in no wise prejudicial to the latter.—*Nass v. Chadwick*, (Tex.) 13 S. W. 883.

19. E. agreed to sell defendant land for a certain price, and to include an adjoining tract, belonging to plaintiff. E. negotiated with plaintiff's agent for the purchase of the tract, which on measurement was found to contain 18 acres; and plaintiff made a deed to defendant, which he accepted, and which recited the purchase money as paid, though, unknown to plaintiff, her agent agreed that it should be paid at a future time. In a suit by plaintiff to enforce his vendor's lien, *held*, that defendant could not obtain a judgment against E. by merely asking, in his answer, that he be made a party, and that he and plaintiff be required to settle the rights between themselves, without asking affirmative relief against him.—*Clark v. Collins*, (Tex.) 13 S. W. 44.

20. A direction that the order of sale to enforce a vendor's lien may issue to the county where suit was brought, or to the county where the land lies, as plaintiff's attorney may direct, is harmless error, as a sale in the county where the land does not lie, being a nullity, would not probably be directed by the attorney, and, if it was, it would only occasion costs of issue and return of the writ, for which defendants could not be taxed.—*Dalton v. Rainey*, (Tex.) 13 S. W. 34.

21. Judgment cannot be rendered against subsequent purchasers of land subject to a vendor's lien for attorney's fees stipulated for in notes given for the purchase price, where the deed reserving the lien contained no notice of such fees, nor for an increased rate of interest agreed upon by the original vendee without notice to them.—*Dalton v. Rainey*, (Tex.) 13 S. W. 34.

Vendor's lien—Priorities.

22. Where the vendee of land gives his note for the purchase price, and afterwards pays the note from the proceeds of his minor children's property, the children become subrogated to the vendor's lien; and a conveyance of such land by the vendee to his children, in satisfaction of their lien, gives them good title as against his wife, since her interest in the land, either as a homestead or as community property, is subject to the lien.—*Oury v. Saunders*, (Tex.) 13 S. W. 1080.

23. Where a vendor's lien securing a non-negotiable note was foreclosed by an assignee of the note after the same had been paid, a purchaser under the foreclosure, with notice of such payment, and of the existence of a junior lien, takes no title as against a purchaser under foreclosure by the junior lienholder, who was not a party to the first suit.—*Andrews v. Key*, (Tex.) 13 S. W. 640.

24. Plaintiff conveyed land to defendant's husband, reserving a lien for unpaid purchase money. The vendee conveyed part of the land to one A. in exchange for other land, and died, leaving defendant and his infant children residing on the land received on exchange as a homestead. Held, that A.'s right to have the land taken in exchange subjected to the payment of the lien was superior to defendant's right to a homestead therein.—*Williams v. Samuels*, (Ky.) 13 S. W. 498.

25. In an action to foreclose a vendor's lien on land, it appeared that the notes retaining the lien were received by plaintiff from the vendor, who took them in part payment for the land conveyed to M. as guardian; that they recited they were given by M. as guardian. The other part of the consideration for the land was money belonging to M.'s wards, which she was not authorized to invest as required by Rev. St. Tex. arts. 2530-2563. Held, that the recitals in the notes were sufficient to put plaintiff on inquiry as to the legality of the transaction, and that the wards were entitled to have the land subjected to the payment of their money, with interest, in preference to plaintiff's claim.—*Hurt v. Marshall*, (Tex.) 13 S. W. 88.

Bona fide purchasers.

26. In an action of unlawful entry and detainer, defendants claimed under a lease for 15 years from plaintiff's grantor. It appeared that J. and H., a married woman, had owned the land, J. having an estate for life, and H. the remainder; that J. had leased to H. his interest; and that she, with the parol consent of J., had leased to defendants for 15 years, giving them a writing signed by herself, but which was not registered. Afterwards J. and H. conveyed to plaintiff, who registered his deed. The lease given by H. did not appear to have been executed by her under private examination. Held that, under Code Tenn. § 2090, requiring leases for more than three years to be registered, and section 2074, providing that a registered instrument shall be of effect as against an unregistered instrument of earlier date, the lease to defendants was inoperative as against plaintiff's deed.—*Rogers v. Wheaton*, (Tenn.) 13 S. W. 689.

27. Where the deed of land, purchased with community property, is lost without being recorded, and after the wife's death the husband procures a second deed to himself from the vendor, which is in form an original deed, reciting the consideration as paid by him, and containing no reference to the former deed, one who purchases for value from the husband, or at an execution sale under a judgment against him, without notice of any facts showing the land to have been community property, is an innocent purchaser, and acquires a good title.—*Pouncey v. May*, (Tex.) 13 S. W. 838.

28. One who purchases land with a full knowledge of an outstanding vendor's lien cannot complain that the property is subjected in his hands to the payment of the purchase money.—*Texas Land & Loan Co. v. Bialock*, (Tex.) 13 S. W. 12.

VENUE IN CIVIL CASES.

In action for wrongful attachment, see *Attachment*, 17.

Local and transitory actions.

1. Under Rev. St. Tex. art. 1198, subd. 8, providing that an inhabitant of the state may be sued for a trespass in the county in which the same was committed, or in the county in which he has his domicile, an action for wrongful levy cannot be maintained against the sheriff's indemnitors, in a county other than that of their residence, unless the charge of misconduct against the sheriff is sustained.—*Hilliard v. Wilson*, (Tex.) 13 S. W. 25.

2. The right to maintain a suit in a county other than that in which the statute fixes the venue must depend upon the existence of the facts constituting the exception, and where the defendant pleads his privilege of being sued in the county of his domicile, as provided by statute, the facts relied on to deprive him of this right must not only be alleged, but proved.—*Hilliard v. Wilson*, (Tex.) 13 S. W. 25.

3. Civil Code Ky. tit. 10, c. 15, providing that actions for the division of the lands of a decedent, the allotment of dower therein, and sales to pay debts shall be brought in the county in which the greater part thereof is located, has no application to an action for the sale of other lands, which are owned jointly by the heirs of the deceased, and located in another county, and in which there is no right to an allotment of dower. Such an action is governed by Civil Code Ky. § 68, and title 10, c. 14, which provide that an action to sell lands owned by two or more persons jointly shall be brought in the county where the subject-matter, or some part thereof, is situated.—*Danforth v. Moss*, (Ky.) 13 S. W. 881.

4. Under Civil Code Ky. § 66, providing that an action for the distribution of the estate of a deceased person, or for the sale, for the payment of his debts, of property descended from or devised by him, must be brought in the county in which his personal representative qualified, an action by a ward against the administrator and heirs of his guardian, to subject land which descended from such guardian to the heirs to the payment of the amount of the ward's estate in the hands of the guardian, is properly brought in the county where the heirs reside and the property is located. The provision of section 67, that a ward must sue his guardian for a settlement of his accounts, for additional security, or for his removal, in the county in which the guardian was qualified, does not control.—*Willis' Adm'r v. Roberts' Adm'r*, (Ky.) 13 S. W. 858.

Action for negligence.

5. Where a blast was fired in the Indian Territory, but the rock struck plaintiff in Arkansas, the cause of action for the injury accrued in the latter state.—*Cameron v. Vandegriff*, (Ark.) 13 S. W. 1092.

6. An injury to plaintiff, caused by fright, produced by the negligent acts of defendant, being in the nature of a trespass on the case, is within Rev. St. Tex. art. 1198, which declares that no inhabitant of the state shall be sued out of the county of his domicile except, *inter alia*, for some crime or offense or "trespass" for which a civil action lies, in which case he may be sued in the county where it was committed, or where defendant is domiciled.—*Hill v. Kimball*, (Tex.) 13 S. W. 59.

Venue in Criminal Cases.

See *Criminal Law*, 7-10.

Verdict.

See *Criminal Law*, 64-68; *Trial*, 22-25.

Vested Rights.

See *Constitutional Law*, 12.

Vice-Principal.

Negligence of. see *Master and Servant*, 26.

Voluntary Payment.

See *Payment*, 5.

Waiver of Defects.

See *Pleading*, 15.

WAREHOUSEMEN.**Negligence.**

1. In an action for personal injuries resulting from the alleged negligent manner in which defendant had stowed freight in its warehouse, it is proper to refuse an instruction that, as the accident occurred while the freight was being handled by the agents of the consignees, who had been notified of its being in the warehouse, and had taken control of it for the purpose of removing it, defendant was relieved from all liability, since this would absolve defendant, though it had stowed the freight so negligently as to be dangerous to any person attempting to move it, no matter how careful he might be.—*C. H. Mallory & Co. v. Smith*, (Tex.) 18 S. W. 199.

2. Defendant, a warehouseman, transported certain boxes of copper, 6 feet long, 4 feet wide, 5 or 6 inches thick, and weighing 500 or 600 pounds, and placed them on edge, perpendicularly, in its warehouse, where plaintiff, a drayman employed by the consignees, laid hold of one of the boxes, which immediately fell on him, and broke his leg. Defendant's stevedores testified that this was a proper and safe position for the boxes, while there was other evidence that the only safe manner to place them on edge was to lean them against some other object for support. *Held*, that the jury was authorized to find that defendant's servants were negligent in the premises.—*C. H. Mallory & Co. v. Smith*, (Tex.) 18 S. W. 199.

3. Certain boxes of copper, 5 or 6 inches thick, were placed on edge, perpendicularly, in defendant's warehouse. Plaintiff, a drayman, laid hold of one of the boxes, when it immediately fell over, injuring him. There was evidence that it required as many as four men to place one of the boxes on a dray, but the evidence was conflicting as to whether plaintiff endeavored to move the box, or only touched it for the purpose of identification. It did not appear that he had any experience in handling such freight, its dimensions and weight being unusual. *Held*, that the jury was warranted in finding that he was not guilty of contributory negligence.—*C. H. Mallory & Co. v. Smith*, (Tex.) 18 S. W. 199.

Warranty.

See *Sale*, 5-8.

WATER COMPANIES.**Contract with city—Liability to citizen.**

A contract between a city and a water company, by which the latter agrees to keep the city supplied with a certain quantity of water, to protect its inhabitants from loss by fire, does not create between the city and the company the relation of principal and agent, and the doctrine of *respondent superior* cannot be invoked to relieve the company of liability to a citizen for loss by reason of its failure to keep up such supply.—*Paducah Lumber Co. v. Paducah Water Supply Co.*, (Ky.) 18 S. W. 249.

Way.

Right of, see *Easements*.

Wharves.

Lease of by city, see *Municipal Corporations*, 11-18.

Widow's Allowance.

See *Executors and Administrators*, 28.

Wife's Separate Estate.

See *Husband and Wife*, 7-12.

WILLS.

See, also, *Descent and Distribution*; *Executors and Administrators*.

Or deed, see *Deed*, 1.

Testamentary powers, see *Powers*, 2.

Uncertainty of bequests, see *Charities*, 2.

Capacity to make.

1. An instruction that, to have been capable of making a will, testator must have known the nature of the business he was engaged in, the extent of his property, the persons he wished to make objects of his bounty, and must have been free from any insane delusion, is proper.—*Prather v. McClelland*, (Tex.) 18 S. W. 543.

2. In a contest over a will which devised testator's estate to a church, where it is claimed by contestants that he was a religious monomaniac, an instruction to find the will valid if testator was not at the time of its execution "dominated by some unnatural and irrational bias of mind, so as to overrule and control his own rational will-power," is erroneous, in that it is too broad, and leaves it for the jury to determine what constitutes such bias.—*Williams' Ex'r v. Williams*, (Ky.) 18 S. W. 250.

3. On the contest of a will, which disinherited testator's daughter in case she should marry B., it appeared that testator threatened to disinherit and whip her if she persisted in receiving B.'s attentions; that his opposition to B. was based solely on his supposed thriftlessness and indolence, regarding which the evidence conflicted; that the will was made by testator on being informed of a clandestine meeting between B. and his daughter on the previous evening; that he was then a bed-ridden invalid, subsisting mostly by whisky and morphine, but not taking the latter in quantities sufficient to affect him mentally. The draughtsman and subscribing witnesses, and a majority of the 20 witnesses, testified that testator was competent. Adversely it was shown that he had not attempted to revoke a previous will, which provided for the daughter, until he executed the one in controversy; that on that day and the previous one he was drowsy, and had said that he had to take morphine to ease his misery. The daughter and a disinterested person who had seen him on that day considered him incompetent. *Held*, that a finding against the validity of the will would not be disturbed on appeal.—*Carlin v. Baird*, (Ky.) 18 S. W. 434.

4. The court charged that neither sickness, debility, old age or infirmity, will disqualify one for making a will, if sufficient mind remains; that, if the jury should believe that the will was rational, and the bequests in accordance with expressed intentions, they might consider these things in determining the mental capacity of the testatrix; and that, if they should believe that she knew what she was doing, they should find in favor of the will. *Held*, that the instruction was not objectionable on account of the last clause, as, read in connection with the rest of the charge, its meaning was clear, and in accordance with the law.—*Campbell v. Carnahan*, (Ark.) 18 S. W. 1098.

— Evidence.

5. In a will contest, the circumstances and characters of the executors is a proper subject of consideration and proof on the issue of testator's sanity.—*Prather v. McClelland*, (Tex.) 18 S. W. 543.

6. Evidence as to the willingness with which a witness would have trusted testator to make an important bargain for him is irrelevant, even on a cross-examination for the purpose of testing the ground and extent of a favorable opinion as to testator's sanity expressed by the witness on his direct examination.—*Prather v. McClelland*, (Tex.) 18 S. W. 543.

7. A declaration by testator's wife, just before the execution of a codicil, that testator was in no condition for that kind of business, is inadmissible on the question of testator's capacity.—*Prather v. McClelland*, (Tex.) 18 S. W. 543.

Undue influence.

8. On the contest of a will on the ground of undue influence, evidence as to the feelings of the

testatrix towards those related to her is competent.—*Campbell v. Carnahan*, (Ark.) 13 S. W. 1098.

9. Evidence that the husband of testatrix had made expression to her of unkind feelings towards contestant was competent, it appearing that the property devised had come to testatrix from the husband.—*Campbell v. Carnahan*, (Ark.) 13 S. W. 1098.

Execution—Acknowledgment.

10. Under Gen. St. Ky. c. 118, § 5, which provides that if a will is not "wholly written by the testator the subscription shall be made or the will acknowledged by him in the presence of at least two credible witnesses," the witnesses need not be present together when the acknowledgment is made.—*Grubbs v. Marshall*, (Ky.) 13 S. W. 447.

Probate and contest.

11. In a suit to establish a will, the issue to be tried is, will or no will, and the validity of the devise will not be considered.—*Lilly v. Tobbein*, (Mo.) 13 S. W. 1060.

12. Where an application for the probate of a will is made and prosecuted by a trustee for the legatee, the legatee's substitution as the applicant, made more than four years after testator's death, is not within the inhibition of Rev. St. Tex. art. 1823, which provides that no will shall be probated after the lapse of four years from testator's death, unless it be shown that the applicant was not in default in failing to present the will within the four years.—*Elnell v. Universalist General Convention*, (Tex.) 13 S. W. 552.

13. Under Rev. St. Mo. § 3980, providing that, in a proceeding in the circuit court to contest the validity of a will, the issue to be tried is "whether the writing produced be the will of testator or not," where plaintiff seeks to have an order of probate annulled because, though he was the only child of testator, he is not mentioned therein, and this allegation was denied by defendants, a question not germane to the issue is presented, and it is error for the circuit court to pass upon it. Overruling *Kenrick v. Cole*, 61 Mo. 572.—*Cox v. Cox*, (Mo.) 13 S. W. 1055.

14. Rev. St. Tex. art. 1842, provides that application for the probate of a will may be made by any person interested in the estate. Article 2300 gives any person aggrieved by a decision of the county court the right to appeal to the district court, and article 2307 provides that on such appeal the cause shall be tried *de novo*. Held that, where an application for the probate of a will has been made by a person not interested in the estate, and the contestants have appealed from a decree of the county court admitting the will to probate, the district court has power to substitute the legatee as the applicant for the probate of the will.—*Elnell v. Universalist General Convention*, (Tex.) 13 S. W. 552.

15. In the contest of a will, under the issue of *devisavit vel non*, the court must hear the proof, and establish or reject the will, and contestant cannot take a voluntary nonsuit or dismissal.—*McMahon v. McMahon*, (Mo.) 13 S. W. 208.

16. An independent provision in a will that the executors probate the will, and return an inventory of the property, and that "no further action be had in the county court," does not deprive the county court of jurisdiction of a proceeding to annul some of the provisions of the will.—*Prather v. McClelland*, (Tex.) 13 S. W. 543.

17. Under Rev. St. Tex. art. 1938, which provides that, when a will has been probated, its provisions shall be executed, unless annulled or suspended by order of the court probating the same, a proceeding to annul some of the provisions of a will must be commenced and conducted as a distinct proceeding after the will has been probated.—*Prather v. McClelland*, (Tex.) 13 S. W. 543.

Evidence.

18. On application for the probate of a will, where two of the three subscribing witnesses could remember neither whether testator had signed the will before they did, nor whether he had acknowledged his signature to them, secondary evidence of testator's signature is inadmissible so long as

the non-production of the other subscribing witness is not accounted for.—*Elnell v. Universalist General Convention*, (Tex.) 13 S. W. 552.

19. Where there is nothing in the evidence to show that testator had willed away all his wife's property, it is error to allow an hypothetical question containing an assumption to that effect.—*Prather v. McClelland*, (Tex.) 13 S. W. 543.

20. Under Rev. St. Tex. art. 1855, which provides that a certified copy of the record of testimony taken in the county court in probate proceedings may be read in evidence in the same matter in any other court, the presence of witnesses in the court-room on an appeal of a probate proceeding to the district court does not render incompetent the introduction of the record of their testimony in the county court; nor can they be introduced as witnesses in the appellate proceeding for the purposes of cross-examination.—*Prather v. McClelland*, (Tex.) 13 S. W. 543.

Record of foreign will.

21. Rev. St. Mo. 1879, §§ 3392, 3393, providing for the filing of a copy of a will under which one claims property in the state, apply to a will probated in a foreign country as well as to one probated in another state.—*Gaven v. Allen*, (Mo.) 13 S. W. 501.

Construction—Description of devisees and legatees.

22. A bequest to the "Board of Trustees of the General Convention of the Universalists in the United States of America, a corporation, * * * their successors and assigns," is not invalidated by the fact that the corporation had changed its name to the "Universalist General Convention" before the execution of the will.—*Elnell v. Universalist General Convention*, (Tex.) 13 S. W. 552.

23. A bequest of a \$1,000 bond to a designated church, "the interest to be applied to the church annually, or as fast as due," is a direct bequest to the church, and not to the executor, as trustee, to hold the bond, and pay over the interest.—*Rhodes v. Rhodes*, (Tenn.) 13 S. W. 590.

Description of property.

24. The title to an insurance policy on the life of a husband, payable to his wife, "her executors, administrators, or assigns," does not pass under a bequest by her to him of all her personal property in certain houses, and her interest in the community property acquired during the marriage.—*Evans v. Opperman*, (Tex.) 13 S. W. 312.

Nature of estate.

25. A testator devised his property to his wife, providing, however, that in case of her remarrying, it should be divided among his children. She was empowered to act, as to the sale of his property, "as she may think best for the benefit of herself and my children." Held, that the will gave her power to convey a perfect title in fee.—*Gaven v. Allen*, (Mo.) 13 S. W. 501.

26. A testator devised all his property to his wife and five children, to be equally divided among them, and directed that the wife should be guardian of the minor children, and that no partition of the estate should be made until the youngest child should become of age, and that the wife should still retain her lawful dower, and be privileged to will to whom she pleased her portion of the real estate. Held, that the wife took, in addition to her dower, an undivided one-sixth in fee-simple, under Rev. St. Mo. § 4004, which provides that in all devises of land in which the words "heirs" and "assigns" are omitted, and there are no expressions whereby it shall appear that such devise was intended to convey a life-estate only, and no further devise is made to take effect after the death of the devisee, it shall be understood to be the intention of the testator to devise an estate in fee-simple.—*Cook v. Couch*, (Mo.) 13 S. W. 80.

27. Where a testator devised all his property, real and personal, to his wife, to be administered by her for the support of herself and his children, the wife takes the property as trustee merely.—*O'Riley v. McKiernan*, (Ky.) 13 S. W. 360.

28. Testator devised all his real estate to his wife for life, with power to convey one undivided half thereof in fee-simple absolute. The will then provided that the other undivided one-half should go in equal parts to certain devisees, "to have and to hold in said parts unto them as tenants in common, to them and their heirs, forever; but the said devisees are not to take possession of their said parts until the death of [the wife] and upon her death [the devisees] shall take said parts so devised; * * * and, in case either of them shall die before [the wife,] then the heirs of such person so dying shall take his or her portion so devised." *Held*, that the devisees took a remainder in fee free from any condition, and, in event of the death of one of them before the wife, his heirs took his portion by descent, and not as purchasers.—*Chew v. Keller*, (Mo.) 13 S. W. 395.

29. A testator devised land to several persons, and directed that the land should not be sold under any pretext, and provided that, if either of the devisees should die without issue, his portion should go to the survivors. One of the devisees was absent, and his residence unknown, and the will provided that, if he should never return to claim his portion, it should go to the other devisees. The absent devisee died subsequent to the death of the testator, and his portion was divided among the surviving devisees. Afterwards another of the devisees died, and one of his heirs filed a bill in equity against his other heirs, and had the share of the absent devisee which was allotted to her (plaintiff's) ancestor sold for partition. *Held*, that the heirs of the surviving devisees took a fee-simple title to the land devised to the one who was absent, and the decree for partition was binding on those who were made parties to that suit.—*Best's Ex'r v. Vanhook's Adm'r*, (Ky.) 13 S. W. 119.

— Rights of devisees and legatees.

30. Sayles, Civil St. Tex. arts. 1949-1952, which provide that creditors of an estate administered under a will without the probate court, by executors not required to give bond, may require the legatees to give bond, on which suit may be maintained for the recovery of their claims, is not exclusive of the remedy given by article 1817, under which a legatee becomes personally liable for testator's debts to the extent of debt-paying assets received from the estate.—*Kauffman v. Wooters*, (Tex.) 13 S. W. 549.

31. Where a sole legatee avails herself of a power conferred on her by the will to take the estate out of the hands of the executors, and makes a voluntary conveyance of a part of it to her son, a creditor of the testator cannot subject the portion in the son's hands to the payment of his claim, where the legatee retains sufficient of the estate to meet the claims of all creditors.—*Kauffman v. Wooters*, (Tex.) 13 S. W. 549.

32. In an action on a claim against a testator's estate, evidence that his legatee transferred property acquired under the will to her son, and an admission by the son that he had indirectly received property from testator's estate, is sufficient to warrant the trial judge in assuming in his charge to the jury that the son had received part of testator's estate.—*Kauffman v. Wooters*, (Tex.) 13 S. W. 549.

33. Where a will gives to the wife of testator all his estate, both real and personal, "during her life," with "full and ample authority to dispose of the whole of it as she pleases," but makes several devisees of any property not alienated before her death, and which she has not by will disposed of, such devisees will take effect upon any property not so disposed of by her.—*McCullough's Adm'r v. Anderson*, (Ky.) 13 S. W. 353.

WITNESS.

See, also, *Deposition; Evidence*.

Competency.

1. Under Rev. St. Tex. art. 2243, which allows a party to testify when called by the opposite party, a defendant who has, pending the suit, con-

veyed his interest in the property in controversy to the plaintiff without warranty, is a competent witness for the plaintiff.—*Oury v. Saunders*, (Tex.) 13 S. W. 1030.

2. Gen. St. Ky. c. 23, art. 8, relates to the crimes of "Perjury and False Swearing." Sections 3 to 7, inclusive, relate to specific kinds of false swearing. Section 8 provides that "if any person be convicted of either of the offenses described in the five preceding sections" he shall ever afterwards be disqualified from being a witness in any case. No other provisions are contained in the statutes disqualifying witnesses. *Held*, that one convicted of manslaughter is not disqualified.—*Commonwealth v. Minor*, (Ky.) 13 S. W. 5.

3. Civil Code Ky. § 606, subd. 8, providing that no prisoner in the penitentiary of the state or any other country shall testify, does not apply to the procedure in criminal actions, but is limited to civil causes.—*Commonwealth v. Minor*, (Ky.) 13 S. W. 5.

4. A defendant who has been convicted of a felony is not incompetent to testify as a witness in his own behalf, under Code Crim. Proc. Tex. art. 730, subd. 5, which declares incompetent as witnesses all persons who have been convicted of a felony, unless the convict has been pardoned, as Laws 1889, p. 37, declares that "any defendant in a criminal action shall be entitled to testify in his own behalf therein." Following *Williams v. State*, 12 S. W. 1103.—*Shannon v. State*, (Tex.) 13 S. W. 599.

— Husband and wife.

5. Defendant and his wife were charged by separate informations, under Pen. Code Tex. art. 495*a*, with using violent, abusive language of and concerning J. The language charged in the two informations was different, and there was nothing identifying the transactions as the same, except the date of the offenses, and the name of the injured person. *Held* that, though charged with the same statutory offense, they were not charged with the same transaction, and it was therefore error to reject defendant's wife as an incompetent witness in his behalf.—*Secker v. State*, (Tex.) 13 S. W. 774.

— Transactions with decedents.

6. Civil Code Ky. § 606, relating to testimony of transactions with decedents, does not prevent the contestants of a will from testifying as to the conduct, conversation, and character of the testator.—*Williams' Ex'r v. Williams*, (Ky.) 13 S. W. 250.

7. Decedent, being indebted, conveyed land to a trustee by deed of trust to pay the debts, and authorized him to borrow money, and to give his notes secured by mortgage on the land. *Held*, in a suit to foreclose a mortgage given by the trustee, that plaintiff is competent to testify as to transactions between him and the trustee in regard to the execution of the note and mortgage, though the grantor in the deed of trust is dead. The statute regulating the admissibility of the testimony of interested persons, where the adverse party is dead, does not apply.—*Orr v. Rode*, (Mo.) 13 S. W. 1066.

8. Under Const. Ark. art. 7, § 22, providing that in actions by or against executors or administrators neither party shall be allowed to testify against the other as to any transaction with or statement of the deceased, it is not competent, in an action against an administrator for conversion, for plaintiff to testify to the fact of the delivery of the property converted to the intestate.—*Nunnally v. Becker*, (Ark.) 13 S. W. 79.

Examination—Leading questions.

9. In an action for injuries caused by plaintiff's mules becoming frightened on defendant's bridge, and breaking through the railing of the bridge, a question to plaintiff, "Are not ordinary animals, such as are ordinarily used on farms, apt to be frightened and nervous and skittish when driven on plank-roads and bridges?" is objectionable, as leading.—*Baldridge & Courtney Bridge Co. v. Cartrett*, (Tex.) 13 S. W. 8.

Examination—Refreshing memory.

10. Where the perjury is alleged to have been committed in the grand jury room, it is not error to permit the foreman, on the trial, to read the indictment which was being investigated when the perjury is alleged to have been committed, in order to refresh his memory as to the statements made by defendant on the investigation, when the witness afterwards testifies from memory.—*Sisk v. State*, (Tex.) 13 S. W. 647.

Credibility.

11. On trial for murder, where witnesses for the state in their chief examination disclose the fact that they were bawds at the time of the occurrence to which they are testifying, and defendant on cross-examination elicits and emphasizes the same fact, it is competent for the commonwealth, in support of their credibility, to introduce evidence that the women have since abandoned their evil ways, and are leading respectable lives.—*Carter v. Commonwealth*, (Ky.) 13 S. W. 921.

12. It was not error to ask a witness whether he had not been in the penitentiary two or three times. When the purpose is only to discredit the witness, it is not necessary to produce the record to prove a previous conviction.—*State v. Miller*, (Mo.) 13 S. W. 832.

13. On the trial of indictment for a felonious assault, where defendant is a witness in his own behalf, it is error to require him, upon cross-examination, to answer the question, "Were you not convicted of a felony in this state?"—*State v. Brent*, (Mo.) 13 S. W. 874.

— Impeachment.

14. On trial for gaming, a state's witness, who alone testifies that defendant played the game, may be recalled by defendant, and asked questions for the purpose of laying a foundation for his impeachment.—*Bennett v. State*, (Tex.) 13 S. W. 1005.

15. By recalling a state witness for the sole purpose of laying a foundation for his impeachment, defendant does not make him his own witness, and is not thereby deprived of the right of impeaching him.—*Bennett v. State*, (Tex.) 13 S. W. 1005.

16. Impeaching testimony offered for the purpose of showing the *animus* and ill will of the witness is relevant and admissible.—*Bennett v. State*, (Tex.) 13 S. W. 1005.

17. Evidence which merely contradicts what a witness has testified to on an immaterial point is inadmissible.—*Sutor v. Wood*, (Tex.) 13 S. W. 321.

18. Under Code Crim. Proc. Tex. art. 755, allowing any party, when facts stated by his own witness are injurious to his cause, to attack his testimony in any manner except by proving his bad character, the state, in a prosecution for murder, may, where a witness introduced by it testifies that he heard deceased make threats against defendant, prove by other witnesses that he made contradictory statements as to such threats.—*Self v. State*, (Tex.) 13 S. W. 602.

19. To contradict a witness, the state read in evidence the record of his testimony on the examining trial of defendant. It was not objected that the impeachment was upon immaterial and collateral matter, nor was the identity of the record of the evidence duly and legally taken on the examining trial questioned. *Held*, that the evidence was properly admitted.—*Hudson v. State*, (Tex.) 13 S. W. 388.

20. Where the flagman stationed at a railroad crossing where an accident occurred, testified on cross-examination that he saw one D. there on the evening in question, and that it was untrue that plaintiff, in the presence of D., and after he was hurt, asked him (the flagman) why he told him to cross, and that he did not flag plaintiff across, a sufficient predicate of time, place, and person has been laid to impeach such evidence by the testimony of D.—*International & G. N. R. Co. v. Dyer*, (Tex.) 13 S. W. 877.

21. Though plaintiff has not pleaded the flagman's intoxication to charge the company with his negligence, he may cross-examine him as to whether he was intoxicated, and as to his position when the accident occurred, in order to show the condi-

tion of his mind, and the facilities he had for knowing what happened.—*International & G. N. R. Co. v. Dyer*, (Tex.) 13 S. W. 877.

WRECKING TRAINS.**Indictment.**

1. An indictment following the language of Pen. Code Tex. art. 678, and charging that defendant did willfully place an obstruction upon the track of a railroad, "whereby the lives of persons were endangered," is sufficient, without specifying the persons whose lives were endangered.—*Barton v. State*, (Tex.) 13 S. W. 783.

Evidence.

2. Testimony was admitted that defendant placed another obstruction on the track about three-fourths of a mile from the one charged in the indictment, and very soon after the first. *Held* that, though they were separate and distinct offenses, still, having been contemporaneous, the commission of the second was admissible to show the motive or intent of the first, and also as a part of the *res gestæ*.—*Barton v. State*, (Tex.) 13 S. W. 788.

WRITS.

See, also, *Arrest; Certiorari; Execution; Garnishment; Habeas Corpus; Injunction; Prohibition; Writ of; Sequestration.*

Service, see, also, *Appearance*, 2, 3.

Non-resident defendant, publication, see *Garnishment*, 9.

Service of process.

1. Where all the parties to an action were summoned to answer the original petition, but the record fails to show whether some of them were summoned to answer an amended petition, it will be presumed, after the lapse of 35 or 40 years, that all the parties were served with proper process.—*Best's Ex'r v. Vanhook's Adm'r*, (Ky.) 13 S. W. 119.

2. In a suit by the vendee to recover the land conveyed to him, which is in possession of another, in which suit plaintiff asks that, in case judgment is for defendant, he may have judgment over against his vendor on his covenants of warranty, it appearing that the vendor is a non-resident and has no property in the state, the court does not acquire jurisdiction of him, by the service upon him of plaintiff's petition and exhibits, in the state in which he resides, by the sheriff of his county.—*Masterson v. Little*, (Tex.) 13 S. W. 154.

Publication.

3. A petition alleging defendant's non-residence, the affidavit to which only states that petitioner "believes" the statements contained therein to be true, does not warrant the issuing of a warning order under Mansf. Dig. Ark. § 4990, which provides that the court may make a warning order upon the requisite facts being satisfactorily shown by affidavit or other proof.—*Waggoner v. Fogleman*, (Ark.) 13 S. W. 729.

4. An order published on such an affidavit may be avoided on appeal.—*Waggoner v. Fogleman*, (Ark.) 13 S. W. 729.

Return—Effect.

5. An affidavit, on a motion to set aside a default on the ground of a defect on the face of the citation, and an annexed citation showing such defect, and alleged to be the citation which was served, are insufficient to overthrow the return of the sheriff showing that no such defect existed.—*Wood v. City of Galveston*, (Tex.) 13 S. W. 227.

6. In an action against a sheriff for unlawful seizure, an instruction that the sheriff's return is conclusive is harmless error, where the fact of the seizure is proved independently of such return.—*Halcomb v. Stubblefield*, (Tex.) 13 S. W. 231.

Wrongful Attachment.

See *Attachment*, 16-19. Digitized by Google

TABLES OF SOUTHWESTERN CASES

IN

STATE REPORTS.

VOL. 99, MISSOURI REPORTS.

	Page		Page
Baker v. Vanderburg (12 S. W. 462).....	378	Maverick v. Heard (12 S. W. 892).....	581
Bender v. Dugan (12 S. W. 795).....	126	Mitchell v. City of Clinton (12 S. W. 793).....	153
Bobb v. Bobb (12 S. W. 898).....	578	Mooers v. Martin (12 S. W. 522).....	94
Bohart v. Chamberlain (13 S. W. 35).....	622	Mourning v. Missouri Coal & Min. Co. (12 S. W. 884).....	320
Bollinger County v. McDowell (13 S. W. 100).....	632	Neiser v. Thomas (12 S. W. 725).....	224
Boogher v. Frazier (12 S. W. 885).....	325	Pope v. Kansas City Cable Ry. Co. (12 S. W. 891).....	400
Boogher v. Hough (12 S. W. 524).....	183	Rannells v. Isgrigg (12 S. W. 343).....	19
Briant v. Jackson (13 S. W. 91).....	585	Sayer v. Devore (13 S. W. 201).....	437
Brown v. Hannibal & St. J. R. Co. (12 S. W. 655).....	310	Skinker v. Haagsma (12 S. W. 659).....	203
Brown v. Weldon (13 S. W. 842).....	564	State v. Brooks (12 S. W. 633).....	137
Burgess v. Bowles (12 S. W. 341; 13 S. W. 99).....	548	State v. Burns (12 S. W. 801).....	471
Burgess v. St. Louis County R. Co. (12 S. W. 1050).....	496	State v. Burns (13 S. W. 686).....	542
Charles v. Morrow (12 S. W. 908).....	638	State v. Crawford (12 S. W. 354).....	74
City of Kansas v. Ford (12 S. W. 346).....	91	State v. Jackson (12 S. W. 367).....	60
City of Kansas ex rel. Blumb v. O'Connell (12 S. W. 791).....	357	State v. Mayor (13 S. W. 88).....	602
City of St. Louis v. Marchel (12 S. W. 1050).....	475	State v. Meyers (12 S. W. 516).....	107
City of St. Louis v. White (12 S. W. 1050).....	477	State v. Thomas (12 S. W. 643).....	235
Clafin v. Sylvester (12 S. W. 508).....	276	State v. Young (12 S. W. 642).....	234
Clark v. Phillips (11 S. W. 53).....	550	State v. Young (12 S. W. 879).....	666
Davis v. Hendricks (12 S. W. 887).....	478	State ex rel. Allen v. Vaughan (12 S. W. 507).....	332
Dowell v. Guthrie (12 S. W. 900).....	653	State ex rel. Bell v. Nolan (12 S. W. 1047).....	569
Drey v. Doyle (12 S. W. 287).....	459	State ex rel. Broadwater v. Seibert (12 S. W. 343).....	122
Duffey v. Willis (12 S. W. 520).....	132	State ex rel. Clover v. Ladies of the Sacred Heart (12 S. W. 293).....	533
Duke v. Missouri Pac. Ry. Co. (12 S. W. 636).....	347	State ex rel. Dawson v. St. Louis Court of Appeals (State v. Rombauer, 12 S. W. 661).....	216
Duncan v. Able (12 S. W. 796).....	138	State ex rel. Henderson v. Lesueur (13 S. W. 237).....	552
Finley v. St. Louis Refrigerator & Wooden Gutter Co. (13 S. W. 87).....	559	State ex rel. Kansas City v. Field (12 S. W. 802).....	352
Gardner v. Terry (12 S. W. 888).....	523	State ex rel. Radcliff v. Radcliff (13 S. W. 285).....	609
Goans, Ex parte (12 S. W. 635).....	193	State ex rel. Thomas v. Williams, (12 S. W. 905).....	291
Graves v. Ewart (11 S. W. 971).....	18	State ex rel. Wine v. Keokuk & W. R. Co. (12 S. W. 290).....	30
Green v. Walker (12 S. W. 353).....	68	State ex rel. Withers v. Stonestreet (12 S. W. 895).....	361
Grimes v. Portman (12 S. W. 792).....	229	Thompson v. Ish (12 S. W. 510).....	160
Haley, Ex parte (12 S. W. 667).....	150	Waddell v. Waddell (12 S. W. 349).....	338
Hall v. Klepzig (12 S. W. 372).....	83	Walker v. City of Kansas (12 S. W. 894).....	647
Henry v. Sneed (12 S. W. 663).....	407	Walters v. Hermann (12 S. W. 590).....	529
Hilton v. City of St. Louis (12 S. W. 657).....	199	Weir v. Marley (12 S. W. 798).....	484
Holliday v. Aehle (12 S. W. 797).....	273	West v. Brison (13 S. W. 95).....	684
Holloway v. Holloway (12 S. W. 460).....	305	Whitehead v. Begley (12 S. W. 804).....	456
Jacobs v. Jacobs (12 S. W. 457).....	427	Whitehead v. St. Louis, I. M. & S. Ry. Co. (11 S. W. 751).....	263
Jenning v. St. Louis, I. M. & S. Ry. Co. (11 S. W. 999).....	394	Wilson v. Schoenlaub (12 S. W. 361).....	96
Krider v. Milner (12 S. W. 461).....	145	Winters v. Kansas City Cable Ry. Co. (13 S. W. 652).....	509
Lambert v. Estes (13 S. W. 284).....	604	Young v. Hudson (12 S. W. 632).....	102
Loeb v. American Cent. Ins. Co. (12 S. W. 874).....	50		
McDonald v. Frost (12 S. W. 363).....	44		
Marvin v. Elliott (12 S. W. 899).....	616		
v.18s.w.	(1217)		

VOL. 75, TEXAS REPORTS.

	Page		Page
Adams v. Fisher (6 S. W. 772)	657	Henderson v. Lindley (12 S. W. 979)	185
Anderson v. Horn (13 S. W. 24)	675	Herndon v. Davenport (12 S. W. 1111)	462
Andrews v. Andrews (12 S. W. 1124)	609	Hickey v. Behrens (12 S. W. 679)	488
Baines v. Mensing (12 S. W. 984)	200	Howard v. Russell (12 S. W. 525)	171
Baldridge & Courtney Bridge Co. v. Cartrett (13 S. W. 8)	628	Hunnicut v. State (12 S. W. 106)	233
Beham v. Ghio (12 S. W. 996)	87	Hurst v. Marshall (13 S. W. 33)	452
Bellamy v. McCarthy (12 S. W. 549)	293	International & G. N. Ry. Co. v. Bell (12 S. W. 321)	50
Blair v. Finlay (12 S. W. 983)	210	International & G. N. Ry. Co. v. Garcia (13 S. W. 223)	583
Bohn v. Davis (12 S. W. 837)	24	International & G. N. Ry. Co. v. McDonald (12 S. W. 860)	41
Bonner v. Hearne (12 S. W. 38)	242	International & G. N. Ry. Co. v. State (12 S. W. 685)	356
Boothe v. Best (12 S. W. 1000)	568	Johnson v. Flint (12 S. W. 1120)	379
Bounds v. Little (12 S. W. 1109)	316	Johnson v. Martin (12 S. W. 321)	33
Brasher v. Jamison (12 S. W. 809)	189	Jones v. Matthews (12 S. W. 823)	1
Broussard v. Sabine & E. T. Ry. Co. (13 S. W. 68)	702	Jones v. Rosedale St. Ry. Co. (12 S. W. 998)	382
Brown v. Mitchell (12 S. W. 606)	9	Kimberlin v. Westerman (12 S. W. 978)	127
Brown v. Roberts (12 S. W. 807)	103	King v. Haley (12 S. W. 1112)	163
Brown v. Wheelock (12 S. W. 111, 841)	385	Kirby v. Eastill (12 S. W. 307)	484
Bullis v. Presidio Min. Co. (Bullis v. Noyes, 12 S. W. 397)	540	Kirby v. Giddings (13 S. W. 27)	679
Campbell v. Trimble (12 S. W. 863)	270	Kruegel v. Berry (9 S. W. 863)	230
Capp v. Terry (13 S. W. 52)	391	Lee v. Henderson (12 S. W. 931)	190
Carley v. Parton (12 S. W. 950)	98	Lehman v. Gajusky (12 S. W. 1122)	506
Carter v. Commissioners of Van Zandt County (12 S. W. 935)	286	Lemberg v. Cabaniss (12 S. W. 844)	228
Chappell v. Missouri Pac. Ry. Co. (12 S. W. 977)	82	Litcheinstein v. Brooks (12 S. W. 975)	196
City of Corsicana v. Kerr (12 S. W. 982)	207	Little v. State (12 S. W. 965)	616
Collins v. Panhandle Nat. Bank (11 S. W. 1053)	254	Livingston v. Williams (18 S. W. 173)	653
Cooper v. Lee (12 S. W. 483)	114	Long v. Cude (12 S. W. 827)	225
Cooper v. Loughlin (13 S. W. 37)	524	Love v. Breedlove (13 S. W. 222)	649
Crawford v. Sandridge (12 S. W. 853)	383	Lytle v. Halff (12 S. W. 610)	128
Daggett v. Wallace (13 S. W. 49)	352	McKay v. Paris Exch. Bank (12 S. W. 529)	181
Dalton v. Rainey (13 S. W. 34)	516	Mann v. Wallis (12 S. W. 1123)	611
Davis v. Goldberg (12 S. W. 952)	48	Masterson v. Little (13 S. W. 154)	682
Davis v. Rosedale St. Ry. Co. (12 S. W. 999)	381	Meuly v. Corkill (12 S. W. 1005)	599
Davis v. State (12 S. W. 957)	420	Mexican Nat. Const. Co. v. Meddlege (13 S. W. 257)	634
East Line & R. R. Ry. Co. v. Scott (12 S. W. 995)	84	Milburn Wagon Co. v. Kennedy (13 S. W. 28)	212
East Line & R. R. Ry. Co. v. State (12 S. W. 690)	494	Missouri Pac. Ry. Co. v. Brown (12 S. W. 1117)	267
Eastman v. Eastman (12 S. W. 1107)	473	Missouri Pac. Ry. Co. v. Edwards (12 S. W. 853)	334
Elliott v. Western Union Tel. Co. (12 S. W. 954)	18	Missouri Pac. Ry. Co. v. Hennessey (12 S. W. 608)	155
Engelke v. Schlenker (12 S. W. 999)	559	Missouri Pac. Ry. Co. v. Henry (12 S. W. 828)	220
Equitable Life Ins. Co. v. Hazlewood (12 S. W. 621)	338	Missouri Pac. Ry. Co. v. Jones (12 S. W. 972)	151
Ferris v. Kimble (12 S. W. 689)	476	Missouri Pac. Ry. Co. v. Lehmberg (12 S. W. 838)	61
Finn v. Williamson (12 S. W. 852)	336	Missouri Pac. Ry. Co. v. Mitchell (12 S. W. 810)	77
Ft. Worth & D. C. Ry. Co. v. Thompson (12 S. W. 742)	501	Missouri Pac. Ry. Co. v. Williams (12 S. W. 835)	4
Ft. Worth & N. O. Ry. Co. v. Pearce (12 S. W. 864)	281	Moore v. Bayne (12 S. W. 850)	665
Gallagher v. Goldfrank (12 S. W. 964)	562	Morris v. Balkham (12 S. W. 970)	111
Gay v. Halton (12 S. W. 847)	203	Moss v. Sanger (12 S. W. 619)	321
Glover v. Thomas (12 S. W. 684)	506	Noyes v. Brown (13 S. W. 36)	458
Gouldy v. Metcalf (12 S. W. 830)	455	O'Connor v. Luna (12 S. W. 1125)	592
Greenville First Nat. Bank v. Pennington (12 S. W. 1114)	272	Parks v. Young (12 S. W. 986)	278
Grounds v. Ingram (12 S. W. 1118)	509	Pearce v. Tootle (12 S. W. 536)	148
Gulf, C. & S. F. Ry. Co. v. Baird (12 S. W. 530)	256	Prescott v. Linney (12 S. W. 1128)	615
Gulf, C. & S. F. Ry. Co. v. Compton (13 S. W. 667)	687	Reinstein v. Daniels (13 S. W. 21)	640
Gulf, C. & S. F. Ry. Co. v. Dwyer (12 S. W. 1001)	572	Ricker v. Douglas (12 S. W. 975)	180
Gulf, C. & S. F. Ry. Co. v. Hathaway (12 S. W. 999)	557	Rio Grande & E. P. Ry. Co. v. Ortiz (12 S. W. 1129)	602
Gulf, C. & S. F. Ry. Co. v. Redeker (12 S. W. 855)	810	Rowell v. Western Union Tel. Co. (12 S. W. 534)	28
Haas v. Kraus (12 S. W. 394)	106	Roy v. Clarke (12 S. W. 845)	28
Haddock v. Hill (12 S. W. 974)	193	Ruff v. Lind (13 S. W. 68)	700
Hanrick v. Ake (12 S. W. 818)	142	Sabine & E. T. Ry. Co. v. Brouard (12 S. W. 1126)	597
Hargis v. St. Louis, A. & T. Ry. Co. (13 S. W. 953)	19	St. Louis, A. & T. Ry. Co. v. Mathews (12 S. W. 976)	92
Heck v. Martin (13 S. W. 51)	469	St. Louis, A. & T. Ry. Co. v. Prather (12 S. W. 969)	53
		Sampson v. Solinsky (13 S. W. 67)	663

75 TEX.—Continued.		Page		Page
San Antonio & A. P. Ry. Co. v. Moore (13 S. W. 295)	643	Van Sickle v. Catlett (13 S. W. 31)	404	
Schonfield v. Turner (12 S. W. 626)	324	Vela v. Guerra (12 S. W. 1127)	595	
Schwartz v. B. C. Evans Co. (12 S. W. 863)	198	Warner v. Crosby (12 S. W. 745)	295	
Sebastian v. Martin Brown Co. (12 S. W. 986)	291	Western Union Tel. Co. v. Adams (12 S. W. 857)	531	
Selman v. Orr (12 S. W. 697)	528	Western Union Tel. Co. v. Feeglos (12 S. W. 800)	537	
Silberberg v. Pearson (12 S. W. 850)	287	White v. Matador Land & Cattle Co. (12 S. W. 866)	465	
Simmons v. Terrell (12 S. W. 854)	275	White Sewing-Machine Co. v. Atkeson (12 S. W. 812)	330	
Smith v. Smith (12 S. W. 678)	410	Williams v. Ellingsworth (12 S. W. 746)	480	
Smith v. Von Hutton (13 S. W. 18)	625	Willis v. Heath (12 S. W. 971)	124	
Snow v. Starr (12 S. W. 673)	411	Willis v. McNatt (12 S. W. 478)	69	
Southern Pac. Ry. Co. v. Maddox (12 S. W. 815)	300	Wood County v. Cate (12 S. W. 535)	215	
Texas Trunk Ry. Co. v. Johnson (12 S. W. 482)	158	Wood County v. Cate (12 S. W. 536)	219	
Texas & P. Ry. Co. v. Ft. Worth St. Ry. Co. (12 S. W. 977)	83	Woodward v. McNeill (13 S. W. 222)	146	
Texas & P. Ry. Co. v. Lester (12 S. W. 955)	56	Wright v. McCampbell (13 S. W. 293)	644	
Thompson v. Lester (14 S. W. 20)	521	Zapp v. Strohmeier (13 S. W. 9)	638	
Tolbert v. McBride (12 S. W. 752)	95			
Traders' Nat. Bank of San Antonio v. Cresson (12 S. W. 819)	298			

